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IN THIS ISSUE:

Section Chair's Corner

By C. Joyce Hall, Esq.

Economic Development is the theme of this edition of The Mississippi Business Law Reporter, a publication of the Business Law Section of The Mississippi Bar. Job creation goes hand in hand with economic development and is vital to the sustainability of our economy. Several bills have been introduced this session before the Mississippi Legislature with the purpose of increasing our state's economic development potential and giving our economic developers tools to attract new businesses to our state.

Come to the Business Law Section's live CLE seminar May 15, 2012 at the Mississippi Bar Center to learn all of the latest laws passed and updated this session affecting your practice and your client's business. Information regarding registration can be found at the Bar's website and in this newsletter. The Speaker of the House as well as key members of the House and Senate will be speaking, along with a representative from the Secretary of State's office and the Mississippi Bar.

Job creation is important in all areas of business in our state including our own profession. Because of the recent downturn in the economy, law firms have been cautious in hiring new lawyers in an effort to conserve expenses and prevent future lay-offs. Such procedures are, of course, prudent law office management techniques. However, it has created a large lawyer pool of bright young men and women graduating from our state's law schools and seeking employment.

I encourage you to consider ways that you might encourage these young people in their job search and consider ways that you might give them experience while they search for permanent employment. Perhaps short term projects, internships, and contract arrangements might help them gain experience and give you needed assistance in the areas of research, writing briefs, reviewing documents, drafting documents, etc. Thanks for your consideration in this matter.

The Executive Committee of the Business Law Section looks forward to seeing you all on May 15th at the Bar Center for the live CLE Update on the Mississippi Legislative Session and on July 12th at the Section's annual meeting in Destin, Florida.

Revitalizing and Sustaining Communities through Innovative Finance: New Markets Tax Credits Section 45D of the Internal Revenue Code

By Jetson G. Hollingsworth, Esq.

When people ask me "What type of law do you practice?", I never quite know how to answer. Explaining New Markets Tax Credits (NMTC) financing to anyone is never easy. Before diving into the minutia of tax structure with our clients, I like to at least provide a "big picture" of the financial benefits made possible by using NMTCs. Without a general understanding of how much subsidy is generated (and sometimes this happens regardless), clients tend to glaze over into a comatose state about ten minutes into our discussion. This always reminds me of the blank stare and nod I get from my children when they aren't really listening to me but the TV instead. Most clients, however, quickly become extremely focused once they understand how the NMTC subsidy can impact the bottom line of their costs.

It is no wonder that clients are more willing to learn at this point. In today's challenging credit market, businesses, lenders and investors are always looking for alternative means of financing or participating in capital projects. Upon learning that NMTC financing can generate (as a rule of thumb) as much as a 20% subsidy for their project costs, the typical response is "This is too good to be true!" or "Where is the catch?" When projects in today's market are offered the opportunity to fill a financial gap of this size, it can often mean the difference between making or breaking an otherwise viable transaction. At the end of closing an NMTC transaction, I've never heard a client say "Well, that wasn't worth it."

In Mississippi, this type of financing is still relatively underutilized. Part of that is simply that many folks in our state are still unfamiliar with the language and the requirements of the NMTC financing. Another reason is that we often (particularly in today's world) have a lack of trust when it comes to something new and seemingly uncertain. My goal in this article is to erase at least some of the confusion surrounding the language of the program as well as to provide several examples of projects in Mississippi that have proven to be success stories in the NMTC program.

Glossary

Terminology in NMTC financing can get quite confusing. Many acronyms sound like someone is speaking a foreign language at times. With that in mind, I think its helpful to set out the terms on the front end and as your read this article you can refer to this list of definitions as needed:

- CDE = Community Development Entity
- QEI = Qualified Equity Investment
- QALICB = Qualified Active Low Income Community Business
- QLICI = Qualified Low Income Community Investment
- Compliance Period = 7-year NMTC Compliance Period
- Federal NMTCs = Federal New Markets Tax Credits
- Mississippi NMTCs = Mississippi Equity Investment Tax Credits
- Federal Investor = Tax Credit Purchaser (Usually larger financial institutions).
- Investment Fund = The Special Purpose Entity Created by Investors to Make the QEI
- Leverage Lender = The Source of Debt Financing (although can be affiliate

debt/grants/bonds/combination of number of sources)

The NMTC Basics

Enacted as part of the Community Renewal Tax Relief Act of 2000 and administered through the Community Development Financial Institutions (CDFI) Fund, the NMTC Program was created to stimulate economic and community development in the nation's distressed and low-income communities. In Mississippi, these qualifying census tracts (QCTs) are voluminous and often times clients are surprised by those that meet the requirements of the NMTC Program. In addition, many of these QCTs are considered highly distressed and/or rural (non-metro) in nature which makes investments in these areas even more attractive for NMTC purposes. The NMTC Program provides tax incentives to induce private sector, market-driven investment in businesses and real estate developments located in economically distressed communities across the nation. To date, the CDFI Fund has awarded allocation authority to 664 CDEs totaling $33 billion, including $1 billion of special allocation authority to be used for the recovery and redevelopment of the Gulf Opportunity Zone.

A Word About CDEs

To attract private investment, the NMTC Program permits investors to receive a credit against Federal income taxes for making qualified equity investments in investment vehicles known as Community Development Entities (CDEs). Eligible CDEs must apply to the CDFI Fund for an award of NMTC allocation authority. They must be <u>certified</u> by CDFI Fund through CDE Certification Application. CDEs must have a <u>primary mission</u> of serving Low-Income Communities (LICs) or Low-Income Persons. They also must maintain <u>accountability</u> to residents of LICs through representation on governing board or advisory board. The application and selection process is extremely competitive and is based on certain criteria, including the expertise of the CDE in working with disadvantaged businesses and distressed communities. As a result of the competitive nature of the application and selection process for the NMTCs, businesses, lenders and investors typically look to CDEs with an existing allocation of NMTCs and which have a mission consistent with their project.

