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Changes to the IPO Process

Part 1 of the [Impact of the JOBS Act on Private Equity](#)
Podcast Series

July 2, 2012

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
 - Ø **Part 1: Changes to the IPO Process**
 - § 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.

Who Can Use the New IPO Provisions?

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 the New IPO Provisions?

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

Confidential SEC Staff Review

- § An EGC is entitled to confidential review of the registration statement for its IPO
 - § Confidentially-filed initial submission and any amendments must be publicly filed at least 21 days before commencement of roadshow
- § Confidential review is also available for other pre-IPO registration statements of an EGC, such as an S-4 for a debt exchange offer
 - § Confidentially-filed initial submission and any amendments must be publicly filed at least 21 days before request for effectiveness
- § SEC correspondence relating to staff comments will still eventually become public

Testing the Waters

- § An EGC is permitted to make oral and written communications with certain institutional investors before or after filing registration statement to determine whether such investors might have an interest in a contemplated securities offering
 - § Previously, “gun jumping” and “quiet period” rules prohibited communications prior to the initial filing and imposed restrictions on written materials between initial filing and effectiveness
 - § Market practice continues to develop
 - § SEC staff may request copies of testing the waters communications

Reduced Disclosure

- § EGCs benefit from reduced disclosure requirements in the IPO and for up to five years thereafter
- § Reduced requirements relate to:
 - § Financial information and accounting
 - § Executive compensation

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)

Reduced Disclosure: Financial Information

Audit and Accounting Rules

- § Auditors of EGC 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
- § 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

Disclosure of EGC Status

- § We expect that an EGC will disclose its EGC status and its implications in its IPO prospectus as well as periodic reports:
 - § EGC status to be indicated on the cover page of the IPO prospectus
 - § Risk factor relating to consequences of EGC status
 - § Possible disclosure in the Management's Discussion & Analysis
- § SEC may require additional EGC-specific disclosures

Changes for Research Analysts Covering EGCs

- § Reduced restrictions on research reports and the role of securities analysts
 - § Eases restrictions on publication of research reports by underwriting firms prior to IPO and during post-IPO periods
 - § Permits research analysts to participate with investment bankers in management meetings
 - § Extent of practical effect remains uncertain:
 - § Other restrictions still apply, including under an earlier legal settlement with leading underwriting firms
 - § Underwriters may hesitate to publish deal-related research given potential liability concerns

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