

# **A Guide to the JOBS Act**

**Prepared by:**  
**Michael T. Cronin, Esq.**  
**Johnson, Pope, Bokor, Ruppel & Burns, LLP**  
**911 Chestnut Street**  
**Clearwater, FL 33756**  
**(727) 461-1818**  
**Email: [mikec@jpfirm.com](mailto:mikec@jpfirm.com)**

In an effort to ease regulatory burdens on smaller companies and facilitate capital formation, President Obama enacted the Jumpstart Our Business Startups (JOBS) Act on April 5, 2012.

**The JOBS Act includes a number of measures to facilitate capital formation, including:**

- An initial public offering (IPO) on-ramp for a new category of issuer, "emerging growth companies."
- Removal of the prohibition against general solicitation and general advertising in certain private placements.
- A new exemption under the Securities Act of 1933, as amended (Securities Act), for crowdfunding offerings.
- An amendment to the Securities Act (informally referred to as Regulation A+) permitting companies to conduct offerings to raise up to \$50 million through a "mini-registration" process similar to Regulation A.
- Higher triggering thresholds for Securities and Exchange Commission (SEC) reporting obligations under the Securities Exchange Act of 1934, as amended (Exchange Act).

## **Emerging Growth Companies (EGCs)**

### Qualifying as an EGC

- An EGC is defined as an issuer with total gross revenues of less than \$1 billion during its most recently completed fiscal year (subject to inflationary adjustment by the SEC every five years).
- An issuer will not be able to qualify as an EGC if it first sold its common stock in an SEC-registered offering before December 8, 2011.
- Foreign private issuers are included.

## **IPOs by EGCs**

- EGCs may confidentially submit a draft IPO registration statement to the SEC for nonpublic review.
- An issuer that was in registration before the JOBS Act that qualifies as an EGC may switch to the confidential submission process for future amendments.
- Initial confidential submission and all following amendments must be filed publicly at least 21 days before the road show.
- Two years of audited financials are required (instead of three).
- In any other registration statement or periodic report, EGCs do not need to include financial information in selected financial data or in MD&A disclosure for periods before those presented for the IPO.

- EGCs may elect to rely on certain scaled disclosures available to **smaller reporting companies** (such as for executive compensation).
- EGCs and their agents may test the waters with **qualified institutional buyers** and **institutional accredited investors** to gauge interest before or after filing.

## **Governance and Disclosure Exemptions**

EGCs are exempt from:

- The advisory vote on golden parachute payments.
- Disclosing the relationship between executive compensation and financial performance.

- Disclosing the CEO pay-ratio.
- Auditor attestation of internal controls under Section 404 of Sarbanes-Oxley.

### **Phase-in of Governance and Disclosure Requirements**

- The say on pay requirement phases-in as follows:
  - in the case of an issuer that was an EGC for less than two years, by the end of the three-year period following its IPO; and
  - for any other EGC, within one year of having lost its EGC status.

## Accounting Standards

- EGCs are not required to comply with any new or revised accounting standard until the date the standard becomes broadly applicable to private companies.
- EGCs are not subject to any **PCAOB** rules requiring audit firm rotation or modified audit report requirements unless the SEC determines it is necessary.
- An EGC may opt out of any exemption and instead comply with the requirements that apply to other issuers. However, if it elects to forego the exemption from compliance with new or revised accounting standards, it must:
  - Comply with all standards and cannot selectively opt in or out of accounting standards.
  - Make this election at the time it files its first registration statement or Exchange Act report.



## **Permitted Communications**

- Research reports on EGCs that propose to register or are in registration are not offers under the Securities Act even if the broker-dealer participates in the offering.
- Research reports on EGCs are not subject to quiet period or lock-up period restrictions.

## **Effective Dates**

Title I of the JOBS Act became effective on enactment.

## **Practical Consideration**

Depending on the issuer's business and financial condition, it may be the case that underwriters encourage EGCs to furnish more information than required. Once an issuer has become more seasoned, it may choose to provide non-EGC disclosures. It will take some time to see how market practice evolves in relation to scaled disclosures.

The ability to "test the waters" presents a number of interesting possibilities. The IPO window opens and closes and, depending on market conditions, the IPO process may become quite extended (in some cases, nine months or longer). During the long road leading to an IPO, an issuer may need to conduct a private placement to raise capital to carry out its business plans and cover IPO expenses.

Over time, the SEC has provided interpretive guidance providing greater certainty for conducting private placements to institutional investors while pursuing an IPO. The ability to test the waters completes this picture. It is expected that an issuer will keep the information included in test the waters materials consistent with information in its registration statement. Any financial intermediary involved in the IPO and assisting in communications with institutional investors will likely require that the issuer make representations and warranties to this effect for any test the waters information.