<u>CDE Primary Mission Test</u>

CDEs must meet the primary mission test by (a) serving or providing investment capital to low-income communities or low-income persons and at least 60% of its activities are targeted to low-income communities or low-income persons; (b) its incorporation or formation documents, bylaws and other organizational documents must evidence the primary mission that the entity is dedicated to the low-income community or low-income persons; and (c) at a minimum, must demonstrate that 60% of products and services are directed: (i) to low-income persons; (ii) to individuals and businesses located in low-income communities; or (iii) organizations that service low-income persons or residents of low-income communities.

Examples of activities meeting this test would include:

(i) Investing in, lending to or providing technical assistance to businesses that are located in low-income communities and/or owned by low-income persons;

(ii) Lending to low-income persons or residents of low-income communities;

(iii) Investing in or providing loans to support commercial properties that are located within low-income communities; and

(iv) Investing in, lending to or providing technical assistance to organizations (i.e.

CDEs or CDFIs) engaged in activities that promote community development.

CDE Accountability Test

In order to meet the CDE Accountability Test, a CDE must be sure that at least 20% of its governing board or advisory board is representative of low-income communities within the selected service area. In order to meet the test for representative of low-income communities, board members must:

(i) Reside in a low-income community within the CDEs selected service area; or

(ii) Otherwise represent interests of residents within low-income communities: (e.g. small business owner with business inside low-income community; employee or board member of community based or charitable organization principally serving low-income communities; religious leader with congregation in low-income community, government employee within department that principally services low-income communities; elected official whose constituency is principally comprised of low-income communities or residents of low-income communities.)

Borrowers typically submit intake forms to CDEs with existing allocation. These forms usually explain the project economics, anticipated deal structure, and also the economic benefits expected to be created within the QCT as a result of the project. CDEs are looking for projects which "tell a good story" and that can achieve an economic impact within the QCT by way of job creation or other means. These CDEs can then use these stories to explain the NMTC financing they have participated in throughout their service areas with the expectation of receiving additional allocation authority from the CDFI Fund.

QEIs and QLICIs

Qualified equity investments (QEIs) in CDEs must be a seven-year cash or cash equivalent equity investment. The tax credit provided to the investor totals 39% of the cost of the investment and must be claimed over a seven-year credit allowance period (the "Compliance Period"). Investors may not redeem their investments in CDEs prior to the conclusion of the seven-year period. In each of the first three years, the investor receives a credit equal to 5% of the total amount paid for the investment in the CDE at the time of such investment. For the final four years, the value of the credit is 6% annually.

Substantially all of the investor's QEI must be used by the CDE to make qualified investments in, or loans to, qualified active low-income community businesses ("QALICB"). These are referred to as qualified low-income community investments (QLICIs). QLICIs to low-income businesses typically include favorable exit strategies and/or below market interest rates, and may be in the form of an investment in, or loan to, a low-income community business, an equity investment in, or loan to, another CDE or certain financial counseling and other services.

While no two NMTC transactions look exactly alike, investors typically only expect a return from their investment in the form of tax credits. In other words, the investment serves as a discounted purchase price for the NMTCs generated as a result of the project and this is the only economic return an investor expects as a result of its participation. At the end of the Compliance Period, the traditional leveraged model includes a put/call option agreement which has been executed at closing. This allows borrowers to essentially forgive the debt associated with the investor's tax credit equity, thereby realizing the economic benefit of the NMTC subsidy.

In sum, CDEs are the gate keepers of the CDFI Fund and have the authority to generate NMTCs based on QEIs that flow through them. Investors have an appetite for those credits at a discounted purchase price. CDEs are required to invest certain percentages of this purchase price in the form of low interest loans or equity to a QALICB. These loans are typically subject to put/call agreements at the outset which allow for an exit strategy to forgive principal amounts relating to the purchase price for the NMTCs. Confused yet?

Investor would provide an equity investment into a special purpose entity or "Investment Fund" in exchange for 100% of the membership interests. Lender would make a loan (the "Leverage Loan") to the Investment Fund. This debt/equity combination would generate the QEI, which would be invested in the form of a capital contribution to the CDE (or a subsidiary thereof). The Investment Fund would acquire New Markets Tax Credits based on the total amount of the QEI.

In a typical transaction, the CDE uses the proceeds of the QEI to make loans to a QALICB. The loans can be structured to mature or be refinanced in seven years. The senior "A" loan will typically mirror the terms of the Leverage Loan. The subordinated "B" loan (which is derived from the tax credit equity less transactional fees) is generally at a below market interest rate with favorable terms such as full or partial loan forgiveness. At closing, the proceeds of the loans would be deposited into a controlled account and must be spent on construction expenditures for the Project within 12 months of closing.

- Both loans from the CDE are interest-only during the Compliance Period
  - A Loan interest payments are made to CDE, distributed to Fund and then paid to Leverage Lender.
  - B Loan interest payments are made to CDE and typically distributed annually to its Managing Member.
- Leverage Lender may not foreclose on security interest during the Compliance Period.
- QALICB would typically agree to indemnify for any recapture of credits caused by certain events.
- At the end of the Compliance Period, the note securing the A Loan ("A Note") would be distributed by CDE to Fund and QALICB would assume all of Fund's obligations under the A Note.
- The note securing the B Loan would be distributed by CDE to Fund. Fund would exercise options under Put/Call Agreement with affiliate of QALICB, and the B Loan may be subject to full or partial forgiveness.

