

The JOBS Act

For several months now, we have been reporting on various legislative proposals that would ease the regulatory burdens on smaller companies and facilitate capital formation.¹ These proposals were brought together under the Jumpstart Our Business Startups (JOBS) Act (H.R. 3606). The JOBS Act was passed by the U.S. House of Representatives on March 8, 2012, and by the Senate, with an amendment related to crowdfunding, on March 22, 2012. Once the House and Senate reach agreement on a final version of the JOBS Act legislation, it is expected to be enacted by President Obama.

Business leaders and commentators have been observing for some time that the regulatory requirements to be met in order to finance companies in the United States have become overly burdensome and discourage entrepreneurship. These observations had tended to fall on deaf Congressional ears. However, in the aftermath of the financial crisis, with national attention shifting to job creation, and the backlash against over-regulation brought about by the adoption of the Dodd-Frank Act, Congress is now listening. As we discuss below, the JOBS Act includes a number of measures (summarized in our chart at the end of this alert). For example, the legislation creates a transitional “on-ramp” for emerging growth companies to encourage them to pursue IPOs by phasing in compliance measures over time following their IPOs. The legislation also includes a measure that amends the Securities Act of 1933, as amended (the “Securities Act”), to permit companies to conduct offerings to raise up to \$50 million through a “mini-registration” process similar to Regulation A. Regulation A has not been used much in recent years because of the low threshold (currently \$5 million) but many smaller companies would find Regulation A-type offerings a helpful capital-raising alternative. The legislation also modifies the triggers for SEC reporting obligations. Currently, Section 12(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) mandates SEC reporting (even in the absence of a company having conducted a public offering) once a company has 500 or more shareholders of record and the company has total assets in excess of \$10 million. With more companies choosing to stay “private” longer and defer IPOs, this threshold, which was adopted in the 1960s, often constrains their activities. The legislation also modifies the prohibition against “general solicitation and general advertising” in connection with private placements, and provides an exemption under the Securities Act for “crowdfunding” offerings. Together, these measures hold the prospect of making a difference for emerging companies in the United States.

¹ For a more detailed discussion on a number of the specific legislative proposals, please see our prior client alerts on the IPO “on-ramp” at <http://www.mofo.com/files/Uploads/Images/111220-IPO-On-Ramp.pdf>; on Regulation A, at <http://www.mofo.com/files/Uploads/Images/111104-Reg-A-Small-Company.pdf>, <http://www.mofo.com/files/Uploads/Images/110624-HSFC-Approves-Small-Company.pdf>, and <http://www.mofo.com/files/Uploads/Images/110330-Small-Company-Capital-Formation-Act-2011.pdf>; on the Exchange Act threshold at <http://www.mofo.com/files/Uploads/Images/110621-Legislative-Action-on-Exchange-Act-Registration-Thresholds.pdf>; and on the legislative proposals generally, at <http://www.mofo.com/files/Uploads/Images/111107-Capital-Formation.pdf>, and <http://www.mofo.com/files/Uploads/Images/111013-Small-Business-Capital.pdf>.

On-Ramp for Emerging Growth Companies

On-Ramp Background

In March 2011, the U.S. Treasury Department convened the Access to Capital Conference to “gather insights from capital markets participants and solicit recommendations for how to restore access to capital for emerging companies—especially public capital through the IPO market.”² At this conference, a group of private sector professionals formed the IPO Task Force (the “Task Force”) to examine the challenges that emerging growth companies face in pursuing IPOs, and to provide recommendations for restoring effective access to the public markets for emerging growth companies.³ The Task Force published a report in October 2011, in which it noted that, after achieving a one-year high of 791 IPOs in 1996, the U.S. IPO market severely declined from 2001-2008, averaging only 157 IPOs per year during that period, with a low of 45 in 2008, with IPOs by smaller companies showing the steepest declines.⁴ The Task Force’s report presents a thoughtful analysis of the causes of this decline, pointing to a series of regulatory and market structure changes that have had the effect of driving up costs for smaller companies considering an IPO. The report made four principal recommendations to the Treasury Department: providing an “on-ramp” (or phasing in of disclosure requirements) for smaller companies that complete IPOs; improving the availability and flow of information for investors before and after an IPO; lowering the capital gains tax rate for investors who purchase shares in an IPO and hold these shares for a minimum of two years; and educating issuers about how to succeed in the new capital markets environment. Many of these recommendations have been incorporated into the JOBS Act legislation.

Emerging Growth Company Status

Title I of the JOBS Act, titled “Reopening American Capital Markets to Emerging Growth Companies,” establishes a new category of issuer, an “emerging growth company,” for which certain disclosure and other requirements will be phased in over time following the issuer’s IPO.

The Act amends the Securities Act and the Exchange Act, to add a definition of an “emerging growth company.” An emerging growth company is defined as: an issuer with total gross revenues of less than \$1 billion (subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year. A company remains an “emerging growth company” until the earliest of: (A) the last day of the fiscal year during which the issuer has total annual gross revenues in excess of a \$1 billion (subject to inflationary indexing); (B) the last day of the issuer’s fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act; (C) the date on which such issuer has, during the prior three-year period, issued more than \$1 billion in non-convertible debt; or (D) the date on which the issuer is

² See the IPO Task Force Report.

³ See *id.*

⁴ For more on the IPO Task Force Report, see our alert at <http://www.mofo.com/files/Uploads/Images/111220-IPO-On-Ramp.pdf>.

deemed a “large accelerated filer.”⁵ An issuer will not be able to qualify as an emerging growth company if it first sold its common stock in an IPO prior to December 8, 2011.

Emerging Growth Company IPOs and Disclosure Requirements

An emerging growth company will be required to present only two years of audited financial statements in connection with its IPO registration statement, and in any other registration statement or periodic report, an emerging growth company need not include financial information within its selected financial data or in its MD&A disclosure for periods prior to those presented in its IPO registration statement. An emerging growth company may comply with the executive compensation disclosures applicable to a smaller reporting company.⁶

An emerging growth company may confidentially submit a draft registration statement to the SEC for confidential nonpublic review prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the SEC no later than 21 days prior to the issuer’s commencement of a road show.

