Amending the JOBS Act: Issues in the 113th Congress

May 23, 2013

Congressional Research Service
https://crsreports.congress.gov
R43084

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

On April 5, 2012, the Jumpstart Our Business Startups Act (JOBS Act; P.L. 112-106) was enacted with bipartisan support in the 112th Congress. The statute, examined in depth in the CRS Report R42427, *U.S. Initial Public Stock Offerings and the JOBS Act*, by Rena S. Miller and Gary Shorter, aims to boost corporate capital formation through amending parts of federal securities laws some viewed as an impediment to that process. The 113th Congress is currently considering legislation to amend the act in two ways: (1) expand coverage of the JOBS Act to more companies; and (2) accelerate Securities and Exchange Commission (SEC) rulemaking required for the implementation of a specific provision in the act.

Regulation A (Reg A) of the Securities Act of 1933 allows the SEC to exempt publicly offered securities from having to be registered if the value of the securities does not exceed $5 million during any 12-month period. Title IV of the JOBS Act raised that ceiling to $50 million during any 12-month period. Proponents of the provision said that it would provide new sources of capital for private enterprises. However, Title IV imposed no deadline on the SEC, which must adopt rules necessary for the provision's implementation. To date, the agency has not completed the rulemaking process.

H.R. 701 (McHenry), which passed the House with bipartisan support on May 15, 2013, would impose a deadline of October 31, 2013, for completion of SEC rulemaking needed to implement the provision. The legislation is a congressional response to concerns that the SEC is not acting expeditiously enough to finish its rulemaking on what some regard as an important provision. SEC officials have indicated that they have begun the rulemaking process for the provision, but that they have been challenged by a multitude of rulemaking and regulatory obligations amidst resource constraints. Historically, under federal securities laws, banks and bank holding companies (BHCs) were generally required to register their publicly offered securities with the SEC if they have total assets exceeding $10 million and the shares are held by 500 or more shareholders. They were also allowed to stop registering the securities, and cease or reduce attendant reporting requirements, a process known as deregistration, when their shareholders of record fell to 300 or fewer. Title VI of the JOBS Act raised the shareholder registration threshold with the SEC from 500 to 2,000 and increased the deregistration threshold from 300 to 1,200, a provision that went into effect immediately after the JOBS Act's enactment. As of December 2012, this has resulted in about 100 banks and BHCs deregistered since the provision went into effect, an unprecedented number.

Some say that the provision will make it easier for community banks to raise capital without triggering costly SEC registration requirements and enable some SEC-registered community banks to deregister, reducing their regulatory burdens and freeing up bank capital. Various community banks have taken advantage of Title VI's liberalized registration trigger and have been able to raise shareholder equity capital without having to incur registration expenses. S. 872 (Toomey) and a companion bill, H.R. 801 (Womack), which has been ordered reported by committee, would expand the Title IV shareholder registration and deregistration thresholds to savings and loan holding companies. This report discusses these proposed amendments in more detail. It will be updated as developments warrant.

Contents

Introduction 1
Background on Federal Securities Registration and Disclosure Requirements 1
Overview of the JOBS Act 2
How the JOBS Act Amended Regulation A 3
Legislation in the 113th Congress to Accelerate Rulemaking on Regulation A 5
The JOBS Act's Bank Registration and Deregistration Shareholder Thresholds 8
Potential Benefits and Costs of Being an Unregistered Bank 9
Legislation to Amend the JOBS Act's Bank Registration and Deregistration Shareholder Thresholds to Apply to Savings and Loans 11

Contacts

Author Information 12

Introduction

On April 5, 2012, the Jumpstart Our Business Startups Act (JOBS Act; P.L. 112-106) was enacted with bipartisan support in the 112th Congress. The statute, examined in depth in the CRS Report R42427, *U.S. Initial Public Stock Offerings and the JOBS Act*, by Rena S. Miller and Gary Shorter, aims to boost corporate capital formation through amending parts of federal securities laws some viewed as an impediment to that process.

The 113th Congress is currently considering legislation that would amend certain provisions in the JOBS Act. Currently, there are two areas of focus: (1) expanding parts of the JOBS Act that exempted certain banks and bank holding companies[1] (BHCs) from various reporting requirements associated with Securities and Exchange Commission (SEC) registration to include savings and loan holding companies (SLHCs);[2] and (2) expediting the pace of SEC rulemaking on a provision that expands the amount companies can raise through the federal securities law Regulation A (Reg A). Reg A exempts certain firms from having to register securities offerings with the SEC. In the case of the latter legislative initiative, H.R. 701 (McHenry) was passed by the House on May 15, 2013.

This report provides an overview of current legislation that is attempting to accomplish the aforementioned actions by discussing (1) securities registration and disclosure requirements in federal securities laws; (2) modifications made by the JOBS Act; (3) the JOBS Act's amendment to Regulation A and subsequent criticisms; (4) legislation in the 113th Congress to amend Regulation A in the JOBS Act; (5) the JOBS Act's bank registration and deregistration shareholder thresholds; (6) the costs and benefits of being an unregistered bank; (7) legislation to amend the JOBS Act's bank registration and deregistration shareholder thresholds; and (8) bank deregistrations after the JOBS Act and their potential legislative implications.