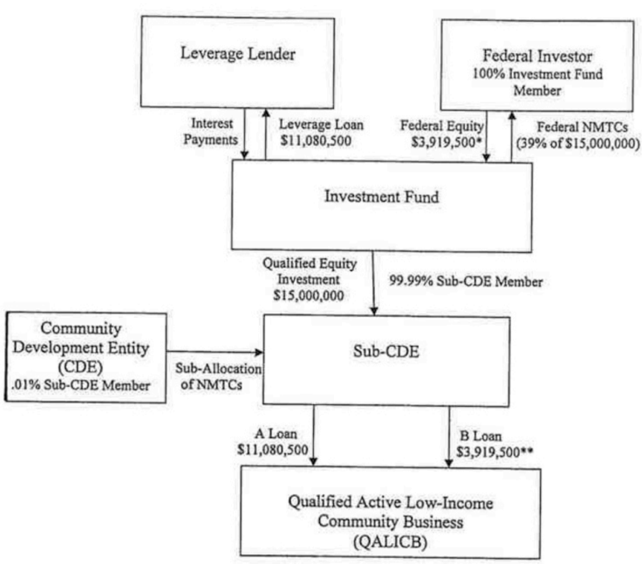
Still fuzzy? Maybe an example would be helpful here. A borrower needs ten million dollars to finance his/her project. Rather than borrow the ten million dollars directly from a bank at market rates he/she learns about the NMTC program. In addition, he/she realizes that the project is in a QCT and can meet the other requirements of a QALICB. Borrower finds a CDE that is willing to provide allocation authority for ten million dollars to the project. Once borrower has a lender and investor in place, rather than pay market rates on ten million dollars, at the close of the transaction he/she will likely be paying on two separate loans. One loan will be at market rates on approximately eight million dollars and the other loan will be for approximately two million dollars carrying a very low rate (typically 1%, unless blended rate provided with the eight million dollar loan). The 2 million dollar note is generated from the investor equity and will be provided in the form of a loan for seven years. However, the two million dollar loan will ultimately be forgiven since it will be distributed to the investment fund and subject to the put/call agreement, thereby allowing the QALICB/borrower to forgive debt to itself at the end of the seven year period.

QALICBs

Almost all businesses located in low-income community areas could qualify for QLICIs. Successful transactions utilizing the NMTC Program typically include businesses such as small technology firms, start-up businesses, health care projects, hotels, real estate businesses, mixed use projects, assisted living facilities and manufacturers. To be eligible for the NMTC Program, the business must be located in a QCT. Low-income communities are generally defined as those census tracts with poverty rates of greater than 20% and/or median family incomes that are less than or equal to 80% of the area median family income. In addition, the business must have a substantial connection to this location. For example, at least 50% of the business's income must be derived from its activity in the low-income community, a substantial proportion of the business's property must be located in a low-income community and the employees of the business must perform a substantial proportion of their work in the low-income community.

Flow Chart

Okay, so now it is clear as mud. Below is a flow chart showing the typical leveraged transaction at closing.



Mississippi New Markets (There is More?)

For Mississippi taxpayers, the Federal NMTCs may also be used in connection with the Mississippi Equity Investment Tax Credit Incentive Program administered by the Mississippi Development Authority and the Mississippi Department of Revenue.[1] The Mississippi Equity Investment Tax Credit Incentive Program provides a tax credit to Mississippi income or insurance premium taxes for qualified equity investments made in certain Mississippi low-income communities.

The Mississippi New Markets Tax Credit ("MS NMTC") Program was created to encourage investments into low-income communities in the state of Mississippi. The requirements of the program generally "piggy back" onto the requirements of the Federal New Markets Tax Credit Program. The typical transaction involves an investment fund that makes a "qualified equity investment" into a "community development entity." The community development entity then makes "qualified low-income community investments" into "qualified low-income community businesses."

The MS NMTC is a credit against income or insurance premium taxes in an amount equivalent to 24% of the qualified equity investment, and it is spread over a three year period – 8% per year. The maximum amount of credits that can be generated from a single project are $2,400,000 or $800,000 per year. The Capital Contribution (price of credits) to the State Investment Fund is negotiated on a transaction by transaction basis. Generally, the price of credits ranges from forty cents to sixty cents per every dollar of MS NMTC allocated to an investor. The Mississippi Department of Revenue has ruled that taxpayers can take a capital loss for Mississippi purposes on their investment when they exit the State Investment Fund. However, in a recent court case, the Fourth Circuit Court of Appeals ruled that taxpayers could not take a capital loss for federal purposes on these types of transactions. An investor's rate of return will be determined by the price paid for the credits, the amount of the Mississippi capital loss and the other tax attributes specific to the investor (for example, whether or not the investor is able to deduct state income taxes paid on their federal income tax return).

The MS NMTCs are subject to a seven year compliance period in which the tax credits can be recaptured meaning that the investor/taxpayer will not be able to claim the tax credit. The MS NMTCs will be recaptured if the Federal NMTCs are recaptured. This occurs under three circumstances.

- The CDE fails to continue to qualify as a community development entity.
- Substantially all (>85%) of the qualified equity investment is not used to make qualified low-income community investments.
- The qualified low-income community investments are redeemed by the CDE.
    - CDE has one year to redeploy funds into another qualified low-income community investment.

In addition to the recapture risk described above, investors in MS NMTCs have exposure to the possibility of redeployment in another state in the event the qualified low-income community investment is redeemed by the CDE. The recapture risk is usually mitigated by the following factors: (i) Federal Due Diligence and Tax Opinions – The federal investor generally performs extensive due diligence to protect against the risk of recapture of the federal credits. Also, federal tax opinions are typically issued covering the federal transaction; (ii) Mississippi Tax Opinion – A Mississippi Tax Opinion is often given covering the allocation of MS NMTCs to investors; (iii) Letter Ruling from Mississippi Department of Revenue – Investors can seek a letter ruling from the Mississippi Department of Revenue blessing the transaction and (iv) Indemnification from Project and CDEs – Investors are often indemnified by the Project/QALICB and sometimes the CDE (if it participates in the credits) for losses resulting from recapture.

