# U.S. LEGISLATION FURTHER OPENS U.S. CAPITAL MARKETS TO NON-U.S. ISSUERS

*As a result of its origins, the Jumpstart Our Business Startups Act (JOBS Act) is generally perceived to be directed at improving access to the U.S. capital markets for qualifying U.S. companies.[1] However, various provisions of the JOBS Act apply equally to similar non-U.S. companies, or so-called "foreign private issuers." The JOBS Act builds on previous reforms and enhances the attractiveness and accessibility to the U.S. markets to qualifying non-U.S. issuers by allowing for certain U.S. offering and listing practices to more closely resemble practices that have developed in other international markets.*

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Since the passage of the Sarbanes-Oxley Act in 2002, various reforms have been implemented in the U.S. to facilitate access by issuers, including non-U.S. issuers, to the U.S. public markets. As a result of these reforms, non-U.S. issuers may, among other things, use International Financial Reporting Standards in U.S. Securities and Exchange Commission (SEC) filings without reconciliation to U.S. GAAP[2] and deregister from, or exit, the U.S. registration system under prescribed circumstances.[3] The reforms to U.S. securities regulations also permit certain seasoned and previously SEC-registered issuers, including qualifying non-U.S. issuers, efficient and often immediate access to the U.S. public markets through a streamlined "shelf" registration process.[4] Furthermore, the exemption provided by Rule 144A continues to be an efficient method for non-U.S. companies to raise capital from U.S. institutional investors without requiring SEC registration.

Continuing on the theme of these reforms, the JOBS Act, which was passed on April 5, 2012, brings certain provisions of U.S. securities law closer in line with developed international standards. By eliminating the remaining hurdles to the U.S. capital markets for qualifying issuers, the JOBS Act has broad implications for non-U.S. issuers seeking to access the U.S. capital markets.

In particular, the JOBS Act has created a new category of issuers called "emerging growth companies" (EGCs), which generally include both U.S. and non-U.S. issuers with less than $1

[1] H.R. 3606. *See* Willkie Farr & Gallagher LLP, *JOBS Act Increases the Ability of Portfolio Companies, Start-up Ventures and Small Businesses to Raise Capital and Access the Public Markets* (April 3, 2012). Certain provisions of the JOBS Act require the SEC to revise its rules to give effect to the JOBS Act no later than 90 days to one year after enactment.

[2] SEC Release 33-8879 (December 21, 2007). *See* Willkie Farr & Gallagher LLP, *SEC Adopts Rules Eliminating U.S. GAAP Reconciliations For Foreign Private Issuers Using IFRS* (January 14, 2008).

[3] SEC Release No. 34-55540 (March 27, 2007).

[4] SEC Release No. 33-8591 (July 19, 2005). *See* Willkie Farr & Gallagher LLP, *SEC Adopts Securities Offering Reform* (August 5, 2005).

billion in annual gross revenues during their most recently completed fiscal year.[5] Non-U.S. issuers that qualify as EGCs will benefit equally from the elimination of requirements and restrictions applicable to securities offerings and reporting in the U.S. pursuant to the JOBS Act, including those described below.

***Impact of the JOBS Act on the U.S. Public Listing and Offering Process*:**

- *Financial Disclosure*. The JOBS Act permits a non-U.S. issuer that is an EGC to include two (as opposed to three) years of audited financial statements in an IPO registration statement and to exclude selected financial data for any period prior to the earliest audit period presented in the IPO registration statement. As long as a company remains an EGC, such an issuer would not be required to include selected financial data for any periods prior to those included in its IPO registration statement. This revised requirement has the potential to eliminate financial disclosure that would not otherwise be required by a non-U.S. issuer's home country or market.

- *Internal Controls Attestation and New Accounting Standards*. Pursuant to the JOBS Act, a non-U.S. issuer that is an EGC no longer needs to obtain auditor attestation reports on its internal controls under the Sarbanes-Oxley Act. A non-U.S. issuer that chooses to use U.S. GAAP can delay application of any new or revised U.S. GAAP financial accounting standards that are applicable to public companies until the standard becomes mandatory for private companies. These reforms remove significant burdens in the U.S. IPO process for qualifying EGC issuers seeking to bring their controls and accounting methods in line with U.S.-listed company standards.