Background on Federal Securities Registration and Disclosure Requirements[3]

The Securities Act of 1933 (the 1933 Act) makes it illegal to offer or sell securities to the public unless they have been registered with the SEC.[4] Registration covers only the securities actually being offered and only for the purposes of the offering in the registration statement. The registration consists of two basic parts: (1) the prospectus, which must be provided to every purchaser of the securities, and (2) supplemental information, which contains information and exhibits that do not have to be provided to purchasers but are available for inspection by the

[1] A bank is a financial institution that provides services, such as accepting deposits, extending business loans and auto loans, mortgage lending, and providing basic investment products like certificates of deposit. Some large banks also engage in investment banking activities, including underwriting, acting as an intermediary between an issuer of securities and the investing public, facilitating mergers and other corporate reorganizations, and acting as a broker for institutional clients. A bank holding company is a company that owns or controls two or more banks or other bank holding companies.

[2] A savings and loan institution is a federally or state chartered financial institution that takes deposits from individuals, funds mortgages, and pays dividends.

[3] This section was taken from: CRS Report R42427, *U.S. Initial Public Stock Offerings and the JOBS Act*, by Rena S. Miller and Gary Shorter (and was written by Michael Seitzinger).

[4] 15 U.S.C. §77e.

public at the SEC. Section 7 of the 1933 Act[5] sets forth the information that must be contained in the registration statement. The schedule requires such information as the underwriters, the specific type of business, significant shareholders, debt and assets of the company, and opinions as to the legality of the issue. Section 10(a) of the 1933 Act specifies what information the prospectus must contain.[6] Numerous regulations issued by the SEC provide further details about the registration process under the 1933 Act.[7]

Certain transactions and securities are exempted from the registration requirements. Exempted transactions include private placements, intrastate offerings, and small offerings.[8] The SEC may, by rules and regulations, exempt any class of securities if it finds that such an exemption is in the public interest and the issue of securities does not exceed $5 million.[9] Among other exempted securities are government securities and short-term commercial paper, securities for which it is believed that other, adequate means of government regulation exist.[10]

The Securities Exchange Act of 1934 (the 1934 Act) addresses many different areas, one of which is the ongoing process of disclosure to the investing public through the filing of periodic and updated reports with the SEC.[11] Any issuer that has a class of securities traded on a national securities exchange or has total assets exceeding $1 million and a class of equity securities with at least 500 or 750 shareholders, depending upon certain factors, must register with the SEC.[12] Every issuer required to register under the 1934 Act must file periodic and other reports with the SEC.[13] Section 12[14] requires the filing of a detailed statement about the company when the company first registers under the 1934 Act. Section 13[15] requires a registered company to file annual and quarterly reports with the SEC. These reports must contain essentially all material information, financial and otherwise, about the company that the investing public might need in making a decision about whether to invest in the company.[16]

Overview of the JOBS Act

Among the views that helped drive the passage of the JOBS Act were (1) that there has been a "steady decline in the U.S. share of the IPO [initial public offering] market" that needs to be addressed and (2) that after the last recession, it has been hard for small businesses to "get traditional bank financing so they [must] rely more on investors and capital markets for financing" and there is a need to make "it easier for them to do that."[17]

---

[5] Ibid.

[6] 15 U.S.C. §77j(a).

[7] See, e.g., 17 C.F.R. Parts 230, 231, and 239.

[8] 15 U.S.C. §77d.

[9] 15 U.S.C. §77c(b). See also SEC Regulation A at 17 C.F.R. §§230.251 *et seq*.

[10] 15 U.S.C. §77c.

[11] 15 U.S.C. §78m.

[12] 15 U.S.C. §78*l*. As stated earlier, the 1933 Act requires the registration of a particular *offering* of securities. The 1934 Act requires the registration of a *class* of securities.

[13] 15 U.S.C. §§78*l*, 78m, and 78n.

[14] 15 U.S.C. §78*l*.

[15] 15 U.S.C. §78m.

[16] See, e.g., 17 C.F.R. Parts 240, 241, and 249.

[17] For example, see "Congressman Spencer Bachus, Chairman of the House Financial Services Committee Speaks on the Floor of the House," *Press Release from the Office of Congressman Spencer Bachus*, March 7, 2012, available at

In addition to the changes to Reg A and the bank and BHC shareholder registration and deregistration thresholds described above, the JOBS Act contains several other components. Several key elements are described briefly below.

The JOBS Act establishes a category of firm known as an *emerging growth company* (EGC), and relaxes various disclosure and accounting requirements for such firms. Criteria for EGC status include having up to $1 billion in annual gross revenue and having less than five years elapse since its initial shares were first sold to the public.

Under federal securities law, certain provisions exist that exempt companies from having to register with the SEC when marketing securities to investors. One such exemption, Rule 506, is used by various start-ups when raising money. The chief limit imposed on companies using Rule 506 is that their securities offering must be principally limited to what are known as accredited investors[18] and that there can be no general solicitation, meaning that the offering must entail a targeted solicitation of accredited investors. This has meant that companies could not broadly advertise their Rule 506 offerings through mass media such as television and print publications. Under the JOBS Act, companies are permitted to conduct general solicitation and advertising for a Rule 506 offering, which could include advertising through television or print media publications. Such offerings, however, are still limited to accredited investors. The SEC has not completed rulemaking required to implement these provisions of the act.

