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## News Briefs

# JOBS Act Update: SEC Misses Rulemaking Deadline, But "the Wheels Are in Motion"

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The Securities and Exchange Commission (SEC) will not meet the first rulemaking

deadline mandated under the Jumpstart Our Business Startups Act (JOBS Act), according to testimony Chairman Mary

Schapiro delivered to Congress on June 28. Schapiro said it was "not feasible" to meet the JOBS Act's 90-day deadline for the implementation of changes to Securities Act Rule 506 to permit general solicitation in private placements to accredited investors.

However, the revisions to Rule 506 were not the only deadline missed; the SEC also failed to provide a report on decimalization that should have been completed within the 90-day deadline. Schapiro revealed no more than basic processes of the implementation of the JOBS Act, giving little hint of the success of immediately-enacted provisions or the progress of provisions still in need of rulemaking.

Schapiro briefly reviewed the status of other key JOBS Act reforms, including emerging growth companies, the 2,000-shareholder rule, and crowdfunding — some of which were immediately effective upon the JOBS Act's April 5 passage, others of which require SEC rulemaking. **Schapiro's**

**testimony** — which revealed little of substance about the new rules themselves and instead focused on the rulemaking process — could be fairly summarized in the classic Seinfeld excuse, **“the wheels are in motion ... things are happening!”**

Below is an update on major JOBS Act reforms.

## General Solicitation

When SEC rulemaking is complete, the JOBS Act will lift the longstanding prohibition on general solicitation or advertising in private placements under Rule 506, provided that all purchasers are accredited investors. More specifically, Section 201(a)(1) of the JOBS Act requires the SEC to amend Rule 506 to exempt offers and sales of securities under Rule 506 from the prohibition on general solicitation or advertising in Rule 502(c), when all purchasers are accredited investors. This JOBS Act private placement reform is thoroughly explained in the article **Private Placement Reform, or How the SEC Learned to Stop Worrying and Love General Solicitation.**

Since the SEC missed the 90-day rulemaking deadline, general solicitation and general advertising are not yet legal and Rule 506 still needs to be revised. Schapiro promised Congress “that the Commission will be in a position to act on a staff proposal in the very near future” but provided no estimated time frame. In other words, the wheels are in motion.

## Emerging Growth Companies

To encourage IPOs and ease public reporting burdens for smaller companies, the JOBS Act created a new category of issuer under the Securities Act, the “emerging growth company.” This provision, commonly referred to as the “IPO Fast Track” or the “IPO On-Ramp,” was effective immediately on April 5, without any SEC rulemaking. As explained in **How to Get Your Emerging Growth Companies on the IPO Fast Track**, an emerging growth company (1) is a domestic or a foreign private issuer with total annual gross revenues of less

than \$1 billion during its most recently completed fiscal year and (2) prices its IPO on or after Dec. 9, 2011.

Emerging growth companies may initiate the IPO process by confidentially filing preliminary registration documents, go public with two years of audited financials instead of three, and receive analyst coverage immediately after going public. They are also able to phase in full public reporting and internal controls over five years.

It is speculated that the status of "emerging growth company" could promote the addition of middle market, private equity-backed companies to the public market, but the status reports on its influence are not quite ready. Schapiro only revealed that reports on decimalization and registration requirements are in progress and inconclusive at this time. Despite lack of evidentiary reports with cost-benefit analysis, companies such as Splunk Inc. and Midstate Petroleum Co. have taken advantage of the new issuer status and gone public as emerging growth companies. Another example is biopharmaceutical company Globelmmune, which peHUB's Angela Sormani reported this week had **publicly filed a registration statement for its IPO**, after previously submitting its registration statement on a confidential basis under the JOBS Act.

## 2,000 Shareholder Rule

Effective April 5, without SEC rulemaking, the JOBS Act amended Section 12(g)(1) of the Exchange Act to require a company to register with the SEC and begin filing periodic Exchange Act reports within 120 days after the fiscal year in which:

- The company's total assets exceed \$10 million; and
- The company's shareholders of record exceed (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. (For banks and bank holding companies, 2,000 persons.)

Section 12(g)(1) previously required companies to register with 500 shareholders instead of 2,000. Commonly known as the “500 Shareholder Rule,” Section 12(g)(1) was a key factor driving Facebook’s IPO, and Microsoft’s a generation earlier, as discussed in [The “Facebook Problem,” Secondary Market Trading and the 500 Shareholder Rule.](#)

Title VI of the JOBS Act, which applies only to banks and bank holding companies, amended Section 12(g) to raise the registration threshold from 500 holders of record to 2,000 holders of record and also change the threshold for exiting the reporting system from 300 holders of record to 1,200 holders of record. Schapiro noted in her testimony that as of June 28, “approximately 50 bank holding companies have de-registered” in order to “build their earnings and market position.”

## Crowdfunding

Schapiro had little to say about the JOBS Act’s creation of new exemption from registration under Section 5 of the Securities Act to permit crowdfunding. She noted that the SEC has 270 days under the JOBS Act to implement the new crowdfunding exemption.

Schapiro in the past has revealed skepticism about crowdfunding, stating that it would weaken investor protection and be “a step backwards,” so it is not surprising that her testimony hinted at significant crowdfunding regulation in the future. Based in part on Schapiro’s obvious distaste for the concept, this article explaining crowdfunding is entitled, [“Will Crowdfunding Live Up to the Hype?”](#) It predicts that crowdfunding will be subject to a very heavy regulatory burden when the SEC finally implements rules.

Because the 270-day rulemaking period means crowdfunding securities offerings will not be permitted until 2013, the SEC’s primary concern at this point appears to be preventing companies from utilizing crowdfunding before it becomes legal. Schapiro noted that on April 23, the SEC issued a sternly-worded warning that crowdfunding was not legal until implementing rules are adopted. As explained in [Be Careful Entrepreneurs, Crowdfunding Securities](#)

**Offerings Aren't Yet Legal**, until then “any offers or sales of securities purporting to rely on the crowdfunding exemption would be unlawful under the federal securities laws.”

*Author's note: Thank you to Katie Fernilius for her assistance with this article.*

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***Image credit:*** SEC artwork created by Katie Fernilius on behalf of Chris Manderson

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