Emerging growth companies may engage in oral or written communications with qualified institutional buyers, or QIBs, and institutional accredited investors (as defined in Rule 501 of the Securities Act) in order to gauge their interest in a proposed IPO either prior to or following the first filing of the IPO registration statement.

An emerging growth company may forego reliance on any exemption available to it. However, if it chooses to comply with financial reporting requirements applicable to non-emerging growth companies, the emerging growth company must comply with all such standards and cannot selectively opt in or opt out of requirements. Any election must be made at the time the emerging growth company files its first registration statement or Exchange Act report.

Research Reports

The JOBS Act permits a broker-dealer to publish or distribute a research report about an emerging growth company that proposes to register or is in registration, and the research report will not be deemed an “offer” under the Securities Act even if the broker-dealer will participate or is participating in the offering. The Act also prohibits any SRO and the SEC from adopting any rule or regulation that would restrict a broker-dealer from participating in certain meetings relating to emerging growth companies. Post-offering, no SRO or the SEC may adopt any rule or regulation prohibiting a broker-dealer from publishing or distributing a research report or making a public appearance with respect to the securities of an emerging growth

⁵ A “large accelerated filer” is an issuer that meets the following requirements at the end of its fiscal year: the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer’s most recently completed second fiscal quarter; the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and the issuer is not eligible to use the requirements for smaller reporting companies in Part 229 of the Exchange Act for its annual and quarterly reports.

⁶ A “smaller reporting company” is generally defined for the purposes of initial testing as an issuer that has a public float of less than \$75 million or, in the case of an issuer that has no public float (e.g., an IPO registrant), has annual revenues of less than \$50 million.

company. This does away with the traditional post-IPO “quiet period” for emerging growth companies. These changes do not affect current rules and regulations relating to research analyst conflicts of interest.

Phase-in of Other Requirements

The JOBS Act phases in a series of other requirements for emerging growth companies. For example, an emerging growth company will not be subject to certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, including (1) the say-on-pay vote requirement;⁷ (2) the advisory vote on golden parachute payments requirement;⁸ (3) the requirement to disclose the relationship between executive compensation and the financial performance of the company;⁹ and (4) the CEO pay-ratio disclosure requirement.¹⁰ An issuer that was an emerging growth company shall be required to comply with the say-on-pay requirement as follows: (1) in the case of an issuer that was an emerging growth company for less than two years, by the end of the three-year period following its IPO, and (2) for any other issuer, within one year of having lost its emerging growth company status.

An emerging growth company will not be required to comply with any new or revised financial accounting standard until the date that such accounting standard becomes broadly applicable to private companies. Moreover, an emerging growth company would not be subject to any rules requiring mandatory audit firm rotation or a supplement to the auditor’s report that would provide additional information regarding the audit of the company’s financial statements.¹¹

An emerging growth company will not be subject to the requirement for an auditor attestation of internal controls pursuant to Section 404(b) of the Sarbanes-Oxley Act; however, it will be subject to the requirement that management establish, maintain, and assess internal control over financial reporting. Also, the CEO and CFO of an emerging growth company will be required to provide Sarbanes-Oxley-compliant certifications. An emerging growth company will be subject to a transition period for any required PCAOB mandatory audit firm rotation and any supplemental audit report information requirement, unless the SEC determines that such requirement is necessary and appropriate for investor protection.

Required Studies

The JOBS Act requires that the SEC conduct two related studies. Within 90 days of enactment of the Act, the SEC must present to Congress the findings of a study that examines the impact of decimalization on IPOs and the impact of this change on liquidity for small- and mid-cap securities. If the SEC determines that securities of emerging growth companies should be quoted or traded using a minimum increment higher than \$0.01, the SEC may, by rule, not

⁷ Section 14A(a) of the Exchange Act.

⁸ Section 14A(b) of the Exchange Act.

⁹ Section 14(i) of the Exchange Act. The SEC has not yet adopted rules requiring this disclosure.

¹⁰ Section 953(b)(1) of the Dodd-Frank Act. The SEC has not yet adopted rules requiring this disclosure.

¹¹ While the PCAOB has announced its consideration of these potential auditing rules, no such rules have been adopted at this time.

later than 180 days following enactment of the Act, designate a higher minimum increment between \$0.01 and \$0.10. Within 180 days of enactment, the SEC is required to present to Congress its findings and recommendations following a review of Regulation S-K that is intended to analyze current registration requirements and determine whether these requirements can be updated, modified or simplified in order to reduce costs and other burdens on emerging growth companies.

Effective Dates

The provisions of this title are self-effectuating.

Practical Considerations

Issuers: These changes raise a number of considerations for issuers. An issuer that completed its IPO after December 8, 2011 is eligible to be considered an emerging growth company. This raises the possibility that an issuer that completed a registration statement on Form S-1 (or F-1) and included in that registration statement all of the information that was required at that time presumably may elect to furnish, at least in respect of certain items like compensation disclosure, less information in its future SEC filings. It is not clear whether an issuer that already completed its IPO can now furnish financial information for the shorter two-year period. However, it seems that a newly public company could elect emerging growth company status and rely on the exemptions available from Section 404(b) of the Sarbanes-Oxley Act, and from say-on-pay and other similar proxy issues. For an issuer that is contemplating an IPO, the ability to rely on scaled disclosure and on these other governance and proxy exemptions are likely to be appealing. Depending on the issuer's business and financial condition, it may be the case that potential underwriters may encourage the issuer to furnish more information than would strictly be required, and an issuer may opt in and provide on a voluntary basis the additional disclosures. Over time, once an issuer has completed its IPO, and has become a more seasoned issuer, we would anticipate that the issuer may elect to opt into non-emerging growth company disclosures. We will have to wait to see how market practice evolves in relation to scaled disclosures.

