

**Testimony Concerning the “JOBS Act in Action Part II: Overseeing Effective  
Implementation of the JOBS Act at the SEC”  
before the  
Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs  
Oversight and Government Reform Committee  
U.S. House of Representatives**

**by  
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June 28, 2012**

Chairman McHenry, Ranking Member Quigley, and Members of the Subcommittee:

I appreciate the opportunity to testify regarding the implementation of the Jumpstart Our Business Startups Act (JOBS Act), as well as the implementation of our staff’s guidance on economic analysis in rulemaking.<sup>1</sup> In the two months since my testimony on these issues, we have continued to work hard to implement the new statutory provisions and to ensure that our rulemaking fully incorporates appropriate and rigorous economic analysis.

**JOBS Act Implementation**

The JOBS Act, enacted on April 5, 2012, makes significant changes to the federal securities laws, including:

- changing the initial public offering process for a new category of issuer, called an “emerging growth company,” including, among other things, permitting these companies to submit draft registration statements for review on a confidential basis, providing exemptions for such companies from various disclosure and other requirements for up to five years following their initial public offerings, and relaxing certain restrictions on communications by issuers and their underwriters;

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<sup>1</sup> The views expressed in this testimony are those of the Chairman of the Securities and Exchange Commission and do not necessarily represent the views of the Commission.

- requiring the Commission to modify the prohibition against general solicitation and general advertising in Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933 (Securities Act);
- requiring the Commission to implement exemptions under the Securities Act for “crowdfunding” offerings and unregistered public offerings of up to \$50 million; and
- increasing the number of holders of record that trigger public reporting under the Securities Exchange Act of 1934 (Exchange Act), and increasing the number of holders that permits deregistration and suspension of reporting under the Exchange Act for banks and bank holding companies.

The JOBS Act also requires that the Commission conduct several studies and prepare reports to Congress. In addition, the JOBS Act mandates that the Commission provide online information and conduct outreach to small and medium-sized businesses and businesses owned by women, veterans and minorities, about the changes made by the new statute.

As you know, certain of the JOBS Act’s provisions became effective immediately upon enactment, while others require extensive Commission rulemaking, in some cases within very short timeframes. These rulemakings are in addition to Commission rulemaking activity to address important market structure issues and weaknesses identified in the aftermath of the events of May 6, 2010, as well as to implement the many statutory mandates with regard to financial reform.

The Commission staff has moved aggressively to implement the provisions of the JOBS Act. Prior to enactment, Commission staff began analyzing the draft legislation in order to be in a position to provide essential information to companies and their advisers about those provisions of the law that became effective immediately. For example, on the day of enactment, staff in the Division of Corporation Finance posted procedures on the Commission’s website

explaining how emerging growth companies could submit draft registration statements for confidential non-public review as permitted by the JOBS Act. The staff also provided a telephone number that companies and their advisers could use to contact staff with JOBS Act related questions. In fact, on the same day the President signed the JOBS Act into law, the staff received a confidentially submitted registration statement from an emerging growth company that used the new procedures the staff had posted earlier.

Soon after enactment, the staff prepared and posted on the Commission's website frequently asked questions that provide guidance to issuers and their advisers about matters related to the law's IPO "on-ramp," as well as changes to the requirements for Section 12(g) registration and deregistration and the crowdfunding provisions of the JOBS Act. The feedback provided to the staff from companies and their advisers on the JOBS Act guidance has been uniformly positive.

With respect to the rules required under the JOBS Act, the staff has formed several rule writing teams consisting of staff from across the agency, including economists from the Division of Risk, Strategy, and Financial Innovation (RSFI). As discussed below, these teams are working on rulemaking recommendations, including the associated economic analyses, for the Commission to implement those provisions of the JOBS Act that require rulemaking.

To aid the rulemaking process and increase the opportunity for public comment, we have made available a series of e-mail boxes on the SEC website through which interested parties can proactively submit comments on the various portions of the JOBS Act prior to the issuance of

any proposed rules. Since the e-mail boxes were established in April, a wide range of interested parties has been providing helpful feedback and insights on each title of the JOBS Act. For example, the request for comment on the crowdfunding provisions has generated over 80 submissions. In addition, Commission staff has been meeting with a broad cross-section of interested members of the public about implementation of the JOBS Act. In order for the process to be as transparent as possible, we post on our website the names of individuals participating in these meetings, along with any agendas and written materials distributed by them at such meetings.

