How the JOBS Act Revolutionized Small-Company

New rules offer more options for private companies looking to raise funds

Since being enacted three years ago, the Jumpstart Our Business Startups Act of 2012 (known as the JOBS Act) has expanded the ways in which many startups and small companies can access financing.

Beyond streamlining the process of going public, the JOBS Act has added new options to the formerly binary decision of whether to remain private or go public. For example, companies can now remain private while offering equity shares to a far greater number of investors than they could under prior regulations. "It's been a huge improvement and given private companies a lot more flexibility," says Jocelyn Arel, partner in the corporate and technologies companies group with law firm Goodwin Procter LLP.

Here are a couple of key ways the JOBS Act has improved the financing landscape.

Confidential Filing

One particularly significant provision of the law, Title I, created a new class of companies under federal securities law called emerging growth companies (EGCs). In general, these are firms with annual revenues under $1 billion. EGCs receive relief from several of the reporting requirements traditionally imposed on companies seeking to go public. According to consulting firm Ernst & Young, about 85 percent of EGCs that registered with the SEC since the JOBS Act passed have taken advantage of at least one Title I provision.[1]

For instance, formerly all companies were required to file initial public offering (IPO) statements with the Securities and Exchange Commission (SEC) that were available to the public, often months in advance of their IPO. Now, EGCs can file draft statements confidentially to the SEC, receive feedback on those statements and revise them, but don't need to file those statements publicly until a few weeks before they proceed with an IPO. This allows firms to wait until market conditions are right for the offering, says Steve Bochner, partner at law firm Wilson Sonsini Goodrich & Rosati. He is also advisory board chair of Nasdaq Private Market, which helps private companies manage their equity. "They can file confidentially without exposing sensitive information to competitors," Bochner says.

Regulation A+

Another significant regulation stemming from the JOBS Act is Regulation A+ (“Reg A+”), which the SEC finalized in March 2015. This exempts certain private companies from the requirements typically imposed on companies offering their securities to the general public. The old rules (called Regulation A) required that companies looking to sell their securities go through a costly and timely state-by-state review process while allowing them to raise only $5 million. The new rules offer two tiers of securities offerings: Tier 1 allows companies to raise up to $20 million within a 12-month period without needing to file audited financial statements and generally without reporting to the SEC. However, tier 1 filers must comply with costly state-by-state registration processes, called “blue sky” laws. Tier 2 allows companies to raise up to $50 million and generally exempts them from blue sky laws, although they must provide audited financial statements and comply with ongoing reporting requirements.

Regulation A+ “opens the market to a broader universe of investors,” says Anna Pinedo, partner with Morrison & Foerster LLP. Many private companies have expressed interest in recent months in taking advantage of Reg A+, she adds. They may plan to proceed to an IPO in the future, yet first need to beef up their reporting systems. Engaging in a Reg A+ offering lets them start the process and get their name in front of research analysts without all the requirements traditionally imposed on companies going public. Another key attraction: The securities are freely transferable once they are sold to investors, although some limits apply in tier 2 sales to non-accredited investors.

Future effects

The longer-term impact of the JOBS Act on companies’ ability to raise funds remains to be seen. For starters, the SEC has yet to issue final rules on the equity crowdfunding provisions of the JOBS Act, which are intended to allow private companies to take on non-accredited equity investors. The SEC is scheduled to put out those rules in October 2015.[2]

What’s also unclear going forward is the influence of the JOBS Act on private companies’ decision to stay private or go public. More private companies have waited longer to go public in recent years, but whether the JOBS Act provisions will further encourage that trend remains to be seen, says Jamie Hutchinson, another partner with Goodwin Procter.

NASDAQ Private Market

Getting expertise

Although the long-term impact of the JOBS Act continues to unfold, private companies have a growing number of opportunities to sell equity and raise money. Nasdaq Private Market offers an array of services to help private and pre-IPO companies better take advantage of new ways to raise funds—including technical tools, marketing expertise and shareholder liquidity programs, says Annemarie Tierney, Vice President of Strategy and New Markets for Nasdaq Private Market. "We're looking at every place along the continuum to help companies, whether they're growing, want to stay private or want go public," she says.

Learn more at NasdaqPrivateMarket.com or call (415) 243-3156.

1 Ernst & Young, "The JOBS Act: 2014 mid-year update," August 2014
2 RegInfo.gov

Citations

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