The ability to "test the waters" presents a number of interesting possibilities. In recent years, we have seen that the IPO window opens and closes, and, depending on changes in market conditions, the IPO process may become quite extended. In fact, many companies that have filed for IPOs have been in registration for over nine months, and some for longer than that. It is easy to see that during the long road leading up to an IPO, an issuer may need to conduct a private placement in order to raise capital to permit the issuer to continue to carry out its business plans and to cover the expenses associated with the IPO. Over time, the SEC has provided additional interpretive guidance and Staff Compliance and Disclosure Interpretations that have provided greater certainty for issuers that must complete a private placement to institutional investors while they are pursuing an IPO. The ability to "test the waters" completes this picture. We would expect that the issuer will keep the information included in any test the waters materials consistent with the information that the issuer provides in its

registration statement. Any financial intermediary involved in the IPO and assisting the issuer in its communications with institutional investors will likely require that the issuer make certain representations and warranties with respect to any test the waters information.

Placement agents/underwriters: Financial intermediaries will want to think carefully about their advice to prospective IPO issuers concerning the type of information that potential investors would expect to see in relation to the issuer's business and financial results. If the issuer has close competitors that are already reporting companies, for competitive reasons, an issuer may find that it may have to opt in and provide more robust disclosures. Also, depending on the trends that are reflected in the issuer's business over a period longer than the two-year period, it may be appropriate or necessary to include a discussion about the issuer's business over that longer period. We anticipate that these decisions will require discussion and analysis, and will be highly dependent on the particular facts and circumstances for the issuer and its market. In any event, we would expect that underwriters and their counsel will need to review their various forms of underwriting agreements and related documents to address many of the changes made by these regulations. Underwriters and their counsel also may want to consider including representations and warranties that address any test the waters materials, just as most underwriting agreements now address roadshow materials.

From the research perspective, the compliance groups of investment banks will have to review and update their policies and procedures and their chaperoning guidelines. In the past, SIFMA has taken an active role in providing guidance on suggested best practices for chaperoning the communications involving research analysts. Given the need to address a number of practices, as well as, in certain cases, various technology issues, it may take some time for best practices to develop in this area. It is also not clear whether investment banks will be incented to provide research in connection with emerging growth companies, particularly at the time of the IPO. Research coverage may depend on the sophistication of the particular emerging growth company and on the market sector. One might reasonably surmise that certain market participants may be reluctant to provide research on earlier stage companies until the disclosures and financial statements and accounting policies for those companies have been fully vetted through the course of the SEC's review process.

Regulation D

Background

Issuers of all sizes and levels of sophistication rely on exempt offerings as part of their capital-raising efforts. Issuers often rely on the private placement exemption, and in particular on Regulation D, to raise capital. Regulation D was intended to facilitate capital formation by providing issuers with a safe harbor from the Securities Act registration requirements. Because Regulation D provides a non-exclusive safe harbor from registration, an issuer that fails to satisfy the objective criteria of Regulation D may still be in a position to rely on the broader Section 4(2) private placement exemption. Over time, issuers have come to place great reliance on Rule 506 of Regulation D, which permits issuers to sell their securities in a private placement to an unlimited number of accredited investors, provided that issuers comply with the general requirements of Regulation D. Rule 502(c) of Regulation D prohibits the issuer or any person acting on its behalf to offer or sell securities by any form of general solicitation or general advertising, including, but not limited to: (1) any advertisement, article, or other published or broadcast communication; or (2) any seminar or meeting whose attendees have been invited by general solicitation or advertising. This prohibition against general solicitation has been criticized because there is often confusion regarding whether a particular communication constitutes a “general solicitation.” The ban also has become subjective and complex given the prevalence of Internet communications and the use of social media. Many have noted that the ban on general solicitation in private offerings has resulted in an excessive concern about offerees that may never actually purchase securities, rather than on protection of the actual investors in the offering.

Easing the Prohibition Against General Solicitation

Title II of the JOBS Act, titled “Access to Capital for Job Creators,” requires that the SEC undertake rulemaking to revise the prohibition against general solicitation. Specifically, within 90 days following enactment of the Act, the SEC must revise Rule 506 to make the prohibition against general solicitation or general advertising contained in Rule 502 inapplicable in the context of Rule 506 offerings, provided that all purchasers in the offering are accredited investors. Issuers must take “reasonable steps” to verify that investors are accredited investors. These steps will be determined by the SEC. Also within the same time period, the SEC must revise Rule 144A(d)(1) to permit the use of general solicitation or general advertising. Conforming changes will be required to ensure that any offering made pursuant to Rule 506 that uses general advertising or general solicitation will not be deemed a “public offering.”

Matching Services

The Act also makes clear that persons who maintain certain online or other platforms to conduct Rule 506 offerings that will use general advertising or general solicitation will not, by virtue of this activity, be required to register as a broker or a dealer pursuant to Section 15 of the Exchange Act, provided that certain specified conditions are satisfied. For example, in order not to be subject to registration as a broker-dealer, these matching services or platforms must not receive transaction-based compensation. The platform also cannot take possession of customer funds or securities. The conditions specified in this provision are generally consistent with the guidance that the Staff of the SEC has provided in various of its no-action letters relating to matching and other online platforms, and help provide greater certainty for many of these services.¹²

Effective Dates

Certain of the provisions of this title are not self-effectuating, as indicated above.

Practical Considerations

The notion of “deregulating” offers is not a new one; however, in the past, when the SEC has considered deregulating offers, it had not added the concept of imposing an affirmative duty on the issuer to verify the status of purchasers. Currently, placement agents and issuers often rely on self-certification of accredited investor status. Many online platforms also rely on self-certification. Once a transaction moves forward, the issuer generally obtains detailed representations and warranties from each purchaser regarding its accredited investor status. Presumably, obtaining these detailed representations and warranties should be sufficient to discharge the issuer’s duty; however, without further SEC guidance it is not clear whether obtaining these representations is sufficient. Once the SEC guidance becomes available, placement agents and issuers will need to review their practices in connection with Rule 506 private placements and likely revise their documentation. Separately, in the event that an issuer failed to be able avail itself of the Regulation D safe harbor, it could always rely on the Section 4(2) exemption, and for secondary transfers that generally met the conditions for a “private placement,” participants rely on Section 4 1-1/2. In the context of Section 4(2), a “pre-existing” substantive relationship has always been an important factor in assessing whether the transaction was a private placement. By deregulating offers, one wonders whether the relative weight given to the presence or absence of a pre-existing relationship will shift in connection with this type of analysis over time.

