CROWDFUNDING, THE JOBS ACT & THE TRUTH!

THE MYSTERY REVEALED - BY MICHAEL FUGLER, APRIL 2012©

I might be biased, I'm not sure, because my take on all of this is our current capital formation process in America for Small Business is broken, so just the mere fact that we have managed to have an open, transparent discussion about fixing it, actually get bi-partisan support to pass new legislation is a victory and a miracle and should be applauded regardless of where you stand on this particular piece of legislation and its details of implementation. Don't kick a "gift horse," get a new saddle.

Yes, of course we should all be worried about fraud, and the "dark knights" coming out the woodwork being mindful of another possible opportunity to rip off "seniors" and school teachers but that fear is not justification to stop these new capital raising processes in their tracks.

While opposing sides are coming together let's embrace that and keep the cooperation going. Maybe next--tax incentives that will protect and enhance investment in small business? Let's keep talking and developing creative thinking.

Michael Fugler, global expert and speaker on Entrepreneurship. Delivering education, training, and demonstration workshops.

Hasn't anyone learned anything from Bernie Madoff and Allen Stanford enough to realize all these layers and layers of bureaucracy and regulatory didn't protect any of those investors from anything? We don't need more regulation, more nitpicking; we need more cooperation from regulators. So many financial firms are full of good people trying to do the right thing and we have set up a convoluted system that only rewards the regulators if they find fault and can issue monetary fines on our financial firms, Broker/Dealers and RIAs. The current system doesn't seem much different than the NFL having coaches paying players to injure opponents.

Let's be honest. We know every time a regulator walks into a financial firm they have failed if they don't walk out with a fine, where else will they get money for their bonus pool? They don't come in and say you filed 99% of your forms on time and correctly, let's sit down and visit on that 1% and see how we might help you get that right as well. No, it's how much are we going to fine you for that 1% we found and put this on your record and make you carry it like a scarlet "A" for the rest of your career. We don't have a system where if the firm reports it has a Rep that missed the deadline for continuing education the firm is rewarded for pointing out the representative was 30 days late, but did it the minute it was discovered, no, what you get is a notice and no negotiation that $12,500 is the minimum fine they can give and they are doing you a favor and thanks for the contribution to the bonus pool.

Try going in and asking for guidance to a regulator, they tell you that is not why they are there, they tell you to go ask someone else, get a lawyer, and if he gives you bad advice tough, we will come in and fine you, we will not tell you what you could have done to avoid the issue even though you asked in advance because that is how our system is set up.

Finally, enough people are fed up with our broken, archaic capital system and finally thanks to Social Media, people are banning together and finally politicians are forced to listen and voilà, we get legislation with new ideas and a possibility of improving a broken system to help who? Small Business!!!

Why is it such a "hot topic" and why are so many people dying to know all about it now that its law? Or is it? Well, it is law, but it's "on hold," so the SEC (Securities & Exchange Commission) can get their arms around its neck and try and choke it before life is breathed into it. That's life in the regulatory world, kill what you don't know and can't control; make all in your reach subservient. Unless we ban together and keep this flame alive it will go out. And even though I am "hammering" the regulatory system I am willing to give the SEC a chance to step up and do the right thing and open up using social media and Crowdfunding and help small business. Where do they think companies like Microsoft came from, remember it was a garage.

So, even if you don't like some of the new law, embrace the fact that we are on the road for change and improvement and we have something to debate and work on. It is better than what we have, and it is better than nothing! We can always add investor protective language but we need to let people have more freedom to do with their money what they want. Right? The SEC and FINRA don't step in when there is a junket to Vegas, do they? Or a family vacation with spending out of hand? Or credit card spending for non-accredited investors that are out of "whack" with their income level?

Crowdfunding and the JOBS Act are "hot topics" because the root of their existence is JOBS. Where do jobs come from? Small Business. What is Small Business?

Small Business is the engine that drives America!

