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LEGAL UPDATES AND NEWS

JOBS Act Provides Regulatory Relief and Capital Investment Opportunities to Community Banks

On April 5, 2012, the President signed into law the "Jumpstart Our Business Startups Act" (the "JOBS Act"). The JOBS Act facilitates capital raising activities by small businesses, including financial institutions and their holding companies, and in particular offers community banks and bank holding companies significant regulatory relief from the burden of ongoing SEC reporting and compliance.

Below is a brief summary of the JOBS Act and how it may affect your bank. Many of the provisions of the JOBS Act will require rulemaking and further SEC interpretation. In future newsletters we will address strategies that community banks may employ to take advantage of the JOBS Act, and discuss SEC rulemaking implementing the new legislation.

Relief from Registration and Reporting Requirements Under the Securities Exchange Act

Prior to the enactment of the JOBS Act, every issuer with total assets in excess of $10 million and a class of equity security held of record by 500 or more persons (in each case as of the end of a fiscal year) was required to register the class of equity security with the SEC under the Securities Exchange Act of 1934 (the "Exchange Act"), subjecting the issuer to the various periodic reporting, accounting, and other compliance requirements imposed by the SEC. Moreover, a company could terminate its registration with the SEC, and terminate its obligation to file periodic reports with the SEC, only when the number of record holders of its class of equity security fell below 300 persons.

Under the JOBS Act, a company will be required to register (and file periodic reports) with the SEC only if it has a class of equity security that is held of record by 2,000 or more persons, or by 500 or more non-accredited investors. Persons holding securities that were received pursuant to an employee compensation plan in a transaction exempt from registration with the SEC will be excluded from the record holder count.

- *For banks and bank holding companies, registration with the SEC is required only if a class of equity security (typically common stock) is held of record by 2,000 or more persons, without regard to the number of non-accredited investors.*

- The JOBS Act also allows a bank or bank holding company already registered under the Exchange Act to terminate its registration with the SEC and its obligation to file periodic and other reports with the SEC, when the class of equity security is held of record by fewer than 1,200 persons.

- For other issuers, including savings associations and savings and loan holding companies, termination of registration (and the obligation to file periodic reports)

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with the SEC under the Exchange Act is only available when the class of equity security is held of record by fewer than 300 persons.

It is important to remember the following:

- The JOBS Act does not alter the stock exchange (Nasdaq and NYSE) requirement that a listed security be registered and file periodic reports with the SEC under the Exchange Act.

- The JOBS Act also does not affect the obligation of savings institutions to maintain the registration of their common stock with the SEC for at least three years following a mutual-to-stock conversion or mutual holding company stock offering.

General Solicitation and Advertising Is Allowed in Regulation D Private Placements

The JOBS Act requires the SEC to amend Regulation D under the Securities Act of 1933 (the "Securities Act"), which applies to private placements of securities (*i.e.*, offerings and sales of securities that are not required to be registered with the SEC) to eliminate the prohibition against general solicitation or general advertising with respect to offers and sales under Section 506 of Regulation D, provided that all purchasers of the securities are accredited investors. The revised rule will require issuers to take reasonable steps to verify that the purchasers of securities are accredited investors.

Section 506 is available to private placements of securities without regard to the dollar amount of the offering, and it currently allows up to 35 purchasers who are not accredited investors. Accordingly, if non-accredited investors will be allowed to purchase securities in the 506 offering, general solicitation or advertising may not be used. If sales are made only to accredited investors, Regulation D does not include specific disclosure requirements.

The SEC is also directed to revise Rule 144A to provide that securities sold thereunder may be offered to non-qualified institutional buyers, provided that all purchasers are reasonably believed to be qualified institutional buyers.

- Allowing general solicitation and general advertising in connection with private placements should greatly facilitate capital raising activities for financial institutions and their holding companies (*i.e.*, banks, savings associations and their holding companies).

