Alert
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Jumpstarting the Next JOBS Act — JOBS Act 4.0

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The Jumpstart Our Business Startups (JOBS) Act was signed into law by President Barack Obama on April 5, 2012 and aimed to improve access to public capital markets for emerging growth companies. While largely considered a success in increasing capital formation, the number of smaller companies that go public still remains relatively low and critics have pointed to certain areas for improvement. In February 2021, U.S. Senate Banking Committee ranking member Pat Toomey (R-Pa.) announced requests for legislative proposals for what they are referring to as JOBS Act 4.0 in order to increase economic growth and job creation by facilitating capital formation. After receiving 35 submissions with over 150 legislative proposals, a discussion draft of the JOBS Act 4.0 was drafted and committee Republicans asked for feedback through June 3, 2022. Some of the proposals will likely receive resistance from Democrats, but the proposals give a sense of issues that are top of mind for companies and certain changes that may be on the horizon. Below are summaries of certain legislative proposals in the draft, but not all, that would impact public companies.

- ***Modify the Emerging Growth Company Definition (Section 102)*** — Modify the definition of emerging growth company ("EGC") so that status as an EGC would expire, if certain other thresholds are not hit before then, on the last day of the fiscal year following the tenth, instead of the fifth, anniversary of its IPO. The proposed change would not eliminate the loss of EGC status before such date once a company hits annual gross revenues of $1.07 billion, issuing more than $1 billion in non-convertible debt over three years or when it becomes a large accelerated filer. Extension of the time period during which a company will remain an EGC, with reduced reporting requirements, would reduce the disclosure burden on smaller companies, but is unlikely to encourage more companies to go public.

- ***Remove Pay Ratio Disclosure Requirements (Section 103)*** — Remove the

requirement under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") for CEO pay ratio disclosures to be included in proxy statements and include a prohibition on passing substantially similar rules. Disclosure of CEO pay ratios is largely unpopular with companies, but important to investors and eliminating the disclosures would likely be controversial.

- ***Remove Conflict Mineral Disclosure Requirements (Section 103)*** — Remove Sections 1502, 1503 and 1504 of Title XV of the Dodd-Frank Act and items (p) and (q) under the Securities Exchange Act of 1934 (the "Exchange Act"), which includes requirements to disclose information related to conflict minerals, coal or other mine safety and payments by resource extraction issuers. These revisions would reduce the reporting burden on public companies that are subject to these reporting requirements.

- ***Make Quarterly Reporting Voluntary (Section 104)*** — Add a new provision to the Exchange Act that issuers may, instead of filing quarterly 10-Qs, elect to file any report required under Section 13 of the Exchange Act on a semi-annual basis. Some Republicans have advocated for reduced reporting obligations to encourage longer term thinking and reduce expenses. The proposed legislation would apply to all companies, not just EGCs or smaller companies, and is likely to face resistance as it would decrease transparency to investors.

- ***Making Compliance with §240.14a-8 Regarding Shareholder Proposals Voluntary (Section 105)*** — Remove the requirement that a company has to include a shareholder's proposal in its proxy statement if the shareholder meets certain eligibility requirements and follows certain procedures. Requiring companies to opt-in to Rule 14a-8 would decrease the ability for shareholders to be successful in passing shareholder proposals and would increase the cost for shareholders wanting to have such proposals voted on as they would have to file their own proxy materials.

- ***Bases for Exclusion of Shareholder Proposals Apply Without Regard to Whether the Shareholder Proposal Relates to a Significant Policy Issue (Section 105)*** — Companies will be able to exclude shareholder proposals under Rule 14a-8 regardless of whether the proposal relates to a significant policy issue. The SEC Staff came out with guidance in November 2021 that makes it more difficult for companies to exclude shareholder proposals that address significant policy issues which will make it easier for ESG related shareholder proposals to be included in proxy materials and passed. If the

proposed legislative changes were made, this guidance would be overruled and companies will be able to exclude a larger number of shareholder proposals.

- ***Requires Shareholders that Submit Shareholder Proposals Under Rule 14a-8 to Hold 1% of the Market Securities of the Company and Permits Aggregation (Section 105)*** — Currently, to be eligible to submit a shareholder proposal, a shareholder has to have continuously held either (i) $2,000 or more in securities entitled to vote on the proposal for at least three years, (ii) $15,000 or more in securities entitled to vote on the proposal for at least two years, or (iii) $25,000 or more in securities entitled to vote on the proposal for at least one year. Under the proposed revisions, shareholders would be required to hold 1% of the market securities of the company, but would be permitted to aggregate their holdings with another shareholder or group of shareholders in order to meet the eligibility threshold. The proposed revisions would make shareholder proposals only available to large shareholders or shareholders who are able to organize enough smaller shareholders in order to meet the 1% threshold. Republicans argue decreasing shareholder proposal access will help cut down on frivolous submissions.

