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The JOBS Act for Portfolio Companies

Part 2 of the [Impact of the JOBS Act on Private Equity](#)
Podcast Series

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SIMPSON THACHER & BARTLETT LLP

JOBS Act Podcast Series

- § The Jumpstart Our Business Startups Act (or “JOBS Act”) became law on April 5, 2012
- § Intended to make it easier for businesses to raise capital, the JOBS Act may have meaningful benefits for private equity firms and their portfolio companies
- § This presentation is part of our Impact of the JOBS Act on Private Equity Podcast Series, focusing on the practical implications for private equity firms and their portfolio companies
 - § Part 1: Changes to the IPO Process
 - Ø **Part 2: The JOBS Act for Portfolio Companies**
 - § Next...

Presenters



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Joshua Ford Bonnie

Joshua Ford Bonnie is a partner in Simpson Thacher's Corporate Department. Mr. Bonnie has advised a significant number of companies on their initial public offerings, including: The Carlyle Group L.P. (2012); Regional Management Corp. (2012); FXCM Inc. (2010); DynaVox Inc. (2010); The Blackstone Group L.P. (2007); MasterCard Incorporated (2006); Evercore Partners Inc. (2006); Alpha Natural Resources, Inc. (2005); Cohen & Steers, Inc. (2004); and Accenture Ltd (2001). The initial public offerings of Blackstone, MasterCard and Accenture were the largest U.S. IPOs of 2007, 2006 and 2001, respectively. Mr. Bonnie has also advised Blackstone and The Carlyle Group on a number of strategic transactions, including Blackstone's sale of \$3 billion of non-voting common units to a sovereign wealth fund established by the People's Republic of China and the 2007 and 2010 investments in The Carlyle Group by Mubadala Development Company, the Abu Dhabi-based strategic development and investment company.



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Joseph H. Kaufman

Joseph Kaufman is a member of the Simpson Thacher's Corporate Department. Mr. Kaufman advises clients on public and private offerings of debt and equity securities, corporate governance, business combinations and general corporate and securities law matters. Mr. Kaufman advised HCA Holdings Inc. in its March 2011 \$4.35 billion initial public offering, the largest private-equity backed IPO ever in the United States. He also advised Nielsen Holdings N.V. in its January 2011 \$1.89 billion initial public offering, as well as each of Dollar General Corporation, Virgin Mobile USA, Inc., Sealy Corporation and PanAmSat Holding Corporation in connection with their respective initial public offerings. He also advised Kohlberg Kravis Roberts & Co. in connection with its business combination with KKR Private Equity Investors L.P., resulting in KKR being listed publicly on the New York Stock Exchange.

Reduced Disclosure

- § Under the JOBS Act, “emerging growth companies” benefit from reduced ongoing disclosure requirements
- § While targeted at IPO companies, these reduced disclosure requirements are available to any reporting company meeting the emerging growth company standard, potentially including:
 - § Debt-only filers
 - § Voluntary filers

Who Can Use Reduced Disclosure?

Emerging Growth Company (“EGC”)

§ An issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year

§ A company is not an EGC if any of its common equity securities were first sold in a registered offering on or before December 8, 2011

Who Can Use Reduced Disclosure?

Emerging Growth Company (“EGC”)

§ EGC status continues until the earliest of:

- § the date on which such issuer has, during the previous three years, issued more than \$1 billion in non-convertible debt securities
- § the date on which such issuer becomes a “large accelerated filer” (i.e., a seasoned issuer with \$700 million or more of public float)
- § last day of fiscal year in which revenues exceed \$1 billion
- § last day of fiscal year following the fifth anniversary of the IPO

Reduced Disclosure: Financial Information

§ Fewer years of historical financial information required in IPO registration statement

§ Two years of audited financial statements (rather than three)

§ Two years of associated MD&A (rather than three)

§ Two years of selected financial data (rather than five)

§ No more than two years of acquired business financial statements (rather than up to three)

§ In other filings, issuer need not disclose financial information for periods prior to the periods included in its first registration statement

§ Registration statement filed before IPO?

Reduced Disclosure: Auditors and Financials

- § EGC auditors not required to attest to its internal controls under Sarbanes-Oxley 404(b)
- § EGCs exempt from selected audit rules that may be issued by the Public Company Accounting Oversight Board:
 - § Audit firm rotation
 - § Auditor's discussion and analysis
 - § Other future audit rules (unless SEC specifically determines otherwise)
- § For any future new or revised accounting standards, EGC can rely on any longer implementation timetables applicable for private companies

Reduced Disclosure: Executive Compensation

- § Generally only required to disclose compensation of three executive officers (including the principal executive officer) rather than five (including the principal executive and financial officers)
- § Not required to present Compensation Discussion and Analysis (CD&A)
- § Also not required to present Grants of Plan-Based Awards Table, Options Exercises and Stock Vested Table, Nonqualified Deferred Compensation Table, Pension Benefits Table

Reduced Disclosure: Dodd-Frank Executive Compensation Disclosures

- § Exempt from certain recently adopted or proposed executive compensation disclosure requirements:
 - § Comparison of executive compensation to company performance
 - § Ratio of CEO compensation to average worker pay
 - § Disclosure of relationship between risk and compensation
- § Not required to hold “say-on-pay” or “say-on-when” votes

Choosing Whether to Use Reduced Disclosure

- § A reporting company can choose whether or not to take advantage of each reduced disclosure benefit on a case-by-case basis
- § Exception: No “cherry picking” among new or revised accounting standards
 - § While election to forgo extended period is irrevocable, SEC staff has indicated that an EGC using the extended implementation periods may later make an irrevocable election to forgo it
 - § Reporting companies are required to disclose any election to forgo the extended implementation period available for future new or revised accounting standards

Increased Shareholder Cap

- § Exchange Act registration and SEC reporting is required upon reaching a threshold number of securities holders – cited as a main driver for some recent high-profile IPOs
- § JOBS Act has increased this threshold from 500 to 2,000 holders
 - § New sublimit requires registration once there are 500 holders that are not accredited investors
- § Also allows an unlimited number of holders who received securities pursuant to an employee compensation plan in transactions exempt from Securities Act registration
- § SEC rulemaking

Easing of General Solicitation Limits

- § The JOBS Act directs the SEC to remove the prohibition on general solicitation or general advertising with respect to:
 - § Rule 506 of Regulation D (which allows the private placement of securities)
 - § Rule 144A (which allows private resales, including as part of debt offerings)
- § Changes are not yet effective and full consequences will not be fully known until SEC rules are adopted and the market adapts to them.

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