Crowdfunding is a method by which companies or individuals can raise money through relatively small individual contributions from often large numbers of people. It is a fundraising approach that has been propelled by the Internet and social media. Crowdfunding websites solicit everything from charitable donations, to donations for movie production projects, to donations to help underwrite scientific research, to donations for artistic endeavors, and have become central to the crowdfunding process. In return for their funding, donors may receive everything from a thank-you item like a t-shirt, to a product produced by the donation's recipient. Under the 1933 Act, donors could not be given ownership interests, or shares in the profits of a soliciting crowdfunder, as these constitute securities. Subject to limitations on the amount that individuals can invest in them over a 12-month period, the JOBS Act created a special exemption that permits crowdfunding companies to sell securities to those individuals. The SEC has not yet completed rulemaking to implement the crowdfunding provisions in the JOBS Act.

How the JOBS Act Amended Regulation A

Regulation A is an SEC regulation that exempts certain small businesses from some registration and disclosure requirements.[19] Reg A allows the SEC, through the issuance of rules and

http://bachus.house.gov/index.php?option=com_content&task=view&id=1252.

[18] According to federal securities laws, an accredited investor is a bank, insurance company, registered investment company, business development company, or small business investment company; an employee benefit plan, within the meaning of the Employee Retirement Income Security Act, if a bank, insurance company, or registered investment adviser makes the investment decisions, or if the plan has total assets in excess of $5 million; a charitable organization, corporation, or partnership with assets exceeding $5 million; a director, executive officer, or general partner of the company selling the securities; a business in which all the equity owners are accredited investors; a natural person who has individual net worth, or joint net worth with the person's spouse, that exceeds $1 million at the time of the purchase, excluding the value of the primary residence of such person; a natural person with income exceeding $200,000 in each of the two most recent years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year; or a trust with assets in excess of $5 million, not formed to acquire the securities offered, whose purchases a sophisticated person makes.

[19] 17 C.F.R. §§230.251 *et seq*.

regulations, to exempt any class of securities from the registration requirement under the 1933 Act if it finds that the exemption is in the public interest and the issue of securities does not exceed $5 million during any 12-month period. According to a report released by the U.S. Government Accountability Office (GAO), Reg A offerings cleared by the SEC have fallen significantly since the late 1990s. The GAO study found that after peaking at 116 in FY1997, the number of Reg A offerings fell to 19 by 2011.[20]

Title IV of the JOBS Act, often called Reg A+, raises the offering limit under Reg A to $50 million over the course of a year from the previous $5 million. In addition, if the securities are offered or sold on a national securities exchange, or are offered or sold to "qualified purchasers," they will be considered "covered securities," which would exempt them from state securities law regulation. Otherwise, securities offered under Reg A+ are still subject to state securities regulatory review.

Proponents of the Reg A+ provision in the JOBS Act have spoken of its potential to expand capital availability for smaller firms. For example, after the act's passage, then House Financial Services Committee Chairman Spencer Bachus observed,

> Amending Regulation A to make it viable for small companies to access capital will permit greater investment in these companies, resulting in economic growth and more jobs. By reducing the regulatory burden and expense of raising capital from the investing public....[21]

A number of questions have, however, been raised about whether the expanded Reg A will attract significant numbers of new issuers. The concern is that the demands of additional costs and time from state securities regulatory reviews required for Reg A issues that are not covered securities could be a deterrent to taking advantage of Reg A+.[22] State securities regulators, as represented by the North American Securities Administrators Association (NASAA), an association of state and provincial securities regulators, have argued that, whatever rule the SEC eventually issues concerning Reg A, the states must maintain some authority over these offerings.[23]

To facilitate Reg A+, the JOBS Act requires the SEC to issue implementation rules for the disclosures that are required in Reg A offerings. For example, the SEC may require disclosures involving the delivery of the offering statement and other information about the entity issuing the security. The agency also has the authority to impose other rules that it deems to be in the public interest for the protection of investors. The rules could also require issuers to file offering statements and related documents with the SEC, including audited financial statements, a description of the issuer's business operations, and commentary on the company's financial status. The SEC has also been directed to issue regulations fleshing out the details of the new offering limit, such as the definition of a qualified purchaser[24] of a Reg A offering.

---

[20] "Factors that May Affect Trends in Regulation A Offerings," GAO-12-839, *U.S. Government Accountability Office*, July 3, 2012, available at http://www.gao.gov/products/GAO-12-839.

[21] Chairman Richard Bachus, "Regulation A Reform in JOBS Act a 'Game Changer' for Small Business," *House Financial Services Press Release*, June 27, 2012. Available at http://financialservices.house.gov/blog/postid=301209.

[22] For example, see "Factors That May Affect Trends in Regulation A Offerings," *GAO Report No. 12-839*, July 2012. Available at http://op.bna.com/srlr.nsf/id/ywik-8vute4/$File/GAO%20Reg%20A.pdf, and Rutherford B. Campbell, Jr, "Regulation A and the Jobs Act: A Failure to Resuscitate," August 22, 2012. Available at http:/ssrn.com/abstract=2134313 or http://dx.doi.org/10.2139/ssrn.2134313.

[23] "Comments on SEC Regulatory Initiatives under the Jumpstart Our Business Startups Act: Title IV – Small Company Capital Formation," *NASAA*, April 10, 2013. Available at http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Reg-A+-Comment-Letter.pdf.

