

Presented:
Securities Regulation and Business Law

February 12-13, 2015
Dallas, Texas

Provisions of the JOBS Act Relating to Regulations A and D

Marty Dunn

David M. Lynn

Provisions of the JOBS Act Relating to Regulations A and D

Prepared by: David M. Lynn and Martin P. Dunn, Morrison & Foerster LLP

December 2014

I. The Background of the JOBS Act

The Jumpstart Our Business Startups Act (the “JOBS Act”) has resulted in significant changes to the way in which public and private offerings are conducted. This outline describes the background of the JOBS Act and the major provisions of the JOBS Act that relate to Regulation A (Rules 251-263) and Regulation D (Rules 500-508) under the Securities Act of 1933.

A. Dialogue and Regulatory Efforts Preceding the JOBS Act

A dialogue emerged in early 2011 regarding potential restrictions on access to capital and other related regulatory issues, which set the stage for a number of the key provisions of the JOBS Act. On March 22, 2011, Congressman Darrell Issa (R-CA), Chairman of the House Committee on Oversight and Government Reform, sent a letter to Mary Schapiro, then Chairman of the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”). The letter raised concerns about whether the current securities regulatory framework had a negative impact on capital formation, which led to the dearth of initial public offerings in the U.S., as well as the extent to which SEC regulations potentially limited other capital raising activities by small and emerging companies. The letter from Chairman Issa also sought specific information regarding the economic studies conducted by the SEC Staff in these areas, along with information concerning the consideration of costs and benefits in connection with SEC rulemakings. In her response dated April 6, 2011, Chairman Schapiro stated that she requested that the SEC Staff take a fresh look at the agency’s rules in order to develop ideas for the SEC about ways to reduce the regulatory burdens on small business capital formation in a manner consistent with investor protection.

B. Legislative Efforts Preceding the Jumpstart Our Business Startups Act of 2012

Various pieces of legislation were introduced in the 112th Congress to address a number of the capital raising considerations addressed in the correspondence between Chairman Issa and Chairman Schapiro, ultimately culminating in the enactment of the JOBS Act. These included bills seeking to (i) significantly raise the 499-shareholder cap under Section 12(g) of the Exchange Act for banks and for all issuers; (ii) eliminate the prohibition on general solicitation in private offerings under certain circumstances; (iii) expand the offering exemptions available for crowdfunding and for offerings by issuers under \$50 million; and (iv) ease restrictions and disclosure requirements with regard to IPOs and newly-public companies. At the same time, the SEC Staff was engaged in efforts to study potential recommendations that it could make to the Commission regarding concepts for addressing the limitations on general solicitations imposed on private offerings and ways in which the 2005 offering reforms might be applied to smaller companies.

II. Enactment of the JOBS Act

The JOBS Act, H.R. 3606, was passed by the House of Representatives on March 8, 2012. This bill reflected a combination of many of the legislative initiatives referenced above. Subsequently, on March 22, 2012, the Senate passed H.R. 3606 with an amendment to Title III (providing for the crowdfunding exemption with enhanced investor protections). On March 27, 2012, the House of Representatives accepted the Senate's amendment, and on April 5, 2012, President Obama signed the JOBS Act into law. The JOBS Act was the culmination of a year-long bipartisan effort in both the House and Senate to address concerns about capital formation and unduly burdensome SEC regulations.

A. Key Provisions of the JOBS Act

The JOBS Act affects both exempt and registered offerings, as well as the reporting requirements for certain public issuers. A centerpiece of the JOBS Act is an "IPO on-ramp" approach for a class of "emerging growth companies" (Title I), with confidential SEC Staff review of draft IPO registration statements, scaled disclosure requirements, no restrictions on "test-the-waters" communications with qualified institutional buyers (QIBs) and institutional accredited investors before and after filing a registration statement, and fewer restrictions on research (including research by participating underwriters) around the time of an offering. In addition, the JOBS Act directs the SEC to amend its rules to:

- eliminate the ban on general solicitation and general advertising in Rule 506 offerings when sales are only to accredited investors, along with comparable changes to Rule 144A (Title II);
- establish a small offering exemption for crowdfunding (Title III); and
- create a new exemption for offerings up to \$50 million (Title IV)

The JOBS Act also raises the holder-of-record threshold for mandatory registration under the Securities Exchange Act of 1934 (the "Exchange Act") (Titles V and VI).

This outline focuses on Titles II and IV, which relate directly to Regulation D and Regulation A under the Securities Act of 1933, respectively.

B. Effective Dates for the JOBS Act

Title I was retroactively effective to December 9, 2011 for qualifying issuers. The revised Exchange Act Section 12(g) thresholds specified in Titles V and VI were effective upon enactment. Title II's contemplated changes to Rule 506 of Regulation D and Securities Act Rule 144A required SEC rulemaking, which was completed on July 10, 2013. Title III required SEC rulemaking within 270 days of enactment for the establishment of a crowdfunding exemption, but the SEC did not propose rules until October 23, 2013 and has not yet adopted final rules. Title IV does not provide any rulemaking deadline for the SEC to establish an exemption for offerings up to \$50 million, but the SEC did propose rules on December 18, 2013.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Provisions of the JOBS Act Relating to Regulations A and D

Also available as part of the eCourse

[Offerings Updates: Reg. A & D Updates; How to Do a Texas Public Offering; plus Crowdfunding](#)

First appeared as part of the conference materials for the
37th Annual Conference on Securities Regulation and Business Law session
"Non-Registered Offerings: Updates on Regulation D and Regulation A"