Bottom line? In the existing market, where MS NMTC credits hover at a price point around fifty cents on the dollar, for a ten million dollar transaction (i.e. a transaction that maxes out the MS NMTCs), a borrower can expect to create an additional 800,000 to 1.2 million dollars in state tax credit subsidy depending on fee arrangements with CDEs.

The NMTC Program has proven to be an effective means of rebuilding economically distressed communities, including those devastated by Hurricane Katrina. New and rehabilitated projects are being developed throughout Mississippi, Louisiana and Alabama as a result of the NTMC Program, including office buildings, schools, hotels, retail centers and manufacturing facilities. Businesses, investors and lenders who are interested in financing projects within underserved areas should strongly consider the NMTC Program and its potential benefits.

Sample Transactions

- The development of a photovoltaic solar facility, which is utilizing federal New Markets Tax Credits leveraged by Section 1603 Energy Grants and first mortgage financing guaranteed by the United States Department of Agriculture.

- Processing facility which is utilizing federal and state New Markets Tax Credits, CDBG grant funds, a loan from the State, acting through the Mississippi Development Authority and the Mississippi Major Economic Impact Authority, a grant through the Rural Impact Fund Program, a loan through the Capital Improvements Revolving Loan Fund, as well as other state and local economic incentives.

- Orthopedic hospital facility combining federal and state New Markets Tax Credits with GO Zone Tax Exempt Bonds and other state and local economic development incentives.

- Medical office building and related facilities consisting of outpatient imaging center, physical therapy and cardiopulmonary rehabilitation activities, as well as a comprehensive wellness center with aquatics. This project financing combined federal and state New Markets Tax Credits with GO Zone Tax Exempt Bonds and other state and local economic development incentives.

- New construction and renovation of a private, nonprofit hospital which combined federal and state New Markets Tax Credits and used a portion of the equity generated from the New Markets Tax Credits to support the hospital's charitable programs.

- Biomass facilities combining both state and federal NMTCs, as well as bond financing in order to access number of state incentives.

- Historic building renovations combining NMTC and historic tax credits.

Conclusion

New and rehabilitated projects have been developed throughout Mississippi as a result of this program, including office buildings, schools, hotels, retail centers and manufacturing facilities. In particular, the NMTC program has supported projects in various communities in Mississippi, including Jackson, where the historic King Edward Hotel is open for business; Jackson State University has begun the construction of a 50-acre residential and commercial planning area; and at least two dozen other downtown and surrounding area buildings have been constructed or rehabilitated as the result of private equity through the NMTC program. In addition, at least three major hospitals in Mississippi have benefited from the NMTC program, as well as several manufacturing facilities, including the restoration of a closed lumber mill in Brookhaven. The NMTC program has also proven to be an effective means of rebuilding economically distressed communities devastated by Hurricane Katrina. For example, Habitat for Humanity and other nonprofit foundations have utilized the NMTC program to build homes in low-income areas on the Mississippi Gulf Coast and in New Orleans. According to the Government Accountability Office, the great majority of investors in these projects have only participated because of the availability of the credit.

However, the program is really just beginning to gain traction among businesses, investors, and communities in the state. In rural and urban communities alike in Mississippi, the need for private sector investment in low-income areas remains great. Revitalized businesses and job creation through economic development are the keys to self-sufficient communities. I believe the continuance of the NMTC program will have a very positive effect on communities throughout Mississippi.

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[1] MISS. CODE ANN. § 57-105-1 (2011).

* Estimate based on price of $.67 per credit (pricing as of this writing is approximately $.72). Mississippi and Louisiana New Markets Tax Credits could generate additional equity for the project.

** The amount of the B Loan will vary depending on the CDE, legal and accounting fees, which are generally paid from Federal Equity.

Mississippi's Enactment of the Uniform Prudent Management of Institutional Funds Act

By Drew Snyder, Esq.

On April 16, 2012, Governor Bryant signed into law the Uniform Prudent Management of Institutional Funds Act (UPMIFA). Effective July 1, 2012, House Bill 1104 establishes new rules to govern the management and investment of funds held by Mississippi educational and charitable institutions.

Overview

Modeled after the 2006 Uniform Law Commission act of the same name, UPMIFA replaces Mississippi's longstanding Uniform Management of Institutional Funds Act of 1972 (UMIFA). UPMIFA is intended to provide more guidance and flexibility to institutions managing and investing institutional funds with a charitable purpose. Under the new law, an institution can spend from the principal of an endowment if it is deemed prudent by the governing board. This is a significant departure from current Mississippi law which prohibits a nonprofit from tapping into endowment funds and limits spending to only the net appreciation of the endowment over its historic dollar value (HDV). These limitations have hamstrung institutions whose gift funds dropped below their original worth during the global financial crisis. The increasing number of these "underwater" gift funds accelerated efforts at the state level to enact modern management rules for charitable institutions. Since 2006, 48 states have enacted a version of UPMIFA.

The Mississippi version of UPMIFA was sponsored by Rep. Angela Cockerham. Members of Secretary of State Delbert Hosemann's Trust Laws Study Group assisted in drafting this proposal.

Scope

UPMIFA applies to "institutional funds" held by and used for the benefit of any type of entity established, organized, and operated exclusively for charitable purposes and to split-interest trusts once all non-charitable interests have terminated. UPMIFA does not include banks, trust companies, or other regulated financial institutions.