[24] Securities laws define a qualified purchaser as: (1) any natural person who owns $5,000,000 or more in net investments; (2) any person, acting for his own account or for the accounts of other qualified purchasers who, in the

The JOBS Act did not specify a deadline for the SEC's promulgation of Reg A+ rules. To date, the agency has not proposed any such rules. Agency officials testified before Congress in April 2013 that agency staff had begun developing rule recommendations for Title IV for formal SEC consideration.[25]

Legislation in the 113th Congress to Accelerate Rulemaking on Regulation A

H.R. 701 (McHenry) was passed by the House on May 15, 2013, with bipartisan support. The bill would amend Title IV of the JOBS Act by requiring the SEC to implement the Reg A+ rules by October 31, 2013. H.R. 701 passed the House with bipartisan support on May 15, 2013.

The bill's sponsor, Representative Patrick McHenry, has said that the bill

> ... simply codifies an intended deadline for Regulation A as part of the JOBS Act. The [bill's] target date is reasonable, nearly 19 months after the JOBS Act was signed into law and 5 months before the official Reg A review would need to occur. Our economy needs efficient, vibrant capital markets to thrive and this legislation is a step in the right direction.[26]

A biotech industry trade group known as BIO spoke of the implications of delayed SEC rulemaking on the provision.

> [D]elays at the SEC have blunted the potential impact of the other capital formation reforms in the law, including Regulation A. BIO applauds Rep. McHenry for introducing legislation to speed the implementation of this important provision.... Emerging biotech companies that do not yet have product revenue must cultivate a wide range of public and private investors to finance the development process. Changing the eligibility threshold for Regulation A offerings will provide a new source of capital to fund the search for cures and breakthrough medicines. Bringing groundbreaking cures and treatments from bench to bedside is a long and arduous road, and biotechnology companies are at the forefront of the effort."[27]

In March 2013, SEC Chair Mary Jo White testified that the agency was pursuing Reg A rulemaking "as quickly as possible … [b]ut … some [rulemakings] are easier to move and faster to move than others."[28]

---

aggregate, owns and invests on a discretionary basis, not less than $25,000,000 in net investments; (3) any family-owned organization or entity that owns $5,000,000 or more in net investments; and (4) any trust that was not formed for the specific purpose of acquiring the securities offered, as to which each trustee and person who contributed assets to the trust meets the requirements under (1),(2) or (3) above.

[25] Testimony on "JOBS Act Implementation Update" by Lona Nallengara, Acting Director, Division of Corporation Finance U.S. Securities and Exchange Commission and John Ramsay, Acting Director, Division of Trading and Markets, U.S. Securities and Exchange Commission before the Subcommittee on Investigations, Oversight and Regulations, Committee on Small Business, U.S. House of Representatives, April 11, 2013, available at http://www.sec.gov/news/testimony/2013/ts041113lnjr.htm.

[26] "McHenry Introduces JOBS Act Deadline Bill. Representatives Schweikert, Eshoo, Garrett, and David Scott Co-Sponsor, "*Press Release from the Office of Congressman Patrick McHenry*, February 15, 2013, available at http://mchenry.house.gov/news/documentsingle.aspx?DocumentID=320278, http://ssrn.com/abstract=2134313, or http://dx.doi.org/10.2139/ssrn.2134313.

[27] "BIO Praises Rep. Patrick McHenry on Introduction of Legislation to Speed JOBS Act Implementation" *BIO Press Release*, February 15, 2013, available at http://news.thomasnet.com/companystory/BIO-praises-Rep-Patrick-McHenry-on-bill-to-speed-JOBS-Act-20003423.

[28] "Senate Committee on Banking, Housing and Urban affairs Holds a Hearing on the Consumer Financial Protection

SEC officials have also said that they generally prioritize rulemaking obligations based on their statutory deadlines.[29] They have argued that the agency is facing multiple demands for rulemaking related to the JOBS Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act; P.L. 111-203). At the same time, they have also described resource constraints that they said challenged their pursuit of the obligations:

> [T]he Commission is facing an unprecedented work load when you factor in all of the Congressionally mandated rule-makings. There's over 90 Dodd-Frank provisions that have rule-writing requirements and over 20 studies. Although we've completed 80 percent of those and 17 of those studies, there's still plenty to do. And some of those, some of the rule-makings that are, that are left to do, particularly the ones in John's division are related to systemic risk. And then, and then when you add the JOBS Act rule-making, sort of the three main rule-makings, but there's ancillary rule-makings and studies and reports to do. That is an unprecedented level of work, and the ones related to the JOBS Act as I, as I, as I mentioned earlier, those are fundamental changes to the way that the capital markets, the private offering markets will work. [To properly implement these] … requires us to make sure that we're getting the rules done right. That being said, we need to get them. We appreciate that you gave us deadlines, and those deadlines have passed, but we are focused on getting those rules done.[30]
>
> It also has been clear to me from the outset that the significant expansion of the SEC's responsibilities [under the Dodd-Frank Act] cannot be handled appropriately with the agency's current resource levels.... [T]he SEC does not yet have all the resources necessary to fully implement the law.[31]

In March 2013, Chairman Darrel Issa of the House Oversight and Government Reform Committee; Chairman Jeb Hensarling of the House Financial Services Committee; Chairman Jim Jordan of the House Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending of the Committee on Oversight and Government Reform, and Chairman Patrick McHenry of the House Subcommittee on Oversight and Investigations of the House Financial Services Committee, sent a joint letter to then-SEC Chair Elisse Walter.

