Statement of Professor John C. Coffee, Jr.
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at

Hearings Before the Subcommittee on TARP, Financial Services and
Bailouts of Public and Private Companies
of the
Committee on Oversight and Governmental Reform

United States House of Representatives

"The JOBS Act in Action: Overseeing Effective Implementation That Can Grow American Jobs"

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Room 2154 of the Rayburn House Office Building
Washington, D.C.

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

I. Introduction

I thank you for inviting me, and I share the common concern that we need to spur job creation. Basically, I will make three points:

First, the greatest enemy of job creation today is not overregulation, but the loss of investor confidence. In particular, American investors have lost confidence in the initial public offering ("IPO") process and in the integrity of the mechanisms for capital raising. This is evidenced not only by the much discussed failure of the Facebook offering, but by the fact that the IPO pipeline has dried up over recent months and that the stock prices of the other companies in the "social media" industry that recently went public— i.e., Zynga, Groupon, Ren-Ren, and Zipcar[1] — are now trading well below their initial offering prices.

Second, virtually every page of the JOBS Act imposes obligations on the SEC to adopt rules implementing it. Yet, in light of recent decisions of the D.C. Circuit Court of Appeals, this is a task that is both time-consuming and fraught with peril, because the D.C. Circuit Court of Appeals has repeatedly indicated its willingness to substitute its judgment for that of the Commission as to whether the costs of an SEC rule exceed its claimed benefits. The D.C. Circuit has also indicated its readiness to invalidate SEC rules which are in its judgment not based on sufficient empirical data, and the level of data that is adequate is often more in the eye of the beholder than objectively clear.

[1] For a recent review of the price discounts on these offerings from the time of their IPOs, see Larry Doyle, "Social Media: You Know You're in a Bubble When . . .," Benzinga.com June 19, 2012.

Third, given that the risk of judicial invalidation is real, many have an incentive to sue to challenge SEC rules under the JOBS Act, as and when they are proposed. More than any other factor, this will create uncertainty and legal confusion for entrepreneurs, underwriters, promoters, and investors alike and will slow the implementation of the JOBS Act.

The timetable for the implementation of the JOBS Act has been determined in substantial part by the legislation itself. Congress gave the SEC just 90 days after enactment to issue rules relaxing restrictions on general solicitations and advertising for purpose of Rule 506 and Rule 144A (see Section 201 of Title II); that date expires on or about July 4, 2012. In contrast, the SEC has 270 days to issue rules relating to crowdfunding (Title III), and no deadline at all for rules relating to the new Regulation A (Title IV). Given Parkinson's Law that work expands to fill the time available for its completion, I will review the JOBS Act in terms of the approaching deadlines beginning with Title II.

I. IPOs and the JOBS Act

Let me begin, however, by returning to the context of IPOs. There are multiple explanations for the burst of the apparent bubble surrounding social media IPOs (IPO pricing is after all always uncertain), but the factor that has the greatest future relevance is the sense that retail investors now have that they are not receiving accurate information about IPOs and generally receive allocations in "hot" IPOs only when more sophisticated and better informed institutional investors spurn their full allocations. Please understand that I am not suggesting that anything unlawful happened in the Facebook offering or any other recent IPO. Actually, the problem is the reverse. What is eroding investor

confidence begins from the fact that it is today basically permissible for issuers, underwriters, and their analysts to make selective disclosure of information, projections and forecasts in the IPO process, releasing information to favored investors, but withholding it from retail investors. This is because the key regulation prohibiting selective disclosure — Regulation FD[2] — has an express exemption for registered securities offerings "for capital formation purposes for the account of the issuer."[3] This is a loophole the size of Paris's Arc de Triomphe, and much information can and does pass through it. Indeed, the conventional roadshow is the structural embodiment of selective disclosure, as institutions attend roadshows to hear oral projections and estimates that are denied to retail investors (who cannot attend).