Standards of Conduct

UPMIFA addresses the standard of conduct in managing and investing institutional funds. The new law requires individuals responsible for managing and investing a fund to act in good faith and with the care an ordinarily prudent in a like position would exercise under similar circumstances. Fund managers also must consider the purpose of the institutional fund, incur only costs that are "appropriate and reasonable", and make a "reasonable effort" to verify facts relevant to the fund.

Other factors that must be considered are:

1. General economic conditions;
2. The possible effect of inflation or deflation;
3. The expected tax consequences, if any, of investment decisions or strategies;
4. The role that each investment or course of action plays within the overall investment portfolio of the fund;
5. The expected total return from income and the appreciation of investments;
6. Other resources of the institution;

7. The needs of the institution and the fund to make distributions and to preserve capital; and
8. An asset's special relationship or special value, if any, to the charitable purposes of the institution.

Unlike the uniform act, Mississippi's version of UPMIFA immunizes institutions from any liability arising from a failure to diversify the investments of an institutional fund to the extent the terms of the gift instrument waive the duty. It also relieves unpaid volunteers from the duty to use any special expertise or skill in managing or investing institutional funds. Under this non-standard provision, volunteers who aid in the management of an institutional fund will not be liable for malpractice or negligence related to their volunteer work.

Expenditure or Accumulation of an Endowment Fund

While UMIFA contains a HDV limitation freezing investments or expenditures from an institutional fund if the fund's value falls below its initial value, UPMIFA offers extra flexibility by allowing a governing board to spend or accumulate as much of the endowment fund it determines is prudent, as long as the institution acts in good faith and with reasonable care. Seven factors are intended to guide the determination:

1. The duration and preservation of the endowment fund;
2. The purposes of the institution and endowment fund;
3. The general economic conditions;
4. The possible effect of inflation or deflation;
5. The expected total from income and the appreciation of investments;
6. Other resources of the institution; and
7. The investment policy of the institution.

During the development of Mississippi's version of UPMIFA, drafters omitted a provision that would have created a rebuttable presumption of imprudent investment against any institution spending greater than 7% of an endowment fund in a given year. Omitting the provision is expected to give institutions more autonomy and flexibility in formulating investment strategies.

Delegation of Management

The new law also changes delegation of management standards. Under UMIFA, delegation was allowed without express standards. With UPMIFA, however, an institution may make a prudent delegation in good faith to select an agent, establish the scope and terms of the delegation, and periodically review and monitor the agent. The agent has a duty of reasonable care and is subject to court jurisdiction.

Modifying a Restriction on Funds

With respect to modifying a gift instrument, the chancery court in the county where principal activities of the institution are conducted may agree to modify a restriction if the restriction has become impracticable or wasteful or impairs the management of the investment of the fund. If unanticipated circumstances arise, a modification will be allowed if will further the purpose of the fund. The donor's probable intention should guide any modification.

Conclusion

UPMIFA is a welcome change for Mississippi's endowment fund managers. The updated rules governing endowment funds provide better guidance and more flexibility to institutions and the individuals responsible for managing, investing, and spending the funds.

JOBS Act Relaxes SEC Registration and Disclosure Requirements and Encourages Entrepreneurs and Small Businesses

By Neal C. Wise, Esq.

On Thursday, April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act ("JOBS Act" or the "Act"). Among its most important features, the JOBS Act transforms the ability of smaller companies to raise capital from investors by establishing a new category of securities issuers called emerging growth companies ("EGCs"), which will benefit from a revamped initial public offering ("IPO") process. The Act also lessens many of the statutory and regulatory burdens that restrict smaller companies from raising capital regardless of whether that company qualifies as an EGC.

New-Look IPO Process Seeks to Help Smaller Companies Get Off the Ground

EGCs will benefit from a newly streamlined IPO process to market and sell securities. A company may qualify as an EGC if it had less than one billion dollars in total annual gross revenue (indexed for inflation) in its most recently completed fiscal year and did not complete its IPO process on or before December 8, 2011. In other words, even if a registration statement was filed for the company on or before December 8, 2011, the company may still qualify as an EGC so long as the first sale of common equity occurred after that date. Further, a company can maintain its EGC status until the earliest of (1) the end of the fiscal year in which its revenues exceed one billion dollars, (2) the end of the fiscal year of the fifth anniversary of the EGC's IPO, (3) as soon as the EGC has issued more than one billion dollars in non-convertible debt in a three-year period, or (4) the date it becomes a "large accelerated filer" under applicable SEC rules. Further, no company may qualify as an EGC if it first sold securities in an IPO on or prior to December 8, 2011.

The new IPO process, dubbed the IPO "On-Ramp", gives EGCs a period of up to five years to fully comply with certain disclosure, accounting, and auditing rules that currently burden all public companies regardless of size or age. During this five-year period, EGCs will enjoy many of the following exemptions and modifications.

Say-on-Pay, Say-on-When, and Executive Compensation Exemptions.

As long as a company qualifies as an EGC, it will be exempt from certain requirements under the Dodd-Frank Wall Street Reform and Consumer Protections Act ("Dodd-Frank"). Under Dodd-Frank, companies must often disclose and submit certain executive compensation arrangements to an advisory shareholder vote, including what executives should be paid (Say-on-Pay), when they should be paid (Say-on-When), and whether so called golden parachute compensation arrangements are permissible. The JOBS Act eliminates these requirements for EGCs. In addition, EGCs are exempt from other cumbersome disclosures such as disclosing the ratio of the chief executive officer's compensation to the median annual total compensation of all other employees.

Auditor and Accounting Exemptions.