Below is a more detailed description of the efforts taken to date to implement the various sections of the JOBS Act.

### *Title I*

Title I creates a new category of issuer called an “emerging growth company,” which is defined as a company with total annual gross revenues of less than \$1 billion during its most recently completed fiscal year. Only companies whose first registered sale of common equity securities occurred after December 8, 2011 may be considered emerging growth companies. A company retains its status as an emerging growth company until the earliest of the following:

- the last day of its fiscal year during which its total annual gross revenues are \$1 billion or more;
- the date it is deemed to be a large accelerated filer under the Commission’s rules;
- the date on which it has issued more than \$1 billion in non-convertible debt in the previous three years; or
- the last day of the fiscal year following the fifth anniversary of the first registered sale of common equity securities of the issuer.

As referenced above, emerging growth companies may confidentially submit draft registration statements to the Commission prior to the company's initial public offering date. All such submissions and amendments must be filed publicly no later than 21 days before the date the issuer conducts a road show, as that term is defined in Rule 433.

Under the JOBS Act, emerging growth companies can take advantage of scaled disclosure and other requirements, including with respect to the Commission's financial statement and selected financial data requirements and certain executive compensation disclosures. Emerging growth companies are exempted from the audit of internal controls required under Section 404(b) of the Sarbanes-Oxley Act of 2002, and from specific potential future auditing standards. In addition, under the JOBS Act, emerging growth companies cannot be required to comply with any new or revised financial accounting standard until the date that a private company would be required to comply.

Title I also makes important changes with respect to communications around securities offerings, the provision of research, and securities analyst communications. The law provides a Securities Act exemption for emerging growth companies and persons authorized to act on their behalf to communicate with potential investors that are qualified institutional buyers or institutional accredited investors prior to or following the filing of a registration statement to "test the waters" for an offering. Title I also provides an exemption under the Securities Act for the issuance of research reports before, during, and following initial public offerings and other

offerings for emerging growth companies by underwriters engaged in such offerings. It also prohibits the Commission and national securities associations from:

- restricting which associated persons of a broker-dealer may arrange for communications between a securities analyst and a potential investor;
- restricting a securities analyst from participating in communications with an emerging growth company's management team that is also attended by any other associated person of a broker-dealer whose functional role is not that of a securities analyst; and
- restricting broker-dealers from publishing or distributing research reports or making public appearances with respect to the securities of an emerging growth company within a specified time period after the emerging growth company's initial public offering or prior to the expiration of a lock-up agreement.

Title I's provisions are effective without Commission rulemaking. As noted above, immediately following enactment of the JOBS Act, the staff developed and published procedures for emerging growth companies to submit draft registration statements for confidential non-public review. The staff continued to work to simplify that process, and in early May 2012 announced the implementation of a secure e-mail system that provides for the electronic transmission and receipt of confidential submissions. The staff also has sought to provide guidance on the implementation and application of Title I in light of the Commission's existing rules, regulations and procedures through the issuance of frequently asked questions. The staff is continuing to work with companies and practitioners concerning the application of Title I, and plans to issue additional guidance in the near future.

Title I also requires the Commission to submit two reports to Congress. Section 106(b) requires that the Commission, within 90 days of enactment of the JOBS Act, conduct a study and report to Congress on the transition to trading and quoting securities in one penny increments –

also known as decimalization – and the impact decimalization has had on the number of initial public offerings since its implementation relative to the period before its implementation. If the Commission determines that the securities of emerging growth companies should be quoted and traded using a minimum increment of greater than \$0.01, the Commission may by rule, not later than 180 days after the date of enactment, designate a minimum increment for emerging growth companies that is greater than \$0.01 but less than \$0.10. Staff from RSFI and the Division of Trading and Markets are leading a cross-agency team in structuring and conducting the required study.<sup>2</sup> We expect to release the study shortly.