The legislation would provide entities serving as matching services with significantly more certainty about the permissible business model that may be used to effectuate these services.

¹² See, for example, *Oil-N-Gas Inc.* (avail. June 8, 2000) and *Progressive Technology* (avail. Oct. 11, 2000).

This additional certainty could cause more organizations to enter this area and set up matching services, which could increase the potential sources of capital for companies.

Crowdfunding

Background

“Crowdfunding” or “crowdsourced funding” is a new outgrowth of social media that provides an emerging source of funding for a variety of ventures. Crowdfunding works based on the ability to pool money from individuals who have a common interest and are willing to provide small contributions toward the venture. Crowdfunding can be used to accomplish a variety of goals (e.g., raising money for a charity or other causes of interest to the participants), but when the goal is commercial in nature and there is an opportunity for crowdfunding participants to share in the venture’s profits, federal and state securities laws will likely apply. Absent an exemption from SEC registration (or actually registering the offering with the SEC), crowdfunding efforts that involve sales of securities are in all likelihood illegal. In addition to SEC requirements, those seeking capital through crowdfunding have had to be cognizant of state securities laws, which include varying requirements and exemptions. By crowdfunding through the Internet, a person or venture can be exposed to potential liability at the federal level, in all fifty states, and potentially in foreign jurisdictions. Existing exemptions present some problems for persons seeking to raise capital through crowdfunding. For example, Regulation A (which we discuss below) requires a filing with the SEC and disclosure in the form of an offering circular, which would make conducting a crowdfunding offering difficult. The Regulation D exemptions generally would prove too cumbersome, and a private offering approach or the intrastate offering exemption is inconsistent with widespread use of the Internet. Section 25102(n) of the California Corporations Code might provide a possible exemption for some California issuers, given that it permits general announcement of an offering without qualification in California (with a corresponding exemption from registration at the federal level provided by SEC Rule 1001, the California limited general solicitation exemption). Crowdfunding advocates have called on the SEC to consider implementing a new exemption from registration under the federal securities laws for crowdfunding.¹³

When H.R. 3606 was adopted in the House of Representatives, the bill included Title III, titled “Entrepreneur Access to Capital.” This Title provided for an exemption from registration under the Securities Act for offerings of up to \$1 million, or \$2 million in certain cases when investors were provided with audited financial statements, provided that individual investments were limited to \$10,000 or 10 percent of the investor’s annual income. The exemption was conditioned on issuers and intermediaries meeting a number of specific requirements, including notice to the SEC about the offering and the parties involved with the offering, which would be shared with state regulatory authorities. The measure would have permitted an unlimited number of investors in the crowdfunding offering, and would have preempted state securities regulation of these types of offerings (except that states would be permitted to address fraudulent offerings through their existing enforcement mechanisms).

¹³ For more on crowdfunding, see also our prior alert at <http://www.mofo.com/files/Uploads/Images/110810-Socially-Aware.pdf>.

The House measure also contemplated that the issuer must state a target offering amount and a third-party custodian would withhold the proceeds of the offering until the issuer has raised 60 percent of the target offering amount. The provision also contemplated certain disclosures and questions for investors, and provided for an exemption from broker-dealer registration for intermediaries involved in an exempt crowdfunding offering.

After it was adopted, the House crowdfunding measure drew a significant amount of criticism, with much of that criticism focused a perceived lack of investor protections. In a letter to the Senate leadership, SEC Chairman Mary Schapiro noted that “an important safeguard that could be considered to better protect investors in crowdfunding offerings would be to provide for oversight of industry professionals that intermediate and facilitate these offerings,” and also noted that additional information about companies seeking to raise capital through crowdfunding offerings would benefit investors.¹⁴

In the Senate, an amendment to H.R. 3606 that was submitted by Senator Merkley and approved by the Senate would provide additional investor protections in crowdfunding offerings. Title III, titled “Crowdfunding,” would amend Section 4 of the Securities Act to add a new paragraph (6) that provides a crowdfunding exemption from registration under the Securities Act. The conditions of the exemption are that:

- 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, is not more than \$1,000,000;
- 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, does not exceed:
 - the greater of \$2,000 or 5 percent 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; or
 - 10 percent of the annual income or net worth of an 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;
- The transaction is conducted through a broker or funding portal that complies with the requirements of the exemption; and
- The issuer complies with the requirements of the exemption.

Among the requirements for exempt crowdfunding offerings would be that an intermediary:

¹⁴ Letter from Mary Schapiro to Senator Tim Johnson and Senator Richard Shelby, March 13, 2012.

- Registers with the SEC as a broker or a “funding portal,” as such term is defined in the amendment;
- Registers with any applicable self-regulatory authority;
- Provides disclosures to investors, as well as questionnaires, regarding the level of risk involved with the offerings;
- Takes measures, including obtaining background checks and other actions that the SEC can specify, of officers, directors, and significant shareholders;
- Ensures that all offering proceeds are only provided to issuers when the amount equals or exceeds the target offering amount, and allows for cancellation of commitments to purchase in the offering;
- Ensures that no investor in a 12-month period has invested in excess of the limit described above in all issuers conducting exempt crowdfunding offerings;
- Takes steps to protect privacy of information;
- Does not compensate promoters, finders, or lead generators for providing personal identifying information of personal investors;
- Prohibits insiders from having any financial interest in an issuer using that intermediary’s services; and
- Meets any other requirements that the SEC may prescribe.

Issuers also must meet specific conditions in order to rely on the exemption, including that an issuer file with the SEC and provide to investors and intermediaries information about the issuer (including financial statements, which would be reviewed or audited depending on the size of the target offering amount), its officers, directors, and greater than 20 percent shareholders, and risks relating to the issuer and the offering, as well specific offering information such as the use of proceeds for the offering, the target amount for the offering, the deadline to reach the target offering amount, and regular updates regarding progress in reaching the target.

The provision would prohibit issuers from advertising the terms of the exempt offering, other than to provide notices directing investors to the funding portal or broker, and would require disclosure of amounts paid to compensate solicitors promoting the offering through the channels of the broker or funding portal.