EGCs are exempt from the auditor attestation requirements of section 404(b) of Sarbanes-Oxley for the duration of the "on-ramp" period. Further, any new or revised financial accounting standards promulgated under GAAP will not apply to EGCs until those standards also become applicable to private companies. Likewise, if new requirements for mandatory audit firm rotation are put into place, as proposed by the Public Company Accounting Oversight Board, EGCs will be exempt from those rules as well.

Financial Statements and CD&A Reductions.

Currently, when filing registration statements with the Securities and Exchange Commission ("SEC"), most companies are required to provide three years of financial statements. Under the JOBS Act, EGCs now must only provide two years of financial statements. These new issuers also do not have to provide certain financial data in Annual Reports or Form 10-Ks for any period prior to the earliest audited period presented in its IPO registrations statement. Recent SEC guidance clarified that this rule also permits EGCs to submit only two years of financial data under Item 301 of Regulation S-K instead of the usual five (5) years. Further, EGCs may forego the detailed compensation discussion and analysis narratives usually required in registration statements and periodic reports to the extent they are over and beyond those required for smaller reporting companies.

Relaxed Investor and Analysts Communications.

The JOBS Act permits EGCs and their agents to communicate with qualified institutional buyers and accredited investors more freely than before. Under the new rules, EGCs management and institutional investors may also meet with research analysts, who will be able to attend pre-IPO meetings arranged by broker-dealers. As a result, these broker-dealers will be able to make public appearances and publish research reports on behalf of the EGC prior to and after filing a registration statement for the offering of common equity securities.

Confidential Registration Statement Filings.

Typically, companies are required to submit their initial registration statements through the SEC's EDGAR filing system. However, under the JOBS Act, EGCs will be able to submit draft registration statements to the SEC apart from the normal process. These submissions will be exempt from Freedom of Information Act requests until three weeks before an EGC begins its public roadshow. Additionally, no filing fee is required for the draft registration statement. The filing fee is not required until the official registration statement is actually filed.

The JOBS Act also relaxes the restrictions for the draft registration statement contents. Because it is not considered a "filing" for purposes of Securities Act Sections 5I and 6(a), the draft is not required to be signed or to include the consent of auditors and other experts. Nor must the draft registration statement include the public offering price or other offering-related information as provided in various existing rules and regulations. However, the SEC has indicated that these confidential submissions should be substantially complete and should include the signed audit report of the registered public accounting firm auditing the financial information for the fiscal years presented in the draft.

New Shareholder Triggers and Relaxed Solicitation Rules

Although the IPO On-Ramp provisions of the JOBS Act apply only to EGCs, the Act also modifies existing securities laws regarding private placements for all companies and participants. The new law requires the SEC to amend Regulation D within 90 days of enactment to allow for general solicitation and general advertising of securities offered under Rule 506 so long as all purchasers are accredited investors. The SEC must also eliminate the restrictions on general solicitation or general advertising to non-qualified institutional buyers, provided that the securities are sold to persons reasonably believed to be qualified institutional advisors. A company seeking to solicit its securities under these new, relaxed standards must take reasonable steps to verify that purchasers are either accredited investors or qualified institutional buyers.

The JOBS Act significantly increases the threshold at which a company must register its securities with the SEC. Titles V and VI of the JOBS Act amend Section 12(g) of the Exchange Act to increase the number of shareholders that will trigger an issuer's duty to register with the SEC. Under the new law, a non-bank or non-bank holding company's obligation to register its securities with the SEC does not arise until (1) the company has 2,000 shareholders of record of any class of securities or (2) 500 shareholders of record are not accredited investors. The company will have 120 days from the fiscal year end in which either threshold is met to register its securities. An employee who receives securities under an exempt employee compensation plan will not be counted for purposes of the new thresholds.

The Act also modifies the registration threshold for bank and bank holding companies with total assets of ten million or more. Under the new law, these bank or bank holding companies will be required to register any class of securities with the SEC when such class is held by 2,000 or more persons. Section 12(g) and Section 15(d) of the Exchange Act is further amended to allow for deregistration and suspension of reporting obligations for a class of securities once the total number of holders of that security falls below 1,200 persons.

Crowdfunding Provision Expands Investor Pool

One of the most important, and controversial, provisions of the new legislation allows private companies to raise up to one million dollars from the general public through SEC-registered brokers or funding portals in what is known as "crowdfunding." Crowdfunding allows companies to raise limited amounts of capital in exchange for small equity stakes in the company, usually via the Internet. The new crowdfunding provision provides that one million dollars may be raised by a non-public or non-investment company during any twelve month period so long as the following restrictions are met.

- An individual's investment may not exceed (1) the greater of $2,000 or 5% of the investor's annual income or net worth if the investor's annual income or net worth is less than $100,000 <u>or</u> (2) 10% of an investor's annual income or net worth – not to exceed a $100,000 investment – if the investor has an annual income or net worth equal to or more than $100,000.

- An SEC-registered broker or funding portal, known as an intermediary, must be used in the transaction. These intermediaries must also register with any applicable self-regulatory organization and must ensure that investors understand the risks associated with their investments by conducting background checks, making sure no investment limits are exceeded and making sure any other SEC-prescribed requirements are met.

- Issuers still may not advertise the terms of the offering, but must instead direct potential investors to the registered intermediary. Neither compensation nor commission may be paid to anyone promoting the offering unless proper procedures are taken to ensure disclosure of that fact with the SEC. Issuers will also be required to file target offering amounts and deadlines with the SEC as well as ongoing updates in regards to reaching those amounts or deadlines.