How Important Are Small Businesses to the U.S. Economy? According to the U.S. Small Business Administration, small firms:

- Represent 99.7% of all employer firms
- Employ just over half of all private sector employees
- Pay 44% of total U.S. private payroll
- Have generated 64% of net new jobs over the past 15 years
- Create more than half of the non-farm private gross domestic product (GDP)
- Hire 40% of high tech workers (such as scientists, engineers, and computer programmers)
- 52% are home-based and 2% franchises

Ask most people if they know what "Crowdfunding" is and you will get a general positive, yes! It combines two words that everyone can relate to, "Crowd" and "Funding," but as for specifics, forget it, and who can blame them, even Congress who couldn't pass it fast enough doesn't understand it and "punted" to the SEC to be the scapegoat in case it doesn't get off the ground soon enough for its proponents.

If I sound somewhat cynical about regulators it's because I am.

I have never really had good experiences with them. Maybe that will change? But let's move on, I know they are here to stay, I just wish while we are trying to improve Entrepreneurialism in America we could improve the regulatory relationship between the good guys, trying to do the right thing, and the regulators who feel like they have failed if they don't extract a nice fine from their visit with you.

HISTORY

From August 2011 to March of 2012 there were numerous efforts in both Houses of Congress to get a bill passed to do something, either Crowdfunding, creating jobs, freeing up credit for small business, anything:

- H.R. 1070 – Small Company Capital Formation Act of 2011
- S. 1544 – Small Company Capital Formation Act of 2011
- H.R. 2930 – Entrepreneur Access to Capital Act
- S. 1791 – Democratizing Access to Capital Act
- S. 1970 – Capital Raising Online While Deterring Fraud & Unethical Non-Disclosure Act of 2011 the Crowdfund Act
- H.R. 2940 – Access to Capital for Job Creators Act
- S. 1933 – Reopening American Capital Markets to Emerging Growth Companies Act of 2011
- H.R. 2167 – Private Company Flexibility and Growth Act

Let's take a look at the new law. Its called the JOBS Act.

The Jumpstart Our Business Startups Act (JOBS Act) is a consolidation of several bills introduced in our Congress in 2011 with the idea of making it easier for small business to raise money and ease the regulatory burden. The House of Representatives passed the JOBS Act on March 8 by a vote of 390-23, and the Senate passed the same bill, with one amendment, on March 22 by a vote of 73- 26. The Senate amendment offered more restrictions than the House, specifically dealing with Crowdfunding. On reconsideration of the bill with the Senate amendment, the JOBS Act passed the House by a vote of 380-41 on March 27, and President Obama signed it into law on April 5.

In case you missed all the hoopla in the past year, I know history is often important to put things in perspective so here is a breakdown.

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The final bill that made it was HB-3606, below are its particulars. Amazing at the speed it made it through the system from date of introduction to execution by the President.

The JOBS Act (HB-3606- Public Law No: 112-106) is one of the most comprehensive pieces of legislation in recent years to be targeted at "emerging growth companies".

What are the highlights of the JOBS Act and what do they mean? Most importantly, what can we do now that it has been signed into law? Actually nothing right now and it could be 90 days to nine months or even more with extensions, so don't hold your breath, but do study and get prepared because there are new processes coming and keep the pressure and positive momentum going so this battle grows and we force our Congress and regulators to give us what we need to bring America back! Change is in the air. Right?

HB-3606- Public Law No: 112-106-H.R. 3606:
Jumpstart Our Business Startups Act
Sponsor: Rep. Stephen Fincher [R-TN8]

Introduced	Dec 08, 2011
Referred to Committee	Dec 08, 2011
Reported by Committee	Feb 16, 2012
Passed House	Mar 08, 2012
Passed Senate with Changes	Mar 22, 2012
Passed Senate	Mar 27, 2012
Signed by the President	Apr 05, 2012

This bill was enacted after being signed by the President, April 5, 2012.

SEVEN TITLES

If you look at the index of the new law, there are seven Titles, which form the foundation of the legislation:

Title I "Reopening American Capital Markets to Emerging Growth Companies Act of 2011" (HR 3606, Carney-Fincher) HR 3606 creates an expanded on-ramp for newly public companies by exempting a new category "emerging growth companies" (companies with less than $1 billion in revenues or $700 million in public float) for up to five years from a variety of securities law requirements, including: say-on-pay votes; certain executive compensation reporting; requirements to provide 3-years of audited financials (would only need 2 years worth), SOX section 404(b) auditing of internal controls over financial reporting; and any future auditor rotation or other auditor requirements. HR 3606 also eases restrictions on communications and research related to an IPO. HR 3606 passed the Financial Services Committee by a vote of 54-1 on 2/16/12, has not previously come to floor action.