Issuers relying on the exemption would need to file with the SEC and provide to investors, no less than annually, reports of the results of operations and financial statements of the issuers as

the SEC may determine is appropriate. The SEC may also impose any other requirements that it determines appropriate.

A purchaser in a crowdfunding offering could bring an action against an issuer for rescission in accordance with Section 12(b) and Section 13 of the Securities Act, as if liability were created under Section 12(a)(2) of the Securities Act, in the event that there are material misstatements or omissions in connection with the offering.

Securities sold on an exempt basis under this provision would not be transferrable by the purchaser for a one-year period beginning on the date of purchase, except in certain limited circumstances. The crowdfunding exemption would only be available for domestic issuers that are not reporting companies under the Exchange Act and that are not investment companies, or as the SEC otherwise determines is appropriate. Bad actor disqualification provisions similar to those required under Regulation A would also be required for exempt crowdfunding offerings.

Funding portals would not be subject to registration as a broker-dealer, but would be subject to an alternative regulatory regime, subject to SEC and SRO authority, to be determined by rulemaking at the SEC and SRO. A funding portal is defined as an intermediary for exempt crowdfunding offerings that does not: (1) offer investment advice or recommendations; (2) solicit purchases, sales, or offers to buy securities offered or displayed on its website or portal; (3) compensate employees, agents, or other persons for such solicitation or based on the sale securities displayed or referenced on its website or portal; (4) hold, manage, possess, or otherwise handle investor funds or securities; or (5) engage in other activities as the SEC may determine by rulemaking.

The provision would preempt state securities laws by making exempt crowdfunding securities “covered securities,” however, some state enforcement authority and notice filing requirements would be retained. State regulation of funding portals would also be preempted, subject to limited enforcement and examination authority.

The SEC must issue rules to carry out these measures not later than 270 days following enactment. The dollar thresholds applicable under the exemption are subject to adjustment by the SEC at least once every five years.

Effective Dates

The provisions of this title are not self-effectuating, as indicated above.

Practical Considerations:

Issuers: For those issuers who are seeking to raise small amounts of capital from a broad group of investors, the crowdfunding exemption may ultimately provide a viable alternative to current offering exemptions, given the potential that raising capital through crowdfunding over the Internet may be less costly and may provide more sources of 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 that is contemplated by the legislation. Moreover, it is not yet known how much intermediaries such as brokers and funding portals will charge issuers once SEC and SRO regulations apply to their ongoing crowdfunding operations.

Intermediaries: Brokers and potential funding portals will need to consider how their processes can be revamped to comply with regulations applicable to exempt crowdfunding offerings, in particular given the level of information that will need to be provided in connection with crowdfunding offerings and the critical role that intermediaries will play in terms of “self-regulating” these offerings.

Regulation A

Background

Section 3(b) of the Securities Act authorizes the SEC to adopt rules and regulations exempting securities from registration, if the SEC finds that registration “is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering....” One of the exemptions that the SEC adopted pursuant to Section 3(b) of the Securities Act is Regulation A. Regulation A was enacted to promote capital formation for small businesses. One of the SEC’s primary purposes in adopting Regulation A was to provide a simple and relatively inexpensive process by which small businesses could raise limited amounts of capital, while ensuring investors had access to current information. Pursuant to Regulation A, issuers may 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 also provides controlling stockholders, as well as non-affiliates, an opportunity to sell their unregistered securities.

A Regulation A offering is not a “private placement”; in fact, a Regulation A offering is often referred to as a “mini-registration.” Regulation A incorporates a number of conditions that in certain respects resemble the registration requirements of Section 5 of the Securities Act. For example, in order for an issuer to avail itself of the Regulation A exemption, it must: prepare and file with the SEC an offering statement for the SEC’s review and qualification; deliver an offering circular to prospective investors; and file periodic reports of sales after completion of the offering. The availability of Regulation A is conditioned upon meeting certain substantive and procedural requirements. As with any exemption under the Securities Act, the person claiming the benefit of Regulation A has the burden of proving compliance with its requirements. The Regulation A exemption is generally available for any United States or Canadian entity that (i) has its principal place of business in the United States or Canada and (ii) is not subject to reporting obligations under Section 13 or Section 15(d) of the Exchange Act immediately before the offering. Securities sold in a Regulation A offering are not “restricted securities.” However, securities sold in a Regulation A offering are not “covered securities” for blue sky purposes. The need to comply with state securities law requirements, together with the current low-dollar threshold, has made Regulation A an unappealing capital-raising

alternative, especially in light of the availability of Rule 506 under Regulation D. Concern about the availability of capital and a desire to facilitate capital formation by smaller, emerging companies led to calls in recent years to increase the Regulation A offering threshold.¹⁵

Amendments to Regulation A

Title IV of the JOBS Act, “Small Company Capital Formation,” amends Section 3(b) of the Securities Act, substantially increasing the dollar threshold for a Regulation A-style offering. Pursuant to the Section 3(b)(2), an issuer will be able to offer and sell up to \$50 million in securities within a 12-month period in reliance on the exemption. The issuer may offer equity securities, debt securities, and debt securities convertible or exchangeable for equity interests, including any guarantees of such securities. The securities sold pursuant to the exemption will be offered and sold publicly (without restrictions on the use of general solicitation or general advertising) and will not be “restricted securities.” The issuer may “test the waters” or solicit interest in the offering prior to filing any offering statement with the SEC, subject to any additional conditions or requirements that may be imposed by the SEC. The securities will be considered “covered securities” for NSMIA purposes (and not subject to state securities review) if: the securities are offered and sold on a national securities exchange, or the securities are offered or sold to a “qualified purchaser” as defined under the Act. The civil liability provision in Section 12(a)(2) shall apply to any person offering or selling such securities.

The SEC will require that the issuer file audited financial statements with the SEC annually. The SEC may impose other terms, conditions or requirements deemed necessary for investor protection, including a requirement that the issuer prepare and file electronically with the SEC and distribute to prospective investors an offering statement and any related documents, including a description of the issuer’s business and financial condition, its corporate governance principles, the intended uses of proceeds, and other appropriate matters. The SEC also may require an issuer that relies on the exemption to make available to investors and file with the SEC periodic disclosures. The bad actor disqualification provisions applicable for the exemption shall be substantially similar to the disqualification provisions contained in the regulations adopted pursuant to Section 926 of the Dodd-Frank Act (which looks to the bad actor disqualification provisions in current Regulation A).