I believe that bipartisan concern exists today that some aspects of the IPO process have become dysfunctional.[4] My goal today is not to review IPO procedures, but to suggest that in implementing the JOBS Act, Congress and the SEC must exercise care not to compound this loss in investor confidence or exacerbate serious conflicts of interest. In some respects, because of the speed with which the JOBS Act was drafted and passed, this danger is real. For example, if we are concerned about selective disclosure, it is disquieting to realize that by raising the threshold for "reporting company" status from 500 to 2,000 shareholders of record, the JOBS Act will effectively make it possible for a much greater number of issuers (i.e., those with less than 2,000 shareholders of record) to

[2] See 17 C.F.R. § 243. 100 to 103.

[3] See 17 C.F.R. § 243. 100(b)(2)(iii). Also, under the definition of "issuer" in Rule 101 of Regulation FD, only "reporting" companies are subject to Regulation FD. See 17 C.F.R. § 101 (b). Thus, most IPO issuers will be exempt on this grounds as well.

[4] See Richard Blackden, "New Rules Needed for Public Floats, Says Congress Watchdog," The Daily Telegraph (London), June 22, 2012, Business at p. 5 (quoting Congressman Darrell Issa, Chair of the House Oversight Committee).

engage lawfully in selective disclosure (again, because non-reporting companies are exempt from Regulation FD). Although it may be justifiable to require less substantive financial disclosure from smaller issuers and to spare them from some of the costs of "reporting company" status, it is far less clear that Congress wanted to legitimize selective disclosure on the part of smaller (and even medium-sized) companies. That is an issue of fairness, not efficiency. In this light, in implementing the JOBS Act, the SEC should re-examine rules — such as Regulation FD — that work off of "reporting companies" status. Certainly, it would be possible for Regulation FD to use a lower than 2,000 shareholder of record threshold.

In other areas, however, the SEC's hands are tied, as some statutory provisions are triggered only by "reporting company" status. For example, the Williams Act (and particularly Section 13(d) thereof) protects companies against sudden raids or stealthy accumulations of their stock in "creeping" control acquisitions by requiring acquirers to disclose when they (or a group in which they are a member) accumulate more than 5% of any class of equity security of the issuer. But Section 13(d) applies only to "reporting companies." If smaller companies had the choice, I strongly suspect that they would have preferred to retain the protection of Section 13(d) against sudden and hidden stock accumulations. This is, I respectfully suggest, an example of the cost of haste and the likelihood of unintended consequences.

If investors are dissatisfied with the IPO process today, the role of the securities analyst has particularly disenchanted them. In their view, analysts quietly ferry information from the issuer to favored institutional investors. The JOBS Act may compound this lack of trust because it preempts most existing regulations affecting what

securities analysts can do (and cannot do) in public offerings in the case of "emerging growth companies" (which category will include the vast majority of IPOs). Section 105(a) of the JOBS Act permits the publication and distribution of analyst research reports about "emerging growth companies," even during the quiet period before a registration statement is filed, and it deems such a report to constitute neither an offer to sell a security nor a statutory prospectus. As a practical matter, this means that underwriters in the future could start the marketing process by circulating an analyst's report instead of a "red herring" preliminary prospectus.

Security analysts are also permitted by Section 105 to engage in oral communications with accredited investors, which means that they can attend and make forecasts at road shows (at least so long as non-accredited investors are not present). Existing rules prohibiting analysts working for an underwriter from circulating research until 25 or 40 days after the offering are also preempted, and analysts are authorized to participate in the "bake-off" sessions at which issuers choose an underwriter (based in part on the level of analyst support for the offering that the underwriter can demonstrate). In short, in the future, analysts may play an even larger role in the marketing of public offerings (particularly IPOs), and their objectivity will come under greater question.

The SEC could respond by framing rules that require better broker-dealer supervision of research analysts in the their employ, but as later discussed these rules may be challenged in court.

