

EMERGING GROWTH COMPANIES UNDER THE JOBS ACT: AN ANALYSIS OF THE “IPO ON-RAMP”

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Abstract

Since 2008, the United States has been faced with a “jobless recovery” which can be attributed in part to a decline in new business creation. To study the link between small companies’ access to markets and creation of jobs, the IPO Task Force was created. The IPO Task Force conducted research and set forth various findings regarding the correlation between emerging growth companies and job creation. The IPO Task Force also attributed a decline in IPO activity to the complex regulatory environment. Accepting these findings, and in response, the JOBS Act passed with surprisingly high bipartisan support.

The JOBS Act incorporated certain reduced regulatory barriers including, but not limited to, the special designation of “emerging growth company” status, reduced disclosure and accounting requirements, as well as increased access to reports, and confidential review of draft registration statements. This Article conducts further in-depth analysis as to these standards. In addition, this Article presents varying opinions as to the JOBS Act, as well as research conducted as to its effects. This Article concludes that the research presented thus far yields mixed results, but remains optimistic that the promise of a growing economy, coupled with the passage of time, will determine the effectiveness of the JOBS Act.

I. Introduction

On April 5, 2012, President Barack Obama signed into law the Jumpstart Our Business Startups Act (the “JOBS Act”).¹ The JOBS Act aims to “increase American job creation and economic growth by improving access to the public

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1. *See generally* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.) [hereinafter JOBS Act].

capital markets for emerging growth companies.”² To this end, Title I of the JOBS Act, titled “Reopening American Capital Markets to Emerging Growth Companies,” provides for optional reduced regulation for companies with less than \$1 billion in annual gross revenues (these companies are referred to as “emerging growth companies” in the Act) that wish to complete, or have recently completed, an initial public offering (an “IPO”).³ In particular, the JOBS Act focuses on easing requirements with respect to financial and compensation disclosures, auditing standards, and the publication and distribution of research reports by broker-dealers.⁴ It also affords emerging growth companies the opportunity to confidentially submit draft registration statements to the Securities and Exchange Commission (the “SEC”) before filing a registration statement publicly.⁵ Finally, the legislation mandates that the SEC examine the impact of Regulation S-K and decimalization, or the pricing of securities in one cent increments, on emerging growth companies to determine whether these rules and policies should be modified for these companies.⁶

This Article analyzes Title I of the JOBS Act from its days as little more than a policy recommendation to its current state as enacted legislation. Part II surveys the political and economic environment leading up to the passage of the JOBS Act. Part III summarizes the statutory provisions of Title I relating to “emerging growth companies.” Part IV describes responses to and research on Title I and its underlying assumptions. Part V provides an overview of how Title I has affected the IPO and job markets, if at all, since its inception. Part VI concludes. Although Title I of the JOBS Act may have encouraged younger, high-growth companies to think about going public, the mass migration to public markets and resultant job growth that the JOBS Act promised have yet to be realized.

II. Background

A. Declining IPO Activity, Declining Employment

Since the 2008 economic crisis, start-up activity and unemployment in the United States have been persistent problems.⁷ By 2011, the employment rate had declined by an estimated 7 million jobs since 2007.⁸ Even more troubling, in 2011 the McKinsey Global Institute projected an additional five years of “jobless

2. *Id.*

3. *See* §§ 101-08, 126 Stat. at 307-13.

4. *See* §§ 102-05, 126 Stat. at 308.

5. *See* § 106(a), 126 Stat. at 312.

6. *See* JOBS Act, Pub. L. No. 112-106, § 106(b), 126 Stat. 306, 312 (2012).

7. *See generally* James Manyika et al., *An Economy That Works: Jobs Creation and America's Future*, MCKINSEY GLOBAL INST. (June 2011), *available at* http://www.mckinsey.com/insights/employment_and_growth/an_economy_that_works_for_us_job_creation.

8. *See id.* preface.

recovery.”⁹ This lack of jobs appeared to relate directly to a twenty-three percent decline in the rate of “new business creation” since 2007.¹⁰

On January 31, 2011, President Obama announced the Startup America “White House Initiative” in response to the sluggish economic growth and related unemployment in the United States.¹¹ The program was designed to “improve the environment for high-growth entrepreneurship across the country” by implementing policies that, among other things, opened capital markets to young, but promising, companies.¹² The goal was to encourage economic growth not only through corporate growth and value creation, but also through increased employment opportunities.¹³

As part of the initiative, the Obama administration and the U.S. Treasury Department brought capital market professionals together for a conference in March 2011 called *Access to Capital: Fostering Growth and Innovation for Small Companies*.¹⁴ During the conference, a group of these market professionals formed the “IPO Task Force” with an aim “to 1) examine the challenges that emerging growth companies face in pursuing an IPO and 2) develop recommendations for helping such companies access the additional capital they need to generate jobs and growth for the U.S. economy and to expand their businesses globally.”¹⁵ Members of the IPO Task Force represented various sectors of the capital markets industry, including venture capital, entrepreneurialism, securities, accounting, investment banking, and public investments.¹⁶

On October 20, 2011, the IPO Task Force issued its report (the “IPO Report”) to the Treasury Department.¹⁷ The IPO Report put forth several conclusions regarding emerging growth companies, IPOs, and job growth. First, the IPO Task Force found that “innovative, high-growth companies,” referred to throughout the IPO Report as “emerging growth companies,” that go public create a significant number of jobs.¹⁸ Supporting this thesis, the IPO Task Force found that “firms less than five years old accounted for all net job growth” in the United States from 1980 to 2005, and that ninety-two percent of that job growth was created after those companies went public.¹⁹ Second, the number of those high-growth companies going

9. *Id.*

10. *Id.* at 16.

11. See *Startup America*, WHITE HOUSE, <http://www.whitehouse.gov/economy/business/startup-america> (last visited Sept. 26, 2014).

12. See *Startup America/Progress Report*, WHITE HOUSE, <http://www.whitehouse.gov/economy/business/startup-america/progress-report> (last visited Sept. 21, 2014).

13. *Startup America*, *supra* note 11 (quoting President Obama’s statement that “entrepreneurs also play a critical role in expanding our economy and creating jobs”).

14. See *Access to Capital Conference*, U.S. DEP’T OF THE TREASURY (Apr. 12, 2011), <http://www.treasury.gov/press-center/news/Pages/access-to-capital.aspx>; see *Fact Sheet: White House Launches “Startup America” Initiative*, WHITE HOUSE, <http://www.whitehouse.gov/startup-america-fact-sheet> (last visited Sept. 21, 2014); IPO TASK FORCE, REBUILDING THE IPO ON-RAMP: PUTTING EMERGING COMPANIES AND THE JOB MARKET BACK ON THE ROAD TO GROWTH 4 (2011), available at http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf.

15. IPO TASK FORCE, *supra* note 14.

16. See *id.* at 33.

17. See *id.*

18. See *id.* at 5.

19. *Id.*

public had “plummeted.”²⁰ Pointing specifically to companies backed by venture capital investments, the IPO Report demonstrated a drop in IPOs of more than seventy-five percent in the past two decades; 2,000 venture-backed IPOs from 1991 to 2001 compared to just 477 venture-backed IPOs from 2001-2010.²¹ Moreover, those companies who went public from 2006 to 2011 waited an average of more than nine years to do so. From 1997 to 2001, companies were completing IPOs on average after only five and a half years.²² The IPO Task Force’s third conclusion, therefore, was that this decline in IPO activity by high-growth companies was inevitably contributing to a decline in jobs.²³

According to the IPO Report, the decline in IPO activity could be traced back to “a complex series of changes in the regulatory environment and related market practices.”²⁴ Specifically, this regulatory environment had purportedly:

1. driven up costs for emerging growth companies looking to go public, thus reducing the supply of such companies,
2. constrained the amount of information available to investors about such companies, thus making emerging growth company stocks more difficult to understand and invest, and
3. shifted the economics of investment banking away from long-term investment in such companies and toward high-frequency trading of large-cap stocks, thus making the IPO process less attractive to, and more difficult for, emerging growth companies.²⁵

With these barriers in view, the IPO Task Force recommended that lawmakers take several steps to alleviate the burden on emerging growth companies who sought to go public.²⁶ Specifically, the group envisioned a legislative “on-ramp” for emerging growth companies that would apply to companies with annual revenues of less than \$1 billion and would further scale down disclosure requirements for such companies during the “transition period” between their existence as private companies and public issuers.²⁷ The Task Force focused particularly on requirements relating to the scope of financial and compensation disclosures as well as requirements relating to internal audit control mechanisms and accounting standards.²⁸ In addition, the IPO Report recommended that lawmakers “improve the availability and flow of information for investors before and after an IPO” by removing certain restrictions on securities analyst communications and quiet periods, introducing a system of confidential registration statement filing, and bolstering current safe harbors relating to research reports.²⁹

20. *Id.* at 6.