We provide below a chart comparing the current Regulation A requirements and the new Section 3(b)(2) exemption.

¹⁵ For more on Regulation A, see our prior client alerts at <http://www.mofo.com/files/Uploads/Images/111104-Reg-A-Small-Company.pdf>, <http://www.mofo.com/files/Uploads/Images/110624-HSFC-Approves-Small-Company.pdf>, and <http://www.mofo.com/files/Uploads/Images/110330-Small-Company-Capital-Formation-Act-2011.pdf>.

	Regulation A Exempt Public Offering	Section 3(b)(2) Exempt Public Offering
Offering Limit	Up to \$5 million within the prior 12-month period.	Up to \$50 million within the prior 12-month period.
SEC Filing Requirements	Must file with the SEC a Form 1-A, which is reviewed by the SEC Staff.	Must file with the SEC and distribute to investors an offering statement, which will likely be reviewed by the SEC Staff.
Blue Sky Requirements	Blue sky law compliance is required, without in many cases the possibility for a more streamlined “registration by coordination” process.	Blue sky law compliance is required, except when the securities are offered and sold on a national securities exchange, or the securities are offered or sold to a qualified purchaser.
Limitations on Investors	No limits on investors, except to the extent imposed under state laws.	No limits on investors, except to the extent imposed under state laws.
Restrictions on Resale of Securities	No restrictions on the resale of securities, except to the extent that the securities are held by affiliates.	No restrictions on the resale of securities, except to the extent that the securities are held by affiliates.
Offering Communications	An issuer may “test the waters” to determine if there is interest in a proposed offering prior to filing the Form 1-A. Sales literature may be used before the filing of the Form 1-A, after filing, and following qualification.	An issuer may “test the waters” to determine if there is interest in a proposed offering prior to filing an offering statement.
Financial Statement Requirements	A current balance sheet, as well as income statements for a period of two years, as well as any interim period. Financial statements must be prepared in accordance with GAAP but do not have to conform to Regulation S-X and, in most cases, do not have to be audited.	Audited financial statements must be included in the offering statement, as determined by the SEC.
Disqualification Provisions	Felons and bad actors disqualified from the offering in accordance with Securities Act Rule 262.	Felons and bad actors disqualified from the offering in accordance with rules adopted under Section 926 of the Dodd-Frank Act.
Periodic Reporting	No reporting required after the offering, other than to disclose the use of proceeds.	Audited financial statement must be filed and provided to investors annually, and the SEC may require other periodic disclosures.

Periodic Review of Offering Threshold

Not later than two years after enactment and every two years thereafter, the SEC shall review the offering threshold and report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on its reasons for not increasing the dollar amount.

Required Study

The Comptroller General must conduct a study on the impact of blue sky laws on offerings made under Regulation A. Within three months of enactment of the Act, the Comptroller General must deliver the report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate.

Effective Dates

Certain of the provisions of this title are not self-effectuating, as indicated above.

Practical Considerations

Many clients have asked us why an issuer might choose to rely on Regulation A if the issuer could rely on Rule 506 of Regulation D. It's a fair question. Now perhaps, the answer will become a bit more nuanced as we factor in the availability of scaled disclosures and "test the waters" communications for emerging growth companies, as well as the availability of general solicitation and general advertising for Rule 506 offerings involving only accredited investor purchasers.

An exempt offering, including, for example, a Regulation D offering, may still be subject to several limitations that may not be appealing to an issuer, and a registered public offering may still be too time-consuming and costly. Using the new Section 3(b)(2) provisions to offer securities can provide an issuer with an offering format that is similar to a registered offering with certain accompanying advantages, but may be more efficient. 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. An offering statement is usually less detailed and shorter than a prospectus for a registered offering. The costs associated with external advisors, such as counsel and auditors, will be lower in connection with a Regulation A type offering. Since timing is often the most important determinant of success for an offering, a Regulation A offering may offer a distinct advantage. Regulation A does not impose any limitations on offerees. 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, nor does it impose any requirement that offerees be accredited investors. An issuer and underwriter may have greater flexibility in structuring a Regulation A type offering. Securities offered and sold pursuant to Regulation A are offered publicly and are

not “restricted securities.” The securities are freely tradeable in the secondary market (assuming that there is a secondary market) after the offering. No holding period applies to the securities purchased in this type of offering. This may be important to certain institutional investors that are subject to limitations on investments in “restricted securities.” Also, 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 offering, or a Regulation S offering, after it has completed a Regulation A type offering.

Exchange Act Registration Threshold

Background

Section 12(g) of the Exchange Act requires issuers to register a class of equity securities with the SEC if, on the last day of the issuer’s fiscal year, such class of securities is held of record by 500 or more record holders and the company has total assets of more than \$10 million.¹⁶ After a company has registered under Section 12(g), all of the reporting requirements under the Exchange Act apply; therefore, a company would need to file annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and proxy statements on Schedule 14A, and certain persons would be required to report transactions on Forms 3, 4, and 5 and Schedules 13D and 13G.¹⁷ A company can deregister a class of equity securities under Section 12(g) when such class of equity securities is held of record by less than 300 persons, or by less than 500 persons and the total assets of the issuer has not exceeded \$10 million on the last day of each of the issuer’s three most recent fiscal years.

Prior to 1964, only listed companies were required to comply with the Exchange Act registration, reporting, proxy solicitation and other requirements. Section 12(g) of the Exchange Act was added in amendments to the Exchange Act in 1964.¹⁸ The purpose of the amendments, as stated in the preamble, was “to extend disclosure requirements to the issuers of additional publicly traded securities.”¹⁹ The legislative history indicates that the purpose of adding this section was to extend the registration and disclosure requirements to issuers whose securities trade in the over-the-counter market to be comparable to the registration and disclosure requirements of listed issuers. The amendments are believed to have had the effect of increasing investor confidence in issuers whose securities trade in the over-the-counter market and allowed such companies to access the capital markets with greater ease.