The letter criticized the agency's pace in carrying out required rulemaking on the Dodd-Frank Act and the JOBS Act. It also cited reports suggesting that the agency was "using its limited resources to draft a discretionary rule requiring the reporting of corporate expenditures on political activities."[32] Given what it said was the agency's "discretionary" use of its resources that were

---

Bureau and Securities and Exchange Commission Nominations," March 12, 2013, available at http://search.proquest.com/docview/1315958752/13DFE65594E20A1A2A2/1?accountid=12084.

[29] For example, see the comments of Mary Schapiro in: Representative Patrick McHenry Holds a Hearing on SEC Implementation of the JOBS Act," *Political Transcript Wire*, July 2, 2012, available at http://search.proquest.com/docview/1022976345/13E00CB75572B32CE65/30?accountid=12084.

[30] See the comments of Lona Nallegara, SEC Director of Corporation Finance in: "Representative David Schweikert Holds a Hearing on JOBS Act Implementation Update," April 11, 2013, available at http://search.proquest.com/docview/1328124343/13E00E052213F6C0A6E/1?accountid=12084.

[31] See the comments of Elisse Walter, acting SEC Chair in: Senator Tim Johnson Holds a Hearing on Wall Street Reform," *Political Transcript Wire*, February 14, 2013, available at http://search.proquest.com/docview/1287642747/13E00E812DC18A54768/17?accountid=12084.

[32] "Letter to the Honorable Elisse Walter, Chairman of the Securities and Exchange Commission from the Hon. Darrelll Issa, Chairman of the House Oversight and Government Reform Committee; the Hon. Jeb Hensarling, Chairman of the House Financial Services Committee; the Hon. Jim Jordan, Chairman of the House Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending of the Committee on Oversight and Government Reform; and the Hon. Patrick McHenry, Chairman of the House Subcommittee on Oversight and Investigations of the Committee of Financial Services," March 5, 2013, available at http://about.bloomberglaw.com/files/2013/03/letterjobs.pdf. In 2011, the SEC received a rulemaking petition asking it to mandate public company disclosure of the corporate funds they use

unrelated to the agency's mandate "to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation," it questioned Ms. Walter's assertions that the agency lacked adequate resources to "fully implement" statutorily required rulemaking.[33]

In April 2013, an SEC spokesperson told journalists that the agency's staff was considering whether to make a formal recommendation on mandating the disclosure of political expenditures to the commission. He also emphasized that in the event that there is such a recommendation, its timing "will be influenced by the [SEC's] ongoing workload" as dictated by the Dodd-Frank Act and the JOBS Act.[34]

Addressing subjects that included the SEC's alleged resource constraints and dilatory engagement rulemaking projects, SEC commissioner Daniel Gallagher has spoken of the difficult decisions faced by the agency in prioritizing and managing its large and complex work portfolio with respect to obligated statutory rulemaking requirements as well as the conduct of its core missions:

> [A major challenge faced by the agency] is regulatory distraction.... a state of affairs in which a regulatory body is so inundated with external mandates that it risks losing focus of its core responsibilities. Given the mandates flowing from Congress … this is a condition that we at the Commission must be very careful to avoid.... Because of [its] … disparate statutory mandates, many of which are not grounded in the [financial] crisis, the SEC is left with a long list of decisions to make. Decisions about how to prioritize and sequence the rulemakings, decisions about how to give effect to each separate mandate as we tackle them, and decisions about the utility of pursuing certain mandates instead of going back to Congress to seek reconsideration when the mandates simply don't make sense given our statutory mission.... [T]he SEC can't do everything. The Commission and its staff's time and attention are more limited commodities than are policy options in Washington - especially if our solutions need not address any demonstrable problem. And we, as an agency, no less than individually, find ourselves surrounded with many superficially attractive ways to distract ourselves. Our agenda is necessarily shaped by legislation. Dodd-Frank and the JOBS Act are the current headline-grabbers. But, we must not forget the fundamentals; we must not lose sight of our core mission.... [This mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation is, however, often undermined by] the Commission's scatter-shot menu of short-term and reactive priorities.[35]

for political expenditures. In support of this, the agency later received hundreds of thousands of comment letters from investors. Yin Wilczek, "Disclosure: Group Tells White to Make Issuer Disclosure of Political Spending Her First Priority at SEC," *BNA's Securities Regulation & Law Report*, April 22, 2013.

[33] See the comments of Elisse Walter, Acting SEC chair in: "Senator Tim Johnson Holds a hearing on Wall Street Reform," *Political Transcript Wire*, February 14, 2013. We were unable to find an available link to the letter.

[34] Yin Wilczek, "Disclosure: Group Tells White to Make Issuer Disclosure Of Political Spending Her First Priority at SEC," *BNA's Securities Regulation & Law Report*, April 22, 2013. In May 2012, several observers, including Professor John Coffee, Jr. of the Columbia University School of Law and the Consumer Federation of America, a consumer advocate group, wrote the SEC criticizing it for a dilatory approach to its Dodd-Frank Act rulemaking. The SEC was said to be diverting itself from the act's obligated rulemaking by "investing in resources and other lower priority initiatives" … [and] "leap frogging rulemakings whose deadlines are months away ahead of rulemakings whose deadlines are months past and in some cases cherry picking which congressional mandate the commission will even choose to follow." "Representative Patrick McHenry Holds a Hearing on the Implementation of the JOBS Act," June 26, 2012, available at http://search.proquest.com/docview/1022194311/13DFE68453BD822F4D/4?accountid=12084.

