

REFORMS FOR HIRE: THE JOBS ACT LEGISLATION

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I. INTRODUCTION

Just over ten years ago, following corporate and accounting scandals in which investors lost billions of dollars, Congress enacted the Sarbanes-Oxley Act of 2002.¹ Sarbanes-Oxley reformed public accountability reporting standards, raising the costs of compliance.² In 2010, following the recent financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).³ The Dodd-Frank Act further increased market regulation.⁴ Sarbanes-Oxley and the Dodd-Frank Act have together worked to stem market participation.⁵

On April 5, 2012, President Barack Obama signed the bipartisan Jumpstart Our Business Startups Act (the “JOBS Act”).⁶ The JOBS Act now seeks to ease some of the restrictions brought about by Sarbanes-Oxley and the Dodd-Frank Act, and promote market participation. President Obama’s Startup America initiative⁷ and independent efforts to

¹ Securities Law Disclosure After Sarbanes-Oxley, June 2005, 1501 PLI/Corp 11, 19-20.

² See Robert P. Bartlett III, *Going Private but Staying Public: Reexamining the Effect of Sarbanes-Oxley on Firms' Going-Private Decisions*, 76 U. CHI. L. REV. 7 (2009) (noting that, while conventional wisdom suggests Sarbanes-Oxley was among the leading catalysts of the IPO decline, the root-causes may be more numerous and complex). See also Noam Noked, *Considering Causes and Remedies for Declining IPO Volume*, HARVARD L. BLOG (Apr. 2, 2012, 9:36 AM), <http://blogs.law.harvard.edu/corpgov/2012/04/02/considering-causes-and-remedies-for-declining-ipo-volume/>.

³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31 & 42 U.S.C.).

⁴*Id.* For a comprehensive overview of the Dodd-Frank Act and its effect on issuers, see John Wilson & Doreen Lilienfeld, *Implications of the Dodd-Frank Act on Corporate Governance Preparation for IPO Issuers*, BOARDMEMBER.COM, https://www.boardmember.com/Article_Details.aspx?id=5712&terms=Implications+of+the+Dodd-Frank+Act (last visited Nov. 25, 2012).

⁵ See Robert P. Bartlett III, *Going Private but Staying Public: Reexamining the Effect of Sarbanes-Oxley on Firms' Going-Private Decisions*, 76 U. CHI. L. REV. 7 (2009) (noting that, while conventional wisdom suggests Sarbanes-Oxley was among the leading catalysts of the IPO decline, the root-causes may be more numerous and complex); Noam Noked, *Considering Causes and Remedies for Declining IPO Volume*, HARVARD L. BLOG (Apr. 2, 2012, 9:36 AM), <http://blogs.law.harvard.edu/corpgov/2012/04/02/considering-causes-and-remedies-for-declining-ipo-volume/>; Karlyn Gorski, *Dodd-Frank Creates Obstacles, Restricts Growth*, NCPA (Oct. 24, 2011), <http://www.ncpa.org/pub/ba755>.

⁶ Press Release, President Obama To Sign Jumpstart Our Business Startups (JOBS) Act, whitehouse.gov (Apr. 5, 2012), <http://www.whitehouse.gov/the-press-office/2012/04/05/president-obama-sign-jumpstart-our-business-startups-jobs-act>.

⁷ Fact Sheet: White House Launches “Startup America” Initiative, WhiteHouse.gov, <http://www.whitehouse.gov/startup-america-fact-sheet> (last visited July 18, 2011).

legalize crowdfunding as a method for raising early-stage equity-based financing⁸ were among the catalysts of the JOBS Act legislation, which includes a crowdfunding component.

Since many Americans are looking for jobs, “lawmakers looking for an edge on Capitol Hill are...labeling their proposals ‘jobs’ bills.”⁹ But, the JOBS Act is not fundamentally about the direct creation of jobs. The full name of the new legislation – the Jumpstart Our Business Startups Act – more accurately reflects its aim: encouraging small business capital formation by easing restrictions imposed by the federal securities laws.¹⁰ Although the Securities and Exchange Commission (“SEC”) has yet to implement the bulk of the JOBS Act provisions through required regulations,¹¹ this article describes and explores the changes to federal securities regulation promised through the JOBS Act and assesses their prospective impact on a preliminary basis.

This article will first consider the amended offering exemptions provided under Sections 3(b) and 4(2) of the Securities Act of 1933, as amended, generally, before addressing the new crowdfunding exemption under Section 4(6) specifically. Then, the article describes legislative changes to the initial public offering process before addressing amended threshold requirements for issuers registering a class of securities under the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

II. OFFERING EXEMPTIONS

Section 5 of the Securities Act prohibits the offer and sale of securities absent registration or an available exemption.¹² Prior to the JOBS Act, Sections 3(a), 3(b), and 4(2) of the Securities Act authorized the most popular exemptions used by issuers to offer and sell their securities without registration.¹³ In its effort to ease restrictions imposed by the federal securities laws, the JOBS Act amended Section 3(b) of the Securities Act, required the SEC to amend some of its regulations adopted under Section 4(2) of the Securities Act, and created a new exemption in Section 4(6) of the Securities Act.

⁸ See, e.g., *Crowdfund Investing – A Solution to the Capital Crisis Facing our Nation’s Entrepreneurs*: Hearing on Crowdfunding: Connecting Investors and Job Creators Before the H. Comm. on TARP, Financial Services, and Bailouts of Public and Private Programs, 112th Cong. 1 (2011) (testimony of Sherwood Neiss, Entrepreneur), available at <http://oversight.house.gov/hearing/crowdfunding-connecting-investors-and-job-creators/>.

⁹ Sean Lengell, *All Bills Lead to Jobs in Latest Spin in Congress*, The Washington Times (July 8, 2012), <http://www.washingtontimes.com/news/2012/jul/8/all-bills-lead-to-jobs-in-latest-spin-in-congress/>.

¹⁰ President Obama To Sign Jumpstart Our Business Startups (JOBS) Act, *supra* note 6.

¹¹ In fact, the SEC will fail to meet its earliest JOBS Act-mandated rulemaking deadlines. Chris Manderson, *JOBS Act Update: SEC Misses Rulemaking Deadline, But “the Wheels Are in Motion,”* peHUB (July 6, 2012), <http://www.pehub.com/158043/jobs-act-update-sec-misses-rulemaking-deadline-but-the-wheels-are-motion/>.

¹² 15 U.S.C. § 77e (2012).

¹³ 15 U.S.C. § 77c(a)-(b) (2010); 15 U.S.C. § 77d(2) (2010).

A. *Section 3(b) of the Securities Act*

Section 3(b) of the Securities Act exempts qualifying small securities offerings from the reach of the federal securities laws.¹⁴ Under Section 3(b), the SEC has promulgated three exemptions that are especially important to capital formation for small businesses: (1) Regulation A;¹⁵ (2) Rule 504;¹⁶ and (3) Rule 505¹⁷ (collectively, the “Section 3(b) Exemptions”). The latter two (Rule 504 and Rule 505) exemptions are part of Regulation D, which also includes Rule 506, described below.

In the period preceding the JOBS Act, the Section 3(b) Exemptions were not often used.¹⁸ Perhaps the maximum offering thresholds allowed by the Section 3(b) Amendments prior to the JOBS Act, ranging from \$1,000,000 to \$5,000,000,¹⁹ were in many cases too low (especially when taking into account the expenses associated with compliance), diminishing issuers’ returns.²⁰ In small-dollar-value offerings of securities, “accounting, legal, and other expenses can easily exceed \$50,000....”²¹ Such amounts are burdensome, especially as “relative to the total yield from a small offering,”²² especially when “relative, not absolute, offering expenses...are [most] important.”²³

Perhaps other offering restrictions imposed by the Section 3(b) Exemptions are too burdensome.²⁴ Reliance on any of the Section 3(b) Exemptions also necessitates some form of filing with the SEC.²⁵ In the case of Regulation A, the required filing is, in effect, an

¹⁴ *Id.* at § 77c(b) (2010).

¹⁵ 17 C.F.R. § 230.251-263 (2012) (“Regulation A”).

¹⁶ 17 C.F.R. § 230.504 (2012) (“Rule 504”).

¹⁷ 17 C.F.R. § 230.505 (2012) (“Rule 505”).

¹⁸ *See, e.g.,* Richard A. Mann et. al., *Starting from Scratch: A Lawyer's Guide to Representing A Start-Up Company*, 56 ARK. L. REV. 773, 773-74 (2004).

¹⁹ 15 U.S.C. § 77c(b)(1) (2012); 17 C.F.R. § 230.251-263 (2012); 17 C.F.R. § 230.504 (2012); 17 C.F.R. § 230.505 (2012).

