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M E M O R A N D U M

TO: Clients and Friends of the Firm

FROM: Stanley B. Kay

DATE: April 13, 2012

SUBJECT: Jumpstart Our Business Startups Act ("JOBS Act")

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (the "JOBS Act"). The stated purpose of the JOBS Act is to increase job creation and economic growth by making it easier for private companies to raise capital, enabling a larger portion of the general public to invest in private companies and reducing securities laws reporting and registration requirements. Although provisions of the JOBS Act are generally effective upon enactment, some of the provisions require implementing regulations to be adopted by the Securities and Exchange Commission ("SEC").

This memo discusses the JOBS Act below. In summary, its key provisions include the following:

- creates a new category of issuer, the "emerging growth company," that is subject to less burdensome registration and reporting requirements during and following its initial public offering ("IPO");
- relaxes certain restrictions for Regulation D offerings to accredited investors under Rule 506;
- creates a new transaction exemption under the Securities Act of 1933 (the "Securities Act") for "crowdfunding;"
- provides the statutory basis for a new limited offering exemption for offerings up to $50 million;
- increases the period of time that a private company may remain private by increasing the

threshold for registration under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") from 500 holders of record, as determined by the issuer at the end of each fiscal year, to either (i) 2,000 holders of record or (ii) 500 holders of record who are not accredited investors; and

- for banks and bank holding companies, increases the threshold for registration under Section 12(g) of the Exchange Act from 500 holders of record to 2,000 holders of record, and increases the threshold for termination of registration under the Exchange Act from 300 holders of record to 1,200 holders of record.

STREAMLINED IPO'S FOR EMERGING GROWTH COMPANIES

Title I of the JOBS Act will significantly streamline the IPO process for most companies seeking to go public. It creates a new category of issuer under the Securities Act and the Exchange Act designated as an "emerging growth company" ("ECG") For these issuers, the SEC registration, reporting and corporate governance requirements are scaled back for up to five years to facilitate the transition from private company to public company through the IPO process. This "on-ramp" is intended to give new public companies time to get up to speed prior to implementation of the full public company reporting and governance requirements.

EGCs will benefit from the following changes to the IPO process:

1. they will be able to make pre-filing offers to institutional investors;

2. they will be permitted to initiate the registration process confidentially with the Securities and Exchange Commission;

3. they will need only two, rather than three, years of audited financial statements to go public; and

4. research analysts will be allowed to publish reports on EGCs immediately after they become public companies.

The IPO On-Ramp

Once public, an EGC will have a limited transition period of one to five years, depending upon the size of the company, during which the regulatory requirements will be scaled in order to ease the cost of compliance. During this on-ramp period, an EGC is not required to:

1. provide proxy statement disclosure and hold shareholder votes on say-on-pay, say-on-frequency and golden parachute compensation arrangements;

2. provide the comprehensive executive compensation disclosures in its annual proxy

statement, but is permitted to provide the less burdensome executive compensation information required of "smaller reporting companies," i.e., companies with a public common equity float of less than $75 million (for example, the Compensation Discussion and Analysis (CD&A) is not required, the disclosure in the Summary Compensation Table is reduced and many of the other compensation tables can be eliminated by substituting narrative disclosure);

3. comply with the requirement to disclose the relationship of executive pay to performance or the ratio of the annual compensation of the issuer's chief executive officer to the median annual compensation of all other employees of the issuer;

4. present more than two years of audited financial statements, selected financial data or management's discussion and analysis (MD&A) in a registration statement for an initial public offering (rather than the usual three years of financial statements and MD&A and five years of selected financial data);

5. present selected financial data and MD&A in Exchange Act periodic reports for any period prior to the earliest audited period presented in connection with the issuer's first registration statement that became effective under the Securities Act or Exchange Act;

6. comply with any new or revised financial accounting standard until private companies (those that are not "issuers" as defined under the Sarbanes-Oxley Act of 2002) are required to comply with such standards (if such standards apply to private companies);

7. comply with the requirement, under Section 404(b) of the Sarbanes-Oxley Act, to obtain an independent auditor attestation report on management's assessment of the effectiveness of the issuer's internal controls (management's annual report on internal controls will still be required);

8. comply with any requirement of the Public Company Accounting Oversight Board ("PCAOB") requiring mandatory audit firm rotation or a supplement to the auditor's report providing additional information about the audit and the financial statements of the company (auditor's discussion and analysis); and

9. comply with any additional rules adopted by the PCAOB after the date of enactment of the JOBS Act, unless the SEC determines that the application of such additional requirements is necessary or appropriate in the public interest.