[35] '"SEC Priorities in Perspective. Speech of Commissioner Daniel M. Gallagher at SIFMA Regional Conference," September 24, 2012, available at http://search.proquest.com/docview/1073454337/13E005D4DECCA42067/21?accountid=12084.

It is difficult to predict with confidence the behavioral impact on the SEC's RegA+ rulemaking if H.R. 701 or similar legislation were to become law. There are, however, a number of possible resulting scenarios, including two discussed below.

If such legislation were to become law, the SEC might be encouraged to prioritize its RegA+ rulemaking ahead of rulemaking obligations with later deadlines or no deadlines at all or other non-rulemaking projects. Whether the legislation is enacted, its mere existence could send a message to the SEC that getting certain rulemaking done is of special importance to its congressional overseers, a message that could lead to expedited RegA+ rulemaking. An alternative scenario is that the bill is enacted, but the SEC does not complete its Reg A+ rulemaking by its deadline, a situation that has occurred in a number of cases with Dodd-Frank Act and JOBS Act rulemaking obligations that have deadlines in statutes.

The JOBS Act's Bank Registration and Deregistration Shareholder Thresholds

Historically, under the 1933 Act, banks and BHCs have generally been required to register securities with the SEC if they have total assets exceeding $10 million and the shares are held (as per *shareholders of record*)[36] by 500 or more shareholders. Banks and BHCs were also allowed to no longer register securities with the SEC, a process known as deregistration, if the number of their shareholders of record fell to 300 or fewer. Title VI of the JOBS Act raised the shareholder registration threshold with the SEC from 500 to 2,000 and increased the upper limit for deregistration from 300 to 1,200 for those financial entities. The provision went into effect immediately upon the enactment of the JOBS Act on April 5, 2012.

An official at the Independent Community Bankers of America, a bank trade group that supported the provision, spoke of its dual benefits:

> This reform will make it easier for community banks to raise capital without tripping costly registration requirements, enhancing their ability to serve their customers and communities. It would also permit some community banks that are already registered with the SEC to deregister and thus significantly reduce their overall regulatory burden, freeing them up to make more small business and consumer loans in the communities they serve.[37]

[36] The shareholder of record is the entity that is named on a company's books as owning one or more shares of that company's stock. Dividends or any other distributions made by the company are only made to the shareholder of record. The shareholder of record should not be confused with the beneficial owner of shares. The beneficial owner receives the benefits of stock ownership without being the shareholder of record. A beneficial owner may create a shareholder of record (often a child or other family member or a corporation) for tax or other purposes. Brokerage houses often keep shares in a "street name" rather than the name of the shareholder of record in order to facilitate future transactions. A shareholder of record may also be called a holder or owner of record. The number of shareholders of record is often much lower than the number of "actual shareholders" or beneficial owners because "shares are often held in 'street name' by a brokerage firm or clearinghouse, which counts only as one owner.

[37] "Statement of Jeff Gerhart, chairman of the Independent Community Bankers of America (ICBA) and chairman of Bank of Newman Grove, Nebraska on Senate Passage of the JOBS Act," *ICBA Press Release*, March 22, 2012, available at http://www.icba.org/news/newsreleasedetail.cfm?ItemNumber=123582.

Potential Benefits and Costs of Being an Unregistered Bank

Title VI of the JOBS Act makes it easier for banks and BHCs to (1) increase their number of shareholders, while remaining unregistered private banks; and (2) if already registered, to voluntarily deregister even while adding shareholders.[38]

Potential benefits of being unregistered may include

- **Resource and Cost Savings from Reduced Reporting Burdens**. Unregistered institutions must still file call reports[39] and BHCs must make FR Y-6 submissions (annual reports to regulators that are also filed by SLHCs, and other reports with the applicable prudential regulatory authorities). However, they are not required to file certain 1933 Act reports with the SEC (or, in the case of a bank without a holding company, the Federal Deposit Insurance Corporation or the Office of the Comptroller of the Currency). The preparation and filing of those disclosure documents arguably tends to require non-trivial amounts of time, attention, and training for personnel in finance, administration, human resources, legal, and other departments. Being unregistered eliminates such reporting, freeing up personnel for other areas of concern. In addition, by ending various SEC reporting obligations, deregistered institutions may be able to lower their accounting, legal, insurance, and compliance costs. Anecdotal reports from banks who deregistered after the passage of the JOBS Act indicate that a number of them reported cost savings of upwards of a couple of hundred thousand dollars.[40] A bank's shareholders may also financially benefit from such cost savings.
- **The Ability to List on the Over-the-Counter Bulletin Board.** Registration under the 1934 Act is required in order to list a security on exchanges such as the Nasdaq stock exchange or the New York Stock Exchange (NYSE). Provided that they meet certain reporting requirements, unregistered banks and BHCs may, however, have their shares traded on the Nasdaq-owned Over-the-Counter Bulletin Board (OTCBB).[41] To be traded there, they must provide copies of the reports that they submit to their primary federal financial regulator and other certain notices or forms as specified in OTCBB rules, including notices of dividend payments to the Financial Industry Regulatory Authority (FINRA).[42] As

[38] This section largely derives from: Katherine Koops, "The JOBS Act and SEC Deregistration: New Thresholds and Special Considerations for Banks and Bank Holding Companies," June 8, 2012, available at http://www.bankbryancave.com/2012/06/the-jobs-act-and-sec-deregistration-new-thresholds-and-special-considerations-for-banks-and-bank-holding-companies/.