21. *Id.*

22. *Id.*

23. *See id.* at 7.

24. *Id.* at 8.

25. *Id.*

26. *See id.* at 17-31.

27. *See id.* at 19-25.

28. *See id.* at 21-25.

29. *See id.* at 26-29.

With these findings and recommendations in hand, policymakers largely accepted the IPO Task Force's conclusion: fewer IPOs meant fewer jobs.³⁰ And to many in Congress, swift deregulation was the answer.³¹ Less than a month after the IPO Report was presented to the Treasury Department, Congress introduced a bill incorporating virtually all of the IPO Task Force's suggestions.³²

B. The JOBS Act in Congress: Enthusiasm Trumps Caution

On December 8, 2011, Representatives Stephen Fincher (R-TN) and John Carney (D-Del.) introduced the JOBS Act as H.R. 3606 as co-lead sponsors in the House of Representatives.³³ The initial bill provided for the creation of an "emerging growth company" status for companies with total annual gross revenues of less than \$1 billion.³⁴ Such companies would benefit from reduced financial disclosure and auditing requirements, increased communication between and among the companies, underwriters, securities analysts, and potential investors, and an opportunity to submit draft registration statements to the SEC for confidential review prior to filing publicly for an IPO.³⁵ After first being referred to the House Committee on Financial Services, the bill was formally referred in January 2012 to the Subcommittee on Capital Markets and Government-Sponsored Enterprises.³⁶ It was ordered reported by the Committee on Financial Services by a vote of fifty-four to one on February 16, 2012.³⁷

Consideration of the bill took place in the House of Representatives on March 7, 2012.³⁸ Much of the debate centered on whether H.R. 3606 would achieve its stated purpose "[t]o increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies."³⁹ Although speaking in support of the bill, Representative Carolyn Maloney (D-NY) described the bill as merely the "repackaging [of] a group of old bills that we've passed before" and not a "comprehensive jobs bill."⁴⁰ Representative Jared Polis (D-CO), while also supporting the bill, argued that more needed to be addressed, such as the growing deficit and "uncompetitive business Tax Code," to ensure that employment opportunities expanded.⁴¹ Other Democrats also voiced concern over

30. See H.R. REP. NO. 112-406, at 7-8 (2012) (citing to the IPO Task Force's report and describing the link between small company IPOs and job growth as a major reason for the creation of the JOBS Act).

31. See *id.*

32. See Reopening American Capital Markets to Emerging Growth Companies Act of 2011, H.R. 3606, 112th Cong. (2011) (as introduced in H.R., Dec. 8, 2011).

33. See *id.*; HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, EMERGING TRENDS IN SECURITIES LAW § 1:3 (2012-2013 ed., 2012).

34. See BLOOMENTHAL & WOLFF, *supra* note 33, § 2.

35. See *id.* at §§ 3-7.

36. *Id.* at § 1:3.

37. 158 CONG. REC. H1222-04 (daily ed. Mar. 7, 2012) (statement of Rep. Sessions).

38. See *id.*

39. See *id.*; Reopening American Capital Markets to Emerging Growth Companies Act of 2011, H.R. 3606, 112th Cong. (2011) (as introduced in H.R., Dec. 8, 2011).

40. 158 CONG. REC. H1222-04 (daily ed. Mar. 7, 2012) (statement of Rep. Maloney).

41. *Id.* (statement of Rep. Polis).

the reduction of the regulation, stating that the JOBS Act “goes beyond what is necessary at the expense of protecting the investor.”⁴² But a number of the minority’s proposals to tighten exemptions were rejected.⁴³ These included reducing the annual gross revenues threshold in the definition of an emerging growth company from \$1 billion to \$750 million, subjecting analyst research reports to potential liability, and reinstating the non-binding shareholder vote on executive compensation.⁴⁴

On March 8, 2012, the House of Representatives passed the bill “on a bipartisan basis” 390 to 23.⁴⁵ The engrossed H.R. 3606 included additional provisions that further defined the emerging growth company status, allowed emerging growth companies to opt into certain regulatory exemptions and not others, and required the SEC to perform its own analysis on liquidity issues and regulatory burdens that these companies face.⁴⁶ An amalgamation of six bills, H.R. 3606 included additional provisions related to capital formation but unspecific as to emerging growth companies.⁴⁷ For example, under the proposed bill, the SEC would be directed to lift the ban on general solicitation in private offerings of securities under Regulation D, companies would be permitted to engage in limited but unregistered small public offerings by way of “crowdfunding” and “Regulation A+,” and the shareholder threshold that triggers a private company’s reporting requirement would be increased.⁴⁸

Senate support for H.R. 3606 was less bipartisan.⁴⁹ Just one week after the bill passed the House of Representatives, Senators Jack Reed (D-RI), Mary Landrieu (D-LA), and Carl Levin (D-MI) proposed an alternative bill titled the Invigorate New Ventures and Entrepreneurs to Succeed Today in America Act of 2012, commonly referred to as the “INVEST in America Act.”⁵⁰ The bill proposed to, among other things, lower the \$1 billion annual revenue threshold for emerging growth companies to \$350 million, “retain[] but modif[y] the ban on general solicitation, and . . . retain[] more of the conflict-of-interest restrictions on research reports that were eliminated in” H.R. 3606.⁵¹ Senator Al Franken (D-MN) argued that the substitute bill “strikes the right balance between promoting entrepreneurship and protecting investors” while “H.R. 3606 just has too many problems.”⁵² Despite support from a number of senators, the cloture motion on

42. See H.R. REP. NO. 112-406, at 25-26 (2012).

43. *Id.*

44. *Id.*

45. BLOOMENTHAL & WOLFF, *supra* note 33; Reopening American Capital Markets to Emerging Growth Companies Act of 2011, H.R. 3606, 112th Cong. (2012) (as passed by H.R., Mar. 8, 2012).

46. See H.R. 3606 §§ 101, 106-08 (as passed by H.R., Mar. 8, 2012).

47. See 158 CONG. REC. H1222-04 (daily ed. Mar. 7, 2012) (statement of Rep. Maloney); H.R. 3606 §§ 201-701 (as passed by H.R., Mar. 8, 2012).

48. See H.R. 3606 §§ 201-701 (as passed by H.R., Mar. 8, 2012).

49. BLOOMENTHAL & WOLFF, *supra* note 33 (“Bipartisanship in the Senate surrounding the JOBS Act was slightly overemphasized.”).

50. *Id.* at § 1:5; 158 CONG. REC. S1742-01 (daily ed. Mar. 15, 2012) (text of amendments).

51. BLOOMENTHAL & WOLFF, *supra* note 33, § 1:5; 158 CONG. REC. S1742-01 (daily ed. Mar. 15, 2012) (text of amendments).

52. 158 CONG. REC. S1995-02 (daily ed. Mar. 22, 2012) (statement of Sen. Franken).

INVEST in America Act was defeated by four votes.⁵³ But Democratic opposition to H.R. 3606 remained strong. During debates, Senator Levin warned of an ominous future:

I am going to vote no on this bill because it will significantly weaken existing protections for investors against fraud and abuse. . . . It will . . . take the cop off the beat relative to the activities of some huge banks, and it will threaten damage to the honesty and integrity of our financial markets. . . . If we pass this bill, it will allow new opportunities for fraud and abuse in capital markets. Rather than growing our economy, we are courting the next accounting scandal, the next stock bubble, the next financial crisis. If this bill passes, we will look back at our votes today with deep regret.⁵⁴

Others worried about the “breakneck speed” at which the bill was being processed.⁵⁵ Specifically referring to the portion of the bill focused on reducing regulation for emerging growth companies—dubbed by many as the “IPO on-ramp”—Senator Reed lamented, “This so-called IPO onramp desperately needs an offramp, through more careful consideration by the Senate and the House in conference so that we can improve some provisions which have great merit but need improvement.”⁵⁶ The majority of senators felt differently, however, pointing to the need for legislation, the potential benefits to small companies, and the “overwhelming” bipartisan support that the bill enjoyed.⁵⁷ With this support, the Senate passed H.R. 3606 on March 23, 2012 by a vote of seventy-three to twenty-six.⁵⁸ Just four days later, the bill won the concurring vote in the House of Representatives by a vote of 380 to 41, with nineteen abstaining.⁵⁹ Signing the bill into law on April 5, 2012, President Obama heralded the JOBS Act as “a potential game changer” for small companies while commending legislators for their bipartisan efforts.⁶⁰ In just under four short months, Congress had brought the IPO Task Force’s recommendations to life.

III. An Overview of Title I of the JOBS Act

As passed, the JOBS Act is comprised of seven titles, each of which concentrates on a different aspect of capital formation, both in the private and public markets, and a reduction of regulatory burdens.⁶¹ Title I of the Act introduces “emerging growth companies” as a new category of securities issuers and provides special rules for those companies should they choose to go public via an IPO.⁶²

53. BLOOMENTHAL & WOLFF, *supra* note 33, § 1:5.

54. 158 CONG. REC. S1963-02 (daily ed. Mar. 22, 2012) (statement of Sen. Levin).