Section 108 of the JOBS Act requires the Commission to conduct a review of Regulation S-K to comprehensively analyze the registration requirements of such regulation and determine how they may be updated to modernize and simplify the registration process and reduce the costs and other burdens for emerging growth companies. Within 180 days of enactment of the JOBS Act, the Commission must transmit a report to Congress on this review, including specific recommendations. The Commission’s staff currently is in the process of reviewing Regulation S-K’s requirements and preparing its recommendations.

## ***Title II***

Title II requires the Commission to revise the Rule 506 safe harbor from registration to allow general solicitation and general advertising for offers and sales made under Rule 506, provided that all securities purchasers are accredited investors. The rules the Commission adopts are to require issuers to take “reasonable steps to verify that purchasers of the securities are

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<sup>2</sup> On June 8, 2012, the SEC Advisory Committee on Small and Emerging Companies held a discussion of market structure issues and their impact on initial public offerings which provided additional useful information that informed the study.

accredited investors, using such methods as determined by the Commission.” The JOBS Act also states that Rule 506 will continue to be treated as a regulation issued under Section 4(2) of the Securities Act, and that offers and sales under Rule 506 as revised will not be deemed public offers under the Federal securities laws as a result of general solicitation or advertising. The Commission also is required to revise Rule 144A to provide that securities sold under the revised rule may be offered to persons other than qualified institutional buyers, including by means of general solicitation or advertising, provided that the securities are sold only to persons reasonably believed to be qualified institutional buyers.

The rulemakings to revise Rule 506 and Rule 144A are both required to be completed within 90 days of enactment of the JOBS Act. As I stated to Congress prior to the passage of the Act, time limits imposed by the JOBS Act are not achievable. Here, the 90 day deadline does not provide a realistic timeframe for the drafting of the new rule, the preparation of an accompanying economic analysis, the proper review by the Commission, and an opportunity for public input. Although we will not meet this deadline, the staff has made significant progress on a recommendation and economic analysis, and it is my belief that the Commission will be in a position to act on a staff proposal in the very near future.

In addition, Title II amends Section 4 of the Securities Act to provide a narrow exemption from the requirement to register with the SEC as a broker-dealer in connection with certain limited activities related to Regulation D offerings.

### ***Title III***

Title III provides a new exemption from Section 5 of the Securities Act for crowdfunding offerings. Crowdfunding offerings are securities offerings that meet certain specific conditions, including with regard to the maximum amount that may be raised by an issuer and the maximum amount that an individual investor may invest, including any amounts sold in reliance on the crowdfunding exemption during the prior 12 months. These conditions also include a requirement that a crowdfunding offering be conducted through a crowdfunding intermediary that is either a registered broker or a registered “funding portal,” and that both the intermediary and the issuer comply with certain requirements, including with regard to disclosure to investors.

The JOBS Act also includes other restrictions that issuers and crowdfunding intermediaries must comply with, including with regard to advertisement of the offering and compensation of persons who promote the offering through communications on an intermediary’s website. The Commission also is required to establish disqualification provisions for certain bad actors, and exempt crowdfunding securities from counting toward the thresholds in Section 12(g) of the Exchange Act.

In May, the staff published responses to frequently asked questions related to the crowdfunding exemption to provide guidance on the implementation of the Title III provisions. In April, we issued a notice reminding market participants that this title was not yet effective. The JOBS Act requires the Commission to adopt rules within 270 days of enactment to implement the new crowdfunding exemption. Staff in the Divisions of Corporation Finance and

Trading and Markets are working closely together, along with the economists in RSFI, to develop recommendations for the Commission.

#### ***Title IV***

Title IV requires Commission rulemaking to create a new exemption from Securities Act registration, similar to existing Regulation A, which would allow certain “small issue” offerings of up to \$50 million in a 12-month period. The JOBS Act specifies that the exemption include certain terms and conditions, including, among others, that the securities may be offered and sold publicly, the securities sold under the exemption will not be restricted securities, and issuers of the securities will be required to file audited financial statements annually with the Commission. The Commission may add other terms, conditions, and requirements it determines necessary in the public interest and for the protection of investors, which may include electronic filing of the offering documents, periodic disclosures by the issuer, or disqualification provisions. The staff is working on proposed rules to recommend to the Commission. The JOBS Act also requires the Commission to review the offering limit under the new exemption not later than two years after enactment of the JOBS Act, and every two years thereafter.