- Initial disclosures are still required, as the issuer must file an anticipated business plan, the financial condition of the company, a description of the intended use of the capital, and the capital structure of the company with the SEC, any intermediaries, investors, and potential investors. Further, issuers will be subject to ongoing disclosure requirements with the SEC, including financial statements reporting.[1]

- The securities purchased by investors under the new crowdfunding provisions will still be restricted shares that may not be resold for one year from the date of purchase, except to the issuer, to accredited investors, to family members, as part of an SEC-registered offering, or in the event of death or divorce. Investors also will enjoy a private right action of rescission in the event of material misstatements or omissions by officers, directors, and partners of the issuer.

Securities acquired pursuant to a crowdfunding offering do not count towards the issuer's shareholders of record calculation. These securities are also exempt from state blue sky registration requirements.

Expanded Regulation A

The JOBS Act significantly increases the amount of debt or equity a company may offer pursuant to Regulation A (the conditional exemption for small issues) from five million dollars to fifty million dollars in a twelve-month period. These securities will not be restricted securities, but will be subject to liability under Section 12(a)(2) of the Securities Act. Subject to certain exemptions, issuers will be required to register under state blue sky laws and must file annual audited financial statements, an offering memorandum, and other periodic disclosures with the SEC.

Timing

Recently, the SEC shed light on the timing of several important provisions of the JOBS Act. With regards to the confidential draft registration statement, an emerging growth company that was in registration at the time of enactment of the JOBS Act may switch to the confidential submission process for future amendments rather than withdrawing its registration statement and resubmitting a confidential draft form. The company should reflect this change on the cover sheet to any filing.

Similarly, the SEC has offered accommodating guidance for the implementation of the new shareholder trigger rules. For non-bank holding companies that had triggered a Section 12(g) registration obligation as of fiscal year-end before April 5, 2012, but would not have triggered such an obligation under the revised rules, the issuer is no longer required to register. If the issuer has filed a registration statement, but it has not become effective, the issuer may withdraw that registration statement.

Likewise, a bank holding company that had a registration obligation as of April 5, 2012, but would not have had such an obligation under the new requirements of the JOBS Act, may withdraw its registration statement if it has not become effective. If the bank holding company's registration statement has already become effective, but the issuer has less than 1,200 security holders, the issuer may file a Form 15 to terminate its Section 12(g) registration of that class of securities.

Effective Date

While many provisions of the JOBS Act, such as the IPO On-Ramp, are effective immediately, others, such as the crowdfunding rules, will become effective within 270 days or within a reasonable time of the Act's effective date. A qualifying company may choose to forego any of the exemptions provided to EGCs and instead comply with the rules applicable to non-EGC companies. However, an EGC must choose whether or not it will comply with certain exemptions at the time it first makes a filing with the SEC. Therefore, it is critical that these companies understand the advantages and consequences of the new legislation.

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[1] The financial statements that must be provided depend on the level of crowdfunding activity by the

issuer during the preceding twelve-month period. When that twelve-month total equals $100,000 or less, the issuer must only provide income tax returns for the most recent fiscal year and financial statements certified by the chief executive officer.

If the offering amount exceeds $100,000, but is less than $500,000, financial statements reviewed by an independent public accountant must be provided. For all offerings with targets exceeding $500,000, the issuer must provide audited financial statements.

About the Editor

Ryan Pratt is the founding attorney of Pratt Law Firm PLLC, located in Ridgeland, Mississippi. He focuses on Collaborative Law to help spouses peacefully resolve the dissolution of marriage and to minimize the negative effects of divorce. His practice includes Collaborative Divorce, estate planning, and government affairs representation. Prior to opening Pratt Law Firm PLLC, Ryan served as Assistant Secretary of State over the Policy and Research Division. Ryan was previously an associate at Butler, Snow, O'Mara, Stevens, and Cannada, PLLC, where he practiced governmental and public finance law. A native of Jackson, Ryan received a Bachelor of Arts degree in Psychology from the University of Mississippi and a Juris Doctorate from the University of Mississippi School of Law, where he was Managing Editor of the *Mississippi Law Journal*. Ryan is an adjunct professor of legal writing at the Mississippi College School of Law, and is a 2010 graduate of Leadership Mississippi. Ryan and his wife Loren live in Madison County.

How to Contribute

Persons interested in submitting news, a proposal or an article for publication in The Mississippi Business Law Reporter should submit it by e-mail to the Editor, Ryan Pratt, at ryanpratt@prattlawfirm.net. All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

When submitting an article, the article should be the original work of the author and must not have been previously published (unless proof of consent to reproduction can be provided). Articles shall not, to the best of the author's knowledge, contain anything which is libelous, illegal, or otherwise infringes upon anyone's copyright or other rights. Authors are responsible for the accuracy of all citations and quotations.

Articles should be arranged in the following order: (i) article title, (ii) author's name, (iii) acknowledgement of assistance, if applicable or desired, and (iv) text of the article. All contributions should be submitted in MS Word format.

A short biographical statement should also be provided at the time the article is submitted. The statement should include, at a minimum, the author's (i) current position, (ii) practice areas, (iii) professional affiliations. A head and shoulder photograph of the author(s) in color is requested but not required.

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C. Joyce Hall is an attorney at Watkins & Eager PLLC in Jackson, Mississippi. She was admitted to the Mississippi Bar in 1987 and the Louisiana Bar in 1995. Her experience includes commercial transactions, public finance, corporate and health care law. Joyce has been recognized as one of Mississippi's 50 Leading Business Women and is a past recipient of Mississippi's Outstanding Young Lawyer. She is an active member of the American Bar Association, where she serves on the Health Law Section Council, and The Mississippi Bar where she is the chair of the Business Law Section.

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Drew Snyder is the Assistant Secretary of State of Policy and Research. Before joining the Secretary of State's Office in January 2012, Snyder was an associate at the law firm Hollingsworth LLP in Washington D.C. A Eupora native, Snyder graduated *summa cum laude* from the University of Mississippi with a Bachelor of Business Administration, with an emphasis in Management and Managerial Finance. Snyder received his J.D. from the University of Virginia School of Law.