III. Title II: Access to Capital for Job Creators.

Section 201 ("Modification of Exemption") of the JOBS Act instructs the SEC to (i) to revise its rules to eliminate "the prohibition against general solicitation or general

advertising contained in" Rule 502(c) of Regulation D to the extent that it applied to offers and sales of securities to "accredited investors," and (ii) revise Rule 144A(d)(1) to provide that securities sold under that exemption "may be sold to persons other than qualified institutional buyers, including by means of general solicitation or advertising, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer."

In short, general solicitation and general advertising may be used, but the SEC is also authorized by Section 201(a)(1) to "require the issuer to take reasonable steps to verify that the purchasers of the securities are accredited investors." In this light, the principal issues for the SEC fall under the following headings:

1) If general solicitation is now permitted (as it is), should the SEC require that any additional specific disclosures be made to accredited investor when general solicitation or advertising is used. Today, Regulation D does not mandate any specific disclosures to accredited investors (but only to other investors). But arguably, the use of a general solicitation could justify the inclusion of some more specific warnings, caveats or disclosures in such a solicitation or advertising. Conceivably, some issuers or promoters may soon use television (including less-expensive cable channels), "blast" emails directed to many investors, and internet web sites. Arguably, special disclosures advising the investor about the generic risks of such an offering are more justifiable when the broker or promoter has no prior relationship with the investor. Indeed, in Title III of the JOBS Act, Congress

outlined in detail many of the disclosures that should be required when the promoter and the investor are strangers, and many of those disclosures might be appropriate here as well.

2) Section 201(a)(1) does expressly instruct the SEC to mandate by rule that "the issuer take reasonable steps to verify that purchasers are accredited investors, using such methods as determined by the Commission." What should the SEC do here? Should it require the issuer to receive some form of financial statement from the purchaser? Or should it be sufficient that the purchaser simply sign a written representation that he or she is an "accredited investor" (possibly with the criteria fully spelled out in the representation)?;

3) Should a seller under Rule 144A also be required to obtain similar documentation that its buyer is a QIB for purposes of that exemption? Although no corresponding language is set forth in Section 201(a)(2) to specify "the reasonable steps" necessary for the seller to take "to verify the buyer's status" as a "qualified institutional buyer" (or "QIB" in the parlance), Section 201(a)(2) does require that the seller "reasonably believe" that is purchaser is a "QIB." Arguably, what it is reasonable for the SEC to require under Section 201(a)(1) may also be necessary to support a reasonable belief in "QIB-hood" under Section 201(a)(2).

Beyond simplifying private placements, Section 201 also contains a sweeping exemption for persons who otherwise might be characterized as "brokers" or "dealers."

Specifically, Section 201(b) exempts both (i) persons who maintain "a platform or mechanism that permits the offer, sale, purchase or negotiation of or with respect to securities," and (ii) persons "associated with" them, from the definition of broker or dealer for purposes of Section 15(a)(1) of the Securities Exchange Act of 1934. The impact of this provision could be considerable, as it seems to permit persons having no prior professional relationship with the securities industry (and not members of FINRA) to maintain a web site on which securities are offered for sale or resale in private placements and follow-up secondary transactions. The principal conditions for this broker-dealer exemption are that (i) such person "receives no compensation in connection with the purchase or sale of such security," and (ii) such person "does not have possession of customer funds or securities in connection with the purchase or sale of such security." See Section 201(c) of the JOBS Act (adding a new Section 4(b)(2) to the Securities Act of 1933), Here, SEC rulemaking seems desirable to define what forms of compensation or consulting activities might disqualify a person from this exemption. For example, if a person who maintains such an above-described web site for private placements has received advisory fees from the issuer for general consulting with the past year, it is certainly arguable that such receipt should render such person ineligible for this exemption. But the rules need to be clear.

This broker-dealer exemption might also be used by the issuer, itself, provided that it did not hold customer funds or securities. This could result in a major change in current practice, and issuers might use a broker simply to hold the customer's securities and funds while they handled sales and resales on their own web site. The result is to place marketing activities beyond the scrutiny of FINRA (and also the SEC, except to the

extent that antifraud rules were violated). Again, careful SEC rule-making seems justified.