#### ***Titles V and VI***

Titles V and VI of the JOBS Act both amend Section 12(g) of the Exchange Act, which sets forth certain registration requirements for classes of securities. Prior to enactment of the JOBS Act, Section 12(g) required a company to register its securities with the Commission within 120 days after the last day of its fiscal year, if, at the end of the fiscal year, the securities

were held of record by 500 or more persons and the company had total assets exceeding \$10 million.

Title V amends Section 12(g) to raise the threshold for registration from 500 holders of record to either 2,000 holders of record or 500 holders of record who are not accredited investors. Title V also excludes from the number of holders of record shares held by persons who received them pursuant to employee compensation plans, and requires Commission rulemaking to provide a safe harbor for the determination of whether such a holder is to be excluded.

Title VI applies only to banks and bank holding companies. It amends Section 12(g) to raise the registration threshold from 500 holders of record to 2,000 holders of record and also changes the threshold for exiting the reporting system from 300 holders of record to 1,200 holders of record. Title VI requires the Commission to write rules to implement this provision within one year of enactment of the JOBS Act.

Titles V and VI were effective immediately upon the enactment of the JOBS Act. In the days following enactment, the staff prepared and posted practical guidance addressing anticipated questions related to the JOBS Act changes to the requirements for Section 12(g) registration and deregistration. To date, approximately 50 bank holding companies have deregistered. Staff is in the process of preparing rule proposals for the Commission's consideration addressing the new requirements of Titles V and VI.

Title V also requires the Commission to examine its authority to enforce the anti-evasion provisions of Rule 12g5-1 and submit recommendations to Congress within 120 days following enactment of the JOBS Act. Staff from the Division of Corporation Finance is working with staff from RSFI and the Divisions of Enforcement and Trading and Markets to review the anti-evasion provision in Rule 12g5-1(b)(3) and the Commission's related enforcement authority and tools, as required by Section 504 of the JOBS Act.

### ***Title VII***

Effective upon enactment, Title VII requires the Commission to provide online information and conduct outreach to inform small and medium sized businesses, as well as businesses owned by women, veterans and minorities, of the changes made by the JOBS Act. Led by the Commission's Office of Minority and Women Inclusion (OMWI), the staff is developing and implementing an outreach plan tailored to these business communities. This will include:

- expanding the content of OMWI's existing outreach efforts, such as our Vendor Outreach Days and one-on-one business matchmaking sessions, to provide information about the JOBS Act and how it benefits the business communities listed in Section 701; and
- implementing an agency-wide effort to provide user-friendly, tailored information about the JOBS Act on the sec.gov website, in various print media outlets, and in hard copy materials distributed at conferences and outreach events.

OMWI also will collaborate with other divisions and offices within the Commission to create a long-term strategy for disseminating JOBS Act information and guidance to the business communities listed in Section 701. Components of this long-term strategy may include partnering with the Small Business Administration and Department of Veterans Affairs,

providing featured JOBS Act presentations and panel discussions at conferences and community events, and hosting JOBS Act roundtables at our headquarters and regional office locations.

As described above, the Commission has made significant progress on implementation of the JOBS Act. By prioritizing the provisions of the Act that became effective upon enactment and providing user-friendly guidance, the staff has enabled interested parties to begin using many provisions of the Act to achieve their business objectives. At the same time, the rule writing teams are working to provide the Commission with recommendations and economic analysis for the remaining provisions as soon as practicable.

### **Economic Analysis**

When I appeared before this Subcommittee in April, I was pleased to report on several improvements in the Commission's capabilities and processes for conducting economic analysis in rulemaking, most notably new staff guidance (Guidance) regarding economic analysis. As I previously noted, high-quality economic analysis is an essential part of SEC rulemaking, as it helps ensure that decisions to propose and adopt rules are informed by the best available information about a rule's likely economic consequences. The Guidance is available on the Commission's website for public review.<sup>3</sup> Although the Guidance is in effect and being followed by the rule writing teams as they develop rule recommendations, including those to implement the JOBS Act, we continue to work to improve the Guidance and have solicited input from all Commissioners with a goal of developing a version of the Guidance that can be approved by the full Commission.