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Member News and Announcements

2012 Update on Mississippi Business Law CLE Seminar – May 15

The Business Law Section of The Mississippi Bar is pleased to host the 2012 Update on Mississippi Business Law CLE Seminar. The CLE Seminar will be held on May 15, 2012 at the Mississippi Bar Center located at 643 North State Street in Jackson. The goal of this CLE Seminar is to provide a quality 3-hour business law compliance seminar. Put yourself on the cutting edge of business law compliance with representatives from the Mississippi Secretary of State's Office. Learn from the Speaker of the House, a Senator and a Representative about recent laws passed by the Mississippi Legislature during the 2012 session. You will find attendance at this seminar to be an efficient, cost-effective method of obtaining continuing legal education. To download a registration form, click here.

2012 Business Law Ethics CLE Seminar – June 12

The Business Law Section of The Mississippi Bar and The Mississippi Corporate Counsel Association will sponsor a Business Law Ethics CLE Seminar for 1 hour of Ethics credit at the River Hills Club in Jackson on Tuesday, June 12, 2012. Will Manuel, of the Jackson office of Bradley Arant Boult Cummings LLP, will present "Social Media in the Workplace." To download a registration form, click here.

2012 Annual Bar Convention and Summer School – Business Section Meeting

When:	Thursday, July 12th (10 a.m. – 12 p.m.)
Where:	Sandestin Beach Hilton in Destin, Florida
Speakers:	Adam Kilgore, The Mississippi Bar, General Counsel – "Professionalism: The Lawyer's Creed"
	Kenneth A. "Kap" Primos, Butler Snow – "New Markets Tax Credits"

University of Alabama School of Law LL.M. Program

The course of study for the business transactions program is interdisciplinary in fields of law and business, including tax, finance, intellectual property, entrepreneurship, and traditional corporate classes. It is a 24-credit-hour program designed to train students to serve the needs of clients throughout the life cycle of a business venture beginning with formation and choice of business entity, then addressing financing in the growth phase, possible reorganizations and mergers as the business matures, and then finally the law effecting recession and dissolution. The curriculum makes the program particularly well suited for associates who need training in transactional skills. The LL.M. in Taxation program has been offered online since 2008 using the same format. It has nearly 200 students enrolled. It provides students with a broad coverage of tax law but also the opportunity to choose electives in Estate Planning or Business Tax. More information can be found by visiting www.AlabamaLLM.com.

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The Business Law Section of the Mississippi Bar is on facebook!

If you are a facebook member go to our group page entitled "Business Law Section of the Mississippi Bar" which is at the following address:

http://www.facebook.com/home.php?sk=group_169138153115599&ap=1

and join. If you are not on facebook, you must first become a facebook member (which is free) before you may join. To join go to facebook.com or click on the image below which will take you to the website.

We will post news, announcements, and upcoming events on the page as well as pictures. We hope to see you there soon!

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The Business Law Section of the Mississippi Bar has a listserv.

As a member of the Business Law Section you are automatically a member of the listserv.

To send a message to the following listserv email address:

BusinessLaw@listbox.com

LISTSERV RULES AND ETIQUETTE

TO MB LISTSERVE PARTICIPANTS:

Please review the listserve rules, etiquette and legal disclaimer below. This email is forwarded to participants on all MB listserves on a periodic basis to remind everyone of the rules and etiquette of MB listserves.

Listserve Rules and Etiquette

By joining and using The Mississippi Bar's listserves, you agree that you have read and will follow the rules and guidelines set for this listserve. You also agree to reserve list discussions for topics intended for discussion on this listserve.

As with any community, there are guidelines governing behavior on the listserves. Please take a moment to acquaint yourself with these important guidelines. MB reserves the right to suspend or terminate membership on all lists for members who violate these rules.

- **When sending messages use a meaningful subject line.** State concisely and clearly the specific topic of the comments in the subject line. This is a time-saver for all participants. Listserve participants will know if something can wait. Also, if they are not interested in the subject matter they can delete the message.
- **Do not post commercial messages.** The cyberspace term for this is "spamming". Contact people directly with products, programs and services that you believe would be of interest to them.
- **Stick to the topics intended for discussion on the listserve.**
- **Be polite, professional and civil.** Do not challenge or attack others. The discussions on MB listserves are meant to stimulate conversation, not to create contention. If you have a conflict with an individual, please settle it by private email.
- **Include a signature tag on all messages.** Include your name, affiliation, location, and e-mail address. Include only the relevant portions of the original message in your reply, delete any header information, and put your response before the original posting.
- **Warn other list subscribers of lengthy messages.** Either in the subject line or at the beginning of the message body with a line that says "Long Message."
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- **All defamatory, abusive, profane, threatening, offensive, or illegal materials are strictly prohibited.**
- **Don't send meaningless messages with no content.** Messages such as "thanks for the information" or "me, too" to individuals--not to the entire list. Do this by using your e-mail application's forwarding option and typing in or cutting and pasting in the e-mail address of the individual to whom you want to respond.
- **Do not send administrative messages through the listserve.** Messages such as "remove me from the list", should be directed to Rene' Garner at rgarner@msbar.org
- **Use caution when discussing products.** Information posted on the listserve is available for all to see, and comments are subject to libel, slander, and antitrust laws.
- **Use virus detection/protection software.** Make sure you have and use virus detection/protection software on your PC. If you receive a email that has a virus please post a message to the listserve immediately with "WARNING VIRUS" in the subject line followed by an explanation.

- **Do not send attachments through MB Listserves.** Many virus are spread by way of attachments. If you wish to send an attachment to someone please email directly and DO NOT POST to listserve .

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