

## **JOBS ACT OF 2012**

On April 5, 2012, President Obama signed the Jumpstart Our Business Startups (JOBS) Act into law. The new law eases regulatory burdens on startup businesses and potentially makes new sources of funding available to small businesses. This memorandum provides a big picture view of the JOBS act regarding new fundraising capabilities and describes how startup companies can take advantage of the new law.

The JOBS act softens, or removes altogether, regulatory restrictions for private companies across the spectrum – from companies ready to go public to smaller companies wishing to remain private. The new law is designed to make it easier for startups and small business to raise funds, especially through a source called online crowdfunding. Crowdfunding permits the sale of securities through non-traditional means. Until the JOBS act, startups could use crowdfunding only to solicit donations to help support the company because laws and SEC regulations prohibited selling securities to non-accredited investors. With the new legislation, startups can sell an ownership stake in their company to non-accredited investors. This memorandum first examines the new crowdfunding exemptions from securities regulations then moves on to discussion of issuer responsibilities during crowdfunding. The analysis is necessarily limited because the SEC has not yet issued rules and regulations required for certain parts of the law to go into effect.

### Crowdfunding

The JOBS act creates a crowdfunding exemption to the general rule prohibiting the sale of securities prior to filing a registration statement with the SEC. A registration statement is a long, costly legal document filed with the SEC. If an issuer qualifies for the crowdfunding exemption, the company will save time and money while still being able to issue securities. The exemption covers transactions involving the offer or sale of securities by an issuer if all of the following conditions exist:

- The aggregate amount of securities sold to all investors by the issuer during the 12-month period preceding the date of such transaction is not more than \$1,000,000.
- The aggregate amount of securities sold to any investor by an issuer does not exceed:
  - The greater of \$2,000 or 5% of the annual income or net worth of the investor, if the investor's annual income or net worth is less than \$100,000.
  - 10% of the annual income or net worth of an investor, not exceeding \$100,000, if the investor's annual income or net worth is equal to or more than \$100,000.
- The transaction is conducted through a broker or funding portal complying with the requirements of section 4A(a) of the act.
- The issuer complies with the requirements of section 4A(b).

The act requires the SEC to create additional rules and regulations governing the use of crowdfunding to raise capital for a company. The deadline for the SEC to promulgate rules is January 1, 2013. Since the JOBS act requires the SEC to adopt rules to implement crowdfunding before enterprises may begin to crowdfund, it remains unlawful to utilize crowdfunding at the present time. Therefore, other than the language of the act and the information pages posted on the SEC website, no explanation of the crowdfunding exemption is available from the SEC at this time.

### Issuer Responsibilities

Section 4A(b) imposes requirements on issuers to protect investors if the issuer utilizes the new crowdfunding exemption. To offer or sell securities through the crowdfunding exception, an issuer must meet all of the following requirements:

- File with the Commission (and provide to investors and the broker or funding portal):
  - Basic company information
  - Names of directors, officers, and persons holding more than 20% share in the company
  - Description of business and business plan
  - Description of financial condition of issuer
  - Description of stated purpose and intended use of proceeds
  - Target offering amount
  - Price of securities
  - Description of ownership and capital structure
- Not advertise the terms of the offering
- Not compensate any person to promote its offerings
- Not less than annually file with the Commission and provide to investors reports of results of operations and financial statements, as the Commission shall deem appropriate.

These requirements impose considerably fewer burdens on the company seeking funding when compared to the time, information, and money required to sell securities under the old regime. Congress added many of these investor protections in an amendment to the act out of concern for fraud, but still left the bar comparatively low. A material misstatement or omission in financial statements or other documents required by the SEC, however, may result in liability for the company.

### Actions in Anticipation of SEC Regulations

Since the SEC regulations governing crowdfunding are not due until the beginning of the next year and crowdfunding cannot begin until the SEC issues those regulations, it is difficult to determine the fallout of the law or how the law will affect individual startups and small businesses. However, there are a few things business can begin immediately to begin fundraising as soon as possible after the SEC finalizes its regulations.

- Gather all relevant documents – Certain documents are required to launch a crowdfunding campaign, including:

- Financial status of the company or project
- Financial statements (depending on the size of the target offering, different financial statements are required)
- Most recent tax return
- Business plan summary
- Capital structure explanation
- Prepare a pitch – This involves doing some market research and determining how to present the company to a potential investor. Investing campaigns require a different tone than fundraising campaigns – investment is a strategic decision.
  - Have all required paperwork handy
  - Have an attractive business model
  - Establish credibility of executive team
- Plan marketing campaign – Publicize your company without advertising the crowdfund offer – advertising the terms of the offer is prohibited.
- Identify and partner with broker or fund portal – As crowdfunding requires a broker or fund portal, identifying possible options will speed up the process once the SEC completes the regulations. The broker or fund portal must comply with section 4A(a) requirements – these requirements were created to protect investors. While the SEC will promulgate regulations effecting the duties and registration requirements of brokers and fund portals, companies should nevertheless be able to identify potential partners. Having created a list or contacted firms may a company to begin crowdfunding sooner.

With these steps completed, a company will be ready to begin a crowdfunding campaign as soon as the SEC develops the regulations. Companies taking the time to prepare now may be able to get out in front of the crowdfunding storm beginning next year. The Business and Commercial Law practice group at Robison, Curphey & O'Connell can assist companies of all sizes and interests in determining if using the JOBS act would be beneficial.

Prepared by: W. David Arnold, with assistance from Dan Fotoples (student, Notre Dame Law School)



[W. David Arnold](#) His business practice addresses a variety of organizational and transactional issues confronting small, medium-sized and multinational corporations, partnerships, limited liability entities, associations and other business entities. In his commercial practice, he works closely with clients on all types of business arrangements, including supply and distribution arrangements, manufacturing agreements, and many other types of commercial transactions.



**Toledo**  
 Four SeaGate, Ninth Floor  
 Toledo, Ohio 43604  
 419-249-7900/phone  
 419-249-7911/fax

**Findlay**  
 220 W. Sandusky Street  
 Findlay, Ohio 45840  
 419-423-4321/phone  
 419-423-8484/fax

**Waterville**  
 204 Farnsworth  
 Waterville, Ohio 43566  
 419-878-2931/phone  
 419-878-4727/fax

**Tecumseh**  
 105 Brown Street, Suite 100  
 Tecumseh, Michigan 49286  
 517-423-5404/phone  
 517-423-5647/fax

**Monroe**  
 23 East Front Street, Suite 101  
 Monroe, Michigan 48161  
 734-457-1092/phone  
 734-457-1094/fax

*This publication is designed to provide general information prepared by professionals in regard to the subject matter covered. Although prepared by professionals, this publication should not be utilized as a substitute for professional service in specific situations. If legal advice or other expert assistance is required, the services of a professional should be sought.*