CLEARY GOTTLIEB

Alert Memo

APRIL 16, 2012

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The JOBS Act of 2012—What Does it Mean for Foreign Companies?

The new Jumpstart Our Business Startups Act (the "Act" or the "JOBS Act") makes some important changes to U.S. securities regulation. Although these were designed to facilitate access to the capital markets for U.S. companies, several provisions could impact foreign companies, too. These are briefly summarized below.

Provisions of interest to foreign issuers

New IPO "on-ramp"

- *Eligible issuers*. The Act makes the IPO process less burdensome for what it defines as emerging growth companies ("EGCs") – companies with annual gross revenues of less than $1 billion that have not issued debt aggregating more than $1 billion in the past three years. A non-U.S. company can be an EGC and use this lighter IPO process.

- *Disclosure accommodations*. The Act provides relief from some SEC disclosure requirements for an EGC's IPO and for its ongoing reporting for up to five years. The most important relief is that (a) an EGC will be permitted to provide only two years (rather than three) of audited financial statements, and only those two years (rather than five) as selected financial data, in its IPO, and (b) an EGC will not have to provide an independent audit of its assessment of its internal control over financial reporting.

- *Confidential review*. The Act provides for SEC review of an IPO registration statement of an EGC to remain confidential until 21 days before the road show begins. The SEC already allows confidential review for a foreign issuer that meets certain requirements, and that practice will continue for a foreign issuer that meets those requirements and does not file as an EGC.

- *Liberalization of research publication*. The Act permits a broker-dealer (whether or not participating in the offering) to publish research on an EGC before, during and after an IPO.

- *Liberalization of pre-marketing*. The Act allows an EGC to "test the waters" – to make oral or written communications with qualified institutional buyers ("QIBs") and institutional accredited investors ("AIs") to determine interest in the contemplated offering. Testing the waters can occur before or after the filing of a registration statement.

- These provisions are available immediately, though the SEC will probably make some rules to govern "on-ramp" IPOs.

Eliminating publicity restrictions in private placements

- The Act requires the SEC to eliminate certain restrictions on publicity in private placements. Under current rules, a Rule 144A offering cannot involve any general solicitation or general advertising, or any offers to anyone other than QIBs. Within 90 days, the SEC must amend its rules in a way that will lift these restrictions for Rule 144A offerings.

Implications for a foreign company considering an IPO

- A non-U.S. company that sees potential benefits to a U.S. listing needs to consider the burdens of SEC registration and ongoing reporting. Many have decided to proceed instead with a home country IPO coupled with a private placement to QIBs in the United States under Rule 144A. The JOBS Act is not enough to reverse that trend by itself, but it eases some of the more burdensome disclosure requirements and may affect a foreign company's calculus by making an SEC-registered IPO a little easier and more attractive.

Implications for a foreign company doing an SEC-registered IPO

- *Use of "pre-deal" research reports*. If a foreign EGC decides to do a registered offering, the underwriters (and other financial institutions) will be permitted to circulate research reports in the United States – before, during and after the offering. The issuer might even encourage the use of research, if that would appear to help market or position the offering, particularly if there is pre-deal research in the home jurisdiction. Underwriters will, however, still be concerned about liability, so it remains uncertain whether pre-deal research will become a regular practice.

- *"Testing the waters."* An EGC and its underwriters may communicate with QIBs and institutional AIs to determine interest in the contemplated offering – even before the registration statement is filed. Testing the waters communications can be oral or written, but because of the risk of liability, we expect them to be oral.

Relaxed financial disclosure requirements: under law, but perhaps not in practice?

- The most significant disclosure accommodation for EGCs – the ability to provide only two years of audited financial statements and selected financial data – will as a practical matter only be helpful to some foreign companies. A company contemplating a dual listing (in the United States and, typically, at home) will usually be required to present one more year under the rules of the foreign jurisdiction. As a result, the principal beneficiaries of the two-year provision will likely be foreign companies that seek a single listing (in the United States only), and even in that case marketing or disclosure considerations may prompt inclusion of a third year of financial information.

- It remains to be seen whether market practice in 144A offerings (perhaps even by non-EGCs) will change to require only two years of audited financial statements, by analogy to the requirements for EGCs in registered offerings.

Rule 144A/Regulation S offerings

- *Effect of relaxation of general solicitation rules*. It is not clear how much the JOBS Act's easing of restrictions on communications in private placements will affect offerings by foreign companies. Foreign issuers typically sell securities in dual-tranche offerings that rely on both Rule 144A, for sales in the United States, and Regulation S for sales elsewhere. The JOBS Act directs the SEC to amend Rule 144A (and Rule 506 of Regulation D) to remove the restrictions on general solicitation and general advertising, but it does not address the prohibition on "directed selling efforts" in offshore offerings under Regulation S. Until the SEC provides guidance on the implications of the changes to these private placement rules on the Regulation S exemption, it will be uncertain whether the conduct the Act permits will be considered inconsistent with the Regulation S exemption. Even in the absence of guidance, given the elimination of the prohibition on general solicitation and general advertising in 144A offerings, we expect that practitioners may take the view that minor and inadvertent conduct, such as receipt of materials by U.S. persons that are not QIBs, should not be characterized as directed selling efforts that compromise the Regulation S exemption.

- *Use of "testing the waters" and pre-deal research*. The limitations on pre-launch "pilot-fishing," and on the circulation of pre-deal research in the United States, in Rule 144A/Regulation S offerings have been based on liability concerns, rather than statutory prohibitions. But if investment banks use the new flexibility provided by the JOBS Act for these activities in registered deals, they may also seek to use it in non-registered deals.

Issuers already listed in the United States

- The JOBS Act will not have a significant impact on foreign companies that sold equity in SEC-registered offerings prior to December 9, 2011, because they would not qualify as EGCs and thus would not benefit from the Act's "on-ramp" provisions.

JOBS Act provisions less likely to affect foreign issuers

- *Revised public company registration requirement*. The Act raises the number of shareholders that triggers the requirement to register with the SEC as a public company. This will not affect most foreign companies, which can rely on exemptions from the registration requirements, notably Rule 12g3-2(b).

- *Small offerings*. The Act requires the SEC to adopt rules permitting exempt sales of less than $50 million of securities in a 12-month period. Whether a foreign company will consider this new exemption attractive will likely depend on the SEC's rulemaking and whether the benefits of a small public offering in the United States justify the related costs and burdens relative to an offering in the company's home market (on a stand-alone basis or paired with a Rule 144A offering).

- *Crowdfunding*. The Act creates a new exemption for "crowdfunding," which is not applicable to foreign companies.

You may find additional information about the matters discussed above in our Alert Memo dated March 27, 2012, which we attach for your convenience. Please contact any of our partners and counsel listed under "Capital Markets" in the "Practices" section of our website (www.cgsh.com) or any of your other regular contacts at the firm for further information on this or other related topics.

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