[39] A call report is a quarterly report of income and condition required by a financial institution's primary prudential supervisory agency: the Comptroller of the Currency for National Banks; Federal Reserve Banks for state member banks; the Federal Deposit Insurance Corporation for insured nonmember banks; or state banking agencies for state chartered banks and trust companies.

[40] Mike Armstrong, "JOBS Act Rule Having Immediate Impact on Small Banks, "*Philadelphia Inquirer*, January 29, 2013, available at http://articles.philly.com/2013-01-29/business/36598381_1_harleysville-savings-phillyinc-savings-bank.

[41] The OTCBB is a regulated electronic trading service owned by Nasdaq that shows real-time share price bids to buy and sell, last-sale prices, and volume information for traded over-the-counter securities (non-exchange traded securities). The OTCBB has no listing requirements like those found on the Nasdaq and NYSE.

[42] Overseen by the SEC, FINRA is a regulatory body that was created after the merger of the National Association of Securities Dealers (NASD) and the NYSE's regulation committee. FINRA is responsible for governing business between brokers, dealers and the investing public.

a consequence of being able to trade on the OTCBB, an institution's shareholders may mitigate the loss in their equity's liquidity that can occur when their formerly exchange-listed bank or bank holding company deregisters.[43] Stocks traded on the OTCBB tend to be less liquid than those traded on stock exchanges like the NYSE and Nasdaq, a potential shortcoming for their shareholders.[44]

- **Reduced Personal Liability for Certifying Officers**. The chief executive officer and the chief financial officer of registered companies are required to certify the completeness and the material accuracy of company filings under the 1934 Act. If these certifications are false, the officers can be held personally liable. Such risks may discourage otherwise qualified persons from serving in those capacities. This kind of risk is removed when an entity is unregistered and the certifying obligations are not applicable. Bank shareholders may benefit from this.

Potential costs of being unregistered may include

- **Potential Reductions in Shareholder Information about the Banks.** Because unregistered banks and BHCs are no longer subject to SEC reporting and disclosure requirements associated with registered entities, current and prospective bank shareholders may be deprived of material information about the banks.
- **Greater Potential of Bank Fraud that Could Harm Shareholders**. Investor advocates such as officials from the Council of Institutional Investors, an association of large investors, say that unregistered entities are legally able to avoid the provision of material disclosures about themselves to the public through the SEC. They have concerns that this more opaque disclosure environment can lead to a greater likelihood of bank fraud, which may ultimately harm bank shareholders.[45] Such concerns may take on added currency given reports that in the context of depository institutions in general, small banking and savings and loan institutions are reportedly experiencing a disproportionate amount of financial stress.[46] Others, such as the Independent Community Bankers of America, argue that financial prudential regulators such as the Federal Deposit Insurance Corporation and the Federal Reserve already regulate and oversee many banks to ensure safety and soundness and that SEC registration is essentially unnecessary.[47] Considerable research exists on the importance of required SEC financial disclosures by SEC registered entities for the investment decisions of institutional investors, professional investors, and retail investors.[48]

[43] Liquidity refers to the ease with which stocks can be bought and sold on secondary markets like the OTCBB.

[44] For example, see Randall Dodd, "Markets: Exchange or Over-the-Counter," *International Monetary Fund Release*, March 8, 2012, available at http://www.imf.org/external/pubs/ft/fandd/basics/markets.htm.

[45] For example, see the comments of Amy Borrus, deputy director of the Council of Institutional Investors, an association of large investors, in: "New Law Allows More Small Banks to Deregister with SEC," *Ohio CPA*, February 14, 2013, available at http://www.ohioscpa.com/news/2013/02/14/new-law-allows-more-small-banks-to-deregister-with-sec.

[46] For example, see CRS Report R43002, *Financial Condition of Depository Banks*, by Darryl E. Getter.

[47] For example, see The CRS Legal Sidebar WSLG414, *JOBS Act Allows Some Banks to End SEC Reporting*, by Michael Seitzinger, which provides a brief overview of Title VI of the JOBS Act.

[48] For example, see Alastair Lawrence, "Individual Investors and Financial Disclosure," October 27, 2010, available at http://www.rhsmith.umd.edu/feaconference/docs/Session3LawrenceIndividualInvestors.pdf.

A caveat is that this research has generally not involved entities that were also subject to other extensive and publicly available reporting requirements such as the disclosures to financial regulators required of BHCs and SLHCs. Some experts outside of the banking industry have also argued that from an investor information standpoint, there is redundancy between the disclosures required of SEC-registered entities and the financial regulatory disclosures required of depository institutions.[49]

- **Shareholder Perception Problems.** Deregistration involves a reduction in the amount of public information that is available about a corporation's operations. Because of this, such entities run the risk of being perceived as having "something to hide."
- **Potential Reduction in Available Capital from Stock Buybacks.** One bank deregistration strategy may entail reducing the number of an entity's shareholders by purchasing their stock. Such stock buybacks, however, involve bank capital that has alternative uses such as provision of additional loans.