These changes will take effect immediately. The IPO-related provisions of the JOBS Act are self-executing and do not require any SEC rulemaking, although the SEC may issue interpretive guidance and technical conforming changes to existing rules. Until that happens, uncertainty will remain about a variety of implementation issues. For example, the SEC may adopt specific procedures for making confidential submissions to initiate the IPO process.

What Is an Emerging Growth Company?

To qualify as an EGC, a company must have annual revenue for its most recently completed fiscal year of less than $1.0 billion. An issuer will not be considered an ECG if the first sale of its common equity securities pursuant to an effective registration statement under the Securities Act occurred on or before December 8, 2011.

After the initial determination of EGC status, a company will remain an EGC until the earliest of:

1. the last day of any fiscal year in which the company earns $1.0 billion in revenue;

2. the date when the company qualifies as a "large accelerated filer," with at least $700 million in public float;

3. the issuance, in any three-year period, of more than $1.0 billion in nonconvertible debt securities; or

4. the last day of the fiscal year ending after the fifth anniversary of the IPO pricing date.

EGC status will ordinarily terminate on the last day of a fiscal year. However, the issuance in any three-year period of more than $1.0 billion in non-convertible debt securities would cause an issuer to lose its EGC status immediately.

EGC status is unavailable to any issuer that priced its IPO before December 9, 2011.

KEY CHANGES TO THE IPO PROCESS

1. **Testing the Waters**. The JOBS Act revises Section 5 of the Securities Act to permit EGCs and their authorized persons (including underwriters) to make oral or written offers to qualified institutional buyers and institutional accredited investors before or after the initial filing of a registration statement. As a result, emerging growth companies can "test the waters" for a contemplated IPO by contacting institutional investors. This new provision significantly modifies the Section 5 restrictions on gun-jumping, which will allow pre-road show meetings with key institutional accounts to become a standard part of the IPO process. The new law does not change the prospectus delivery requirements of Section 5(b)(2) of the Securities Act.

2. **Confidential SEC Filings**. EGCs will be permitted to initiate the IPO registration process confidentially by submitting to the SEC a draft registration statement for nonpublic review by the SEC Staff. However, an EGC must hold its traditional IPO road show marketing process at least 21 days after publicly filing the initial submission and all amendments.

3. **Scaled Financial Disclosures**. An EGC will be allowed to provide two, rather than three,

years of audited financial statements at the time of its IPO. After its IPO, the EGC will phase into full compliance by adding one additional year of financial statements in each future year until the EGC presents the traditional three years of audited financial statements plus two years of selected financial data. The required management's discussion and analysis of financial condition and results of operations will cover only the years for which audited financial statements are provided.

4. **Increased Availability of Research**. The JOBS Act removes or lessens restrictions governing research reports and analyst communications relating to an emerging growth company. Under the new law, the issuance of a research report by a broker or dealer about an emerging growth company in connection with a proposed IPO (whether or not the registration statement has been filed or is effective) will not constitute an offer for sale under Section 5(c) of the Securities Act, even if the broker or dealer is participating or will participate in the registered public offering. In addition, SEC and Financial Industry Regulatory Authority (FINRA) restrictions are required to be lifted so that brokers or dealers will be permitted to issue research reports or make public appearances with respect to the securities of an emerging growth company immediately following an IPO and around the time that restrictions in lock-up agreements expire. Finally, research analysts now will be permitted to participate in communications with the management of an emerging growth company that are also attended by brokers or dealers who are not analysts. This will facilitate due diligence conducted as part of the IPOs of emerging growth companies. Other restrictions relating to research analysts, such as those relating to conflicts of interest and compensation practices, are not affected by the JOBS Act.