²⁰ *See, e.g.,* Daniel E. Hannon & John Hempill, *JOBS Act Helps Make Section 3(b) a Viable Fundraising Alternative*, VC EXPERTS, https://vcexperts.com/buzz_articles/1205 (last visited Nov. 21, 2012).

²¹ Rutheford B. Campbell, Jr., *Regulation A: Small Businesses' Search For "A Moderate Capital,"* 31 DEL. J. CORP. L. 77, 90 (2006). In 1997, the average cost of a Regulation A offering was \$40,000 to \$60,000, and the average cost of a registered offering using Form S-1 was between \$400,000 and \$1,000,000. *See* Thomas Lee Hazen, *The Law of Securities Regulation* § 4.17[1], at 183-84 (5th ed. 2005).

²² Campbell, Jr., *supra* note 21 at 90.

²³ *Id.* (noting that costs of \$500,000 to raise \$500,000 would not kill the offering, but costs of \$500,000 to raise \$500,000 certainly would).

²⁴ Regulation A is not often used, in part due to the “cost of preparing the mandatory offering statement.” Securities Act Release No. 6949 (July 30, 1992). Rule 504 and Rule 505 are precarious due to principles of integration and aggregation. *See* 17 C.F.R. § 230.502(a) (2012) (prescribing integration principles); 17 C.F.R. § 230.504(b)(2) (2012) (prescribing aggregation limits for Rule 504); 17 C.F.R. § 230.505(b)(2) (2012) (prescribing aggregation limits for Rule 505).

²⁵ 17 C.F.R. § 230.251-263 (2012) (applying to Regulation A); 17 C.F.R. § 230.503 (2012) (applying to Regulation D rules). *See* Securities Act Release No. 8876 (Dec. 19, 2007); Securities Act Release No. 8891 (Feb. 6, 2008).

abbreviated registration statement that includes an abbreviated form of a marketing document that looks like a public offering prospectus.²⁶ As a result, Regulation A offerings are often referred to as mini-public offerings.²⁷

The ongoing challenge for the SEC is to “promote efficiency, competition, and capital formation,”²⁸ while maintaining important investor protections.²⁹ The JOBS Act amended Section 3(b) by, among other things, creating a new basis for exemption, Section 3(b)(2) of the Securities Act (“Section 3(b)(2)”). Section 3(b)(2) may help the SEC to promote capital formation while also fostering efficiency, healthy competition, and investor protection.³⁰

The key provisions of Section 3(b)(2) indicate cost-effective potential. First, Section 3(b)(2) allows issuers to “publicly” offer and sell the securities, and “solicit interest in the offering[,] prior to filing any offering statement...”³¹ In other words, issuers may test the waters before committing additional capital.³² Second, Section 3(b)(2) has a \$50,000,000 12-month aggregate offering limit.³³ Because Section 3(b)(2)’s aggregate offering limit is much higher than those allowed under the Section 3(b) Exemptions, issuers may enjoy more favorable returns on their investment in undertaking a securities offering.³⁴ Third, Section 3(b)(2) offerings will be limited to certain kinds of securities, including “equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including

²⁶ See M. Louise Turilli & Joseph Kerschenbaum, *Securities on the Internet: Changes in Laws Required to Increase Online Offerings*, 70 N.Y. ST. B.J. 22, 25 (1998) (citing 17 C.F.R. § 230.251(d)).

²⁷ See Stephen J. Choi, *Behavioral Economics and the Regulation of Public Offerings*, 10 LEWIS & CLARK L. REV. 85, 115 (2006).

²⁸ 15 U.S.C. § 77b(b). See also *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

²⁹ SEC, *THE INVESTOR'S ADVOCATE: HOW THE SEC PROTECTS INVESTORS, MAINTAINS MARKET INTEGRITY, AND FACILITATES CAPITAL FORMATION* (2012). The SEC intends to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.” *Id.* The SEC seeks to achieve such goals through its rules and regulations. See, e.g., S. REP. NO. 73-47, pt. 1 (1933) (explaining the investor protection goals underlying the Securities Act).

³⁰ Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 401(a)-(c), 126 Stat. 306 (2012) (hereinafter “JOBS Act”). The JOBS Act divided 15 U.S.C. § 77c(b) (2010) into sub-sections (b)(1) and (b)(2) while 15 U.S.C. § 77c(b)(1) (2012) retains the language of 15 U.S.C. § 77c(b) (2010). *Id.* Compare 15 U.S.C. § 77c(b) (2010) with 15 U.S.C. § 77c(b) (2012).

³¹ JOBS Act § 401(a).

³² Prior to the JOBS Act, testing the waters was only available under Regulation A. *The March Towards Meaningful Reform for Small and Emerging Growth Companies Moves Forward - House Passes Measures to Open Private Capital Raising and Facilitate an On-Ramp of New IPOs*, CORP. & SEC. L. BLOG (Mar. 12, 2012), <http://www.corporatesecuritieslawblog.com/346554-print.html>.

³³ JOBS Act § 401(a).

³⁴ See Campbell, Jr., *supra* note 21 at 90 (noting that costs of \$500,000 to raise \$50,000,000 would not kill the offering, but costs of \$500,000 to raise \$500,000 certainly would).

any guarantees of such securities.”³⁵ Although issuers are restricted with respect to the kinds of securities that may be offered in reliance on Section 3(b)(2), this may have little noticeable effect. Finally, the SEC may prescribe issuer disclosure requirements.³⁶ Ideally, the SEC would perform a cost-benefit analysis prior to determining the specifics of any disclosure requirements.³⁷ What we know now is that the SEC may “require...periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters...”³⁸ Although the disclosure specifics are not yet finalized, Section 3(b)(2) may present a cost-effective capital-raising option; in fact, it may “be the best new way for private companies to raise money without the headaches of going public or the restrictions of private offerings...”³⁹

B. *Section 4(2) of the Securities Act*

Section 4(2) of the Securities Act (“Section 4(2)”) exempts offerings of securities “not involving a public offering,”⁴⁰ from the registration requirement of Section 5.⁴¹ Rule 506 in Regulation D (“Rule 506”) provides a nonexclusive safe harbor for compliance with Section 4(2).⁴² For several reasons, attorneys may recommend Section 4(2) and Rule 506 for

³⁵ JOBS Act § 401(a). All securities purchased pursuant to Section 3(b)(2) will be unrestricted. *Id.* They will also be treated as “covered securities” for the purposes of the National Securities Markets Improvement Act of 1996. *Id.* at § 401(b); 15 U.S.C. 77r(b)(4) (2012).

³⁶ JOBS Act § 401(a) (the SEC has the authority to require issuer disclosures “in the public interest and for the protection of investors,” but it remains to be seen whether, and to what extent, the SEC will actually require such disclosures).

³⁷ Generally, when the SEC engages in rulemaking, it must consider the effect on public interest and investor protection, and “whether the action will promote efficiency, competition, and capital formation.” 15 U.S.C. § 77b(b); 15 U.S.C. § 78w(a)(2). Recent developments have shed light on, and have begun to reform, the SEC’s rulemaking process. *See, e.g., Bus. Roundtable*, 647 F.3d at 1144. *See also* Follow-Up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Act Rulemakings, Report No. 499 (Jan. 27, 2012), available at http://www.sec-oig.gov/Reports/AuditsInspections/2012/Rpt%20499_FollowUpReviewofD-F_CostBenefitAnalyses_508.pdf. Proposed legislation would expressly require the SEC to undertake formal cost-benefit analyses when engaging in rulemaking processes. *See* 2011 Cong. U.S. S. 3468, 112th Congress, 2nd Session (“The Independent Agency Regulatory Analysis Act of 2012”).

³⁸ JOBS Act § 401(b).

³⁹ Gregory K. Bader, *Regulation A+: Raise the Capital You Need Without the Hassle or Expense*, THE SECURITIES EDGE (Sept. 27th, 2012), <http://www.thesecuritiesedge.com/2012/09/regulation-a-raise-the-capital-you-need-without-the-hassle-or-expense/> (noting, however, that Section 3(b)(2) will be most effective for “smaller and mid-cap” companies).

⁴⁰ *See* Sec. & Exch. Comm’n v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

⁴¹ 15 U.S.C. § 77d(a)(2) (2012).