Reports indicate that after the passage of the JOBS Act, a number of privately-held banks and BHCs took advantage of Title VI's reduction in shareholder ownership registration triggers by raising capital from additional shareholders without having to register with the SEC.[50] Banks have also taken advantage of the law to deregister from the SEC.

For example, as of late December 2012, SNL Financial, a research firm, reportedly found that of the 208 publicly traded banks and thrifts with fewer than 1,200 shareholders, 101 of the banks had filed to deregister after the passage of the JOBS Act. SNL also reportedly found that the number represented an historically unprecedented increase in the incidence of deregistrations over those done before the passage of the act.[51]

Legislation to Amend the JOBS Act's Bank Registration and Deregistration Shareholder Thresholds to Apply to Savings and Loans

At present, two bills, S. 872 (Toomey) and its companion bill, H.R. 801 (Womack), would amend Title VI of the JOBS Act to also apply its shareholder registration and deregistration numerical triggers to SLHCs. H.R. 801 was ordered to be reported by the House Financial Services Committee on May 7, 2013.

H.R. 801's sponsor, Representative Stephen Womack, observed that the JOBS Act gave "community banks the flexibility they needed to raise capital without having to comply with the onerous SEC regulations intended for larger banks.... [H.R. 801] extends the same flexibility to savings and loans, ensuring that they along with community banks across the country can deploy capital throughout the communities they serve."[52]

---

[49] Richard Frankel, Joshua Lee and Xiumin Martin, "Factors Associated with Bank Deregistration Following the 2012 Jobs Act," February 1, 2013, available at http://ssrn.com/abstract=2228420 or http://dx.doi.org/10.2139/ssrn.2228420.

[50] For example, see "Key JOBS Act Provision Must Be Addressed to Benefit Thrifts*" Independent Community Bankers of America Press Release*, September 13, 2012, available at http://www.icba.org/files/ICBASites/PDFs/test091312.pdf.

[51] Dina El-Boghdady, "100 Banks End Reporting to SEC Under New Law," *Washington Post*, January 30, 2012, available at reporting-to-sec-under-new-law/2013/01/30/bf15226e-6b00-11e2-95b3-272d604a10a3_story.html.

[52] "Womack, Himes, Delaney, and Wagner Introduce Bipartisan Holding Company Registration Threshold

The Independent Community Bankers of America, which supported passage of the legislation, described the bill as correcting a key shortcoming in Title VI's differential treatment of banks and thrifts:

> While the banking agencies have so far interpreted the deregistration provisions of the JOBS Act to cover thrifts, the SEC still has not clarified whether thrift holding companies are covered. Thrifts and thrift holding companies are subject to the same oversight and supervision as banks and bank holding companies and are subject to the same financial reporting requirements. The enhanced oversight and regulation of banks is the rationale for affording them higher shareholder registration and deregistration thresholds under the JOBS Act. That being the case, there is no policy reason for denying thrift holding companies, subject to the same oversight and regulation, the benefits of the higher thresholds.[53]

As Congress deliberates on legislation that would expand the JOBS Act to SLHCs, some empirical research has also examined the financial impact on community banks who took advantage of the JOBS Act threshold changes to deregister. One academic study concluded that the act was generally, but not entirely, financially beneficial to them. It found that on average, the legislation resulted in $1.31 in higher net bank income and $3.28 lower pretax expenses for every $1.00 of bank assets, and was responsible for $1.54 million in increased assets per bank employee. The study, however, found that on average, each examined bank had $2.13 lower pretax income and $2.34 lower equity capital for every $1.00 of bank assets.[54]

Another academic study compared banks that deregistered before the JOBS Act with banks that did so afterwards. Its key finding was that the JOBS Act had a real, and generally beneficial, financial effect on community banks that deregistered in response to the act's shareholder threshold change. The authors of the study also interpreted their findings to suggest that Congress "should pass" legislation such as H.R. 801, which would extend the JOBS Act's liberalized deregistration threshold to SLHCs. The reasoning was that because SLHCs are also required to provide significant disclosures to their prudential regulators in a manner that is identical to the BHCs already covered by the JOBS Act, they should also be covered. The authors also indicated that their findings suggested that the JOBS Act's deregistration cutoffs should be further liberalized to allow banks and BHCs with more than 1,200 shareholders of record to also deregister.[55]

Author Information

Gary Shorter
Specialist in Financial Economics

Equalization Act of 2013," *Press Release from the Office of Congressman Steve Womack*," February 15, 2013, available at http://womack.house.gov/news/documentsingle.aspx?DocumentID=320377.

[53] "Key JOBS Act Provision Must Be Addressed to Benefit Thrifts," *Independent Community Bankers of America*.

[54] Joshua Mitts, Did the JOBS Act Benefit Community Banks? A Regression Discontinuity Study," April 25, 2013, available at SSRN: http://ssrn.com/abstract=2233502ost-JOBS.

[55] Richard Frankel, Joshua Lee, and Xiumin Martin, Xiumin, "Factors Associated with Bank Deregistration Following the 2012 Jobs Act."

Disclaimer