55. BLOOMENTHAL & WOLFF, *supra* note 33, § 1:4 (quoting Sen. Dianne Feinstein (D-CA)).

56. 158 CONG. REC. S1963-02 (daily ed. Mar. 22, 2012) (statement of Sen. Reed).

57. *See id.* (statement of Sen. Toomey).

58. BLOOMENTHAL & WOLFF, *supra* note 33.

59. *Id.*

60. President Barack Obama, Remarks by the President at JOBS Act Bill Signing (Apr. 5, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing>.

61. *See generally* JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

62. *See* § 101-08, 126 Stat. at 307-13.

Unlike other portions of the JOBS Act, Title I is largely self-effective; most provisions were immediately effective on April 5, 2012 and require no further rule-making by the SEC.⁶³ This Section explores the provisions of Title I categorically to explain to whom and how they apply.

A. Emerging Growth Company Status

Any company that earned annual gross revenues of less than \$1 billion “during its most recently completed fiscal year” is an emerging growth company under the JOBS Act “as of the first day of that fiscal year,” if the company has not completed an initial public offering on or before December 8, 2011.⁶⁴ After an emerging growth company completes its IPO, it continues to bear that status until one of the following occurs: the last day of the fiscal year during which it earned annual gross revenues of \$1 billion or more, the last day of the fiscal year following the fifth anniversary of the offering date of its IPO, the date on which the company has issued more than \$1 billion in non-convertible debt in the past three years, or the date on which the company is deemed a “large accelerated filer,” whichever is earliest.⁶⁵ While the status is objectively established, the decision to take advantage of the JOBS Act’s reduced disclosure burden is left to the company.⁶⁶ With the exception of the accounting standards requirement in Section 102(b) and Section 107 of Title I permits emerging growth companies to “opt-in’ to certain regulatory requirements as they see fit.”⁶⁷

B. Reduced Disclosure Requirements

Title I provides for a temporary exemption from certain disclosure requirements for emerging growth companies.⁶⁸ These disclosures concern information about executive compensation, financial statements, and accounting practices.⁶⁹ With respect to executive compensation disclosures, Title I amends Sections 14 and 14A of the Securities Exchange Act of 1934 (the “Exchange Act”) and Section 953(b)(1) of the Investor Protection and Securities Reform Act of 2010 (the “IPSRA”)⁷⁰ to include special treatment for emerging growth companies.⁷¹ A creation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), Section 14A requires public companies to hold “a non-binding shareholder advisory vote to approve compensation of its named executives

63. *See id.*

64. § 101(a)-(b), (d), 126 Stat. at 307-08.

65. *Id.*

66. *See* H.R. REP. 112-406, at 15 (2012); JOBS Act, Pub. L. No. 112-106, § 107, 126 Stat. 306, 312-13 (2012).

67. H.R. REP. 112-406, at 15 (2012); JOBS Act, § 107(a), 126 Stat. at 312-13.

68. *See* JOBS Act, § 102, 126 Stat. at 308-10.

69. *See id.*

70. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Title IX, §§ 901-91, 124 Stat. 1375, 1381-1955 (2010) [hereinafter Dodd-Frank Act].

71. JOBS Act, Pub. L. No. 112-106, § 102(a), 126 Stat. 306, 308-09 (2012).

at least once every three years.”⁷² Public companies must also hold a “say-on-frequency” vote for shareholders to determine how often say-on-pay votes will occur.⁷³ Section 102(a) of Title I allows emerging growth companies to avoid say-on-pay and say-on-frequency votes.⁷⁴ Title I further exempts emerging growth companies from the requirement in Section 14(i) of the Exchange Act that public companies disclose “information that shows the relationship between executive compensation actually paid and the financial performance of the” company.⁷⁵ Finally, Section 953(b)(1) of the IPSRA mandates that the SEC modify its rules to require public companies to disclose “the median of the annual total compensation of all employees of the issuer,” excluding its chief executive officer, as well as the total annual compensation of its CEO, and the ratio between those two amounts.⁷⁶ An emerging growth company is also exempted from this requirement under Section 102(a)(3) of the JOBS Act.⁷⁷ If an emerging growth company loses its status as such prior to the second anniversary of its IPO offering date, it has until the third anniversary of that offering date to comply with these executive compensation voting and disclosure requirements.⁷⁸ If the company loses its status after the second anniversary of its IPO offering date, it has one year from the date it loses that status to comply with the requirements.⁷⁹

Title I grants leniency with respect to financial disclosures and accounting practices, as well.⁸⁰ To this end, Section 102(b) of the JOBS Act amends Section 7(a) of the Securities Act of 1933 (the “Securities Act”) and Section 13(a) of the Exchange Act, which provide minimum disclosure requirements in an issuer’s IPO registration statement and subsequent public filings, respectively.⁸¹ The amendments are twofold, addressing both disclosure requirements and compliance with accounting standards.⁸² With respect to disclosure requirements, emerging growth companies are exempted from Item 301 in Regulation S-X,⁸³ which requires public companies that have a public float of \$75 million or more (or, in the case of a company contemplating an IPO, an estimated post-offering public float of \$75 million or more) to disclose detailed financial data for “each of the last five fiscal years of the registrant” or for the life of the registrant, whichever is shorter.⁸⁴ These companies must also disclose such information for “[a]ny additional fiscal years necessary to keep the information from being misleading.”⁸⁵ Under the JOBS

72. Kiersten Zaza, *Developments in Banking Law, The Impact of Say-on-Pay*, 31 REV. BANKING FIN. L. 580, 580 (2012); 15 U.S.C. 78n-1(a) (2014).

73. Zaza, *supra* note 72; 15 U.S.C. § 78n-1(b) (2014).

74. § 102(a)(1), 126 Stat. at 308-09.

75. *Id.* at § 102(a)(2), 126 Stat. at 309; 15 U.S.C. § 78n-1(e)(2).

76. Dodd-Frank Act, Pub. L. 111-203, §§ 953(b)(1), 124 Stat. 1375, 1904 (2010).

77. JOBS Act, Pub. L. No. 112-106, § 102(a)(3), 126 Stat. 306, 309 (2012).

78. *Id.* § 102(a)(1), 126 Stat. at 308-09.

79. *Id.*

80. *See id.* at § 102(b), 126 Stat. at 309-10.

81. *Id.*

82. JOBS Act, Pub. L. No. 112-106, § 102(b), 126 Stat. 306, 309-10 (2012).

83. *Id.* at § 102(b)(1)-(2), (c), 126 Stat. at 309-10.

84. 17 C.F.R. § 229.301(a), (c) (2009).

85. *Id.* at § 229.301(b).

Act, however, emerging growth companies “need not present more than [two] years of audited financial statements in order for” their IPO registration statements to be effective.⁸⁶ Moreover, audited financial statements for any year prior to those required in the IPO registration statement are not required in any subsequent public filing so long as the company remains an emerging growth company.⁸⁷

C. Accounting Standards and Disclosure

In addition to easing financial reporting obligations, Section 102(b) provides that emerging growth companies need not comply with “any new or revised financial accounting standards issued by the Financial Accounting Standards Board” (the “FASB”) until private companies are also subject to it, if the standard applies to private companies.⁸⁸ The FASB allows private companies “delayed effective dates” premised on the idea that these companies require more time and effort than would a public company to comply with new or revised standards.⁸⁹ Allowing emerging growth companies the same benefit even after they complete an IPO eases the potential burden of becoming a public company.

The JOBS Act further eases accounting requirements by exempting emerging growth companies from any rules of the FASB “requiring mandatory audit firm rotation or a supplement to the auditor’s report in which the auditor would be required to provide additional information about the audit and the financial statements” of the company.⁹⁰ This latter requirement refers to an “auditor discussion and analysis” resembling the “management discussion and analysis” that is ubiquitous on registration forms and other periodic reporting documents.⁹¹ Since the JOBS Act became effective, any new rule that the FASB adopts with respect to the audit of public companies will apply to emerging growth companies only if the SEC “determines that the application of [the rule] is necessary or appropriate in the public interest.”⁹²

Finally, JOBS Act Section 103 exempts emerging growth companies from Section 404(b) of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”).⁹³ Under Section 404(a) of Sarbanes-Oxley, public companies must disclose for each fiscal

86. JOBS Act, § 102(b)(1), 126 Stat. at 309.

87. JOBS Act, Pub. L. No. 112-106, § 102(b)(2), 126 Stat. 306, 309-10 (2012).

88. H.R. REP. NO. 112-406, at 14 (2012); JOBS Act, § 102(b), 126 Stat. at 309-10 (referring to private companies as companies that are not “issuers” as defined by the Sarbanes-Oxley Act); *see* Sarbanes-Oxley Act, Pub. L. No. 107-204, § 2(a)(7), 116 Stat. 745, 747 (2002) (defining “issuer” as a company subject to the reporting requirements of § 12 of the Securities Exchange Act of 1934 or a company that has filed and not withdrawn a registration statement with the SEC).