Title II, "Access to Capital for Job Creators Act" (HR 2940, McCarthy of CA)
HR 2940 amends section 4(2) of the Securities Act of 1933 to permit use of public solicitation in connection with private securities offerings, provided that the issuer or underwriter verifies that all purchasers of the securities are accredited investors. In addition, the SEC would have to share offering materials and documentation with the states. HR 2940 passed the House 413-11 on 11/3/11.

Title III, "Entrepreneur Access to Capital Act" (HR 2930, McHenry)
HR 2930 creates a new exemption from registration under the Securities Act of 1933 for "Crowdfunding" securities. HR 2930 permits a company to raise up to $2 million a year, with investors permitted to invest the lesser of $10,000 or 10% of his or her income annually in such companies. HR 2930 pre-empts the state regulators' registration authority for the exempt securities, but websites and issuers must register with and provide notice to the SEC, which would be shared with the states. HR 2930 passed House 407-17 on 11/3/11.

Title IV, the "Small Company Capital Formation Act of 2011" (HR 1070, Schweikert)
HR 1070 requires the Securities and Exchange Commission (SEC) to create a new and larger exemption, effectively raising the limit from $5 million to $50 million for its Regulation A ("Reg A") security offerings and permitting a more streamlined approach for smaller issuers. The current limit is $5 million, but the mechanism is little used due to the small size of issuances permitted. The bill would permit the SEC to impose conditions on issuance under the rule, and would require periodic review of the limit. HR 1070 passed House 421-1 on 11/2/11.

Title V, "Private Company Flexibility and Growth Act: (HR 2167, Schweikert)
HR 2167 allows companies to remain private longer, with no SEC filings, by raising the minimum shareholder threshold triggering public reporting for all companies from 500 to 1,000 shareholders, and by excluding employees from the definition of a shareholder. HR 2167 passed the Financial Services Committee on voice vote 10/26/11, but has not previously come to the floor.

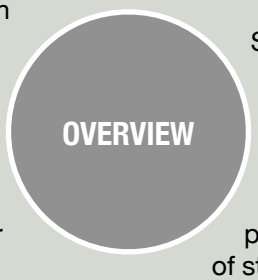
Title VI, "Capital Expansion" (HR 4088, Quayle)
HR 4088 is identical to House-passed HR 1965 (Himes) except that HR 4088 removes a cost-benefit analysis study on raising the shareholder threshold for all companies (see Title V). HR 4088 allows banks and bank holding companies to remain private longer by raising the threshold triggering public reporting from 500 shareholders to 2,000 shareholders. The bill also eases restrictions for discontinuing public reporting by increasing the minimum threshold from 300 shareholders to 1,200 shareholders. The employee exclusion discussed in Title V also applies to banks and bank holding companies. HR 4088 has not been considered in the Financial Services Committee. However, HR 1965 passed the House 420-2 on 11/2/11.

Title VII, Outreach on Changes to the Law directs the SEC to provide online information and conduct outreach to inform small and medium businesses of the new law.

Regulation D under the Securities Act of 1933 will permit General Solicitation and General Advertising; The Threshold for Mandatory Registration under Section 12(g) of the Securities Exchange Act of 1934 will be increased from 500 to 2,000 Persons

The JOBS Act mandates the Securities and Exchange Commission (SEC) to revise Regulation D under the Securities Act of 1933 to permit general solicitation and general advertising in private placements made under Rule 506 under the Securities Act, so long as each purchaser of the issuer's securities meets the definition of an "accredited investor" under the Securities Act. Previously, private companies wishing to solicit prospective investors without registration with the SEC were limited to making offers to those with whom they have a pre-existing relationship or with whom a broker-dealer they engage has a pre-existing relationship. An issuer may now seek out investors that are accredited investors or qualified institutional buyers (QIBs) by engaging in general solicitation and public advertising, including through use of the internet and social media, thereby significantly increasing the universe of prospective investors, all without having a registration statement on file with the SEC. It was already the case that securities offered under Rule 506 are "covered securities" under NSMIA and therefore exempt from substantive state regulation, and are not reviewed by the SEC (unlike Regulation A offerings). It is probable that as we better understand and use these features, Rule 506 will remain the dominant choice for unregistered offerings.