⁴² 17 C.F.R. § 230.506 (2012). Rule 506 states that “[o]ffers and sales of securities by an issuer that satisfy the [enumerated] conditions ... shall be deemed to be transactions not involving any public offering within the meaning of [S]ection 4(2)” *Id.*

their clients' private placement offerings.⁴³ For example, "there is no limit as to the amount of securities that may be offered and sold pursuant to Rule 506."⁴⁴

1. Rule 506

Prior to the JOBS Act, Rule 506 offerings were limited to no more than thirty-five non-accredited investor purchasers or accredited investors.⁴⁵ Non-accredited investors must be afforded disclosure and have an ability to understand and appreciate the potential risks of the investment.⁴⁶ Banks, savings and loan institutions, private business development companies, and 501(c)(3) organizations qualify as accredited investors if they meet certain enumerated requirements; in addition, individual "director[s], executive officer[s], or general partner[s] of the issuer[s] of the securities being offered or sold" and those having high individual net worth qualify as accredited investors.⁴⁷ If there is any trepidation with regard to the accredited investor determination, it lies with qualified natural persons. Perhaps individual accredited investors not affiliated with the issuer, who "need only be rich," should not be presumed able to "bear investment risks..."⁴⁸

The JOBS Act does not relieve issuers from their duty to evaluate and ensure accredited investor status in Rule 506 offerings; therefore, interpretive decisions, like the United States Court of Appeals for the Sixth Circuit's decision in *Mark v. FSC Sec. Corp.*, will maintain importance for practicing attorneys. In *Mark*, the court held that an issuer "failed to sustain its burden of proving an exemption under Rule 506" when it presented to the court the testimony of one of its partners (who had no familiarity with the attribute of investors in the offering at issue) and blank subscription documents and other materials as

⁴³ See, e.g., Richard A. Mann et. al., *Starting from Scratch: A Lawyer's Guide to Representing A Start-Up Company*, 56 ARK. L. REV. 773, 773-74 (2004).

⁴⁴ Joseph E. Dudek Jr. & Lane R. Belisomo, *Federal and State Securities Offer Exemptions for Tennessee Small Businesses*, 46 TENN. B.J. 22, 24 (2010). See 17 C.F.R. § 230.506.

⁴⁵ 17 C.F.R. § 230.501(a) (2012).

⁴⁶ Each "non-accredited investor[,] or the non-accredited investor's 'purchaser representative[,] [must] meet a minimum sophistication requirement[,] or that the issuer 'reasonably believes' immediately prior to making a sale that each non-accredited purchaser or purchaser representative meets that sophistication requirement." Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 918 (2011) (citing 17 C.F.R. § 230.506(b)(2)(ii) (2010) (requiring knowledge and experience in financial and business matters sufficient to evaluate the merits and risks of the investment)). See generally *Sec. & Exch. Comm'n v. Ralston Purina Co.*, 346 U.S. 119, 125-26 (1953) (introducing the concept of sophistication with regard to the kind of investors who do not seem to need the protection of the federal securities laws). Although "sophisticated investors" differ in material respects from "accredited investors," neither need as much protection from the federal securities laws as non-accredited investors. See *id.*; cf. 17 C.F.R. § 230.501(a).

⁴⁷ 17 C.F.R. § 230.501(a)(1-5) (2012).

⁴⁸ C. Edward Fletcher, III, *Sophisticated Investors Under the Federal Securities Laws*, 1988 DUKE L.J. 1081, 1123 (1988).

evidence that purchasers were accredited investors.⁴⁹ The court also found that the partner had no knowledge about any purchaser, much less any belief, reasonable or not, as to the purchasers' knowledge and experience in financial and business matters," and that the "documents offered no evidence from which a jury could conclude the issuer reasonably believed each purchaser was" an accredited investor.⁵⁰

Mark demonstrates that issuers must be diligent and employ good document retention practices when investigating purchaser status in a Rule 506 offering. Prior to the JOBS Act, Rule 506 severely restricted issuer conduct. Rule 502(c) prohibited issuers, and persons acting on behalf of issuers, from generally soliciting or advertising to investors in a Rule 506 offering.⁵¹ General solicitation and advertising includes offering securities to "any person with whom the issuer, or the issuer's agent, has not had a prior relationship."⁵² Additionally, the ban on general solicitation and advertising applied to investors, including accredited investors – investors presumed to be financially able to bear the risk of the investment.⁵³ Critics claimed that the prohibition on general solicitation and advertising was "out-of-step with current communication norms, business practices, and lifestyles."⁵⁴

The JOBS Act lifted the prohibition on general solicitation and advertising for certain Rule 506 offerings.⁵⁵ Commentators had noted that allowing general solicitation and advertising should neither "diminish consumer protection [n]or open the floodgates to fraud."⁵⁶ Lifting the prohibition on general solicitation and advertising may have been "[t]he most ambitious step that the SEC [c]ould take...."⁵⁷ Even so, the change comes with a key

⁴⁹ *Mark v. FSC Sec. Corp.*, 870 F.2d 331, 336-37 (6th Cir. 1989) (noting that the documentary evidence was self-reported by the purchasers).

⁵⁰ *Id.*

⁵¹ 17 C.F.R. § 230.502(c) (2010). *See also* J.D. Manning, Inc., 1986 WL 65354 (SEC No-Action Letter Jan. 29, 1986) (noting that the companies prepared materials used in the newsletter and paid for publication). Communications by non-affiliates may also be deemed to be on behalf of the issuer. *Id.* *See also* Release No. 33-7233, 1995 WL 588462, ex. 20 (S.E.C. Release No. Oct. 6, 1995); Mineral Lands Research & Marketing Corp., 1985 WL 55694 (SEC No-Action Letter Nov. 4, 1985).

⁵² Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns*, 4 N.Y.U. J. L. & Bus. 1, 41 (2007).

⁵³ *See* Securities Act Release No. 6455, 1 Fed. Sec. L. Rep. (CCH) ¶ 2380 (March 3, 1983). *But cf.* Mobile Biopsy, LLC, 1999 WL 607850 (SEC No-Action Letter Aug. 11, 1999).

⁵⁴ Heminway & Hoffman, *supra* note 46 at 952; *see also* Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 Emory L. J. 67, 70 (1989); William K. Sjostrom, Jr., *Relaxing The Ban: It's Time To Allow General Solicitation And Advertising In Exempt Offerings*, 32 FLA. ST. U. L. REV. 1, 4 (2004).

⁵⁵ JOBS Act § 201(a)(1). The JOBS Act added Securities Act § 4(b) ("Section 4(b)") to ensure that the amended Rule 506 remained congruent with Securities Act § 4(2). *See* 15 U.S.C. § 77d(b) (2012). Section 4(b) states that offers and sales in reliance on Rule 506 "shall not be deemed public offerings ... as a result of general advertising or general solicitation."

⁵⁶ Gregory C. Yadley, *General Solicitation: Looking for Funds in all the Wrong Places*, 70 FLA. B. J. 80, 82 (1996).

⁵⁷ Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 EMORY L.J. 67, 127 (1989). *See also* Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small*

qualification: issuers relying on Rule 506 may disregard Rule 502(c)'s prohibition on general solicitation and advertising only if "all purchasers of...securities are accredited investors...."⁵⁸ Issuers relying on the amendment must take "reasonable steps to verify that purchasers...are accredited investors...."⁵⁹ Issuers are already well advised to do so, but the relaxation of the general solicitation and advertising prohibitions for Rule 506 offerings to accredited investors further highlight the importance of diligence in ascertaining the accredited investor status of offerees in those offerings.

C. Rule 144A

Regardless of whether an issuer sells only to accredited investors, Rule 502 will continue to apply to Rule 506 offerings. For example, securities sold under Rule 506 will continue to be restricted securities.⁶⁰ Restricted securities are those "acquired in a transaction under Regulation D," to which is prescribed the status of securities acquired in a transaction under Section 4(2); they cannot be resold "without registration under the [Securities] Act or an exemption therefrom."⁶¹ Rule 144 remains an important safe harbor for conducting secondary transactions of restricted securities.⁶² Alternatively, Rule 144A provides an "exemption from the registration requirements of the Securities Act of 1933 for resales of restricted securities to 'qualified institutional buyers....'"⁶³ Even if persons purchase these securities directly from the issuer "with a view to reselling...pursuant to Rule 144A," it does not "affect the availability to the issuer of an exemption under § 4(2) or...[Rule 506]...."⁶⁴ Issuers may sell "to an initial purchaser in reliance on §4(2)," including in an offering under Rule 506, "even though the initial purchaser contemplates the immediate resale...in reliance on Rule 144A."⁶⁵

Prior to the adoption of the JOBS Act, Rule 144A allowed non-issuer holders of these unlisted and unquoted restricted securities to re-sell them to qualified institutional buyers ("QIBs").⁶⁶ Rule 144A placement in the pre-JOBS Act era commenced "with

Business Financing Concerns, 4 N.Y.U. J. L. & Bus. 10, 11-12 (2007); John L. Orcutt, *Improving the Efficiency of the Angel Finance Market: A Proposal to Expand the Intermediary Role of Finders in the Private Capital Raising Setting*, 37 ARIZ. ST. L. J. 861, 943-44 (2005).

