US Jumpstart Our Business Startups Act – Implications for Indian Issuers and Financial Institutions

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On April 5, 2012, the US Jumpstart Our Business Startups Act (2012) (the "JOBS Act") was signed into law. The JOBS Act is intended to stimulate economic growth by improving access to the US capital markets for US and foreign emerging growth companies. To achieve this, the JOBS Act relaxes certain requirements and restrictions around securities offerings and public reporting obligations in the United States.

Some of the provisions of the JOBS Act that may have implications for Indian issuers and financial institutions include provisions that:

- ease (a) the US initial public offering ("IPO") process for emerging growth companies ("EGCs", defined as companies, whether US domestic or foreign private issuers, that have an annual gross revenue of less than US$1 billion during its most recent fiscal year) and (b) the on-going reporting and related obligations for EGCs for up to five years following an IPO, including some of the regulatory burdens imposed by the Sarbanes-Oxley Act of 2002, including Section 404(b) thereof;
- eliminate some of the restrictions on the distribution of research in the US; and
- eliminate prohibitions on general advertising and general solicitation in connection with sales made pursuant to Rule 144A or to accredited investors under Rule 506 of Regulation D under the US Securities Act of 1933.

Implications of the EGC IPO Streamlined Requirements for Offerings by Indian Companies

The JOBS Act exempts an EGC from providing auditor's attestation reports on its internal controls which would otherwise be required by Section 404(b) of Sarbanes Oxley Act of 2002 for a period of up to five years during which the EGC continues to be an EGC. A 2009 SEC survey reported that the average annual cost of compliance with Section 404(b) was US$2 million. The reduction in compliance cost resulting from this particular JOBS Act reform may be well received by Indian issuers considering listing in the US.

Further, the JOBS Act revises the MD&A disclosure requirements for EGCs to permit an EGC to cover only two years of financial information in the MD&A section of the IPO registration statement for a US listing. This is in conjunction with the change discussed below regarding the requirements for financial statements and selected financial disclosure for EGCs. The JOBS Act also eases requirements pertaining to disclosure on executive compensation by domestic EGCs, which requirements are more burdensome than those applicable to foreign private issuers.

More significant is the likelihood that some of the accommodations in relation to EGC IPOs will be adopted in the context of private placements in the US by Indian issuers that would have met the criteria for being EGCs in the context of a registered offering in the US. These possible changes are discussed below.

Two Years of Financial Statements for Indian Follow-on Public Offerings with a Concurrent US Private Placement

An EGC is now permitted to provide only two years (rather than three) of audited financial statements, and only those two years (rather than five) of selected financial data, in its prospectus for a US IPO. However, as Indian issuers are required to include five years of financial statements for IPOs in India (if in existence for five years) and three years for Qualified Institutional Placements ("QIPs"), the only practical implication is that for follow-on public offerings ("FPOs") by Indian listed issuers the Indian rule requiring only two years of financial statements will now be the same as that for EGC IPOs in the US. We note that the Indian market has already become comfortable with including only two years of financial statements in this context.

Possible Relaxation of Restrictions on the Distribution of Research in the US

The JOBS Act changes the rules applicable to the publication of research reports relating to offerings by EGCs. Under the current rules, investment banks participating in a US IPO cannot publish research in advance of the IPO or until 40 days after completion of the offering and must cease publishing research for a period of 15 days before and after the release or expiration of any lock-up agreement. The JOBS Act would allow research reports on EGCs to be published at any time. Similar limitations on issuing research in the US in Rule 144A/Regulation S offerings have been based on liability concerns, particularly liability under the anti-fraud provisions of the US Securities Exchange Act of 1934, rather than statutory prohibitions. The same liability concerns remain in the context of the distribution of pre-deal research in relation to EGC IPOs in the US. If investment banks in US decide to take advantage of the rule changes and issue pre-deal research in relation to EGC IPOs in the US, then the market practice of prohibiting the distribution of pre-deal research reports to QIBs in connection with US private placements may well change.

SEC Rulemaking to Eliminate Publicity Restrictions in Rule 144A and Rule 506 Offerings

The JOBS Act provides that by July 4, 2012 the SEC must amend its rules to provide that the prohibition against "general solicitation" and "general advertising" will not apply to sales of securities made pursuant to Rule 144A and offers and sales of securities under Rule 506 (provided that all purchasers of the securities are accredited investors). This direction does not, by its terms, affect private offerings made under other exemptions from registration under the US Securities Act of 1933.

The usefulness of the relaxation on the use of general solicitation and general advertising in the context of Rule 144A and Rule 506 offerings for Indian issuers may be very limited due to the fact that there is no requirement under the JOBS Act for the SEC to relax the prohibition of "directed selling efforts" under Regulation S. Unless the SEC changes the rules with respect to what constitutes directed selling efforts, Indian issuers will still have to comply with current market practice on publicity. Moreover, the issuer and other offering participants will remain subject to the anti-fraud provisions of the US Securities Exchange Act of 1934 for

statements included in any general solicitation and general advertising made in connection with an offering. This may also cause at least some market participants to continue to observe current market practice on publicity.

The JOBS Act contains other reforms that have not been discussed in this memorandum.

Please contact any of your regular contacts at Dorsey for further information about the matters discussed above.