89. Lynn Rees, *JOBS Act Carries Implications for FASB/PCAOB Independence*, FIN. ACCT. STANDARDS RES. INITIATIVE (Mar. 23, 2012), <http://www.fasri.net/index.php/2012/03/jobs-act-carries-implications-for-fasbpcaub-independence/>.

90. JOBS Act, § 104, 126 Stat. at 310.

91. *Id.*; *see also* Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056 (Dec. 29, 2003) (providing an overview of and guidance regarding management discussion and analysis in financial disclosures).

92. JOBS Act, Pub. L. No. 112-106, § 104, 126 Stat. 306, 310 (2012).

93. *See id.* at § 103, 126 Stat. at 310; Sarbanes-Oxley Act § 404(b), 15 U.S.C. § 7262(b).

year “an internal control report” which describes management’s role in “establishing and maintaining an adequate internal control structure and procedures for financial reporting” and an assessment by the management of those structures and procedures.⁹⁴ Section 404(b) of Sarbanes-Oxley, in conjunction with Section 989G of the Dodd-Frank Act, requires the auditor of any company with a public float of \$75 million or more to perform an audit of management’s assessment.⁹⁵ The JOBS Act excuses emerging growth companies from this requirement for as long as they retain their status.⁹⁶

D. Research Reports and Information on Emerging Growth Companies

Perhaps to counter the reduced disclosure that emerging growth companies must provide, Title I increases the availability of securities analyst reports and communications by and among broker-dealers, underwriters, the company itself, and potential investors.⁹⁷ This increased availability allows emerging growth companies to “test the waters” before executing an IPO.⁹⁸ The JOBS Act amends Section 2(a)(3) of the Securities Act, which provides the definition of an “offer” to purchase or sell a security, to exclude from this definition research reports published or distributed by a broker-dealer “about an emerging growth company that is the subject of a proposed public offering . . . pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective”⁹⁹ This exclusion applies regardless of whether the broker-dealer participated, is participating, or proposes to participate in the offering.¹⁰⁰ Moreover, the JOBS Act defines the term “research report” broadly, including “written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.”¹⁰¹

Normally, these types of “reports,” save for oral communications, could constitute offers of an issuer’s security.¹⁰² Such offers are otherwise prohibited prior to the filing of a registration statement and highly regulated thereafter, in some cases even after the registration statement becomes effective.¹⁰³ But the JOBS Act

94. Sarbanes Oxley Act § 404(a), 15 U.S.C. § 7262(a).

95. *See* 15 U.S.C. § 7262(b)-(c); Dodd-Frank Act § 989G.

96. *See* JOBS Act, § 103, 126 Stat. at 310.

97. JOBS Act, Pub. L. No. 112-106, § 105, 126 Stat. 306, 310-11 (2012); H.R. REP. NO. 112-406, at 14-15 (2012).

98. *See* BLOOMENTHAL & WOLFF, *supra* note 33, § 1:22.

99. JOBS Act, § 105(a), 126 Stat. at 310-11.

100. *Id.*

101. *Id.*

102. *See* JAMES D. COX, ROBERT W. HILLMAN, & DONALD C. LANGEVOORT, *SECURITIES REGULATION: CASES AND MATERIALS* 189 (6th ed. 2009) (covering existing safe harbors that exempt research reports from Section 5 of the Securities Act of 1933).

103. *Id.* at 168-79 (describing the regulation of offers during the period after the registration statement has been filed but before it becomes effective (the “waiting period”) and offers after the registration statement has become effective (the “post-effective period”).

opens up previously-closed lines of communications to allow information about an emerging growth company's offering to flow to investors even before the company has made public disclosures in its registration statement.¹⁰⁴ Section 105(c) of the JOBS Act amends Section 5 of the Securities Act to allow an emerging growth company or "any person authorized to act on behalf" of the company itself, to make offers to "potential investors that are qualified institutional buyers or institutions that are accredited investors" prior to filing a registration statement in order to assess investor interest.¹⁰⁵ Section 105(d) of the JOBS Act goes further to expand the availability of research reports and other communications regarding an emerging growth company's securities after the offering. The Act prohibits the "adopt[ion] or maint[enance of] any rule or regulation prohibiting any broker, dealer, or member of a national securities association from publishing or distributing" such reports or communications following an emerging growth company's IPO or during any securities holding period agreed to between the company and those entities.¹⁰⁶

In addition to research reports and communications between the issuer or underwriters and investors, the JOBS Act removes restrictions with respect to broker-dealer internal communications.¹⁰⁷ Section 105(b) of the Act prohibits the SEC and any registered national securities association from "adopt[ing] or maintain[ing] any rule or regulation in connection with" the IPO of an emerging growth company that restricts which member of a broker-dealer or national securities association "may arrange for communications between a securities analyst and a potential investor" or whether a securities analyst can participate in communications between non-securities analysts and the emerging growth company's management.¹⁰⁸ Removing these restrictions breaks down the traditional "Chinese Wall" between securities analysts and other members of a broker-dealer that has existed primarily as "a prophylactic against illegal activity and as a legal defense against insider trading and potential conflicts of interest in securities firms."¹⁰⁹

E. Confidential Review of Draft Registration Statements

For emerging growth companies who wish to go public, the JOBS Act introduces a system of confidential review by SEC staff of draft registration statements.¹¹⁰ Section 106(a) amends Section 6 of the Securities Act so that emerging growth companies "may confidentially submit to the [SEC] a draft registration statement, for confidential nonpublic review by the staff" prior to

104. See JOBS Act, Pub. L. No. 112-106, § 105, 126 Stat. 306, 310-11 (2012).

105. § 105(c), 126 Stat. at 311.

106. § 105(d), 126 Stat. at 311.

107. § 105(b), 126 Stat. at 311.

108. *Id.*

109. See H. Nejat Seyhun, *Insider Trading and the Effectiveness of Chinese Walls in Securities Firms*, 4 J.L. ECON. & POL'Y 369, 369-70 (2008).

110. See JOBS Act, Pub. L. No. 112-106, § 106(a), 126 Stat. 306, 312 (2012).

publicly filing a registration statement for its IPO.¹¹¹ A company who takes advantage of this opportunity must publicly file its registration statement at least twenty-one days prior to conducting a road show, or presentation to potential investors regarding the offering.¹¹² However, the SEC cannot be “compelled to disclose any information provided to or obtained by” it through a confidential review under Section 106(a).¹¹³

F. Decimalization, Tick Size, and Regulation S-K for Emerging Growth Companies

Title I of the JOBS Act tasked the SEC with two assignments concerning (i) decimalization, or the “trading and quoting [of] securities in one penny increments,” (ii) tick size, or the increment by which a company’s security is traded, and (iii) Regulation S-K, which governs line item disclosures in the registration statement.¹¹⁴ The SEC was required to submit two reports to Congress within ninety days and 180 days respectively of the enactment of the JOBS Act.¹¹⁵ The first report, as directed by Section 106(b), was to analyze the impact that the transition from fractional pricing and quoting to decimalization has had on the IPO market and on liquidity for “small and middle capitalization company securities” (often referred to as “small cap” and “mid cap” company securities).¹¹⁶ The SEC was to conclude in this report as to whether liquidity would be enhanced with respect to these securities if the one penny increment tick size was increased.¹¹⁷ If the SEC found that an increase in tick size was beneficial, Section 106(b) allows the SEC to create the regulation necessary to increase the tick size up to \$0.10.¹¹⁸ The second report required an analysis of disclosure requirements under Regulation S-K “to determine how such requirements can be updated to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements for issuers who are emerging growth companies.”¹¹⁹ In this report the SEC was to present “specific recommendations” to make disclosure requirements “more efficient and less burdensome” for both emerging growth companies and the SEC.¹²⁰

IV. Responses, Research, and Predictions

Title I of the JOBS Act garnered much attention both before and after its enactment. Questions arose in the private and public sectors as to whether the law would achieve its objectives and at what expense it would achieve such objectives.

111. *Id.*

112. *Id.*; 17 C.F.R. § 230.433(h)(4) (2009).

113. JOBS Act, § 106(a), 126 Stat. at 312.

114. *See* §§ 106(b), 108, 126 Stat. at 312, 313; Regulation S-K, 17 C.F.R. §§ 229.10 et seq. (2009).

115. JOBS Act, Pub. L. No. 112-106, §§ 106(b), 108, 126 Stat. 306, 312 (2012).

116. § 106(b), 126 Stat. at 312.