5. **Opt-In Election**. An emerging growth company is permitted to forgo the relief provided under the new law and instead comply with the requirements that apply to an issuer that is not an emerging growth company. However, with respect to the extension of time to comply with new or revised financial accounting standards, if an emerging growth company chooses to comply with such standards to the same extent as non-emerging growth companies, the emerging growth company must (i) make its choice at the time the company is first required to file a registration statement, periodic report or other report with the SEC and notify the SEC of such choice, (ii) comply with all such standards to the same extent as other public companies and may not select some standards to comply with and not others, and (iii) continue to comply with such standards for as long as the company remains an emerging growth company.

The JOBS Act does not amend the antifraud provisions of the US securities laws. All of the antifraud provisions will continue to apply to analyst research. In addition, the detailed and robust requirements developed in the last decade to address conflicts of interest between analysts and investment banking will continue to remain in effect unless otherwise revised or modified. These include Section 501 of Sarbanes- Oxley, analyst certification requirements under SEC Regulation AC and the comprehensive restrictions on analyst conduct, compensation, supervision and other matters under Rule 2711 and the Global Research Analyst Settlement of

2003 (which applies to certain of the largest investment banking firms). As a result, although we expect the JOBS Act to spur an increase in research coverage of newly public companies after the pricing date of their IPO, we do not expect to see research coverage initiated prior to the pricing of any IPO.

PRIVATE OFFERINGS

The other Titles of the JOBS Act make a number of additional changes to the securities laws that will apply to all participants in the US capital markets, including the following:

1. **General Solicitation Permitted in Certain Regulation D Offerings**. Title II of the JOBS Act requires the SEC to revise its rules relating to Rule 506 offerings under Regulation D within ninety (90) days from the date of enactment. Rule 506 is the SEC's safe harbor for private placements under Section 4(2) of the Securities Act. The revisions will eliminate the long-standing SEC prohibition against general solicitation or general advertising in private offerings made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors (note that the prohibition will still apply to Rule 506 offerings that include non-accredited investors). This means that companies will no longer need to have a "pre-existing relationship" with potential investors. The purpose of the relaxed restriction is to allow businesses in need of capital to reach a wider group of potential investors and therefore have greater access to capital. This should benefit start-ups, entrepreneurs and private companies that seek access to venture, angel or private equity investors. Any company using the amended Rule 506 exemption will be required to take reasonable steps (using methods determined by the SEC) to verify that purchasers of its securities are accredited investors.

2. **Platforms for General Solicitation**. In addition, the JOBS Act provides that, with respect to Rule 506 offerings, any person that maintains a platform or mechanism to facilitate the offering or sale of securities, or permits general solicitation or general advertising, will not be required to register as a broker or dealer, provided that such person receives no compensation in connection with the purchase or sale of such security, does not have possession of customer funds or securities and is not subject to a statutory disqualification.

3. **Rule 144A Offerings.** The SEC is required to revise Rule 144A, not later than ninety (90) days after the date of enactment of the JOBS Act, to provide that securities sold under Rule 144A may be offered to persons who are not qualified institutional buyers, including by means of general solicitation or general advertising, provided that the securities are sold only to persons that the seller and any person acting on its behalf reasonably believe is a qualified institutional buyer (as defined by Rule 144A). Although the new law may change the manner of resale offerings under Rule 144A for "PIPE" transactions and sales of unregistered debt securities, it remains to be seen what impact, if any, the change will have on the issuer's initial Section 4(2) exemption for the private placement to the initial purchasers or placement agent of such securities.