- ***Creation of Venture Exchanges (Section 107)*** — Add language for the creation of venture exchanges where the securities of early-stage growth companies exempt from registration under Section 3(b) of the Securities Act of 1933 (the "Securities Act"), securities of emerging growth companies, and securities registered under section 12(b) if the issuer has a public float that is not more than the value of the public float required to qualify as a large accelerated filer or the average daily trading volume is not more than 75,000 shares during a continuous 60 day period, can trade. The proposed legislation also instructs the SEC to issue regulations to provide sufficient disclosures to investors, allows the SEC to limit transactions as appropriate, and authorizes the SEC to create an Office of Venture Exchanges. Senator John Kennedy suggested this proposal and argues that the creation of venture exchanges will allow small issuers to concentrate trading on one exchange rather than spread out across multiple exchanges.

- ***Adding a Micro-Offering Exemption to Exempt Transactions (Section 204)*** — Including transactions involving the sale of securities by an issuer where the aggregate amount sold of all securities by the issuer during the year preceding the transaction does not exceed $500,000 (with such threshold subject to adjustment at least every five

years for inflation).

- ***Safe Harbors for Private Placement Brokers and Finders (Section 205)*** — Includes legislation that the SEC will promulgate regulations for private placement brokers that are no more stringent than those imposed on funding portals. The JOBS 4.0 draft also includes disclosure requirements for private placement brokers before consummation of a private placement, requires the SEC to pass rules allowing a private placement broker to become a member of a national securities association with reduced membership requirements, and removes private placement brokers from the definitions of broker. The proposal is intended to make it easier for small companies to find investors.

- ***Broker Registration Exemption for Merger and Acquisition Brokers (Section 206)*** — Includes provisions for M&A brokers to be exempt from registration as a broker dealer. This proposed legislation is intended to help small companies sell their company or purchase another company.

- ***Extension of the Rule 701 Exemption to Customers (Section 303)*** — Revisions to Rule 701 to include individuals providing goods for sale, labor or services for renumeration to the issuer or to the customers of an issuer to the same extent as the exemption applies to employees of the issuer. The definition of customers can also include, at the election of the issuer, users of a platform of the issuer. While the reasoning for the proposal is stated to allow “gig workers” to receive compensation in the form of equity, the inclusion of language permitting customers to receive equity would expand the number of people that could receive equity grants even further.

- ***Permits a Certification Examination to Become an Accredited Investor (Section 306)*** — Adds the ability for someone to be an Accredited Investor if an individual is certified through an examination established or approved by the SEC, any State securities commission or any self-regulatory organization without being subject to income requirements and allow anyone to invest in Regulation D securities up to 10% of their income. The proposed legislation would also make relying on a self-certification from the purchaser that they meet the income or net worth requirements under Rule 501 of Regulation D constitute reasonable steps to verify the purchasers are accredited investors. The proposal also adds additional categories of individuals that would be considered accredited investors, including any person having at least $500,000 worth of investments. The legislation also permits the SEC to undertake a review of the definition

of accredited investor and to make adjustments after such review as the SEC deems appropriate. Critics have argued that the accredited investor definition is overly prescriptive and excludes a lot of investors from buying stock in startups that may eventually go public and appreciate substantially in value. The proposed revisions would allow more investors to buy stock in private companies.

- ***Requires Regular Evaluation and Revisions to the Definition of "small entity" (Section 401)*** — Requires within one year of passing the legislation and every five years thereafter for the SEC to conduct a study of the definition of "small entity" for purposes of chapter 6 of title 5, United States Code and submit to Congress a report with detailed recommendations on the way the SEC could amend the definition of the term "small entity." The SEC is then required to issue a proposed rule within 270 days of the submission of the report to Congress to implement the recommendations in the report. The primary purpose of the proposal is to update the low asset size limits in the definitions and the SEC would need to consider regulatory impacts on more small companies.

- ***Establishment of a Database to Track Bad Actors (Section 403)*** — Requires the establishment of a publicly available database of persons convicted or held liable for certain criminal, civil and administrative actions. The purpose of the database would be to help protect the average investor from financial fraud.

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