⁵⁸ JOBS Act § 201(a)(1).

⁵⁹ *Id.*

⁶⁰ 17 C.F.R. § 230.506 (2012).

⁶¹ 17 C.F.R. § 230.502(d) (2012).

⁶² 17 C.F.R. § 230.144 (2012).

⁶³ Resale of Restricted Securities, Securities Act Release No. 6862 (Apr. 23, 1990), at 1. Rule 144A may also be used for securities that are not listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system. 17 C.F.R. § 230.144A(d)(3) (2012).

⁶⁴ Bradley J. Gans, *The Mechanics of Rule 144A/Regulation S Underwritings*, 1174 PLI/Corp. 357 (April 27, 2000).

⁶⁵ *Id.*

⁶⁶ Resale of Restricted Securities, Securities Act Release No. 6862 (Apr. 23, 1990), at 2 (defining a Qualified Interested Buyer (QIB) as an institution that, "in the aggregate[.]" owns and invests, "on a

negotiations between the issuer and a broker-dealer;” usually, the transaction proceeded with “the issuer making extensive disclosures in the Offering Memorandum that the broker-dealer then use[d] in its resales to qualified institutional buyers....”⁶⁷ Rule 144A(d)(1) generally required that “securities are *offered* and sold only to” QIBs.⁶⁸ By definition, QIBs may include banks, savings and loan institutions, registered broker-dealers, and other similar institutional buyers.⁶⁹

The JOBS Act significantly changed the manner in which Rule 144A transactions are conducted. Specifically, the JOBS Act amended Rule 144A(d)(1), “provid[ing] that securities sold under such revised exemption may be offered to persons other than...[QIBs], including by means of general solicitation or general advertising, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a...[QIB].”⁷⁰ Perhaps the JOBS Act’s changes will encourage Rule 144A transactions.⁷¹

D. *Securities Act § 4(6)*

Crowdfunding is rooted in the idea of “crowdsourcing,” relying on the crowd for “feedback and solutions...[to] corporate activities.”⁷² Crowdfunding is “synonymous with efforts to raise funds from numerous donors, usually in small amounts through internet sources....”⁷³ It enables entrepreneurs, who often lack important “relationships

discretionary basis[.] at least \$100 million in securities of issuers...not affiliated with the [QIB] institution”). Rule 144A transactions cannot involve securities that, “at the time of their issuance, were fungible with securities trading on a U.S. exchange....” *Id.* at 4.

⁶⁷ Cox, et al., *Securities Regulation: Cases & Materials*, 378 (6th ed. 2009).

⁶⁸ 17 C.F.R. § 230.144a(d)(1) (2012) (emphasis added).

⁶⁹ See *Resale of Restricted Securities*, Securities Act Release No. 6862 (Apr. 23, 1990). The Nasdaq and NASD handle most of the compliance responsibilities through operation of Private Offerings, Resales and Trading through Automated Linkages (PORTAL); William K. Sjostrom, Jr., *The Birth of Rule 144a Equity Offerings*, 56 UCLA L. REV. 409, 431-32 (2008). The NASDAQ functionally operates PORTAL, and the NASD is responsible for the approval of investors seeking to participate in PORTAL. *Id.*

⁷⁰ JOBS Act § 201(a)(2).

⁷¹ In addition to the changes to Rule 144A, the JOBS Act permits persons, acting as intermediaries, to maintain a “platform or mechanism that permits the offer, sale, purchase, or negotiation of or with respect to securities, or permits general solicitations, general advertisements, or similar or related activities by issuers of such securities, whether online, in person, or through any other means” without having to register, pursuant to Securities Exchange Act § 15(a)(1), as a broker or dealer. JOBS Act § 201(c); 15 U.S.C. § 77d(b) (2012). Such persons must not: (1) receive “compensation in connection with the purchase or sale of such security”; (2) “have possession of customer funds or securities in connection with the purchase or sale of such security”; or (3) be disqualified by applicable statute. 15 U.S.C. § 77d(b) (2012).

⁷² Paul Belleflamme et al., *Crowdfunding: Tapping the Right Crowd 2* (CORE Discussion Paper No. 2011/32, 2012), available at <http://ssrn.com/abstract=1578175>.

⁷³ Stuart R. Cohn, *The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 FLA. L. REV. 1433, 1434 (2012) (noting that “[p]oliticians, charities, and local non-profit organizations all engage in

with...entities and individuals [sufficient] to create a stable source of venture capital without third-party assistance,⁷⁴ to finance their endeavors. Not all crowdfunding arrangements result in the offer and sale of securities,⁷⁵ but those involving revenue-sharing or profit-sharing usually do.⁷⁶

The JOBS Act enables issuers to engage in some forms of crowdfunded securities offerings without registering under to the Securities Act.⁷⁷ To accomplish this, the JOBS Act created Section 4(6) of the Securities Act (“Section 4(6)”).⁷⁸ Section 4(6) is not available for use by reporting issuers⁷⁹ or disqualified issuers;⁸⁰ for eligible issuers, the requirements are many.

First, an issuer must conduct all crowdfunding transactions “through a broker or funding portal...” compliant with Section 4A(a) of the Securities Act.⁸¹ Brokers and funding portals, also referred to as “intermediaries,” facilitate crowdfunding transactions between issuers and investors.⁸²

Second, aggregate offering and per investor purchase amounts are limited. Section 4(6) limits the aggregate amount of crowdfunded securities “sold to all investors...” to

raising funds from broad swaths of the population for specific purposes and generally in relatively low dollar amounts”).

⁷⁴ Heminway & Hoffman, *supra* note 46, at 931 (citing Campbell, *supra* note 21, at 89).

⁷⁵ *Id.* at 918.

⁷⁶ *Id.* at 896. See SEC v. W. J. Howey Co., 328 U.S. 293 (1946) (considering whether an instrument qualified as an “investment contract” for the purposes of 15 U.S.C. § 77a-aa (the “Securities Act of 1933”); the Court found that that the particular instrument qualified as an investment contract, subjecting the investment company to liability under the Securities Act of 1933).

⁷⁷ JOBS Act § 301.

⁷⁸ The applicable provisions are referred to as the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 (the “CROWDFUND Act”). *Id.* § 301. Section 4(6) is a non-exclusive exemption. 15 U.S.C. § 77d-1(g) (2012).

⁷⁹ 15 U.S.C. § 77d-1(f) (2012) (including issuers subject to reporting requirements, pursuant to 15 U.S.C. § 78m (2012) and 15 U.S.C. § 78o(d), and others). “Issuers” includes “all entities controlled by or under common control with the issuer....” JOBS Act § 302(a).

⁸⁰ 15 U.S.C. § 77d-1 (2012) disqualifies issuers “not organized under and subject to the laws of a State or territory of the United States or the District of Columbia...” from relying on Section 4(6). 15 U.S.C. § 77d-1(d)-(f) (2012).

⁸¹ 15 U.S.C. § 77d(a)(6)(C) (2012). 15 U.S.C. § 78c(a)(4) (2012) defines a “broker” as “any person engaged in the business of effecting transactions in securities for the account of others.” 15 U.S.C. § 78c(a)(80) (2012) defines “funding portal” as “any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to...[S]ection 4(6),” and subject to restriction. 15 U.S.C. § 78c(h) (2012) provides funding portals with a limited exemption from registration under 15 U.S.C. § 78o(a)(1) (2012).

⁸² See 15 U.S.C. § 77d-1(a) (2012). Each broker and funding portal must “register with any applicable self-regulatory organization....” *Id.* § 77d-1(a)(2) (2012) (noting that “self-regulatory organization” is defined in 15 U.S.C. § 78c(a)(26)).

\$1,000,000.⁸³ The aggregate amount of crowdfunded securities “sold to any investor by an issuer...” is limited to:

- (i) the greater of \$2,000 or 5% of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than \$100,000; and
- (ii) 10% of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of \$100,000, if either the annual income or net worth of the investor is equal to or more than \$100,000.⁸⁴

These limitations on investor participation are important; after all, “[i]t may be eas[y] for investors who lack corporate finance expertise or knowledge of relevant industries to lose their savings through online investments.”⁸⁵

Third, the securities sold in a crowdfunded offering are given a status similar to that of securities sold in a Rule 506 offering under Regulation D. Specifically, all crowdfunded securities purchased under Section 4(6) are “restricted,” meaning they “may not be transferred by the purchaser...during the 1-year period beginning on the date of purchase,” with some exception.⁸⁶ Crowdfunded securities sold under Section 4(6) are also “covered securities” that are exempt from state regulation,⁸⁷ which may alleviate issuer costs of compliance with that separate body of regulation.