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<sup>3</sup> A link to the Guidance can be found at <http://www.sec.gov/divisions/riskfin.shtml>.

In my prior testimony, I discussed and provided a detailed overview of the economic analysis Guidance developed by RSFI and Office of the General Counsel (OGC). The Guidance was distributed to the leadership of the Commission's rule writing Divisions and Offices in mid-March, and I have explicitly directed the rule writing Divisions and Offices that they are to follow this Guidance. Under the Guidance, staff from RSFI and OGC are extensively involved in the rule writing process: they are involved from the earliest stages of any rulemaking, provide input on drafts and/or assist in drafting before the drafts are circulated to the Commission, and are in frequent communication with the rule writing Divisions. Additionally, as the Guidance indicates, RSFI's concurrence in the economic analysis of both a proposing and an adopting release should be obtained before a draft is formally circulated to the Commission. Such concurrence must come from the Director of RSFI/Chief Economist and be communicated to senior staff in the Division or Office responsible for the rule. This concurrence will ensure that the Guidance has been reflected in the rule release.

The feedback I have received from our Chief Economist and OGC is that the Guidance is in fact being followed for both the rule recommendations already in process as well as those at the earliest stages of development. Moreover, I am told that the Guidance is improving both the rule writing process and the substance of the economic analysis. RSFI economists are more deeply involved in the development of rule recommendations and in conveying and explaining the economic consequences of particular choices. I expect that the Commission's forthcoming rules will reflect this increased collaboration and attention to economic analysis.

Since the Guidance was implemented, the Commission has published two final rules.<sup>4</sup> Although work was underway for the two rules prior to the implementation of the Guidance, the economic analyses in connection with those rules were reviewed prior to adoption and determined to be consistent with the Guidance. In addition, I expect another rule will be published in the very near future that follows the Guidance.

The Guidance has provided clear benefits to our economic analyses. For example, in late April, the Commission unanimously adopted a rule that defined certain terms applicable to the over-the-counter swaps market. Data analysis performed by RSFI economists was instrumental in assisting the Commission in its decisions. The final release illustrates the significant effect transparent and robust economic analysis can have on the Commission's policy choices.

In addition to the work implementing the Guidance, we are strengthening our rule writing teams, in particular by continuing to hire economists in RSFI to work on rulemakings. In the near future, 16 new economists will be joining RSFI to assist in rule writing, and we have requested an additional 20 economist positions as part of the fiscal year 2013 budget request. The potential need for additional economists beyond this will be analyzed on a going forward basis, and our ability to hire economists to fill these positions in the future will depend on the resources provided by Congress. This ongoing commitment to hiring and ensuring that RSFI is

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<sup>4</sup> See Release No. 34-66868, *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant."* (April 27, 2012), <http://www.sec.gov/rules/final/2012/34-66868.pdf>; Release No. 33-9330, *Listing Standards for Compensation Committees* (June 20, 2012), <http://www.sec.gov/rules/final/2012/33-9330.pdf>. This number does not include several technical or ministerial rules that the Commission has adopted during this period.

adequately resourced will enable the Division to fulfill its mandates, including developing high quality economic analyses of Commission rules.

The implementation of the Guidance and the strengthening of our rule writing teams are having a significant, positive impact on our rule writing process and on our economic analysis. In addition, because it is the Commission itself that is responsible for reviewing and ultimately deciding whether to approve each rule proposal prepared by the rule writing staff, each Commissioner has the opportunity to make his or her own assessment of whether the staff has complied with the Guidance and to raise with the staff any concerns about its application.

### **Conclusion**

In conclusion, our implementation of the JOBS Act is ongoing. SEC staff has provided direction and guidance to the public to ensure that the provisions of the Act that were effective on enactment are workable and comprehensible. SEC staff also is moving forward on the various rulemakings required by the Act. The economic analysis Guidance is being followed and is informing rulemaking activity under the JOBS Act in the same manner as our other rulemaking activity.

I would be pleased to answer any questions you may have.