117. *Id.*

118. *Id.*

119. JOBS Act, Pub. L. No. 112-106, § 108(a), 126 Stat. 306, 313 (2012).

120. *Id.*

In academic circles, some speculated that the JOBS Act's reduced regulations were an attempt to fix a problem that did not exist. The existing regulatory environment, they argued, was not preventing companies from going public. And significant research published after the JOBS Act enactment shed additional light on the relationship between IPOs and job growth.

A. Mixed Reactions at the SEC

While many heralded the JOBS Act as an effective response to the decline in the number of IPOs completed by small companies in the United States over the past decade and its impact on employment, some at the SEC feel that the JOBS Act left investors too vulnerable.¹²¹ One outspoken opponent of the Act was then-Chairman Mary Shapiro.¹²² In a letter to Congress, Chairman Shapiro cautioned that the JOBS Act bill lacked sufficient "investor protections."¹²³ According to the Chairman, the \$1 billion threshold for determining emerging growth company status posed too much risk on investors by applying to an overly-broad group of companies.¹²⁴ The law's provisions regarding underwriter research reports and communications between securities research analysts and underwriters caused the Chairman similar alarm.¹²⁵ Such relaxed regulations, she argued, could negatively affect investor confidence and leave investors without "the full protections of the securities laws."¹²⁶ And while the Chairman agreed that reducing certain disclosure requirements for smaller companies "could be a reasonable approach," she felt that the Act's impact on accounting disclosures and compliance "undermine[d] independent standard-setting" by the FASB and the Public Company Accounting Oversight Board.¹²⁷ She further believed that the exemption pertaining to audits of internal controls was "unwarranted" seeing that this otherwise-applicable requirement "has significantly improved the quality and reliability of financial reporting and provides important investor protections."¹²⁸

121. Compare Pablo Chavez, *Bipartisanship, New Businesses and New Jobs, with a Little Help from Your Friends*, GOOGLE PUB. POL'Y BLOG (Mar. 15, 2012, 11:26 AM), <http://googlepublicpolicy.blogspot.com/2012/03/bipartisanship-new-businesses-and-new.html>, and Emily Mendell, *NVCA Celebrates JOBS Act Bill Signing*, NAT'L VENTURE CAPITAL ACCESS (Apr. 11, 2012), <http://nvcaaccess.nvca.org/index.php/topics/events/292-nvca-celebrates-jobs-act-bill-signing.html>, with Letter from Mary L. Shapiro, Chairman, Sec. & Exch. Comm'n, to Tim Johnson, Chairman, Committee on Banking, Housing, and Urban Affairs, and Richard C. Shelby, Ranking Member, Committee on Banking, Housing, and Urban Affairs (Mar. 13, 2012), available at http://www.aicpa.org/advocacy/issues/downloadabledocuments/404b/3-13-12_sec_chm_schapiro_letter_to_johnson.pdf [hereinafter Shapiro Letter], and Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Public Statement by Commissioner: Investor Protection is Needed for True Capital Formation Views on the JOBS Act (Mar. 16, 2012), available at <http://www.sec.gov/news/speech/2012/spch031612laa.htm> [hereinafter Aguilar Statement].

122. See Shapiro Letter, *supra* note 121.

123. *Id.* at 1.

124. *Id.* at 2.

125. See *id.*

126. *Id.*

127. *Id.*

128. *Id.*

Chairman Shapiro's sentiments were not unique. Just three days after the Chairman addressed her letter to Congress, SEC Commissioner Luis A. Aguilar made a public statement condemning H.R. 3606 as a bill that "seems to impose tremendous costs and potential harm on investors with little to no corresponding benefit."¹²⁹ Much of his criticism mirrored that of the Chairman:

H.R. 3606 . . . would seriously hurt investors by reducing transparency and investor protection and, in turn, make securities law enforcement more difficult. . . . [T]here is significant research to support the conclusion that disclosure requirements and other capital markets regulations enhance, rather than impede, capital formation, and that regulatory compliance costs are not a principal cause of the decline in IPO activity over the past decade. Moreover, nothing in the bill requires or even incentivizes issuers to use any capital that may be raised to expand their businesses or create jobs in the U.S.¹³⁰

The Commissioner explained that the definition of emerging growth company captured an estimated ninety-eight percent of IPOs and "a large majority of U.S. public companies."¹³¹ He argued that the temporary exemption from compliance with new or revised accounting standards "may result in inconsistent accounting rules that could damage financial transparency" and distort investors' ability to properly evaluate investments.¹³² The Commissioner also lamented the exemption from the independent audit of financial controls requirement.¹³³ Arguing that the requirement is "an important mechanism for enhancing the reliability of financial statements," he explained that larger public companies who performed these audits had "a 5.1% decline in financial statement restatements from 2009 to 2010" while smaller public companies who did not perform such audits "experienced a 13.8% *increase* in such restatements."¹³⁴ Like Chairman Shapiro, Commissioner Aguilar also criticized H.R. 3606's relaxation of rules concerning communications between securities research analysts and underwriters.¹³⁵ Removing these restrictions, he argued, would cause investors to lose trust in the IPO market.¹³⁶

B. Attacking a Problem That Does Not Exist?

Since the enactment of the JOBS Act, several academics have put forth their own reasoning to explain the dearth of small company IPOs.¹³⁷ In August 2012, as part of the Committee on Small and Emerging Companies, Professors Xiaohui Gao,

129. Aguilar Statement, *supra* note 121.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (emphasis added).

135. *Id.*

136. *Id.*

137. See generally Xiaohui Gao, Jay R. Ritter, & Zhongyan Zhu, Where Have All the IPOs Gone? (Aug. 26, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954788.

Jay R. Ritter, and Zhongyan Zhu presented their own hypothesis to the SEC.¹³⁸ Over-regulation was not the issue, they argued.¹³⁹ Instead, the decrease in IPO activity by smaller companies was attributable to “increased economies of scope” and the “increased importance of speed to market.”¹⁴⁰ The authors fleshed out their reasoning, dubbed the “economies of scope hypothesis,” in a related working paper later that year.¹⁴¹ They found that small firm profitability has been steadily declining since 1995.¹⁴² One reason for this decline in profitability was the fact that smaller companies “lack the resources to quickly take advantage of new technology.”¹⁴³ As a result, larger companies were reaching profitable markets more quickly, leaving smaller companies’ revenues to suffer.¹⁴⁴ To attain profitability, these smaller companies are bypassing public market financing and instead merging with bigger companies that can provide synergies and economies of scale.¹⁴⁵ If this is the case, no amount of regulation or deregulation can affect these small companies’ business decisions to complete a merger rather than IPO.

The economies of scope hypothesis, though not specifically referred to as such, appeared in testimony to Congress as early as 2011.¹⁴⁶ In his testimony before the Subcommittee on Securities, Insurance, and Investment of the Senate Committee on Banking, Housing, and Urban Affairs, Professor John C. Coates IV of Harvard Law School questioned the assumption that deregulation was the answer to the IPO problem.¹⁴⁷ “More serious impediments to a renewal of IPOs,” he stated, “is the increased ‘deretailization’ of the equity markets.”¹⁴⁸ As more and more investors are institutional investors, liquidity—and, in turn, larger cap company stock—become more attractive than illiquid, small cap company stock.¹⁴⁹ In this sense, it is not the overly-burdensome regulation that is discouraging smaller companies from going public, but the change in investor base that is making it increasingly difficult for smaller public companies to thrive.¹⁵⁰

138. See XIAHUI GAO, JAY R. RITTER, & ZHONGYAN ZHU, WHERE HAVE ALL THE IPOs GONE? (2012) (presented to the SEC), available at <http://www.sec.gov/info/smallbus/acsec/acsec-090712-ritter-slides.pdf>.

139. See *id.* at 6-8.

140. *Id.* at 8-9.

141. See Gao, Ritter & Zhu, *supra* note 137, at 2.

142. *Id.* at 7-11.

143. *Id.* at 11.

144. See *id.*

145. See *id.* at 3 (“We contend that many small firms can create greater operating profits by selling out in a trade sale (being acquired by a firm in the same or a related industry) rather than operating as an independent firm and relying on organic (i.e., internal) growth.”).

146. See *Examining Investor Risks in Capital Raising Before the Subcomm. on Sec., Ins., and Inv. of the Comm. on Banking, Hous., & Urban Affairs of the U.S. Senate*, 112th Cong. 21-22 (Dec. 14, 2011) (testimony of John C. Coates, IV, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School), available at www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1d24b42e-3ef8-4653-bfe8-9c476740fafa.

147. See *id.*

148. *Id.* at 21.