⁸³ 15 U.S.C. § 77d(a)(6)(A) (2012) (including “any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction...”).

⁸⁴ 15 U.S.C. § 77d(a)(6)(B) (2012) (including “any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction...”).

⁸⁵ See Kevin Lawton & Dan Marom, *The Crowdfunding Revolution: Social Networking Meets Venture Financing* 1, 180 (2010). It is worrying that unsophisticated investors may lose money in crowdfunding investments, but more serious are “the high rate[s] of securities fraud in the small business context, and the anonymity of the Internet...” Heminway & Hoffman, *supra* note 46, at 937.

⁸⁶ 15 U.S.C. § 77d-1(e) (2012). The purchaser may: (1) transfer crowdfunded securities back to the issuer; (2) transfer crowdfunded securities to an accredited investor; (3) transfer crowdfunded securities “as part of an offering registered with the Commission”; or (4) transfer crowdfunded securities “to a member of the family of the purchaser or the equivalent, or in connection with the death or divorce of the purchaser or other similar circumstance, in the discretion of the Commission....” 15 U.S.C. § 77d-1(e)(1)(A)-(D) (2012). In any case, all holders of crowdfunded securities will be excluded from 15 U.S.C. § 78l(g) calculations. 15 U.S.C. § 78l(g)(6) (2012); JOBS Act § 303(a)-(b); 15 U.S.C. § 78l(g)(1)(B) (2012).

⁸⁷ 15 U.S.C. § 77r(b)(4) (2012). Nonetheless, the JOBS Act reserves some state authority; for example, “to take enforcement action with regard to an issuer, funding portal, or any other person or entity using the exemption from registration provided by...[S]ection 4(6).” JOBS Act § 305(a). The JOBS Act also reserves state authority for investigation and enforcement when “in connection with securities or securities transactions,” and under circumstances so-prescribed. 15 U.S.C. § 77r(c)(1)(A)-(B) (2012).

In addition, Section 4(6) restricts issuer conduct. For example, issuers may not advertise offering terms; rather, issuers are limited to “provid[ing] notices...direct[ing] investors to the funding portal or broker...”⁸⁸ Moreover, an issuer may not “compensate or commit to compensate, directly or indirectly, any person to promote its offerings through communication channels provided by a broker or funding portal, without taking such steps as the Commission shall...require to ensure that such person clearly discloses the receipt, past or prospective, of such compensation, upon each instance of such promotional communication...”⁸⁹

Issuers also are subject to disclosure requirements. Each issuer must disclose: (1) its “name, legal status, physical address, and website;” (2) a description of its business; (3) the names of its directors and officers; (4) each person holding more than twenty percent of its shares; and (4) details regarding the offering itself.⁹⁰ Each issuer must file such information with the SEC and any intermediary involved.⁹¹ Not less than annually, each issuer must also file with the SEC and provide involved intermediaries reports detailing the issuer’s results of operations and financial statements.⁹² As provided in the JOBS Act, intermediaries are essential parties to crowdfunding transactions exempt from registration under Section 4(6).⁹³ Intermediaries are responsible for regulating crowdfunding offerings⁹⁴ and protecting investors.⁹⁵

Finally, issuers will be subject to liability for misstatements of material fact and misleading omissions to state material fact. For the purposes of this liability, a “director or partner of the issuer, and the principal executive officer or officers, principal financial officer, and controller or principal accounting officer of the issuer...that offers or sells a security in a transaction exempted by [S]ection 4(6), and any person who offers or sells the

⁸⁸ *Id.* § 77d-1(b)(2) (2012).

⁸⁹ *Id.* § 77d-1(b)(3) (2012).

⁹⁰ *Id.* § 77d-1(b) (2012).

⁹¹ Jumpstart Our Business Startups Act § 302(b).

⁹² 15 U.S.C. § 77d-1(b)(4) (2012).

⁹³ Jumpstart Our Business Startups Act § 302(a).

⁹⁴ Intermediaries are responsible for “ensur[ing] that no investor in a 12-month period has purchased [crowdfunded] securities . . . that, in the aggregate, from all issuers, exceed the [crowdfunding] investment limits...” *Id.* § 77d-1(a)(8) (2012). Intermediaries must also “ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest...” *Id.* § 77d-1(a)(7) (2012).

⁹⁵ For example, intermediaries must provide issuer disclosures to investors, including those “related to risks and other investor education materials” *Id.* § 77d-1(a) (2012). Intermediaries must also “ensure that each investor . . . reviews investor-education information,” affirm that each investor understands the risk of loss, and “that the investor could bear such a loss...” *Id.* § 77d-1(a)(2)-(4) (2012). Intermediaries must also perform background and history checks on “each officer, director, and person holding more than twenty percent of the outstanding equity of every issuer whose securities are offered...” *Id.* § 77d-1(a)(5) (2012).

security in such offering” is treated as an “issuer.”⁹⁶ Issuers, and others so-included, may be liable for use of:

[A]ny means or instruments of transportation or communication in interstate commerce or of the mails, by any means of any written or oral communication, in the offering or sale of a security in a transaction exempted by [S]ection 4(6), to make an untrue statement of a material fact or omitted to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission; and [provided that the issuer] fails to sustain the burden of proof that such issuer did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.⁹⁷

Purchasers may bring action against issuers, as that term is broadly defined under the JOBS Act, “to recover consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if such person no longer owns the security.”⁹⁸ This right to a rescission remedy parallels that under Section 12(a)(2) of the Securities Act.⁹⁹

At first, crowdfunding was typically used for “funding unique causes.”¹⁰⁰ Crowdfunding models occupied “a legally distinct universe from business funding...”¹⁰¹ Under Section 4(6), entrepreneurs may rely on crowdfunding to raise business capital. Entrepreneurs may benefit from such flexibility, but they should understand the costs.¹⁰² Compliance and reporting requirements may be costly, and issuers are limited in the amounts of capital that can be raised.¹⁰³ Many already believe that the “[c]ost-benefit analysis simply may not favor crowdfunding.”¹⁰⁴

⁹⁶ *Id.* § 77d-1(c)(3) (2012).

⁹⁷ *Id.* § 77d-1(c)(2) (2012).

⁹⁸ *Id.* § 77d-1(c)(1) (2012). All such actions are subject to *Id.* § 77l-m (2012) as if such liability was created under *Id.* § 77l(a)(2) (2012). See *Id.* § 77d-1(c)(1) (2012).

⁹⁹ Compare 15 U.S.C. § 77d-1 with 15 U.S.C. § 77l (2012).

¹⁰⁰ Chris Manderson, *Will Crowdfunding Live Up to the Hype? Part 4 of a 4-Part Series on the Jobs Act*, peHUB (April 28, 2012), <http://www.pehub.com/147531/will-crowdfunding-live-up-to-the-hype-part-4-of-a-4-part-series-on-the-jobs-act/>.

¹⁰¹ *Id.*

¹⁰² Small entrepreneurs, when “attempting to access external capital,” encounter many economic disadvantages. Campbell, *supra* note 21, at 90.

¹⁰³ After all, “relative, not absolute, offering expenses . . . are important.” *Id.* (noting that costs of \$500,000 to raise \$50,000,000 would not kill the offering, but costs of \$500,000 to raise \$500,000 certainly would).

¹⁰⁴ Manderson, *supra* note 100. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 149-150 (2012) (noting that “[t]he enactment of a crowdfunding exemption

Even if investment crowdfunding under the JOBS Act is cost-effective for an issuer, other disadvantages to crowdfunding may affect its ultimate use in small business finance. Although crowdfunding was designed in part to bring “a large number of ‘retail’ shareholders into the cap table,” sophisticated investors and venture capitalists may not want to participate in subsequent offerings because of the existence of a substantially retail-oriented shareholder base.¹⁰⁵ If that turns out to be the case, crowdfunding may be “a dead end for a startup looking to grow through multiple rounds of venture financing.”¹⁰⁶

But this observation is not fatal to the use of crowdfund investing. Although for some business ventures crowdfunding may be inappropriate, others may still be able to benefit from the use of crowdfunding; for example, ventures that only seek small amounts of capital investment and have near-term business plans, or investors who desire to make early exits. These and other issuers may never need traditional venture capital investment.¹⁰⁷ In addition, the type of security offered in a crowdfunded offering may affect the desirability of crowdfunding to a particular issuer. The offer and sale of debt or another non-equity instrument in a crowdfunded offering may make the issuer more attractive to certain types of subsequent investors than the crowdfunded offer and sale of equity securities. In sum, corporate and securities attorneys should carefully evaluate the needs of clients contemplating crowdfunding and advise them based on, among other things, whether, when, and to whom they may need to engage in subsequent offerings.