Another significant feature of the JOBS Act is that it raises the threshold for mandatory registration under Section 12(g) of the Securities Exchange Act of 1934 from 500 to 2,000 shareholders of record (as long as the company does not have 500 shareholders of record who are not accredited investors, in which case the 500-shareholder limit effectively remains. The problem will be determining whether shareholders of record are accredited investors, as many issuers do not even know the identity of most of their shareholders. My guess is we will see more detailed investor questionnaires which request a summary statement of the potential investor's assets and liabilities.



Shareholders "of record" under the new law will exclude Crowdfunding investors and persons who receive securities pursuant to employee compensation plans that are exempt from registration under the Securities Act (which is consistent with the SEC's no-action position permitting private companies to exclude holders of stock options when determining whether they have 500 holders. The 2,000-holder rule will give many private companies more control over whether and when they wish to become a public company and can delay the associated time, expense and regulatory burden associated with becoming a public company.

Taken together, these changes to Regulation D and Section 12(g) may result in very large Regulation D offerings becoming increasingly common. With the mandatory 1934 Act registration limit increased to 2,000 holders, it will be easier for many companies to stay private longer. Rule 506 offerings have had the added attraction, since the Supreme Court's decision in Gustafson v. Alloyd Co., that no private cause of action for negligent misrepresentation is available to disappointed investors. Many private issuers are likely to see Regulation D as a very attractive financing option, given the ability to reach out to a larger audience of QIBs and other accredited investors, the absence of any limitation on offering size or number of investors, the absence of SEC review of substantive disclosure, the absence of state regulation and the absence of private causes of action for negligent misrepresentation.

"IPO On Ramp" and "Emerging Growth Companies"

The JOBS Act provides an "IPO on ramp" for "emerging growth companies" (a newly created category of issuer under the Securities Act), which are issuers with annual gross revenues of less than $1 billion during the most recently completed fiscal year. I venture to say this is the type of client most of us see. Emerging growth companies will be able to take advantage of the reduced disclosure requirements that already have been available to "smaller reporting companies" (defined by the Securities Act as companies having a public float of less than $75 million). The scaled disclosure includes a requirement to include only two, rather than three, years of audited financial statements in the issuer's initial public offering (IPO) registration statement and, during the "IPO on ramp" period, the ability to omit the auditor's attestation on internal control over financial reporting required by the Sarbanes-Oxley, both of which are expensive thereby reducing initial costs.

During the "IPO on ramp" period, emerging growth companies would not need to submit say-on-pay votes to their stockholders (including say-on-pay frequency or golden parachute votes) and would face more limited executive compensation disclosure requirements than larger companies.

The JOBS Act will allow an emerging growth company to submit its IPO registration statement on a confidential basis, with the result that any sensitive information contained in the registration statement would not be immediately publicly available. The ability for an emerging growth company to maintain confidentiality and avoid disclosing that it is contemplating an offering until it is ready to do so is significant. There is a catch, you must be mindful that the initial confidential submission and any subsequent amendments must be publicly filed at least 21 days before the issuer's road show. In addition, the JOBS Act permits an emerging growth company to "test the waters" by communicating orally or in writing with QIBs or other accredited investors to gauge interest in a contemplated securities offering, even if a registration statement has not yet been filed, and permits analysts to publish research reports about an emerging growth company that is going public even if the analyst's firm is one of the underwriters in the issuer's IPO. Wow, this is a 180° turn from the past. I think this will be troubled waters for firms unless they are very careful not to be promoting the upcoming offering but it could a valuable tool handled fairly where the company and its good progress are able to be expounded upon.

These emerging growth company and "IPO on ramp" provisions can be taken advantage of not only by any issuers who go public in the future, but also by any issuer that has consummated an IPO since December 9, 2011. The "IPO on ramp" period ends upon the earliest of:

- the last day of the fiscal year in which the issuer achieves annual gross revenues of at least $1 billion;
- the last day of the fiscal year following the fifth anniversary of the issuer's IPO;
- the issuance of more than $1 billion in non-convertible debt during the previous three years; or
- the issuer's becoming a "large accelerated filer" (which generally is an issuer with at least $700 million in public float).