149. *Id.*

150. See *id.* at 21-22.

C. Research on Post-IPO Employment

Some critics of the JOBS Act doubted the proposition that Congress appeared to wholeheartedly and quickly accept—that IPOs equal job growth.¹⁵¹ Professor Jay R. Ritter of the University of Florida commented, “Conventional wisdom is that companies going public create a lot of jobs. . . . The numbers that the venture capital lobby keep repeating are grossly overstated in terms of what the average IPO can accomplish.”¹⁵² And almost a year after the passage of the JOBS Act, one critic maintains that “the JOBS Act has little to do with employment.”¹⁵³ “The largest number of jobs likely to be created by the JOBS Act,” quipped Steven Rattner, “will be for lawyers needed to clean up the mess that it will create.”¹⁵⁴ But post-JOBS Act research on job growth in public companies at least partially supports the contention that IPOs create jobs.¹⁵⁵

Just one month after President Obama signed the JOBS Act into law, the Kauffman Foundation published a report, co-authored by Professor Ritter, entitled “Post-IPO Employment and Revenue Growth for U.S. IPOs, June 1996-2010” (the “Kauffman Report”).¹⁵⁶ The Kauffman Report surveys 1,700 “emerging growth companies”—defined differently from the JOBS Act—as “domestic companies less than thirty years old that are not spinoffs, rollups, buyouts, or demutualizations.”¹⁵⁷ While the JOBS Act definition captures approximately ninety-three percent of all IPOs, the authors’ definition captures only sixty-one percent.¹⁵⁸ The Kauffman Report’s “emerging growth companies” also included companies like Google and Facebook, which do not fit the JOBS Act’s criteria, “but exclude[d] buyout-backed IPOs,” which do fit within the JOBS Act’s criteria.¹⁵⁹ The survey of these “emerging growth companies” showed that “aggregate employment . . . increased from 651,000 employees prior to the IPO to 1.666 million employees in 2010, a 156 percent increase.”¹⁶⁰ However, the overall increase could be attributed largely to certain “standout performers” such as Amazon, Google, and eBay—all of which went public with annual revenues below \$1 billion (not adjusted for inflation).¹⁶¹

151. See, e.g., John Tozzi, *IPOs’ Job-Boosting Power Is Overblown*, BLOOMBERG BUSINESSWEEK (May 21, 2012), <http://www.businessweek.com/articles/2012-05-21/ipos-boon-for-jobs-is-overblown>.

152. *Id.*

153. Steven Rattner, *A Sneaky Way to Deregulate*, N.Y. TIMES OPINIONATOR BLOG (Mar. 3, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/03/03/a-sneaky-way-to-deregulate/>.

154. *Id.*

155. See generally MARTIN KENNEY, DONALD PATTON, & JAY R. RITTER, KAUFFMAN FOUNDATION, POST-IPO EMPLOYMENT REVENUE GROWTH FOR U.S. IPOs, JUNE 1996-2010 (2012) [hereinafter KAUFFMAN REPORT].

156. See *id.*

157. *Id.* at 1.

158. *Id.* at 1, n.2.

159. *Id.*

160. *Id.* at 1.

161. See *id.* Amazon went public in 1997 with annual revenues in 1996 of \$8.5 million. Amazon.com, Inc., Registration Statement (Form S-1) 20 (Mar. 24, 1997). eBay went public in 1998 with annual revenues in 1997 of \$5.7 million. eBay Inc., Registration Statement (Form S-1) 77 (July 15, 1998). Google went public in 2004 with annual revenues in 2003 of \$961,874,000. Google, Inc., Registration Statement (Form S-1) 35 (Apr. 29, 2004).

The Kauffman Report's conclusions paralleled those put forth earlier by the President's Council on Jobs and Competitiveness.¹⁶² In a 2011 report that was also cited by Congress in support of the JOBS Act, the Council found that younger companies were "adding fewer jobs on average than they were in previous decades."¹⁶³ Had start-up activity remained consistent since 2007, the report went on, there would have existed close to two million additional jobs in 2011.¹⁶⁴ According to this research, the premise on which the JOBS Act was based appears to hold true.

V. Title I in Effect: More IPO Talk, Less IPO Action

Since its enactment, Title I of the JOBS Act has been both popular and disappointing. While certain eligible companies appear eager to take advantage of reduced regulation, to many emerging growth companies, the stigma attached to getting "special treatment" by regulators undermines the advantages of going public. Confidential filing, therefore, has emerged as a favorite opportunity for companies who are looking to decide whether going public is in fact the route they wish to go. The continued stagnation in the U.S. IPO market suggests that confidential filing is helping companies confirm that they should remain private rather than entice them to go public. Moreover, recommendations regarding Regulation S-K and decimalization, as required by Title I, imply that more deregulation is needed to attract young, high-growth companies to the public capital markets.

A. IPOs Still Down, but Emerging Growth Companies Appear Promising

IPOs in 2012 raised a total of \$42.6 billion, representing a seventeen percent increase over IPO proceeds in 2011.¹⁶⁵ Excluding the \$16 billion raised in Facebook's IPO, however, overall proceeds actually decreased by twenty-seven percent.¹⁶⁶ This decrease seems to imply that Title I of the JOBS Act has failed to jumpstart IPO activity. But that may not be true. A simultaneous decrease in median deal size in 2012 suggests that the JOBS Act has encouraged smaller companies to go public.¹⁶⁷ In fact, median deal size in 2012 decreased by twenty-three percent from \$160.2 million in 2011 to \$124 million in 2012, indicating that more small companies are opting to go public.¹⁶⁸ And research indicates that "nearly 75% of issuers that priced a U.S. IPO after [the enactment of the JOBS Act]

162. See PRESIDENT'S COUNCIL ON JOBS AND COMPETITIVENESS, TAKING ACTION, BUILDING CONFIDENCE: FIVE COMMON-SENSE INITIATIVES TO BOOST JOBS AND COMPETITIVENESS 17-18 (2011), available at http://files.jobs-council.com/jobscouncil/files/2011/10/Jobscouncil_InterimReport_Oct11.pdf.

163. *Id.* at 17; H.R. REP. NO. 112-406, at 7 (2012).

164. PRESIDENT'S COUNCIL ON JOBS AND COMPETITIVENESS, *supra* note 162.

165. RENAISSANCE CAPITAL, US IPO MARKET 2012 ANNUAL REVIEW 2 (2013), available at <http://www.renaissancecapital.com/ipohome/review/2012USReview.pdf>.

166. *Id.* at 1-2.

167. *Id.* at 2.

168. *See id.*

identified themselves as” emerging growth companies in their registration statements.¹⁶⁹ Of those emerging growth companies who priced IPOs, approximately eighty-five percent had annual revenues of less than \$250 million—well below the \$1 billion threshold that captures emerging growth companies.¹⁷⁰ Still, whether this data proves that the JOBS Act is catalyzing IPOs among young, high-growth companies is uncertain. Capital markets research firm Renaissance Capital postulates that the JOBS Act “has had no noticeable effects other than reducing the minimum time from filing to pricing,” presumably due to the availability of confidential filing.¹⁷¹

According to Bloomberg, 328 companies listed on national securities exchanges in the United States as of the JOBS Act’s enactment qualified as emerging growth companies in that they had less than \$1 billion in annual revenue, had gone public within the last five years, had issued no more than \$1 billion in debt, and had a public float of less than \$700 billion.¹⁷² This number ostensibly included companies that had gone public before December 8, 2011 and thus would not qualify for the JOBS Act’s reduced regulation.¹⁷³ It also excluded public companies trading over-the-counter and, of course, private companies that fit the emerging growth company definition.¹⁷⁴ The 328 listed companies did include “hot tech companies” like Yelp, Pandora, LinkedIn, Zipcar, and Orbitz Worldwide, as well as twenty companies based in China.¹⁷⁵ Approximately half of these 328 companies were trading above their IPO prices as of April 3, 2012, perhaps demonstrating the higher investment risk associated with emerging growth companies.¹⁷⁶ That also meant, however, that half of those companies were trading below their IPO prices.¹⁷⁷

Despite the performance of the companies cited by Bloomberg, companies who took advantage of the emerging growth company status to go public in 2012 generally fared better than their larger counterparts.¹⁷⁸ According to data from financial-advisory firm Ernst & Young, “nearly three quarters of the [eighty-seven] companies that filed a public registration statement through the end of 2012

169. LATHAM & WATKINS LLP, *THE JOBS ACT AFTER ONE YEAR: A REVIEW OF THE NEW IPO PLAYBOOK 2* (2013).

170. *Id.* at 4.

171. *See* RENAISSANCE CAPITAL, *supra* note 165, at 10.

172. John Tozzi, *The JOBS Act Loosens Regs for Companies Like These*, BLOOMBERG BUSINESSWEEK (Apr. 5, 2012), <http://www.businessweek.com/articles/2012-04-05/the-jobs-act-loosens-regs-for-companies-like-these>. Although not addressed in depth in this Article, it is interesting to note that Title I appears to have encouraged the creation of public special purpose acquisition vehicles (“SPACs”), otherwise known as shell companies. *See generally* Usha Rodrigues, *SPACs and the JOBS Act*, 3 HARV. BUS. L.R. ONLINE 1, 17 (2012), <http://www.hblr.org/wp-content/uploads/2012/10/SPACs-and-the-JOBS-Act-Rodrigues.pdf>.

