KIRKLAND **ALERT**

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JOBS Act Promises to Simplify IPO Process

The Jumpstart Our Business Startups Act (the "JOBS Act") was enacted on April 5, 2012, and a number of provisions of particular relevance to many prospective IPO candidates have taken immediate effect. The SEC's Division of Corporation Finance has also begun issuing initial advice and FAQs on the implementation and interpretation of some of the JOBS Act's provisions.[1]

We will continue to monitor JOBS Act developments closely and urge you to stay tuned for further updates on these important changes under the Federal securities laws and policies.

Jumpstart Our Business Startups Act

Among its provisions, the JOBS Act contains reforms intended to simplify the IPO process and public reporting and compliance requirements for "emerging growth companies," as well as reforms intended to ease raising capital in private and small public offerings. This *Kirkland Alert* principally addresses reforms to the IPO process.

Key elements of the JOBS Act can be traced to the recommendations made by the IPO Task Force to the U.S. Treasury Department in October 2011. The IPO Task Force was a cross-functional group including venture capitalists, executives, public investors, securities lawyers, academicians and investment bankers which arose independently out of the Treasury Department's Access to Capital Conference in March 2011. A fundamental idea behind the recommendations of the IPO Task Force and the JOBS Act is that if the IPO process and the reporting and governance regimes under which emerging growth companies operate after an IPO are simplified, more entrepreneurial, high-growth and job-creating companies will arise and thrive in the United States.

A New Category of "Emerging Growth Companies"

Under the JOBS Act, an "emerging growth company" is an issuer (including a foreign private issuer) with less than $1.0 billion in annual gross revenues (this threshold is to be indexed for inflation every 5 years). An issuer continues to be an emerging growth company until the earliest of (A) the fiscal year following the fiscal year in which its annual gross revenues are $1.0 billion or more; (B) the fiscal year following the fifth anniversary of its IPO of common equity securities; (C) the date on which it has issued more than $1.0 billion in non-convertible debt during the previous three-year period; or (D) the date on which it is deemed to be a "large accelerated filer" under the Securities Exchange Act of 1934 (the "Exchange Act"), which requires a public float of $700 million or more as of the most recently completed second fiscal quarter, being subject to the public reporting requirements of the Exchange Act for at least 12 months and having filed at least one annual report. An issuer will not be an emerging growth company if it completed an IPO on or before December 8, 2011.

Historical Audited Financial Information

The IPO registration statement of an emerging growth company may contain two years of audited financial statements instead of the three years usually required. The associated discussion required in Management's Discussion and Analysis of Financial Condition and Results of Operations will similarly be limited to the years presented. An emerging growth company is required to present selected financial data for the years covered by the

audited financial statements in the registration statement, or as little as two years compared with the five years usually required. (In each case, of course, any interim period financial information and associated MD&A discussion will continue to be required.) This should simplify the disclosures required for emerging growth companies, and should reduce the costs associated with their preparation of audited financial statements in their IPOs. As an emerging growth company continues to file subsequent annual reports and registration statements over time, audited financial statements for a third full year and eventually up to five full years of selected financial data will be required as audited financial statements for subsequent years are prepared.[2]

Sarbanes-Oxley Internal Control Attestation Requirements

While an issuer is an emerging growth company it will be exempt from the requirement for its auditors to attest to and report on the adequacy of its internal control over financial reporting pursuant to Section 404(b) under the Sarbanes-Oxley Act of 2002. This provision could provide significant relief from compliance and reporting expense in early years for emerging growth companies.

Confidential Submission and Review of IPO Registration Statements

An emerging growth company may submit its draft IPO registration statement for confidential nonpublic review by the staff of the SEC[3], provided that the confidentially submitted IPO registration statement and all amendments to it must eventually be filed publicly on EDGAR at least 21 days in advance of a road show by the company.[4] This will provide emerging growth companies confidential review treatment substantially like that provided to foreign private issuers prior to the JOBS Act.[5] This accommodation should provide emerging growth companies with additional time in which their sensitive business information is kept confidential while they continue to assess the viability or attractiveness of a potential IPO.