Because SEC rules implementing Section 201 will presumably be proposed and adopted shortly, it is premature to comment on what the SEC has not yet done. Nonetheless, the biggest issues are those associated with the appearance of "non-brokers" who perform the traditional marketing roles of a broker in a private placement to accredited investors and others. Section 201(c) would appear to permit such an intermediary to maintain a "platform or mechanism" that also reached persons who were not accredited investors, if no general solicitation or advertising was conducted. In any event, these new "non-brokers" will not be subject to the rules or oversight of any self-regulatory organization (such as FINRA), so long as they do not hold customer funds or securities. The potential for fraud and abuse does loom here.

IV. Title III — Crowdfunding

Crowdfunding attracted disproportionate attention during the process leading up to the JOBS Act, and ultimately the exemption was significantly refined and improved late in the drafting of the JOBS Act (as the result of the considerable efforts of Senator Merkley of Oregon). In my judgment, new Section 4(6) of the Securities Act of 1933 will be much less used than Title II's liberalized private placement exemption and probably even less used than the JOBS Act's new Regulation A exemption. This is both because of Section 4(6)'s low $1 million annual aggregate ceiling and the detailed requirements discussed below. Still, this exemption will be used by a particular class of issuer: very small start-ups that lack any access to an underwriter or broker-dealer.

These issuers may also be unable (or unwilling) to afford legal counsel, and hence compliance with Title III's requirements may be spotty (or worse).

The first requirement under Section 302 of the JOBS Act is that the issuer not sell more than a specified amount or percentage of each investor's annual income or net worth. These levels are:

1) the "greater of $2,000 or 5 percent of the annual income or net worth" in the case of an investor with income or net worth less than $100,000;
2) 10% of the annual income or net worth (not to exceed $100,000) if the investor's annual income or net worth is equal to or greater than $100,000.

Obviously, the incentives here are for the issuer to induce the client to advise it that the client has annual income or a net worth of above $100,000 (and so can be sold at least $10,000). In response, the SEC could well follow its recent rules dealing with accredited investors and seek to exclude the value of the investor's principal residence from this net worth computation. This may elicit, however, a legal challenge.

Interestingly, Title III does not say that the issuer must only "reasonably believe" that the investor had the requisite annual income or net worth, and the SEC's rules must address the impact of a mistaken belief on the part of the issuer (which may or may not be a negligent belief). SEC rules need also to provide what documentation the issuer must receive and the degree to which it can rely on any broker's assurance as to income or net worth.

To satisfy new Section 4(6) of the Securities Act, the Crowdfunding issuer must conduct the transaction through an intermediary — either a broker or a "funding portal"

that complies with the requirements of new Section 4A(a) of the Securities Act. Meanwhile the issuer, itself, must comply with new Section 4A(b) of the Securities Act.

"Funding portal" is a new form of intermediary, which is defined in Section 3(a)(80) of the Securities Exchange Act. The "funding portal" must register both with the SEC and any applicable self-regulatory organization (which might be FINRA or a new body). Whether the issuer uses a broker or a funding portal, either one must:

a) "provide such disclosures, including disclosures related to risks and other investor education materials: as the Commission may require by rule;
b) ensure that each investor "reviews investor education information," "positively affirms that the investor understands that the investor is risking the loss of the entire investment and that the investor could bear such a loss," and "answers questions demonstrating . . . an understanding of risk generally applicable to investments in startups, emerging businesses, and smaller issuers," "an understanding of the risk of illiquidity," and "an understanding of such other matters as the Commission determines appropriate by rule." (See Section 4A(a)(4)).