- *Confidential Submission of IPO Registration Statement*. The JOBS Act allows an EGC to file its initial registration statement and amendments thereto on a confidential basis, though these documents must be made public at least 21 days prior to any road-show presentation. In doing so, the JOBS Act restores the ability of qualifying non-U.S. issuers to commence an IPO process with the SEC without the immediate public scrutiny that necessarily accompanies non-confidential filings.[6]

[5] An issuer will be an EGC only until the earliest of: (1) the end of the fiscal year in which the company has total annual gross revenues of $1 billion, (2) the date on which the company issues more than $1 billion in non-convertible debt, (3) the date on which the company becomes a "large accelerated filer" (i.e., an issuer that has an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates of $700 million or more as of the last business day of the issuer's most recently completed second fiscal quarter and the issuer has been subject to the U.S. Exchange Act reporting requirements for at least 12 months and has filed at least one annual report), and (4) the end of the fiscal year following the fifth anniversary of its IPO.

[6] On December 8, 2011, the SEC's Division of Corporate Finance announced strict limitations on its long-held policy of allowing non-U.S. issuers to file their initial registration statement and to allow a substantial portion of the SEC comment process to occur on a confidential basis. *See Policy Statement of the SEC Division of Corporate Finance* (December 8, 2011). Subsequent to the signing of the JOBS Act, the SEC's Division of Corporation Finance maintained that SEC staff will continue to provide confidential review of initial registration statements of eligible non-U.S. issuers pursuant to the pre-JOBS Act procedures, provided that the company does not choose to take advantage of any benefit available to EGCs under the JOBS Act. If a non-U.S. issuer chooses to take advantage of any benefit available to EGCs, it will be treated as an EGC and will be required to publicly file its confidential submissions at least 21 days prior to any road-show. *See Frequently Asked Questions of General Applicability on Title I of the JOBS ACT* (April 16, 2012).

- *Testing the Waters/Pilot Fishing*. Non-U.S. issuers that are EGCs and their authorized representatives (including underwriters) are now permitted to engage with potential investors that are qualified institutional buyers (QIBs) or institutional accredited investors to gauge their interest in an offering prior to and after filing a registration statement for a securities offering. This reform allows a qualifying issuer to gauge the interest of the U.S. markets in a possible public offering and to decide whether or not to launch an IPO.

- *Research Reports*. Publication and distribution of research reports on EGCs prior to and after an IPO will not be deemed to constitute an "offer" of securities under the U.S. Securities Act. In addition, research analysts will be permitted to communicate with management in connection with the IPO of an EGC even if investment bankers are present. Such liberalizations could allow research practice in the context of U.S. public offerings by qualifying issuers to be more similar to the parallel process to which EGCs may be accustomed in other jurisdictions.[7]

***Impact of the JOBS Act on Private Offerings in the U.S.*:**

- *General Solicitation.* The principal U.S. private placement exemptions and legal regimes, Rule 144A and Regulation D, are scheduled to be revised by the SEC by July 4, 2012 (although this deadline is likely to be delayed) to permit general advertising and general solicitation in connection with exempt offerings under those rules, provided the seller reasonably believes all of the eventual actual purchasers are accredited investors or QIBs.[8] These reforms should allow for more freedom of communication by an issuer during the course of private offerings in the U.S. and may be particularly helpful in the context of a concurrent public offering in another market (a standard international offering structure) that would necessarily be accompanied by substantial publicity.

- *Market Practice for Rule 144A Offerings.* As the market practice for disclosure in connection with Rule 144A offerings typically is based upon U.S. public disclosure requirements, the revised requirements for EGCs in public offerings discussed above may impact the financial disclosure included in Rule 144A offering materials for non-U.S. issuers that would qualify as EGCs.[9]

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[7] It remains an open question whether pre-deal research will become as common in the U.S. for EGCs as it is in non-U.S. markets. The Financial Industry Regulatory Authority has not yet revised its rules to reflect these changes. Furthermore, the restrictions set forth in the SEC's Global Research Analyst Settlement may continue to apply to firms that are a party to that settlement. In addition, research reports would still be subject to Rule 10b-5, the SEC's anti-fraud rule, which may affect whether firms take advantage of these amendments.

[8] No amendment has been proposed to the similar "directed selling efforts" prohibition under Regulation S and there is currently speculation as to whether such an amendment will also be effected. To the extent a corresponding amendment is not made, the amendments to the "general solicitation" restrictions under Rule 144A or Regulation D may be of limited use for non-U.S. issuers conducting concurrent Rule 144A/Regulation D and Regulation S offerings.

[9] It is important to note that if the securities will be listed on a non-U.S. exchange with a Rule 144A tranche, the rules governing that exchange may impose different or additional disclosure requirements regardless of what would be permitted for EGCs in a U.S. offering.

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In the current environment, qualifying issuers outside the U.S., their financial sponsors and underwriters may be interested in taking advantage of these new reforms, whether in order to access the U.S. public securities markets, increase an issuer's corporate profile or liquidity in its securities in the U.S. by means of a U.S. listing, or create a currency for potential acquisitions of U.S. public companies.

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