4. **Increase in the 500 Shareholder Trigger**. Titles V and VI of the JOBS Act amend the 500 shareholder trigger in Exchange Act Section 12(g). Under prior law, a company with more than $10 million in assets was required to register with the SEC and begin Exchange Act reporting within 120 days after the first fiscal year end at which it had a class of equity securities that was held of record by 500 or more persons. Under Title V of the JOBS Act, a company's obligation to register with the SEC and begin reporting will now be triggered following any fiscal year end at which the company has either 2,000 record holders of a class of equity securities or 500 record holders who are not accredited investors. However, any employee who received securities under an employee compensation plan in a transaction exempt from registration under the Securities Act will not be counted for purposes of the shareholder trigger.

REGISTRATION EXEMPTION FOR CROWDFUNDING OFFERINGS

Title III of the JOBS Act creates a new exemption from Securities Act registration for "crowdfunding" offerings. Crowdfunding refers to an offering to a potentially large group of investors who are restricted in the amount of money that they can invest in an issuer, and is usually associated with the idea of soliciting funds through Internet websites. Crowdfunding offerings will now be permitted under the exemption provided by Section 4(6) of the Securities Act if the following conditions are met:

1. the issuer is a U.S. company that is neither subject to the reporting requirements of Sections 13 or 15(d) of the Exchange Act nor an investment company under the Investment Company Act of 1940;

2. the aggregate amount of securities sold to all investors by the issuer during the preceding twelve (12) month period is not more than $1 million;

3. the aggregate amount sold to any investor by an issuer during the preceding twelve (12) month period does not exceed the greater of:

   a. $2,000 or 5% of the annual income or net worth of the investor, if the annual income or net worth of the investor is less than $100,000; and

   b. Ten percent (10%) of the annual income or net worth of the investor, if the annual income or net worth of the investor is equal to or more than $100,000, subject to a maximum aggregate cap of $100,000 for such investor;

4. the transaction is conducted through a broker or funding portal that complies with new Section 4A of the Securities Act (as described in "Requirements for Intermediaries" below); and

5. the issuer complies with the requirements of new Section 4A (as described in "Requirements for Issuers" below).

6. **Requirements for Intermediaries**. To qualify for the crowdfunding exemption under Section 4(6) of the Securities Act, a person acting as an intermediary must:

   a. register with the SEC as a broker or a funding portal;

   b. register with any applicable self-regulatory organization;

   c. provide risk and other investor education disclosure as the SEC may determine;

   d. ensure that each investor reviews investor education information, affirms that such investor understands the risk of losing its entire investment, and answers questions demonstrating an understanding of the level of risk in investing in startups and emerging businesses, including the risk of illiquidity;

   e. take steps to reduce the risk of fraud (as determined by the SEC), including background checks on each officer, director and holder of more than 20% of the outstanding equity of every issuer whose securities are offered by such person;

   f. make available to the SEC and to potential investors any information required to be provided by the issuer not later than twenty-one (21) days prior to the first sale of securities to any investor;

   g. ensure that offering proceeds are only provided to the issuer when the aggregate amount raised from all investors is equal to or greater than the target offering amount, and allow all investors to cancel their commitments to invest (as the SEC by rule shall determine);

   h. ensure that no investor in a twelve (12) month period has purchased securities offered pursuant to Section 4(6) that, in the aggregate, from all issuers, exceed the investment limits of Section 4(6);

   i. takes steps to protect the privacy of information collected from investors;

   j. not compensate promoters, finders or lead generators for providing the intermediary with the personal identifying information of any potential investor;

   k. prohibit the intermediary's directors, officers or partners from having any financial interest in an issuer using its services; and

   l. meet such other requirements as the SEC may determine for the protection of investors.

7. **Requirements for Issuers**. To secure the Section 4(6) exemption, an issuer must:

a. file with the SEC and provide to investors and the broker or funding portal certain information about the issuer, including the names of its directors and officers, a description of the business and financial condition of the issuer, the intended use of the proceeds of the offering, the target offering amount, the price or method for determining the price of the securities and the ownership and capital structure of the issuer;

b. refrain from advertising the terms of the offering, except for notices that direct investors to the funding portal or broker;

c. refrain from paying compensation to any person to promote its offerings through communication channels provided by a broker or funding portal, except as may be disclosed in accordance with SEC rules;

d. not less than annually, file with the SEC and provide to investors reports of the issuer's results of operations and financial statements as the SEC shall determine by rule; and

e. comply with all other requirements that the SEC may prescribe for the protection of investors.