In addition to preparing these disclosures and monitoring investor review of them, the broker or funding portal must also "take such measures to reduce the risk of fraud, with respect to such transactions as established by the Commission by rule," including "obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding" 20% or more of the issuer's equity. Finally, the broker or funding portal is given responsibility under Section 4A(a)(8) of the Securities

Act to "make such efforts as the Commission determines appropriate by rule to ensure that no investor in a 12-month period has offered securities pursuant to Section 4(6) that in the aggregate, from all issuers, exceed the investment limits set forth in Section 4(6)(B)." This is a somewhat roundabout way of stating that an investor with an income of $101,000 may not buy $10,000 in one offering and $5,000 in another during the same 12-month period, because the ceiling (which would here be $10,100) applies to all offerings during that 12-month period in the aggregate. But the enforcement responsibility is placed on the broker or funding portal, and the penalty for noncompliance is not specified.

My point in reciting all these requirements is that each requires new SEC rules at each step, requiring the SEC to develop mandated disclosures and procedures. In addition, the JOBS Act asks the SEC to decide broadly "what else should be done." Many brokers may prefer to sidestep these new requirements by instead conducting a private placement, which places none of the foregoing obligations on it. Others, however, may seek to challenge any new SEC rules.

Under new Section 4A(b), the Crowdfunding issuer must also file certain information with the SEC, including (i) "a description of the business of the issuer and the anticipated business plan of the issuer," (ii) "a description of the financial condition of the issuer," including financial statements. In the case of a very small offering (under $100,000), the issuer must file both its income tax return for the last completed year and "financial statements of the issuer , which should be certified by the principal executive officer of the issuer to be true and complete in all material reports." For offerings in the $100,000 to $500,000 range, the financial statements must be "reviewed by a public

accountant, who is independent of the issuer, using professional standards and procedures for such review or standards or procedures established by the Commission by rule for such purpose." In short, although, Section 4A(b) does not require audited financial statements, it stops only an ambiguous distance short of such a requirement, leaving it up to the Commission to specify how much less will be accepted. In the case of offerings over $500,000 (to $1 million), the financial statements must be audited, unless the Commission rules otherwise (by raising or lowering the level at which audited financial statements are required). Again, the SEC is instructed to make the judgment call.

Thus, the idea that an entrepreneur could simply post some Powerpoint slides on a web site and receive checks of up to $10,000 from individual investors did not survive the final revisions of the JOBS Act. Financial statements are required; the intended use of proceeds of the offering must be described; and the names of officers, directors, and 20% shareholders must be disclosed. This means that a would-be entrepreneur with a mere brainstorm (for example, one who wished to go to the market with the marketing pitch "I would like to form a company to make a better cellphone using the following idea") will not be enabled by Section 4(6) to do so. Much more must be done.

Other restrictions in Section 4A address conflicts of interest. The broker or funding portal must prohibit its directors, officers or partners "from having any financial interest in an issuer using its services." Similarly, the Crowdfunding issuer may not "compensate or commit to compensate, directly or indirectly, any person to promote its offerings through communication channels provided by a broker or funding portal without taking such steps as the Commission shall, by rule, require to ensure that such

person clearly discloses the receipt, past or prospectus, of such compensation, upon each instance of such promotional communication."

In addition, there is a continuing disclosure obligation for an annual report to the SEC and to investors "of the results of operations and financial statements of the issuer," with the SEC being authorized to determine the contents of this report by rules (See Section 4A(b)(4)). Finally, the Commission is given authority to specify "such other requirements as the Commission may by rule prescribe for the protection of investors and in the public interest." (See Sections 4A(a)(12) and 4A(b)(5). This is open-ended, and again broad new requirements might be subjected to a cost/benefit-based judicial review.

If all this were not enough to persuade an entrepreneur to avoid Crowdfunding and instead use a private placement, Section 4A(c) authorizes the SEC to create a negligence-based cause of action largely paralleling Section 12(a)(2) of the Securities Act. This new cause of action places the burden on the issuer to show that it "did not know, and, in the exercise of reasonable care could not have known of such untruth or omission." This is in sharp contrast to the private placement context where the issuer can only be sued under Rule 10b-5, which requires the plaintiff to prove scienter. Although Section 4A "authorizes" the SEC to adopt this new standard, the SEC is not simply given discretion to frame such a litigation remedy, as Section 4A(c)(2) provides that "an issuer shall be liable in an action under paragraph (1), if the issuer . . ." (emphasis added). This is mandatory language.