173. *See* Tozzi, *supra* note 172; JOBS Act, Pub. L. No. 112-106, § 101(d), 126 Stat. 306, 308 (2012).

174. Tozzi, *supra* note 172.

175. *See id.*

176. *Id.*

177. *Id.*

178. *See* Brian Matt, *Private Firms Pushed to Tell Better Investment Stories*, CFO.COM (Jan. 15, 2013), http://www3.cfo.com/article/2013/1/capital-markets_jobs-act-emerging-growth-companies-investment-storytestin-g-the-waters-sec; Olivia Oran, *IPO View-Update 1-US Jobs Act cos outperform other IPOs –data*, REUTERS (Jan. 25, 2013), <http://www.reuters.com/article/2013/01/25/jobs-act-ipos-idUSL1N0AUC6V20130125>.

self-identified as ‘emerging growth companies.’”¹⁷⁹ Of companies that completed exchange-traded IPOs in 2012, approximately two-thirds completed their offering as an emerging growth company.¹⁸⁰ Additionally, “price performance of [emerging growth company] offerings during 2012 was superior to [that of non-emerging growth companies] in both the short term (one day and one week subsequent to pricing) and the longer term (through the end of 2012).”¹⁸¹ While non-emerging growth companies’ stock rose, on average, 13.1 percent above their IPO price, emerging growth companies’ stock rose an average of 28.9 percent.¹⁸² Although the Russell 2000 Growth Index, “a barometer of small cap growth stocks,” rose eleven percent since the enactment of the JOBS Act, emerging growth companies still generally outperformed it.¹⁸³ The investor bases of emerging growth companies mirrored that of larger companies, as well.¹⁸⁴ It might thus be inferred that investors did not perceive emerging growth companies as presenting significant investment risk.¹⁸⁵ But critics counter that U.S. markets have been independently on the upswing since the JOBS Act was enacted. Investors might therefore be willing to take on more risk.¹⁸⁶

B. Saying “No Thanks” to Special Treatment

Perhaps surprisingly, it appears that most companies that could qualify as emerging growth companies are choosing not to take advantage of the JOBS Act’s reduced disclosure requirements.¹⁸⁷ Dealogic and the Wall Street Journal found that eighty-five percent of emerging growth companies that went public between April and November 2012 chose not to take advantage of the JOBS Act provision that would allow them to delay compliance with new or modified accounting practices.¹⁸⁸ One reason for this decision is that younger companies are willing to comply with otherwise burdensome requirements to avoid the “stigma” attached to exemptions.¹⁸⁹ Trulia Inc., a real estate website that went public as an emerging growth company in September 2012, opted to take advantage of only the confidential filing provision of the JOBS Act.¹⁹⁰ The company’s general counsel, Scott Darling, explained, “We really wanted to project to investors that we are a

179. Chris Dieterich, *After JOBS Act, Confidential Filers Rise*, WALL ST. J. (Feb. 18, 2013), <http://online.wsj.com/article/SB10001424127887324162304578307052032008888.html?KEYWORDS=confidential+filers>.

180. Matt, *supra* note 178.

181. *Id.*

182. Oran, *supra* note 178.

183. *Id.*

184. Matt, *supra* note 178.

185. *See id.*

186. Oran, *supra* note 178.

187. *Id.*

188. Jessica Holzer, *Some Firms Shun Looser IPO Rules*, WALL ST. J. (Nov. 15, 2012), <http://online.wsj.com/article/SB10001424127887324595904578117322881014396.html?mg=idwsj#articleTabs%3Darticle>.

189. *See id.*

190. *Id.*

mature company.”¹⁹¹ Eloqua Inc., a software company that went public a month before Trulia, followed the same reasoning. By choosing not to make full disclosures “[w]e might look like a little-boy company when we worked really hard to be a big-boy company,” quipped Eloqua’s Chief Executive Officer Joseph Payne.¹⁹² Many industry experts agree, believing that companies who use the opportunity to present less financial and accounting disclosure risk face increased scrutiny from investors.¹⁹³ Such increased scrutiny can lead to lower valuations and a higher cost of capital for emerging growth companies.¹⁹⁴ Xoom Corp., which went public in February 2013, looked to bypass this risk by making full disclosures.¹⁹⁵ “The whole point is what you are signaling,” remarked Roelof Botha, a partner in the private-equity firm Sequoia Capital LLC and board member of Xoom.¹⁹⁶ “If you have five years or so of financial history and you aren’t showing them all, the question becomes, why aren’t you?”¹⁹⁷

C. Taking Full Advantage of Confidential Filings

One very popular aspect of Title I has been the opportunity to receive confidential reviews of draft registration statements under Section 106(b).¹⁹⁸ Ernst & Young hypothesized that the dramatic decrease in the number of companies filing IPO registration statements in the second quarter of 2012 compared to the number of filers in the second quarter of 2011 was due, among other things, to “confidential filings under the JOBS Act.”¹⁹⁹ Supporting this contention is the fact that approximately fifty-nine percent of emerging growth companies confidentially filed draft registration documents to the SEC through the end of 2012.²⁰⁰ In fact, the SEC received two confidential filings from emerging growth companies just hours after the JOBS Act was signed into law.²⁰¹ By February 2013, approximately 150 emerging growth companies had filed confidentially.²⁰² In preparation for the expected onslaught of confidential filings, the SEC had to create a new filing system apart from its electronic public filing system EDGAR.²⁰³ Until the SEC implements

191. *Id.*

192. *Id.*

193. *Id.*

194. *See id.* (quoting Andrew Shapiro, president of the hedge-fund firm Lawndale Capital Management LLC)

195. Dieterich, *supra* note 179.

196. *Id.*

197. *Id.*

198. *See id.*

199. *U.S. IPO Pipeline Slows Due to Confidential Filings Under JOBS Act and Investor Uncertainty*, ERNST & YOUNG (June 27, 2012), http://www.ey.com/US/en/Newsroom/News-releases/News_U-S-IPO-Pipeline-Slows-Due-to-Confidential-Filings (depicting a drop from forty-four registrants in Q2 2011 down to just twenty-four in Q2 2012).

200. Dieterich, *supra* note 179.

201. Transcript of Fourth Meeting of Advisory Committee on Small and Emerging Companies, U.S. Sec. & Exch. Comm’n 6 (June 8, 2012) [hereinafter Advisory Committee Transcript] (statement of Jennifer Zepralka).

202. Jessica Holzer, *SEC Official: Confidential Filings Popular After JOBS Act*, WALL ST. J. (Feb. 22, 2013), <http://blogs.wsj.com/cfo/2013/02/22/sec-official-confidential-filings-popular-after-jobs-act/>.

203. *See* Advisory Committee Transcript, *supra* note 201.

an electronic system for confidential filings, emerging growth companies can submit draft registration statements to the SEC by regular mail either in paper or in a searchable PDF file on a CD or DVD.²⁰⁴

Emerging growth companies who take advantage of this opportunity to file confidentially “can keep [their] financial and strategic plans away from the prying eyes of competitors” and avoid “tip[ping] their hand at intentions to go public.”²⁰⁵ Like companies that present limited financial information, companies that file for an IPO but fail to complete the offering face negative reactions from the markets.²⁰⁶ Confidential filing allows emerging growth companies to file for their IPO but wait for the right market window to complete the offering without fear of creating negative perception.²⁰⁷

Not all emerging growth companies have found the ability to file confidentially a worthwhile advantage.²⁰⁸ For example, Blackstratus, a computer security emerging growth company, decided not to file its registration statement confidentially.²⁰⁹ The tradeoff an emerging company faces if it chooses to file confidentially is that it must disclose its filing history, including confidentially-filed registration statements and conversations with the SEC, at least twenty-one days prior to beginning its road show.²¹⁰ This means that a company who chooses to file confidentially may not be able to take advantage of market windows that present themselves in a short time frame.²¹¹ Additionally, some companies may view the confidential filing process as a means of demonstrating that they are not mature companies.²¹² These companies are worried that perhaps a confidential filing might color the SEC’s and investors’ analysis of the companies’ disclosures.²¹³ One former SEC official commented that the twenty-one day gap between when a company has to disclose its otherwise confidential filings can be an invitation for extra attention.²¹⁴ An emerging growth company must thus decide whether the opportunity for a confidential SEC review of disclosures is worth the added inspections.

D. Weighing in on Tick Size and Regulation S-K

Sections 106(b) and 108 of the JOBS Act call upon the SEC to make two reports to Congress on the impact of decimalization and Regulation S-K on

204. *Division Announcement Regarding Confidential Submission of Draft Registration Statements under the Jumpstart Our Business Startups Act*, U.S. SEC. & EXCH. COMM’N (Apr. 5, 2012), www.sec.gov/divisions/corpfin/cfannouncements/draftregstatements.htm.