The SEC has announced initial procedures for confidential submission of registration statements by emerging growth companies:[6]

- Pending implementation of a system for electronic transmission, confidential submissions are to be sent in a text-searchable PDF file on CD or DVD, or alternatively in paper format but not stapled or bound.
- The draft registration statement is not required to be signed or to include the consent of auditors or other experts.
- While certain limited information (such as price and offering-related information) can be omitted, the staff continues to expect drafts submitted confidentially to be substantially complete. In the event the staff concludes that a submitted draft is materially deficient, it may defer its review until the submission is sufficiently complete.
- A transmittal letter in which the company confirms its emerging growth company status must be included.
- No registration fee is required until the public filing of the registration statement is made on the EDGAR system.
- It is not necessary to make the submission under cover of a confidential treatment request in order to preserve confidentiality.
- The submission package including one copy of the confidentially submitted draft registration statement should be addressed to:

  Draft Registration Statement
  U.S. Securities and Exchange Commission
  100 F Street, N.E.
  Washington, D.C. 20549

- Questions about the confidential submission and review process may be directed to the SEC staff at +1 (202) 551-5867.
- Once the draft is submitted, the SEC staff will contact the issuer and advise it of the office to which review of its submission has been assigned.

Finally, it should be noted that confidential submission does not constitute a filing of the registration statement for purposes of Section 5 of the Securities Act, and therefore will not form a basis under Section

5(c) for commencing offers of securities. However, the Act will permit an emerging growth company and persons authorized to act on its behalf to engage in "test-the-waters" communications with qualified institutional buyers and institutional accredited investors to gauge their interest in the IPO, either prior to or following the filing of the IPO registration statement. The SEC has clarified that these test-the-waters communications will not be considered road show activities that would otherwise require the company's registration statement to have been publicly filed at least 21 days beforehand.

Research Reports

Publication or distribution by a broker or a dealer of a research report about an emerging growth company that is the subject of an IPO will no longer be considered an offer for sale or offer to sell a security and will not be considered "gun-jumping," even if the broker or dealer is participating or will participate in the IPO. This should allow analysts to publish reports prior to, during and after an offering instead of having to wait until 40 days after the IPO. Also, the JOBS Act should permit freer communications with analysts by removing restrictions related to analysts meeting with management of an emerging growth company along with a representative of an associated broker or dealer and restrictions related to arranging communications between analysts and potential investors.

What is Next?

The IPO provisions and other parts of the JOBS Act have become effective upon enactment. We recommend that companies with annual revenues of less than $1.0 billion that have not yet completed an IPO and are currently weighing the pros and cons of raising capital in the public markets consider the changes to the IPO processes afforded by the JOBS Act. We expect that the SEC will continue to issue guidance on the impact of the JOBS Act and the SEC is mandated to develop and update certain of its rules in order to implement the Act. Pending further guidance and rule making, there will remain some uncertainty regarding some of the Act's provisions and policies. There will also be evolving responses by market participants to the changes created by the Act. We will keep you updated on these and other developments associated with the JOBS Act in future Alerts.

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1 The Division has issued in connection with the JOBS Act an announcement regarding the confidential submission procedures for draft registration statements by emerging growth companies (http://www.sec.gov/divisions/corpfin/cfannouncements/draftregstatements.htm) and FAQs and commentary regarding the confidential submission process (http://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm) and changes to the requirements for Securities Exchange Act registration and deregistration thresholds (http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-12g.htm). The SEC has announced that public comment is invited on various aspects of coming rule making to implement the JOBS Act and has set up web forms for submission of comments (http://sec.gov/spotlight/jobsactcomments.shtml).

2 Emerging growth companies will also be exempt from potential future requirements of the Public Company Accounting Oversight Board for mandatory rotation of audit firms and presentation of "auditor discussion and analysis" disclosure and, unless accepted by the SEC, other future rules of the Board that would otherwise apply to audits of emerging growth companies.

3 Confidential review is allowed for a draft registration statement submitted by an emerging growth company prior to the date of first sale of its common equity securities pursuant to an effective registration statement. The sale of common equity pursuant to an effective Form S-8 registration statement for an employee benefit plan or a registered secondary sale by a selling shareholder can constitute the first sale of common equity under an effective registration statement for this purpose. However, a prior sale of other securities, for example debt securities, under an effective registration will not disqualify an emerging growth company from confidential submission and review of its initial registration statement for the sale of common equity.

4 This requirement for public filing at least 21 days in advance of a road show will require careful planning as the time for launch of marketing for a prospective IPO approaches.

5 A foreign private issuer will be able to obtain confidential review treatment under the JOBS Act if it meets the criteria for an emerging growth company. A foreign private issuer that is not an emerging growth company may be able to obtain confidential re-

view treatment under the modified confidential review policy for foreign issuers announced by the Division of Corporation Finance on December 8, 2011, if it is, or is simultaneously becoming, listed on a non-US securities exchange; is being privatized by a foreign government; or can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

[6] Foreign private issuers eligible to make confidential submissions will follow the same procedures as domestic emerging growth companies. A prior email address available for foreign private issuers to make confidential submissions will no longer be active.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland attorneys or your regular Kirkland contact.

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