The one comparative attraction of the "crowdfunding exemption" in Section 4(6) is that it does permit the general solicitation of retail investors. This may be important

for would-be entrepreneurs who lack access to investment banking firms or others with lists of accredited investors. But, given the required disclosures (including the need for financial statements), the need for "funding portal" registration, the restrictions on compensation and ownership, and the "restricted security" status of securities issued under §4(6), all these factors seem likely to chill most issuers from relying on this exemption. To be sure, some may attempt to rely on this exemption without making more than a token effort actually to comply with its rules. That will present a likely new enforcement challenge for the SEC.

V. Title IV — Small Company Capital Formation

The third new issuer exemption adopted or liberalized by the JOBS Act is the expanded Regulation A exemption set forth in Section 401 of the JOBS Act. Section 401 increases the 12-month exemption for small offerings under Section 3(b) of the Securities Act from $5,000,000 to $50,000,000. As in the case of Section 4(6), these securities can be sold to retail investors based on a mandated disclosure document, but, unlike Section 4(6), the securities so issued are not "restricted' and may be resold by the investor immediately. Given this factor and the obvious contrast between the $50 million ceiling under Section 3(b) and the $1 million aggregate ceiling on Section 4(6) (plus the limitation in Section 4(6) on sales to individual investors to either 5% or 10% of their annual income or net worth), Section 3(b) seems likely to dominate Section 4(6) in terms of relative use.

The SEC is given discretion by Section 401 to make three decisions about the scope of Section 3(b): (1) whether to require a disclosure document containing audited financials (See Section 3(b)(2)(6)(i)); (2) whether to adopt disqualification provisions

paralleling those in Section 526 of the Dodd-Frank Act (See Section 3(b)(2)(6)(ii)); and (3) whether to require that an issuer utilizing the §3(b) exemption to make subsequent periodic disclosures resembling those required of a reporting company.

It would be relatively surprising if (a) the SEC did not require a disclosure document with audited financials (at least for larger offerings), (b0 it did not specify similar disqualification rules, and (c0 it did not require some periodic disclosures. But the prospect exists that some will challenge these rules, claiming that the SEC did an inadequate cost/benefit study and seeking to rely on the D.C. Circuit's decision in the Business Roundtable case. This issue will be deferred momentarily, because it overlaps with other areas in which the Commission is given discretion by the JOBS Act.

VI. Title V — Private Company Flexibility and Growth.

In probably the most important provision in the JOBS Act, Section 501 amends the "reporting company" threshold under Section 12(g)(1)(A) of the Securities Exchange Act of 1934 so that companies are only covered if they have "a class of equity securities . . . held of record by either

i. 2,000 persons, or

ii. 500 persons who are not accredited investors (as such term is defined by the Commission) . . . "

The practical issues raised by this dual test is whether the issuer must engage in any factual investigation to ascertain whether it has more than 500 record shareholders who are not accredited investors. Moreover, how frequently must the issuer review this determination? Shares trade on a daily, and thus shares issued in a private placement to accredited investors could be resold to non-accredited investors. Indeed, under Rule 144,

shares sold in a private placement could be resold to non-accredited investors after a one year holding period, even though the stock is not listed, at least if certain information is made publicly available by the issuer.

Issuers that want to avoid "reporting company" status may take a variety of measures to assure that the stock is not transferred to non-accredited investors. For example, restrictions might be placed on the shares' alienability (and prominently displayed on the share certificate to comply with state law rules); such restrictions would deny shareholders the ability to transfer to a non-accredited investor (and possibly require the issuer or its counsel to approve the transfer as a permissible one). Still, some SEC standards are necessary here, both in terms of what the issuer must do and how frequently it must check.