In the 1980s, the SEC raised the asset threshold incrementally to \$5 million and then, in 1996, it was raised to the current level of \$10 million.²⁰ There have been no subsequent changes to the Section 12(g) registration and deregistration threshold. Consistent with Congressional

¹⁶ While Section 12(g) provides for a \$1 million threshold, Rule 12g-1 provides an exemption from the mandatory registration provisions of Section 12(g) for companies with assets of \$10 million or less.

¹⁷ Foreign private issuers are subject to less burdensome disclosure requirements. A foreign private issuer is required to file annual reports on Form 20-F, and quarterly and current reports on Form 6-K if such information is required to be made public in its home jurisdiction. A foreign private issuer is also exempt from the proxy solicitation requirements and its insiders are not required to report transactions on Forms 3, 4, and 5.

¹⁸ Securities Acts Amendments of 1964, Pub. L. 88-467; 78 Stat. 565 (referencing Section (3), which added Exchange Act Section 12(g)).

¹⁹ See *id.*

²⁰ Release No. 34-37157 (May 1, 1996).

intent, the SEC stated that the numerical thresholds that mandate registration under Section 12(g) were directed toward issuers that had active trading markets and public interest of a level sufficient to warrant mandatory disclosure to ensure the protection of investors.²¹

The securities markets have changed significantly since the enactment of the 1964 amendments to Section 12(g), and while the SEC has increased the asset thresholds, it has not made any corresponding changes to the holder of record thresholds under this section. The capital markets have evolved in ways that now offer growing private companies many more capital-raising alternatives than existed in the past. A private company may not want to pursue an IPO, or it may want to defer becoming a public company until later in its life. Over time, a private company may conduct numerous exempt offerings and find that it may begin to bump up against the current threshold. Moreover, emerging companies rely on stock-based compensation. Rule 12h-1 has provided exemptions from the provisions of Section 12(g) for various employee securities, but until 2007 did not specifically provide an exemption for options. The SEC has interpreted section 3(a)(11) and Rule 12h-1(a) to include options as a separate class of equity securities that must be registered under section 12(g) in certain instances. To provide greater certainty for private companies, in 2007,²² the SEC revised Rule 12h-1 and added an exemption from registration under section 12(g) of the Exchange Act for stock options issued by non-reporting companies that meet specified requirements. Through no-action letters, the SEC has extended similar relief from the 500 record holder threshold in the case of restricted stock units. Privately held companies may have less than 500 record holders but can still have actively traded securities on the secondary markets. In the case of public companies, the vast majority of securities are held in street name. Brokers, who typically own large positions in companies, are counted as one record holder. In contrast, in smaller private companies, shares are held directly and all holders are counted for purposes of Section 12(g). A private company that elects to postpone, or seeks to avoid, becoming a public company will not want to become subject to SEC reporting obligations inadvertently.

Threshold for Registration

Titles V and VI of the JOBS Act, respectively titled “Private Company Flexibility and Growth” and “Capital Expansion,” address these issues. The threshold is amended and bifurcated into two: a threshold applicable generally to issuers regardless of their industry, and a specific threshold applicable to banks and bank holding companies. Title V amends Section 12(g)(1)(A) of the Exchange Act and provides that an issuer will become subject to Exchange Act requirements: within 120 days after the last day of its first fiscal year ended on which the issuer has total assets in excess of \$10 million and a class of equity security (other than an exempted security) held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors.

²¹ Exchange Act Release No. 34-23407 (July 8, 1986).

²² Exchange Act Release No. 34-56887, 2007 WL 4372775 (Dec. 7, 2007).

Held of Record Definition

For these purposes, the “held of record” definition in Section 12(g)(5) is amended and shall not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from the Section 5 registration requirements. The SEC is required to implement this amendment by revising the “held of record” definition. The SEC also must adopt certain safe harbor provisions that issuers can follow to determine whether holders received securities pursuant to an employee compensation plan in exempt transactions. There is no specified time period for the SEC’s rulemaking. Securities sold in exempt crowdfunding offerings under Title III would also be excluded from the determination of record holders pursuant to rules to be adopted by the SEC within 270 days from enactment.

SEC Enforcement Authority

The SEC is required to examine its authority to enforce Rule 12g5-1 to determine if new enforcement tools are required to enforce the anti-evasion provision contained in (b)(3) of the rule and, within 120 days of the enactment of the Act, to provide recommendations to Congress.

Banks and Bank Holding Companies

Title VI adds a new Section 12(g)(1)(B) that provides that, in the case of an issuer that is a bank or a bank holding company as defined in Section 2 of the Bank Holding Company Act of 1956, the issuer will become subject to Exchange Act requirements, not later than 120 days after the last day of its first fiscal year ended after the effective date of this amended section, on which the issuer has total assets exceeding \$10 billion and a class of equity security (other than an exempted security) held of record by 2,000 or more persons. In the case of a bank or a bank holding company, the issuer will no longer be subject to reporting if the number of holders dips below 1,200 persons. The SEC must issue final regulations to implement these amendments within a year of the enactment of the Act.

Effective Dates

Certain of the provisions of this title are not self-effectuating, as indicated above.

Practical Considerations

Issuers: Non-reporting issuers will want to review their current organizational documents and related shareholders’ or investors’ rights agreements and consider whether any of these should be revised in light of the increased threshold. Overall, private companies should assess their history of securities issuances in order to be able to determine and document exempt issuances made in connection with executive compensation plans. Banks and bank holding companies, especially community banks, that have engaged in repurchases in order to avoid crossing the Exchange Act threshold may want to consider whether to suspend or defer repurchase programs.

Intermediaries: Intermediaries that facilitate transfers of private securities may, to the extent responsible for monitoring ownership limitations, want to undertake a review of their procedures.