## **General Solicitation**

### Rule 506 Offerings

- General advertising and general solicitation is permitted, provided that the issuer verifies purchasers are all accredited investors.

### Platforms/Matching Services

Will not be required to register as broker-dealers solely as a result of participation or involvement in Rule 506 offerings that use general solicitation or general advertising, provided that the platform does not receive transaction-based compensation, handle customer funds or securities or participate in documentation.

### Effective Dates

- The SEC must enact rules to carry out the removal of the general solicitation prohibition in Rule 506 and Rule 144A offerings by July 4, 2012 (within 90 days of enactment of the JOBS Act).

## **Crowdfunding**

### Offering Threshold

- The aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the crowdfunding exemption during the 12-month period preceding the date of the transaction, must not exceed \$1 million.

### Investment Threshold

- The aggregate amount sold to any investor by the issuer, including any amount sold in reliance on the crowdfunding exemption during the 12-month period preceding the date of the transaction, must not exceed:

- The greater of \$2,000 or 5% of the annual income or net worth of the investor, as applicable, if either the annual income or the net worth of the investor is less than \$100,000.
- 10% of the annual income or net worth of the 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.

## **Information**

Issuers must file with the SEC and provide to investors and selling intermediaries information about the issuer, including:

- Financial statements, which would be reviewed or audited depending on the size of the target offering amount.

- Officers, directors and greater than 20% stockholders.
- Risks relating to the issuer and the offering.
- Target amount, deadline to reach the target amount and regular updates regarding progress.
- At least annually, reports of the results of operations and financial statements and other information the SEC requires by rule.

## **Manner of Offering**

- The transaction must be conducted through a broker or funding portal.
- Issuers cannot advertise the terms of the offering, other than to provide notices directing investors to the broker or funding portal, along with disclosure of amounts paid to compensate solicitors promoting the offering through the broker or funding portal.

## **Broker and Funding Portal Requirements**

- Register with the SEC as a broker or funding portal.
- Register with any applicable self-regulatory authority.



- Provide disclosures to investors, as well as questionnaires, regarding the level of risk involved with the offering.
- Ensure that all offering proceeds are only provided to issuers when the amount equals or exceeds the target offering amount, and allow for cancellation of commitments to purchase in the offering.
- Ensure that no investor exceeds the investment threshold.
- Must not compensate promoters, finders or lead generators.
- Prohibit insiders from having any financial interest in an issuer using that intermediary's services.

### **Transferability**

Securities are not transferrable for a one-year period beginning on the date of purchase, except in certain limited circumstances.

## **Liability**

A purchaser could bring an action against an issuer for rescission under Section 12(a)(2) of the Securities Act in the event that there are material misstatements or omissions in connection with the offering (liability normally reserved for public offerings).

## **Blue Sky Status**

Crowdfunding securities are covered securities, exempting them from state blue sky registration requirements. However, some state enforcement authority and notice filing requirements are retained.

## **Other Conditions**

- The crowdfunding exemption is only available for domestic issuers that are not reporting companies under the Exchange Act and that are not investment companies.
- Bad actor disqualification provisions similar to those required under Regulation A are required.

## **Effective Dates**

The SEC must issue rules to carry out the crowdfunding exemption within 270 days of enactment, or December 31, 2012. Before that time, the crowdfunding exemption is not available.

## **Practical Considerations**

### **Issuers**

For raising small amounts of capital from a broad group of investors, the crowdfunding exemption may ultimately provide a viable alternative to existing offering exemptions, given the potential cost savings and increased sources for funding. At the same time, issuers will need to weigh the ongoing costs that will arise with crowdfunding offerings, in particular the annual reporting requirement. Moreover, it is not yet known how much intermediaries, such as brokers and funding portals, will charge issuers once SEC and self-regulatory organization regulations apply to their ongoing crowdfunding operations.

## **Intermediaries**

Brokers and funding portals will need to consider how their processes can be revamped to comply with the new regulations, in particular given the extensive information that intermediaries will need to provide to investors for crowdfunding offerings and the critical role that intermediaries will play in terms of self-regulating these offerings.

# **Regulation A + Requirements**

Regulation A under Section 3(b) of the Securities Act, allows issuers to raise up to \$5 million through sales of their securities in interstate offerings without complying with the registration requirements of the Securities Act. Regulation A as it currently exists is considered an unappealing capital-raising alternative because of the need to comply with state securities laws and its low dollar annual cap.