205. Dieterich, *supra* note 179.

206. *Id.*

207. *See id.*

208. Emily Chasan, *Confidential Filing Not A No-Brainer For Aspiring IPOs*, WALL ST. J. (Apr. 19, 2012), <http://blogs.wsj.com/cfo/2012/04/19/confidential-filing-not-a-no-brainer-for-aspiring-ipos/>.

209. *Id.*

210. *See id.*; JOBS Act, Pub. L. No. 112-106, § 106(a), 126 Stat. 306, 312 (2012).

211. Chasan, *supra* note 208.

212. *See id.*

213. *See id.*

214. *Id.*

emerging growth companies.²¹⁵ The report on decimalization (the “Decimalization Report”) was presented to Congress in July 2012.²¹⁶ In December 2013, the SEC presented its report on Regulation S-K (the “Regulation S-K Report”).²¹⁷

In its IPO Report, the IPO Task Force pointed to the introduction of decimalization as part of a “regulatory cascade” that effectively shifted the market’s focus towards large cap stocks at the expense of small cap stocks.²¹⁸ Despite the Task Force’s assertions, the SEC’s Report was largely inconclusive.²¹⁹ The SEC staff cited to the lack of literature regarding long-term effects of decimalization on small and middle capitalization companies and the many variables—some being, perhaps, of much greater significance to the number of U.S. IPOs—that should be focused on additionally, if not alternatively, to tick size.²²⁰

The Commission should not proceed with the specific rulemaking to increase tick sizes, as provided for in Section 106(b) of the JOBS Act, but should consider additional steps that may be needed to determine whether rulemaking should be undertaken in the future. The Staff believes that the Commission should solicit the views of investors, companies, market professionals, academics, and other interested parties on the broad topic of decimalization, how to best study its effects on IPOs, trading, and liquidity for small and middle capitalization companies, and what, if any, changes should be considered.²²¹

To this end, the SEC held a Decimalization Roundtable on February 5, 2013 during which “three panels discussed various impacts of decimalization and tick sizes on the securities markets.”²²² The discussions focused heavily on the problems facing small cap stocks, although some observers were “surprised” by the glaring lack of a chief financial officer or investor relations representative from a public company on any of the panels,” particularly when “it was the fate of their stocks that was being discussed.”²²³

The Decimalization Report did indicate, however, that an increased tick size would benefit emerging growth companies.²²⁴ Without concluding on the cause, the SEC stated that “lower spreads” (i.e., the difference between the bid price and the ask price) “tend to be associated with equity securities that are considered to be more, rather than less, liquid.”²²⁵ Since the securities of an emerging growth company tend to be on average less liquid, if their spreads were higher, then the

215. JOBS Act, Pub. L. No. 112-106, § 106(b), 126 Stat. 306, 312-13 (2012).

216. See generally STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT TO CONGRESS ON DECIMALIZATION (2012) [hereinafter DECIMALIZATION REPORT].

217. See generally STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS IN REGULATION S-K (2013) [hereinafter REGULATION S-K REPORT].

218. See IPO TASK FORCE, *supra* note 14, at 9, 13.

219. See DECIMALIZATION REPORT, *supra* note 216, at 21-23.

220. See *id.* at 19-23.

221. *Id.* at 22.

222. See *Decimalization*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/spotlight/decimalization.shtml> (last visited Sept. 21, 2014).

223. *Our Take on the SEC Decimalization Roundtable*, THEMIS TRADING BLOG (Feb. 6, 2013), <http://blog.themistrading.com/our-take-on-the-sec-decimalization-roundtable/>.

224. See DECIMALIZATION REPORT, *supra* note 216, at 19-20.

225. *Id.* at 19.

company could potentially benefit from an increased tick size.²²⁶ Commenting on the Decimalization Report, Associate Professor at Georgetown University's McDonough School of Business James J. Angel suggested that the SEC "should experiment with letting issuers specify their own tick sizes."²²⁷ Emerging growth companies that are "smaller and less liquid," he reasoned, "may benefit from providing relatively more protection [such as an increased tick size] for liquidity providers."²²⁸

In the Regulation S-K Report, the SEC's overall conclusion was that "further information gathering and review is warranted in order to formulate specific recommendations regarding specific disclosure requirements."²²⁹ Although the SEC declined to make specific recommendations on Regulation S-K, it received several comments with suggestions.²³⁰ In a letter to the SEC, Ernst & Young laid out a number of recommendations "for simplifying and modernizing Regulation S-K."²³¹ The letter cites Ernst & Young's own research on the burden that disclosures under Regulation S-K places on issuers.²³² Analyzing annual disclosures from 1972 through 2011, Ernst & Young found that the average number of pages of footnotes had increased by 1,625 percent.²³³ The average pages of Management Disclosure & Analysis had increased by 1,500 percent and were predicted to fill more than 500 pages of disclosure in 2032 if the rate continued.²³⁴ According to Ernst & Young, the problem stems from the fact that "standard setters rarely eliminate existing requirements when they add new ones."²³⁵

To alleviate this heavy burden, Ernst & Young suggested that the SEC eliminate or revise certain types of disclosures:

- Disclosures created to address a void in GAAP requirements in the past that may now be redundant with note disclosures that were mandated later
- Disclosures of information investors can more easily obtain from sources other than SEC filings
- Disclosures that have become industry-specific rather than applicable to all entities

226. See Peter Chapman, *Ticking Up: Larger Tick Size Considered For Small-Cap Companies*, TRADERS MAG. (Aug. 2012), http://www.tradersmagazine.com/issues/25_341/jobs-act-tick-spread-110179-1.html (discussing liquidity issues in small cap stocks as they relate to a potential increase in tick size).

227. Letter from James J. Angel, Assoc. Professor, Georgetown Univ. McDonough Sch. of Bus., to U.S. Sec. & Exch. Comm'n 1 (June 19, 2012), available at <http://www.sec.gov/comments/jobs-title-i/tick-size-study/tick-size-study-1.pdf>.

228. *Id.*

229. REGULATION S-K REPORT, *supra* note 217, at 93.

230. See *Jumpstart Our Business Startups (JOBS) Act*, U.S. SECS. & EXCH. COMM'N, <http://www.sec.gov/spotlight/jobs-act.shtml> (last visited Sept. 21, 2014).

231. Letter from Ernst & Young LLP, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n 2-5 (Sept. 11, 2012), available at <http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk-3.pdf> [hereinafter Ernst & Young LLP Letter].

232. See *id.*; ERNST & YOUNG, NOW IS THE TIME TO ADDRESS DISCLOSURE OVERLOAD (2012), available at [http://www.ey.com/Publication/vwLUAssets/ToThePoint_BB2367_DisclosureOverload_21June2012/\\$FILE/ToThePoint_BB2367_DisclosureOverload_21June2012.pdf](http://www.ey.com/Publication/vwLUAssets/ToThePoint_BB2367_DisclosureOverload_21June2012/$FILE/ToThePoint_BB2367_DisclosureOverload_21June2012.pdf).

233. ERNST & YOUNG, *supra* note 232, at 2.

234. *Id.*

235. *Id.* at 3.

- Disclosures based on purely quantitative thresholds without regard for materiality²³⁶

In addition to these eliminations and revisions, Ernst & Young recommended that the SEC “revisit the way disclosure information is filed and presented to investors.”²³⁷ For example, under the recommended changes, certain basic disclosures (such as the issuer’s directors and executive officers, business risks, and address) “would only need to be updated when something changes.”²³⁸ Until the SEC makes its own conclusions regarding Regulation S-K, however, it is unclear whether Ernst & Young’s recommendations will align with those of regulators.

VI. Conclusion

The JOBS Act has been a controversial but exciting piece of legislation in an economy stricken with a multitude of interrelated symptoms, unemployment being one of the most pressing. Despite unusually high bipartisan support for the law, some critics argue that the link between IPOs and job creation is too attenuated to justify removing long-standing investor protection laws. Others question whether deregulation in any amount will resolve the issue of too few IPOs.

Since its enactment, the JOBS Act may have introduced more questions than it has solved. The ability to confidentially file disclosure documents might be enticing companies to think more about going public. But the continued lack of IPOs in 2012 seems to indicate that companies who test the market with confidential filing are not changing their minds about going public, but are rather confirming that they want to remain private. Yet very small companies, *e.g.*, those with less than \$250 million in annual revenues, appear to be increasingly attracted to the public markets. The markets are still awaiting SEC conclusions on the effects and future of decimalization and Regulation S-K, but it appears that more needs to be done to make the IPO process more efficient. Over the next few years, and hopefully coupled with a growing U.S. economy, emerging growth companies will demonstrate to the markets whether they believe Title I of the JOBS Act has been successful.

236. Ernst & Young LLP Letter, *supra* note 231, at 3.

237. *Id.* at 5.

238. *Id.*

