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## BankNews

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# JOBES Act Creates Opportunities for Community Banks

The Jumpstart Our Business Startups Act was signed into law by President Obama on April 5, 2012. The JOBS Act contains a series of changes to the federal securities law landscape that will benefit community banks and their holding companies, including provisions to assist them in obtaining easier and less expensive access to capital. Note that while these provisions became operative when the President signed the JOBS Act into law, most require implementing regulations by the Securities and Exchange Commission or adjustments to existing regulations to account for the changes.

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### Adjustment of Registration and "Going Dark" Thresholds

Perhaps the most important provisions of the JOBS Act for many banks and bank holding companies are the changes to the threshold number of shareholders that triggers public company reporting obligations. Banks and bank holding companies were previously limited to 500 shareholders of record before being required to become a reporting company and, once a reporting company, were required to fall below 300 shareholders before "going dark" by deregistering. To avoid the increased costs and disclosure obligations of being a reporting company, many organizations have refrained from bringing in new investors for fear of crossing the 500 shareholder threshold. The JOBS Act has increased the registration threshold to 2,000 shareholders and set the threshold for deregistration at 1,200 shareholders. These changes will allow banks and bank holding companies that were approaching the former 500 shareholder cap to breathe easier, knowing they have room to raise capital from new investors without having to comply with burdensome public company registration and disclosure requirements. Reporting companies with fewer than 1,200 shareholders will have the opportunity

to deregister if they decide that the benefits of registration are outweighed by the ability to significantly reduce compliance costs by going dark.

### General Solicitation and Advertising in Rule 506 Offerings

Many private offerings are conducted pursuant to Rule 506 of SEC Regulation D, which exempts from SEC registration sales of securities in any dollar amount to an unlimited number of accredited investors and up to 35 non-accredited investors. To be exempt from registration, a Rule 506 offering currently may not involve any general solicitations or advertising. The JOBS Act directs the SEC to revise its regulations to permit general solicitation and advertising in Rule 506 offerings, provided securities are only sold to accredited investors and qualified institutional buyers.

While the SEC will likely place some parameters on the types of solicitations and advertisements permitted under its new regulations, the elimination of the general prohibition will afford banks and bank holding companies access to larger pools of potential investors in exempt offerings, provided they do not sell shares to any non-accredited investors. The revised regulations may provide opportunities such as advertisement of stock offerings in newspapers and other publications, targeted mailings to potential investors, setting up websites regarding offerings, and holding informational sessions in the community.

Combined with the increase in the shareholder threshold for remaining a private company discussed above, the ability to advertise exempt sales of securities has the potential to greatly enhance banks' and bank holdings companies' ability to raise capital without resorting to the public capital markets.

### Emerging Growth Companies

The JOBS Act creates a new class of SEC reporting companies with reduced regulatory burdens called emerging growth companies. Any issuer, including banks and bank holding companies, whose first public sale of common equity pursuant to a registration statement occurs after Dec.

8, 2011, and that has total annual gross revenues of less than \$1 billion, may initially qualify as an EGC. The issuer will generally remain an EGC until the fifth anniversary of its first sale of common equity pursuant to a registration statement, provided certain qualifications are met.

The JOBS Act's intent is to lessen the regulatory compliance costs for EGCs by exempting them from or relaxing a number of regulatory requirements. For example, EGCs may conduct an IPO with reduced financial statement and disclosure requirements. EGCs also are exempt from the Sarbanes-Oxley requirement of having a public accountant attest to and report on the issuer's internal controls. In addition, they are treated as "smaller reporting companies" for the purpose of some disclosure requirements, do not need to give shareholders a "say on pay" vote on executive compensation, and are not immediately subject to new or revised financial accounting standards. For privately held banks and bank holding companies that would qualify as an EGC, the lightened disclosure requirements may make a public offering an attractive alternative for raising capital.

### **Increase in Regulation A Exemption for Small Public Offerings**

Regulation A provides for small public offerings exempt from registration with the SEC. The JOBS Act increases the current Regulation A cap of \$5 million in any 12-month period to a cap of \$50 million in any 12-month period. The current relatively low \$5 million cap has been a major disadvantage of this method of raising capital, given the increased compliance costs versus a private

offering. These increased compliance costs of a Reg A offering may now be outweighed given the substantial increase in the amount of capital that can be raised. Reg A may also provide a nice solution for merger transactions where the target has more than 35 non-accredited investors (the limit in Rule 506 transactions). Privately held banks and bank holding companies are encouraged to keep abreast of the SEC's rulemaking on this topic to determine if a Reg A offering is a capital raising alternative worth exploring.

### **Crowdfunding**

The most widely publicized, and perhaps most controversial, aspect of the JOBS Act is the new exemption from registration for "crowdfunded" transactions through brokers or funding portals. Under this new exemption, issuers will be permitted to sell as much as \$1 million in securities during any 12-month period to certain small investors. While there has been some negative reaction to the lack of investor protections for the crowdfunding exemption, it has the benefit of permitting small and mid-size companies to obtain limited funding from a large pool of investors. The crowdfunding exemption may enable a small community bank or bank holding company to raise a modest amount of capital from outside investors. While this provision of the JOBS Act has garnered significant attention from the mainstream media, it remains to be seen whether selling securities under this exemption will be attractive to banks and bank holding companies, and how crowdfunding will be viewed by the banking regulators. **BN**