8. **Other Key Provisions.** In addition to the registration exemption under Section 4(6) of the Securities Act, the new crowdfunding law provides that any securities issued under the exemption are "covered securities" for purposes of exempting those securities from state securities registration and offering requirements only if they are listed on a national securities exchange or offered or sold to a qualified purchaser as defined by the SEC. Resales of securities issued under Section 4(6) will be restricted during the one (1) year period beginning on the date of purchase, unless the securities are transferred to the issuer, an accredited investor, as part of a SEC-registered offering, to a family member or in connection with the death or divorce of the purchaser. The new crowdfunding law also provides for civil liability that is similar to Section 12(a)(2) of the Securities Act for any misstatements or omissions in the offer or sale of a security in a transaction exempted by Section 4(6). The SEC has 270 days from the date of enactment of the JOBS Act to promulgate rules implementing the crowdfunding exemption.

REGISTRATION EXEMPTION FOR OFFERINGS NOT EXCEEDING $50 MILLION

Title IV of the JOBS Act requires the SEC to adopt an exemption from registration under Section 3(b) of the Securities Act for offerings of up to $50 million within a twelve (12) month period. This provision is intended to address the $5 million offering amount limitation contained in Section 3(b) of the Securities Act and in Regulation A adopted by the SEC. Regulation A has not been used often in the past because of the low offering amount limitation and the requirement to prepare and file an offering circular with the SEC. The new exemption is limited to equity securities, debt securities and debt securities convertible or exchangeable into equity securities. The securities may be offered and sold publicly and will not be considered “restricted securities” within the meaning of the federal securities laws. The issuer of the securities is permitted under this exemption to “test the waters” by soliciting interest in the offering prior to filing any required offering statement. The SEC is required to review the offering amount limitation every two years and increase the amount as it determines appropriate.

Under the new law, the SEC must require issuers to file audited financial statements with the SEC annually. The SEC is given authority to determine any additional terms, conditions or requirements that it deems necessary for the protection of investors, which may include:

1. a requirement that the issuer prepare and file with the SEC and distribute to prospective investors an offering statement that contains audited financial statements, a description of the issuer’s business operations, its financial condition, its corporate governance principles, its use of investor funds and other information as determined by the SEC;

2. a requirement that issuers make available to investors and file with the SEC periodic disclosures regarding the issuer as determined by the SEC; and

3. disqualification provisions under which the exemption will not be available to certain issuers or their affiliates, officers, directors, underwriters or other related persons.

Unlike the crowdfunding exemption discussed above, offerings under this exemption will be treated as “covered securities” and exempt from state securities laws only if they are listed on national securities exchange or offered or sold to a qualified purchaser as defined by the SEC. The Comptroller General is required to conduct a study on the impact of state securities laws on offerings made under Regulation A and report the findings to Congress not later than three (3) months after the date of enactment of the JOBS Act.

Although the amendment to Section 3(b) of the Securities Act is effective upon the date of enactment, the new registration exemption will not be available to issuers until the SEC adopts implementing regulations.

TIMELINE FOR IMPLEMENTATION

The JOBS Act amendments to the federal securities laws, as described above, are generally effective on April 5, 2012, the date of enactment. However, the SEC is required by the JOBS Act to issue implementing regulations for various Titles under the following time frames: Title II (exempt offerings under Rule 506 of Regulation D and Rule 144A) – 90 days from the date of enactment; Title III (exemption for crowdfunding offerings) – 270 days from the date of enactment; Title IV (exemption for offerings not exceeding $50 million) – no date specified; Title V (increasing the threshold for registration under Section 12(g) of the Exchange Act for most issuers) – no date specified; and Title VI (increasing the threshold for registration under Section 12(g) of the Exchange Act for banks and bank holding companies) – one year from the date of enactment.