Conclusion

Many of the provisions of the JOBS Act will require that the SEC undertake additional rulemaking. Market participants will need to remain focused on this additional rulemaking in order to assess the changes that will be required to their existing processes and documentation. The JOBS Act has been characterized in the press as principally addressing the needs of small and micro-cap companies, however, the provisions related to emerging growth companies will be applicable to a broad universe of companies, domestic and foreign, small, medium and relatively large. Companies with acute ongoing capital needs, but without ready sources of capital in today's regulatory environment, such as technology and life science companies, may realize significant benefits from a broadened menu of capital formation alternatives. The provisions related to Rule 506 offerings will be applicable to existing public companies that seek to undertake private offerings or PIPE transactions, as well as to certain funds that rely on Rule 506 offerings. Of course, the provisions related to the Exchange Act registration threshold also have broad applicability.

For those of us nostalgic for the period in which a handful of (then) upstart investment banks, like Hambrecht + Quist, Robertson Stephens and Vector Securities, regularly proved the point that high quality, emerging companies could be financed publicly, this step forward by Congress may well signal a return to a proud past of financing solid, innovative companies.

In the coming weeks, we will be hosting a number of live and webcast sessions discussing particular aspects of the JOBS Act legislation with a focus on the practical issues that emerging companies and investment banks should consider. Stay tuned.

Authors

David M. Lynn
(202) 887-1563
dlynn@mofocom

Anna T. Pinedo
(212) 468-8179
apinedo@mofocom

About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life sciences companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofocom. © 2012 Morrison & Foerster LLP. All rights reserved.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

JOBS Act—Summary Overview
 March 26, 2012

EMERGING GROWTH COMPANIES (EGCs)	
Qualifying as an EGC	EGC defined as an issuer with total gross revenues of less than \$1b
Disqualification as an EGC	EGC until the earliest of: (A) last day of the fiscal year during which issuer’s total gross revenues exceed \$1b; or (B) five years from IPO; or (C) the date on which issuer has sold more than \$1b in non-convertible debt; or (D) date on which issuer becomes a large accelerated filer (public float of \$750m)
IPOs by EGCs	<ul style="list-style-type: none"> • Confidential submission available • Must file publicly at least 21 days prior to roadshow • 2 years audited financials required (instead of 3) • May elect to rely on certain scaled disclosures available to smaller public reporting companies (such as for exec compensation) • May engage in testing the waters with QIBs and IAs

Ongoing Disclosures/Governance Requirements	<ul style="list-style-type: none"> • May opt into voluntary disclosures • Subject to phase-in for say-on-pay and say-on-golden parachute requirements • Subject to phase-in for any PCAOB mandatory rotation or modified audit report requirement • Exempt from Sec 404(b) attestation (but subject to requirement for management assessment of internal control requirement over financial reporting and to CEO/CFO certification requirement) • Not required to adopt FASB standards until broadly applicable to private companies
RESEARCH REPORTS	
Permitted communications	<ul style="list-style-type: none"> • Research report on EGC not an “offer” • Research report on EGC not subject to quiet period or lock-up period restrictions • Distribution participants may publish research before commencement of an offering, during an offering, or post offering
Conflicts, separation, disclosures	<ul style="list-style-type: none"> • Reports subject to required conflicts disclosures and certifications • Modifies separation/chaperoning requirements in connection with certain activities for EGCs
REGULATION D	
Rule 506 Offerings	General advertising/general solicitation permitted provided that the issuer verifies purchasers are all AIs
BROKER-DEALER REGISTRATION	

Platforms/Matching Services	Not required to register as broker-dealers solely as a result of participation or involvement in Rule 506 offerings that use general solicitation or general advertisement, provided that platform does not receive transaction-based compensation, handle customer funds or securities, or participate in documentation
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, is not more than \$1,000,000
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, does not exceed: <ul style="list-style-type: none"> ○ the greater of \$2,000 or 5 percent 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; or ○ 10 percent of the annual income or net worth of an 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
Manner of offering	The transaction must be conducted through a broker or “funding portal”
Information	Information filed and provided to investors regarding the issuer and offering, including financial information based on the target amount offered
Funding Portals	Funding portals will be subject to SEC and SRO regulation
Liability	Subject to Sec 12(a)(2) liability
Status of securities	Covered securities for NSMIA

Other Conditions	Issuers must file with the SEC and provide to investors, no less than annually, reports of the results of operations and financial statements of the issuers as the SEC may prescribe
REGULATION A/3(B)(2) EXEMPTION	
Eligible issuer	Non-reporting issuer with principal place of business in Canada or the United States
Offering threshold	\$50m in issuer's securities in a 12-month period; SEC required to review threshold and report on threshold to Congress
Status of securities	Covered securities for NSMIA if either: <ul style="list-style-type: none"> • Listed/traded on a securities exchange; or • Sold through a registered broker-dealer to a qualified purchaser
Liability	Subject to Sec 12(a)(2) liability
Other Conditions	The SEC is empowered to impose additional conditions, including a requirement to file annual audited financial statements
EXCHANGE ACT THRESHOLD	
Issuer not a bank or bank holding company	Becomes subject to reporting within 120 days after last day of fiscal year ended in which issuer had: <ul style="list-style-type: none"> • Total assets in excess of \$10m, and • A class of equity securities (other than exempted securities) held of record by either: (1) 2,000 persons, or (2) 500 persons not AIs

Issuer is a bank or bank holding company	Becomes subject to reporting within 120 days after last day of fiscal year ended in which issuer had: <ul style="list-style-type: none"> • Total assets in excess of \$10m, and • A class of equity securities (other than exempted securities) held of record by 2,000 persons May deregister if class of equity securities held of record by fewer than 1,200 persons
Held of record	Excludes: securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from Section 5 registration requirements and securities sold pursuant to crowdfunding exemption
REQUIRED STUDIES	
Decimalization	SEC, within 90 days of enactment; SEC also must consider within 180 days of enactment any recommendations regarding the minimum trading increments for EGCs
Regulation S-K	SEC, within 180 days of enactment, must report to Congress on its review of Regulation S-K and its recommendations concerning changes to S-K requirements for EGCs to simplify burdens
Blue Sky Laws and Regulation A	Comptroller General, within 3 months of enactment, must report to Congress on its study of the impact of blue sky laws on Regulation A offerings
Sec 12 SEC Enforcement Authority	SEC, within 120 days of enactment, must report to Congress on its assessment regarding additional enforcement tools that may be needed for it to enforce anti-evasion provision in Sec 12(b)(3)