For some issuers, traditional private placement offerings are likely to provide better options. Private placements typically “will not impose...ongoing disclosure obligations on issuers.”¹⁰⁸ Furthermore, the JOBS Act’s amendment to Rule 506 (allowing general solicitation and advertising for offerings in which all purchasers are accredited investors) allows small business ventures lacking important relationships with accredited investors to cast their nets more widely.¹⁰⁹ This freedom does not, however, replace the potential market for crowdfunding. Reaching out to accredited investors digresses from the truest concept of

would be no panacea”; nonetheless, advocating for the SEC to “adopt an exemption to facilitate crowdfunded securities offerings”).

¹⁰⁵ Manderson, *supra* note 100.

¹⁰⁶ *Id.*

¹⁰⁷ Also, such ventures may fail before ever needing subsequent rounds of financing. After all, the one-year survival rate for businesses started in 2004 was 76.4 percent. Brian Headd, et al., *What Matters More: Business Exit Rates or Business Survival Rates?*, 3, available at http://www.census.gov/ces/pdf/BDS_StatBrief4_Exit_Survival.pdf.

¹⁰⁸ Manderson, *supra* note 100.

¹⁰⁹ Heminway & Hoffman, *supra* note 46 at 931 (citing Campbell, *supra* note 21, at 89).

crowdfunding: engaging the “crowd” in the operations and “develop[ment] [of] corporate activities.”¹¹⁰ This crowd is not populated solely with accredited investors.

III. THE IPO “ON-RAMP”

The JOBS Act established alternative rules for initial public offerings (“IPOs”) for a new class of issuers called “emerging growth companies” (“EGCs”).¹¹¹ With the objective of “mak[ing] it easier for young, high-growth firms to go public,”¹¹² the JOBS Act scaled back disclosure obligations, removed the Sarbanes-Oxley Act Section 404(b) internal control audit and Dodd-Frank executive compensation vote requirements, expanded permissible communications with research analysts, and provided for EGCs to “test the waters” prior to filing a registration statement.¹¹³ These changes to the IPO process are often referred to as the “IPO On-Ramp”¹¹⁴ and provide EGCs with up to a five-year post-IPO transition period.¹¹⁵

A. *Qualifying as an Emerging Growth Company*

To qualify as an EGC, an issuer must have “total annual gross revenues of less than \$1,000,000,000...during its most recently completed fiscal year.”¹¹⁶ EGCs may remain classified as such until the earliest of:

- (A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of \$1,000,000,000...or more;
- (B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of [its IPO];
- (C) the date on which such issuer has, during the previous 3-year period, issued more than \$1,000,000,000 in non-convertible debt; or
- (D) the date on which such issuer is deemed to be a “large accelerated filer.”¹¹⁷

The law is not retroactive in application, and thus, an issuer may not qualify as an EGC if it conducted an IPO on or before December 8, 2011.¹¹⁸

¹¹⁰ Belleflamme et al., *supra* note 72, at 2. After all, “investors [among the ‘crowd’] may be more likely to be engaged with, and even passionate about, the ventures they are funding than repeat players in the seed, angel, or venture capital game.” Heminway & Hoffman, *supra* note 46, at 931.

¹¹¹ JOBS Act § 101(a).

¹¹² President Obama To Sign Jumpstart Our Business Startups (JOBS) Act, *supra* note 6.

¹¹³ JOBS Act § 102-106.

¹¹⁴ *See, e.g.*, President Obama To Sign Jumpstart Our Business Startups (JOBS) Act, *supra* note 6.

¹¹⁵ JOBS Act § 101(a).

¹¹⁶ *Id.* This “amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics....”

¹¹⁷ *Id.* (internal quotation marks omitted). Generally, a company becomes a “large accelerated filer” when, in addition to certain timing requirements, the market value of its common equity is greater than \$700,000,000. 17 C.F.R. § 240.12b-2 (2005).

¹¹⁸ JOBS Act § 101(d).

To assist an issuer with determining whether or not it qualifies as an EGC, the SEC has issued guidance in the form of Frequently Asked Questions.¹¹⁹ In clarifying the meaning of the EGC requirements set forth above, the SEC has stated that an issuer “must qualify as an [EGC] at the time of submission” of its confidential draft registration statement and at any time the issuer engages in test-the-water communications.¹²⁰ Moreover, the submission date of a confidential draft registration statement is not considered the “initial filing date.”¹²¹ Therefore, should a company “cease[] to qualify as an emerging growth company while undergoing the confidential review of its draft registration statement...it would need to file a registration statement” under the current rules for non-EGC issuers.¹²² The confidential draft statement becomes an exhibit to the registration statement.¹²³

EGCs need not take advantage of the benefits offered to them in and through the JOBS Act. They have the right to opt into compliance with the requirements for other, non-EGC issuers if they so choose.¹²⁴ Further, the SEC staff has indicated that an EGC that “[took] advantage of the extended transition period provided in Section 7(a)(2)(B)...[may] later decide[] to opt in, so long as it complies with the requirements in Sections 107(b)(2) and (3) of the JOBS Act.”¹²⁵ The opt-in decision is to be “prominently disclosed in the first periodic report or registration statement following the company’s decision and is irrevocable.”¹²⁶

If an EGC chooses to comply with new or revised financial accounting standards under Section 7(a)(2)(B) of the Securities Act of 1933, the EGC “must make such choice at the time the company is first required to file a registration statement, periodic report, or other report with the Commission,”¹²⁷ even if the EGC is filing a draft confidential registration statement.¹²⁸ Additionally, an EGC may not choose certain only standards to comply with but must instead “comply with all such standards to the same extent” as a non-EGC issuer.¹²⁹ The decision of whether or not to comply with new or revised financial accounting standards is irrevocable.¹³⁰

¹¹⁹ *Jumpstart Our Business Startups Act, Frequently Asked Questions - Generally Applicable Questions on Title I of the JOBS Act*, SEC. & EXCH. COMM’N (last updated Sept. 28, 2012), <http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm>.

¹²⁰ *Id.* at question 3.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ JOBS Act § 107(a).

¹²⁵ SEC. & EXCH. COMM’N, *supra* note 119, at question 37.

¹²⁶ *Id.*

¹²⁷ JOBS Act § 107(b)(1).

¹²⁸ SEC. & EXCH. COMM’N, *supra* note 119, at question 13.

¹²⁹ JOBS Act § 107(b)(2).

¹³⁰ *Id.* § 107(b)(3).

B. *Changes to the IPO Process for EGCs*

The JOBS Act made several significant changes to the IPO process for EGCs. The changes include, for example, expanded permissible communications and reduced disclosure obligations for EGCs. Each will be addressed in turn in this section.

1. Draft Registration Statements, Permissible Communications, and Research Reports

The Act reversed the long-standing prohibition against submitting confidential registration statements to the SEC.¹³¹ Prior to the JOBS Act, the SEC did not permit issuers to submit draft registration statements except in limited cases with foreign private issuers.¹³² Now, EGCs may submit a draft registration statement “for confidential nonpublic review by” SEC staff as long as the registration statement and accompanying amendments are filed no later than twenty-one days before a road show.¹³³

Next, the JOBS Act relaxes pre-registration restrictions on issuer communications, known informally as “gunjumping” rules. First, the JOBS Act permits EGCs, or authorized persons, to “engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors.”¹³⁴ Communication with QIBs and accredited investors allows EGCs to “test the water” to gauge interest for a potential offering both before and after filing a registration statement.¹³⁵ Prior to the enactment of the JOBS Act, all offers—the term being interpreted broadly to include

¹³¹ See Press Release, Securities and Exchange Commission Non-Public Submissions from Foreign Private Issuers, (May 30, 2012), <http://www.sec.gov/divisions/corpfin/internat/nonpublicsubmissions.htm>.

¹³² *Id.*

¹³³ JOBS Act § 106(a). Since the enactment of the JOBS Act, the SEC has gradually changed the process by which EGCs and foreign private issuers may submit draft registration statements with the goal of submitting draft statements via the EDGAR system. Initially, paper copies or text searchable PDF files on a CD/DVD were acceptable. Press Release, Securities and Exchange Commission, Division announcement regarding confidential submission of draft registration statements under the Jumpstart Our Business Startups Act, (Apr. 5, 2012), <http://www.sec.gov/divisions/corpfin/cfannouncements/secureemail.html>. This procedure was replaced with a secure email submission process. Press Release, Securities and Exchange Commission, Division update regarding submission of draft registration statements for confidential review under the JOBS Act and non-public review under the Division’s policy for certain foreign private issuers, (May 11, 2012), <http://www.sec.gov/divisions/corpfin/cfannouncements.shtml>. The SEC recently made available an EDGAR-based system for draft registration statement filing. Press Release, Securities and Exchange Commission, Draft Registration Statements to Be Submitted and Filed on EDGAR, (Sept. 26, 2012), <http://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures.htm>. As anticipated by the SEC, filing on EDGAR will be mandatory for EGCs and foreign private issuers eventually. *Id.*

¹³⁴ JOBS Act § 105(c).