Title IV of the JOBS Act amends Section 3(b) of the Securities Act, increasing the threshold to \$50 million for a Regulation A-style offering (Section 3(b)(2)) and requires the SEC to amend Regulation A or adopt a new, similar regulation. Practitioners informally refer to this provision as Regulation A+.

## **Offering Threshold**

- \$50 million of issuer's securities in a 12-month period.
- The SEC may increase this amount every two years.

## **Required Disclosure**

- Issuers must file audited financial statements with the SEC annually.
- The SEC may impose other requirements deemed necessary for investor protection, including requiring an offering disclosure statement and periodic reports to be filed with the SEC and distributed to investors.

## **Manner of Offering**

- Securities may be offered and sold publicly.
- The issuer may test the waters to gauge interest prior to filing any offering statement.



## **Transferability**

Securities are not restricted, meaning there would be no holding period or restrictions on resales.

## **Liability**

A purchaser could bring an action against an issuer for rescission under Section 12(a)(2) of the Securities Act, in the event that there are material misstatements or omissions in connection with the offering (liability normally reserved for public offerings).

## **Blue Sky Status**

The securities are covered securities, exempting them from state blue sky registration requirements, if the securities are either:

- Offered or sold on a national securities exchange.
- Offered or sold by broker-dealers only to qualified purchasers (to be defined by the SEC).

### **Other Conditions**

The SEC has broad authority to impose additional conditions necessary for investor protection.

### **Effective Dates**

There is no deadline for SEC rulemaking.

## **Practical Considerations – Regulation A+**

Understanding the advantages of Regulation A+ compared to an EGC public offering or revised Rule 506 offering will become a bit more nuanced after factoring in the availability of scaled disclosures, relaxed communications rules and the availability of general solicitation.

An exempt offering, including a Regulation D offering, remains subject to several limitations that may not be appealing and a registered offering may still be too time consuming and costly. Regulation A+ may provide an offering format that is similar to, but possibly more efficient than, a registered offering. It might be especially appealing for an issuer to consider this type of offering as a precursor to an IPO.

While there are many similarities between an offering circular and a prospectus, the preparation of an offering circular is generally simpler and cheaper to prepare. The costs associated with external advisors, such as counsel and auditors, will be lower in connection with a Regulation A+ offering. Since timing is often the most important determinant of success for an offering, Regulation A+ may offer a distinct advantage.

In contrast to Rules 505 and 506 of Regulation D and Section 4(2) of the Securities Act, Regulation A+ does not limit the number of offerees or investors that can participate in the offering. It also does not impose any requirement that offerees be accredited investors.

In addition, an issuer and underwriter may have greater flexibility in structuring a Regulation A+ offering. The securities will be freely tradable in the secondary market (assuming that there is a secondary market) after the offering with no holding period or resale restrictions. This may be important to certain institutional investors that are subject to limitations on investments in restricted securities.

Further, in connection with a Regulation A+ offering, an issuer may test the waters to gauge investor interest. An issuer also may consider conducting a Regulation D or Regulation S offering after it has completed a Regulation A+ offering.

# **Exchange Act Thresholds**

### **Issuer Is Not a Bank or Bank Holding Company**

Becomes subject to Exchange Act reporting 120 days after the last day of the fiscal year ended in which the issuer had both:

- Total assets over \$10 million.
- A class of equity securities (other than exempted securities) held of record by either:
  - 2,000 persons; or
- 500 persons that are not accredited investors.

### **Issuer Is a Bank or Bank Holding Company**

Becomes subject to Exchange Act reporting 120 days after the last day of the fiscal year ended in which the issuer had both:

- Total assets over \$10 million.
- A class of equity securities (other than exempted securities) held of record by 2,000 persons.

The issuer will no longer be subject to Exchange Act reporting if the number of holders dips below 1,200 persons.

### **Definition of Held of Record**

For these purposes, held of record excludes securities:

- Held by persons who received them under an employee compensation plan in transactions exempt from Securities Act registration. The SEC must adopt a safe harbor to qualify for this exclusion.
- Securities issued under the crowdfunding exemption.



## **SEC Enforcement Authority**

The SEC is required, within 120 days of enactment, to report to Congress on its assessment regarding additional enforcement tools that may be needed for it to enforce against vehicles used to evade the held of record definition.

## **Effective Dates**

- The threshold for registration for non-banks is effective immediately.
- The thresholds for registration and deregistration for banks and bank holding companies are effective immediately.
- The SEC must adopt regulations under the provisions within one year of enactment.
- Banks and bank holding companies (especially community banks) that have engaged in repurchases to avoid crossing the Exchange Act threshold may want to consider whether to suspend or defer repurchase programs.