VII. Judicial Cost/Benefit Review and the Future of the JOBS Act.

In a series of decisions, the D.C. Circuit Court of Appeals has recently invalidated SEC rules on the grounds that the SEC failed to conduct as adequate cost/benefit analysis. In particular, it has ruled repeatedly that "the Commission has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.'" See Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing Section 3(f) of the Securities Exchange Act, 15 U.S.C. § 78(c)(f)). See also Chamber of Commerce v. SEC, 412 F.3d 133, 143 (D.C. Cir. 2000); American Equity Investment Life Insurance Co. v. SEC 613 F.3d 166, 167-168 (D.C. Cir. 2010).

Potentially, an SEC proposed rule could be rejected by the D.C. Circuit either because the SEC failed to consider, or give adequate weight to, some possible costs of the proposed rule or because the SEC relied on inadequate empirical studies. As a result, any

rule quickly adopted by the SEC is vulnerable. To be sure, the D.C. Circuit is unlikely to invalidate every SEC proposed rule, particularly pedestrian ones specifying what an issuer must disclose and when.

But let me give some possible examples of potentially vulnerable rules. First, in the case of the new Regulation A, the SEC is authorized to decide whether (i) the issuer must used audited financial statements (which are not required in most private placements or in the case of the traditional Regulation A exemption, which was limited to $5 million in any 12-month period). Second, the SEC is authorized to decide whether such a Regulation A issuer must make any subsequent disclosures to investors (regardless of whether it becomes a "reporting company" under the new 2,000 shareholder of record standard).

Let's suppose that the SEC decides to require audited financial statements in Reg. A offerings over $25 million and to require periodic disclosure to shareholders as well in the case of such $25 million or greater offerings. Let us suppose next that some unhappy entrepreneurs (or a national organization representing them) decide to sue to challenge these proposed rules. Arguments can be made on both sides of the question: for example, similar companies that instead conduct an IPO would not be required to make follow-up periodic disclosures if they had less than 2,000 shareholders of record. A plaintiff might thus question why it should be singled out because it instead used Regulation A.

Foreseeably, these lawsuits might drag on for a year or more, with the outcome being uncertain. Moreover, the SEC would be more likely to lose if it could not present empirical studies supporting its position, and such studies do not exist on every question

(or they have been conducted by consulting firms in the employ of the objecting litigants). The bottom line is that legal uncertainty seems likely to persist in a variety of areas. Moreover, in my judgment, the SEC has been to a degree traumatized by its defeat in the Business Roundtable case. As a result, it may be moving more slowly and incrementally than in the past. Some may see this as desirable, but the cost is that the JOBS Act will be implemented slowly, and revisions may be necessary.

I have no panacea to offer for this problem. Although it would be possible legislatively to amend the Administrative Procedure Act or to take appeals of SEC proposed rules out of the hands of the D.C. Circuit (perhaps transferring them by lottery or random assignment to all Circuits), there is little likelihood of legislation being enacted along such lines in the near future. One lesson for the future is that Congress in enacting securities legislation probably should not simply authorize the SEC to act, but should mandate them to do so, unless the SEC reached specific findings that the mandated action would be harmful to investors or the public interest. This would take some of the burden of cost/benefit findings off the SEC's shoulders. But for the present judicial second-guessing of the SEC seems likely to persist. Ultimately, this means that the implementation of securities legislation is likely to be halting, slow, and punctuated by judicial reversals from time to time.

Conclusion

Both the revision in Title II (i.e., the general solicitation rules) and Title IV (the expanded Regulation A) are likely to increase small entrepreneurs' access to capital. The great danger is that excessive deregulation could cause investors to lose confidence in the offering process. The SEC has traditionally sought to maintain investor confidence

through active regulation and enforcement. Today, however, the SEC is caught between the rock and the hard place, as the JOBS Act (much like the Dodd-Frank Act) asks it to promulgate rules quickly, while the D.C. Circuit stands ready to strike down precisely those rules that are quickly promulgated.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: John C. Coffee Jr.

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2010. Include the source and amount of each grant or contract.

None

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.
Signature: John C Coffee Jr.

Date: June 24, 2012