Emerging Growth Companies

The JOBS Act provides that a business categorized as an Emerging Growth Company ("EGC") that is engaged in an initial public offering ("IPO") may provide scaled disclosure, including two years of audited financial statements in the registration statement, disclosing information required of a smaller reporting company under Item 402 of Regulation S-K, and no requirement for auditor attestations of internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act of 2002.

An EGC is defined as an issuer with "total annual gross revenues" of less than $1 billion during its most recent fiscal year, other than a company that completed an IPO on or before December 8, 2011. "Total annual gross revenues" means total revenues as presented on the

income statement, in accordance with U.S. GAAP. Banks, savings associations and their holding companies can qualify as EGCs.

An issuer may retain its status as an EGC until any of the following occur: (1) total annual gross revenues exceed $1 billion; (2) the issuer issues more than $1 billion in non-convertible debt (any non-convertible security that constitutes indebtedness, whether issued in a registered offering or not) during a three-year period; (3) the fifth anniversary of the issuer's IPO; or (4) the issuer is classified as a "large accelerated filer."

EGCs will have the advantage of reduced disclosure and auditing obligations in connection with their IPO and on an ongoing basis so long as they remain an EGC.

- Note that mutual savings institutions that convert to stock form will also need to comply with federal and state conversion regulations, notwithstanding their qualification as an EGC.

- The EGC alternative offers significant opportunities for privately held financial institutions and their holding companies to raise capital and go public with substantially fewer disclosure and ongoing regulatory burdens than those facing non-EGC companies.

Regulation A Amendments

Under Regulation A, all companies that do not report under the Exchange Act (with the exception of "blank check" companies and investment companies) may use Regulation A and engage in a public offering that is similar in many respects to a registered offering. Just as in a registered offering, the purchaser must be provided with an offering circular, which is similar in content to a prospectus. Moreover, the securities issued in a Regulation A offering are freely tradeable after the offering. Finally, the company may "test the waters" prior to engaging in the offering to determine whether there is adequate interest in the company's stock before going through the expense of filing with the SEC.

The JOBS Act amends Section 3(b) of the Securities Act to permit the SEC to amend Regulation A to increase the annual aggregate offerings and sales that can be made from $5 million to $50 million. The increase in the aggregate offering and sales amount offers private companies greater flexibility in accessing capital without engaging in an offering subject to the registration and other requirements imposed by the federal securities laws.

Crowdfunding Exemption

The JOBS Act creates a new exemption from registration under the Exchange Act for private companies (*i.e.*, companies that are not subject to the reporting requirements under the Exchange Act) for transactions involving the offer or sale of securities by an issuer provided that:

- The aggregate amount sold to all investors during a single year is not more than $1 million;

- The aggregate amount sold to any single investor during the year does not exceed the greater of $2,000 or 5% of that investor's annual income or net worth (not to exceed a maximum amount of $100,000);

- The offer or sale is conducted through a broker or funding portal (*e.g.*, an internet message board that facilitates funding) that complies with new Section 4A(a) of the Securities Act; and

- The issuer provides certain information to the broker or funding portal and the SEC, and otherwise complies with new Section 4A(b) of the Securities Act.

The exemption allows private companies to raise relatively small amounts of money from a potentially large number of investors. The purpose of this exemption is to create access to credit for private companies and start-ups that may otherwise have difficulty obtaining funds from financial institutions and venture capitalists due to the high risk associated with start-up companies and unproven entrepreneurs. Private companies are able to advertise their investment opportunity via a funding portal, which acts as an internet message board for information about the private company. While funding portals face restrictions on promoting issuers, compensation of employees and affiliation with issuers, these portals could potentially experience a financial boon by providing a platform through which private companies may advertise and obtain funding from the public at large.

Rulemaking and Public Comment

We will monitor rulemaking resulting from the JOBS Act and provide updates as circumstances develop.

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Luse Gorman is one of the leading firms nationally in advising financial institutions on capital-raising, mergers and acquisitions, corporate and securities, regulatory and executive compensation/employee benefits matters. Please contact any of the attorneys listed below if you would like to discuss any information contained in this newsletter.

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