

# Private Placements

Private Placements and Hybrid Securities Offerings 2019

May 2019



# The JOBS Act and Private Offerings

- Although the aspect of the JOBS Act that has received the most attention relates to changes to the IPO process, in large measure, the JOBS Act related changes affecting the private market may be more significant.
  - Title V and Title VI changes to the Exchange Act Section 12(g) threshold
  - Changes to Rule 506
  - Legal certainty for matchmaking platforms
- Taken together, these measures have the effect of permitting companies to stay private longer and to rely on exempt offerings (while enabling companies to contact a broader range of potential investors) for their capital-raising.

# Reliance on Private or Exempt Offerings

- Even pre-JOBS Act, based on various studies, it was already the case that more capital was being raised in reliance on Regulation D and Rule 144A (in aggregate) than in SEC-registered offerings—according to the SEC’s Division of Economic Research and Analysis (DERA), in 2017, for example, the total raised in registered offerings was \$1.5 trillion, whereas the total raised through all private offerings was \$3.0 trillion
  - Amounts raised in private offerings are likely to be understated given that many issuers fail to file Form Ds and amounts raised in 4(a)(2) offerings are not reported
  - The amounts raised in registered offerings include debt offerings, whereas the majority of Reg D offerings involve equity or “new capital”

## Reliance on Private or Exempt Offerings *(cont'd)*

- Companies are choosing to defer their IPOs and rely on private financing for much longer than in the past
  - This is evident from various IPO reports
  - For example, based on statistics for the period from 1/1/12 through 12/31/18, the median market cap for IPO issuers was approximately \$414 million, and the average was \$1.4 billion
  - Fewer than 2.1% of IPO issuers have a market cap of \$50 million or less

# Larger Privately Held Companies

- There are now at least 350 private companies, globally, valued by venture capital firms at \$1 billion or more. (CB Insights)
  - These companies, often referred to as “unicorns,” have a median valuation after their most recent investment of \$2 billion. (CB Insights)
  - Before its IPO, Uber was able to raise significant amounts in private financings, \$19.9 billion, according to Pitchbook and the National Venture Capital Association (NVCA), giving it a pre-IPO value of close to \$72 billion.
- Venture-backed companies raised more \$132.1 billion in the private markets in 2018, and \$32.6 billion in the first quarter of 2018, according to the NVCA and Pitchbook.

## Larger Privately Held Companies *(cont'd)*

- What does this mean for securities lawyers:
  - Private companies and their advisers need to consider how they address providing liquidity opportunities for long-term holders as well as employees, consultants, strategic partners, and others, given that a traditional liquidity opportunity (such as an IPO or an M&A exit) may not be available for many years
  - Private companies are now more broadly held
  - Private companies must give thought to the type of information that they share with third parties

# “Privates” Have Become More Public

- Over the years, and not spurred by the JOBS Act, private placements and exempt offerings have become more “public”
  - The shortened Rule 144 holding period has helped increase liquidity for “restricted securities”
  - The prevalence of hybrid offering techniques has changed capital-raising
  - Relaxation of the prohibition on general solicitation
  - New financial intermediaries that rely principally on the internet
  - A broader universe of investors interested in investing in the securities of private companies

# Exempt offering reform

- The SEC has planned a concept release relating to the framework for exempt offerings
- Among other things, the concept release is expected to address:
  - The accredited investor definition
  - Scaling of investor criteria
  - Overlapping exemptions
  - Integration issues
- This is an active area of focus for the SEC and bears close attention

[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

[mayerbrown.com](https://mayerbrown.com)

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.