¹³⁵ *Id.*

communications gauged to generate an interest in securities—were prohibited until after a registration statement has been filed.¹³⁶

Second, the JOBS Act prohibits the SEC or national securities associations from restricting who at a broker-dealer “may arrange for communications between a securities analyst and a potential investor” regarding an EGC’s IPO.¹³⁷ Additionally, unlike before, the new rules also allow securities analysts to communicate with management of EGCs when non-analysts employees of broker-dealers are attending.¹³⁸ That is, effective immediately, current restrictions by the Financial Industry Regulatory Association (FINRA) are superseded so that analysts may participate in meetings or other communications with management of an EGC in connection with an IPO even if non-analysts (e.g., investment bankers or employees of FINRA members) are present.¹³⁹

Third, the law permits broker-dealers to publish analyst research reports about EGCs prior to and after the IPO, even if the broker-dealer is participating in the offering.¹⁴⁰ Before the JOBS Act, these research reports could constitute offers for sale made in violation of Section 5 of the Securities Act¹⁴¹ that are actionable under Section 12(a)(1) of the Securities Act and, because they are written offers (and therefore, prospectuses) a potential source of liability for material misstatements or omissions under Section 12(a)(2) of the Securities Act.¹⁴² Accordingly, a quiet period barring publication of research reports had been imposed during the period between the filing and effectiveness of the registration statement.¹⁴³ Now, research reports regarding EGCs do not constitute an offer for sale or offer to sell a security, regardless of whether the registration statement has been filed or become effective.¹⁴⁴ Moreover, the post-offering quiet period imposed on analysts and broker-dealers no longer exists for EGCs.¹⁴⁵ Typically, before enactment of the JOBS Act, analysts could not publish favorable reports on an issuer during the prospectus delivery period (within forty days of the IPO date).¹⁴⁶ Under the JOBS Act, broker-dealers may publish any research report and make public appearances regarding the EGC’s offering at

¹³⁶ Securities Act of 1933, Ch. 38, § 5(c), 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a et seq.) (hereinafter “Securities Act of 1933”); *see, e.g.*, Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959).

¹³⁷ JOBS Act § 105(b).

¹³⁸ *Id.*

¹³⁹ *Id.*; *see also* *JOBS Act Will Ease Rules for IPOs and Private Placements and Reduce Compliance Burdens Post IPO*, CLIENT PUBLICATION (Shearman & Sterling LLP), March 2012, at 3; *Jumpstart Our Business Startups (JOBS) Act Changes the Public and Private Capital Markets Landscape*, PUBLICATIONS (Gibson Dunn), Mar. 28, 2012, at e.

¹⁴⁰ JOBS Act § 105(a) and (d).

¹⁴¹ Securities Act of 1933 § 2(a)(3).

¹⁴² *Id.* § 12.

¹⁴³ *Id.* § 5; *see, e.g.*, Jean Eaglesham & Telis Demos, *Regulators Rethink Pre-IPO Chatter*, WALL ST. J., Aug. 17, 2012, C1.

¹⁴⁴ JOBS Act § 105(a) and (d).

¹⁴⁵ *Id.* § 105(d).

¹⁴⁶ NASD Rule 2711(f)(1).

any time after the IPO date or within any period of time surrounding a lock-up agreement for the EGCs securities.¹⁴⁷ Broker-dealers are not free from all restrictions by FINRA regarding research reports, however, as the JOBS Act did not change the restrictions on relationships with research departments and communication with the company that is the subject of the report.¹⁴⁸

2. Reduced Disclosure and Other Requirements for EGCs

Perhaps the broadest overhaul of the IPO process for EGCs is effectuated through the JOBS Act's reduced reporting and disclosure requirements. These reduced requirements operate during the EGC's five-year "transition period."¹⁴⁹ At the center of this transition is scaled disclosure, which reflects the "on-ramp" intent of these JOBS Act provisions: moving issuers from private to public-company status in issuer-friendly steps designed to encourage the use of the IPO process.

Under the JOBS Act, EGCs are required to include only two years of audited financial statements in an IPO registration statement, unlike the traditional requirement of submitting three years of audited financials.¹⁵⁰ Moreover, an EGC is not required to submit any selected financial data "for any period prior to the earliest audited period presented in connect with its [IPO]."¹⁵¹ Conversely, non-EGC issuers are to include selected financial data for the previous five years for registration statements.¹⁵²

Some commentators expect that there will be pressure from the market for EGCs to release the same financials as other issuers.¹⁵³ Moreover, EGC status is included as a risk factor in the prospectus for a number of reasons, including because the issuer is likely using significant exemptions and reduced disclosures and will incur costs as stricter rules come in upon expiration of EGC status.¹⁵⁴ A major criticism of the JOBS Act is that investors in EGCs will no longer be getting an adequate amount of information to enable a comparison

¹⁴⁷ JOBS Act § 105(d).

¹⁴⁸ NASD Rules 2711(b)(2)-(3) and (c)(1)-(2).

¹⁴⁹ JOBS Act § 101(a).

¹⁵⁰ Compare JOBS Act § 102(b), with 17 C.F.R. § 210.3-02a (1999).

¹⁵¹ JOBS Act § 102(b).

¹⁵² 17 C.F.R. § 229-301(a) (2009).

¹⁵³ See Lynn Cowan, *IPO Outlook: The Good (and the Bad) News: We're an 'Emerging' Company*, WALL ST. J., (Sept. 4, 2012 7:35 a.m.), <http://online.wsj.com/article/BT-CO-20120904-704400.html>; Telis Demos, *Workday IPO Shows Jobs Act Rule in Action*, DEAL JOURNAL (Aug. 31, 2012, 1:30 PM), <http://blogs.wsj.com/deals/2012/08/31/workday-ipo-shows-jobs-act-rule-in-action/>.

¹⁵⁴ *Id.*; see Drew DeSilver, *ClearSign's \$12M IPO Among First to Use JOBS Act Exemptions*, SEATTLE TIMES, Apr. 26, 2012, http://seattletimes.com/html/business/technology/2018066722_clearsign26.html.

with other potential investments, and the reduced requirement for providing financial data is a prime example.¹⁵⁵

EGCs also are exempted from compliance with several executive compensation requirements, a number of which were recently enacted by the Dodd-Frank Act.¹⁵⁶ For example, the Dodd-Frank Act requires a “say on pay” resolution by which shareholders are to approve executive compensation at least every three years as well as a “say on frequency” vote regarding how often to hold the “say on pay” vote.¹⁵⁷ EGCs, however, are exempt from holding “say on pay” and “say on frequency” shareholder votes.¹⁵⁸ EGCs are also exempt from the Dodd-Frank requirement that issuers make an “internal pay equity disclosure” comparing the median compensation of the issuer’s employees to its chief executive officer’s compensation.¹⁵⁹

Likewise, an EGC also need not, in connection with a merger, acquisition, or asset sale, disclose “golden parachute” compensation or hold a vote for shareholder approval of “golden parachute” compensation.¹⁶⁰ Once an issuer is no longer an EGC, the issuer must hold a “say on pay” vote and “say on frequency vote” and make the compensation disclosures (1) within three years if the issuer was an EGC for less than two years after the IPO date or (2) within one year of the date that the issuer is no longer an EGC for all other issuers.¹⁶¹

Finally, an EGC may opt to comply with other scaled compensation disclosure requirements available to small companies with a public float of less than \$75,000,000.¹⁶² These reduced disclosure requirements allow EGCs to report compensation for only three named executive officers instead of five;¹⁶³ limit summary compensation tables to two fiscal years instead of three;¹⁶⁴ and eliminate the compensation discussion and analysis, the grants of plan-based awards table, the option exercises and stock vested table, and the nonqualified deferred compensation table and pension benefits table.¹⁶⁵

¹⁵⁵ Cowan, *supra* note 153.

¹⁵⁶ JOBS Act § 102(a) and (c); Dodd-Frank Act § 953(b)(1).

¹⁵⁷ 15 U.S.C. § 78n-1(a) (2012).

¹⁵⁸ JOBS Act § 102; 15 U.S.C. § 78n-1(e)(2).

¹⁵⁹ JOBS Act § 102(a); Dodd-Frank Act § 953(b)(1).

¹⁶⁰ JOBS Act § 102(a); *see* 15 U.S.C. § 78n-1.

¹⁶¹ JOBS Act § 102(a).