The JOBS Act does not completely change the IPO process for emerging growth companies; it could minimize the "time to market" and give issuers that now qualify as emerging growth companies but did not previously qualify as smaller reporting companies more options including, reduces audit-related costs and lessens certain ongoing reporting requirements.

CROWDFUNDING

The JOBS Act provides an exemption from registration for investments from Crowdfunding. Companies can now raise up to $1 million from an unlimited number of purchasers so long as the offering is made through a qualified broker-dealer or "funding portal" (a new concept created by the JOBS Act) and individual investments are limited to:

- the greater of $2,000 or 5% of the investor's annual income, if the investor's annual income or net worth is less than $100,000; or
- 10% of the investor's annual income or net worth (but subject to a $100,000 investment cap), if the investor's annual income or net worth is at least $100,000.

The offering must provide a description of the stated purpose and intended use of the offering proceeds, as well as warnings of the risks related to the investment, and the issuer must take "measures to reduce the risk of fraud" with respect to the transaction. The SEC and investors must be provided with information about the issuer's officers, directors and 20% shareholders, and investors must answer questions demonstrating an ability to understand the risks involved.

If an issuer is targeting total offering amounts of less than $100,000 in a 12-month period, it must provide its most recent income tax return and certified (though not audited) financial statements. For offerings between $100,000 and $500,000, the issuer would need to provide financial statements reviewed by a public accountant. For offerings greater than $500,000, audited financial statements would be required. In addition, issuers would need to factor in fees charged by any intermediary and deal with the challenges presented by having a large, diverse and relatively unsophisticated shareholder base. This is an area ripe for the unscrupulous to dwell. It is up to us to keep them out and find fair rules to protect the unsophisticated investors, but at the same time protect this new freedom to raise capital.

Crowdfunding securities would be "covered securities" for state securities law purposes, with the result that state "blue sky" regulation of Crowdfunding offerings would be preempted by the federal securities laws. Though removing this layer of regulation may be good news for issuers, state securities regulators have been particularly upset given the potential for fraud in Crowdfunding offerings. But if we are honest there has been a move underway for sometime that reveals that state securities regulators are protective of their turf and have wanted to recapture more authority in the federal exemption area, and that move gained momentum with the recent recession and failure of federal regulators to catch Bernie and Allan.

Crowdfunding has attracted significant favorable press. Use of the Crowdfunding provisions is likely to present challenges for many reasons. Opponents say it is unlikely that legitimate issuers would find it attractive to raise $1 million in small investment amounts from a large number of investors, and then to bear the costs of managing such a large shareholder base on an ongoing basis, as well as being subject to SEC oversight and new private rights of action. This is especially true when compared with an issuer's ability to engage instead in a Regulation D offering to accredited investors, which permits general advertising without SEC review of substantive disclosure or a private right of action for negligent misrepresentation. Unfortunately, it is already being predicted that many fraudulent offerings will be conducted under the pretext that they comply with the Crowdfunding exemption.

Be aware that the SOX required CEO and CFO certifications of annual and quarterly reports and liability of those individuals for misstatements as well as the requirement for management to evaluate their company's internal control over financial reporting remain unchanged.

REGULATION A

The JOBS Act provides a new exemption from the registration requirements of the Securities Act modeled on Regulation A, which is being referred to as "Regulation A+". This new exemption increases the permitted size of Regulation A offerings to $50 million of unrestricted securities within a 12-month period to investors, who need not be accredited, subject to the annual filing of audited financial statements and other conditions to be prescribed by the SEC, including periodic reporting requirements. Regulation "A" offerings, currently limited to sales of up to $5 million of securities in any 12-month period, are subject to fewer disclosure requirements than registered offerings.

Regulation A+ has the advantage, compared with Regulation D that offerings of unrestricted securities can be made to a large number of non-accredited investors.

You must review advantages vs. disadvantages that are absent from Regulation D:

- SEC review is required;
- Regulation A+ securities would not be covered securities for blue sky purposes, unless the securities are offered and sold on a national securities exchange or sold to "qualified purchasers," a term that must be defined by the SEC; and investors will have private causes of action under Section 12(a)(2) of the Securities Act (for negligent misrepresentation);
- Regulation A compares very unfavorably with Regulation D and has been rarely used, primarily because of the SEC review process and the fact that securities sold in Regulation A offerings are not covered securities, resulting in significant issuer time and expense devoted to compliance with federal and state securities law regimes. These issues were not addressed by Regulation A.

My attitude may be misplaced but I have always been a champion of small business and the individual and saw "Big Business" as the chosen few who the Politicians, Regulators and the Wealthy cater to. But wait, if Small Business is "America" and its driving force for economic recovery why can't Small Business get loans or raise capital? Why don't the Politicians, Regulators and the Wealthy cater to them? It's because those in control make sure that all the rules benefit the Politicians, Regulators and the Wealthy so the only people who can afford to donate to the Politicians are the wealthy and they make sure their friends are the regulators. It's a mess.

Something we all have going for us here is that the Politicians see that social media is playing a big part in elections and voting and public opinion. They also see a window of opportunity since the regulators messed up so bad in the recession with their oversight and protection of all of us from the bad guys, so maybe they are not the only solution to investor protection, so a positive movement began with the concept of Crowdfunding. We need to keep that fire going for both sides so we can continue these open, transparent discussions and attempt to improve capital raising and entrepreneurialism in America. That's what it's all about. Let's not stop here. Let's dig deep for the best laws we can to fuel the growth of Entrepreneurialism in America!

Think about it, when it comes to your money, you can give it away, you can burn it, you can gamble it, have a hell of a New Years Eve party with it, but you can't choose where to invest it because Congress and the regulators think you are not capable enough, not smart enough. Has history shown us that we weren't any better off with people like Bernie Madoff and Allen Stanford? Let's give the people a chance to spend their money they way they want, at least a reasonable amount of it.

Entrepreneurs need to lead and find a way. Jobs can be created, products and services will be sold, and most loans will be paid back. Yes, some people will go broke trying. It is not possible to have opportunity without risk. Failure is also part of the American way.

So, if you are an Entrepreneur or own a small business, is the deck stacked against you? It may be but let's change that here and now. Yes, there are a lot of obstacles, it's harder than it used to be to start a business and thanks to regulators it's going to continue to get harder. You can't wait for the banks to loosen up.

If small businesses are going to succeed they will need to do more than just hope or just complain about the government and wait for it to solve all problems.

Politicians don't know much but they seem to have grasped that small businesses create more jobs than big businesses and thus are critical to the recovery. They know that small businesses are getting squeezed — by the credit freeze, by skyrocketing costs like health and unemployment insurance, and by cheap imports.

It's the small business warriors who figure out how to get past the problems, how to find money even when it's tight, how to find opportunity among the mounds of destruction and how to find new ideas. They have to continue to believe that they can do anything.

And we need to do our part and get out there and support all these new changes and make them better and keep looking for new and more creative ways to win this battle.

It's time for "critical, creative thinking!" If you have a Crowdfunding 911 moment to get the 411 go to www.crowdfundingeverything.com, hit either the "easy button" or "I need critical thinking" button.

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ABOUT THE AUTHOR

Mr. Fugler is a global expert and speaker on Entrepreneurship. Delivering education, training, and demonstration workshops on how to go from an idea on a napkin to a stock exchange listing and all the steps in between. He has developed the Business Mastery System for Entrepreneurs. Whether seminars, webinars, panels, speaking engagements, or public appearances Michael gives an overview of the vision and the knowledge which will give you a clearer understanding of how to develop your "Master Plan" using technology and social media in shaping your client acquisitions and relationships in this new economy and our changing world, ending with how to develop and present your "killer" client presentations that will move clients to action.

Mr. Fugler has been a licensed Attorney for 38 years developing an expertise in international law and finance, international investment and merchant banking. He has also been an Investment Banker for the past 16 of those years being FINRA registered with Series 7, 24, 63, and 79 licenses and establishing offices and providing extensive consulting and guidance to institutional investors throughout Europe and the USA.

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