¹⁶² *Id.* § 102(c). Smaller reporting companies are defined at 17 C.F.R. § 229.10(f)(1) (2011).

¹⁶³ *Compare* 17 C.F.R. § 229.402(a)(3) (2011), *with* 17 C.F.R. § 229.402(m)(2) (2011) (allowing smaller reporting companies to report compensation for only the CEO and two other most highly compensated executive officers).

¹⁶⁴ *Compare* 17 C.F.R. § 229.402 (c)(1) (requiring three fiscal years), *with* 17 C.F.R. § 229.402(n)(1) (requiring two fiscal years).

¹⁶⁵ *Compare* 17 C.F.R. § 229.402(a)-(k) (listing general requirements for issuers), *with* 17 C.F.R. § 229.402(m)-(r) (listing requirements for smaller reporting companies).

EGCs receive significant exemptions from certain accounting standards. For instance, EGCs may delay application of “any new or revised financial accounting standard” until the standard is applicable to private companies.¹⁶⁶ Moreover, EGCs are exempt from compliance with the auditor attestation requirements imposed by Sarbanes-Oxley Section 404(b).¹⁶⁷ Section 404 requires management to implement and assess internal controls and also requires that the company’s public accounting firm attest to management’s assessment.¹⁶⁸ Section 404 has likely been the most controversial piece of Sarbanes-Oxley; public companies have objected to the cost of compliance.¹⁶⁹ The exemption from Section 404(b) is not surprising given that the SEC has already permanently exempted issuers that are not accelerated or large accelerated filers.¹⁷⁰ All issuers are, however, still subject to Section 404(a), which requires management to report on the internal controls over financial reporting.¹⁷¹ Finally, should the Public Company Accounting Oversight Board (“PCAOB”) promulgate any rule “requiring mandatory audit firm rotation or a[n]...auditor discussion and analysis,” EGCs would be exempt from that rule.¹⁷² As an additional shield for EGCs, the JOBS Act also provides that any other rules promulgated by the PCAOB do not apply to EGCs unless the SEC “determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation.”¹⁷³

IV. THRESHOLDS FOR REGISTERING SECURITIES

The JOBS Act increased the shareholder and total assets thresholds under Section 12(g) of the Exchange Act for public company registration and, as a result, periodic and transactional reporting.¹⁷⁴ These thresholds serve as a trigger for when a private company

¹⁶⁶ JOBS Act § 102(b).

¹⁶⁷ *Id.* § 103; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745 (2002).

¹⁶⁸ Sarbanes-Oxley Act § 404(a)-(b); 15 U.S.C. § 7262. The Public Company Accounting Oversight Board has issued guidance for the performance of the audit of internal control over financial reporting. AUDITING STANDARDS, AS No. 5 (Pub. Co. Accounting Oversight Bd. 2007).

¹⁶⁹ *See* Governance, Risk, and Compliance Handbook: Technology, Finance, Environmental, and International Guidance and Best Practices (Anthony Tarantino, ed., 2008), at 911.

¹⁷⁰ 17 C.F.R. § 210.2-02(f) (2012) SEC Release No. 33-9142. “Accelerated filer” and “large accelerated filer” are defined in Rule 12b-2 under the Exchange Act of 1934. A company becomes an “accelerated filer” when, in addition to certain timing requirements, the market value of its common equity is greater than \$75,000,000, whereas an issuer is a “large accelerated filer” when its public float is greater than \$700,000,000. 17 C.F.R. § 240.12b-2 (2005).

¹⁷¹ *See* 17 C.F.R. § 229.308(a) (2010).

¹⁷² JOBS Act § 104. The PCAOB has issued a concept release for comment regarding mandatory audit firm rotation. PCAOB Concept Release No. 2011-006 (Aug. 16, 2011). Likewise, in considering the auditor reporting model, the PCAOB also accepted public comments regarding the creation of an auditor discussion and analysis section. PCAOB Concept Release No. 2011-003 (June 21, 2011).

¹⁷³ JOBS Act § 104.

¹⁷⁴ *Id.* §§ 501 and 601.

must register a class of its equity securities.¹⁷⁵ Formerly, for issuers that are not bank holding companies, Section 12(g) and the SEC's rules under Section 12(g) set the threshold at 500 or more holders of record and total assets exceeding \$10,000,000.¹⁷⁶ Accordingly, upon surpassing the thresholds, a private company was required to register the subject class of equity securities, making it a public company.¹⁷⁷ The issuer does not have to file an IPO registration statement under the Securities Act, but it must register the class of equity securities under the Exchange Act and start filing periodic reports and other Exchange Act disclosure statements and reports.¹⁷⁸ The JOBS Act increased the shareholder-of-record threshold to (a) 2,000 persons or (b) 500 persons who are not accredited investors.¹⁷⁹ This is a considerable increase regarding holders of record.¹⁸⁰

Securities received "pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act of 1933" are not included in determining compliance with the 2,000 holders of record requirement.¹⁸¹ Moreover, the JOBS Act directed the SEC to adopt safe harbor provisions to assist issuers with determining whether holders of record received the securities under an exempt employee compensation plan.¹⁸² Purchasers of securities in crowdfunding transactions also are not included in the shareholder-of-record determination.¹⁸³

Banks and bank holding companies, which historically dealt with separate threshold requirements for Exchange Act registration, also got some relief from Exchange Act requirements in the JOBS Act. The shareholder-of-record threshold for Exchange Act registration of securities issued by banks or bank holding companies was increased to 2,000 or more persons.¹⁸⁴ The JOBS Act also increased the deregistration threshold for banks and

¹⁷⁵ Securities Exchange Act of 1934 § 12(g) (codified at 15 U.S.C. § 78c(g)).

¹⁷⁶ *Id.*; 17 C.F.R. § 240.12g-1 (2011).

¹⁷⁷ 15 U.S.C. § 78c(g); 17 C.F.R. § 240.12g-1. A popular, recent example of the effects of Section 12(g) can be seen with Facebook. Goldman Sachs was to sell Facebook stock in a private placement that under Rule 12g5-1 was arguably going to trigger the 500 shareholder rule. Although Facebook would not be forced to list its securities, it would have had to begin filing publicly with the SEC. For commentary of the Facebook pre-IPO situation, see Steven M. Davidoff, *The Legal Issues in the Goldman-Facebook Deal*, N.Y. TIMES DEALBOOK (Jan. 10, 2011, 12:13 PM), <http://dealbook.nytimes.com/2011/01/10/the-legal-issues-in-the-goldman-facebook-deal/>; Nicholas Carlson, *Facebook (Effectively) Just Announced Plans To Go Public*, BUSINESS INSIDER (Jan. 3, 2011, 5:36 PM), <http://www.businessinsider.com/rule-12g5-1b3-or-how-facebook-just-announced-plans-to-go-public-2011-1>.

¹⁷⁸ *See* 15 U.S.C. § 78c(g).

¹⁷⁹ JOBS Act § 501.

¹⁸⁰ *Compare* JOBS Act § 501, *with* 15 U.S.C. § 78c(g)(1).

¹⁸¹ JOBS Act § 502.

¹⁸² *Id.* § 503.

¹⁸³ *Id.* § 303.

¹⁸⁴ *Id.* § 601(a).

bank holding companies from 300 to 1,200 persons.¹⁸⁵ A bank or bank holding company may suspend its duty to file reports and cease registration of its securities if the number of holders of record falls below this deregistration threshold.¹⁸⁶

V. CONCLUSION

The JOBS Act creates significant changes to the federal securities laws in an effort to enhance access to capital markets in the United States.¹⁸⁷ Crowdfunding and increased permissible communications in connection with securities offerings reflect today's societal trends and expectations, and reduced offering and reporting requirements are designed to make obtaining public funding more accessible to start-up companies. Ultimately, despite the positive intent of encouraging small business capital formation, the JOBS Act scaled back investor protection mechanisms by undoing or exempting key parts of the Sarbanes-Oxley Act and the Dodd-Frank Act. The scaled disclosure of financial data, exemption from certain accounting standards, and EGC transition period necessarily result in fewer controls to prevent significant restatements and fraud. Investors may discount EGC issuers accordingly.¹⁸⁸ The full implications of these changes will take time to become apparent, but perhaps *caveat emptor* is a useful takeaway from the JOBS Act for investors.

¹⁸⁵ *Id.* § 601.

¹⁸⁶ Jumpstart Our Business Startups Act Frequently Asked Questions: Changes to the Requirements for Exchange Act Registration and Deregistration, Securities and Exchange Commission (Apr. 11, 2012), <http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm>.

¹⁸⁷ President Obama To Sign Jumpstart Our Business Startups (JOBS) Act, *supra* note 6.

¹⁸⁸ *See supra* notes 146-148 and accompanying text.