
The JOBS Act

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THE JOBS ACT

Overview

- Easier IPOs for smaller issuers (EGCs):
 - Marketing before SEC filing
 - Research throughout offering period
 - Confidential review of registration statement
 - Up to 5 years relief from SOX 404
- Relaxes marketing restrictions for 144A/Reg D offerings
- Crowdfunding and other measures to facilitate fundraising by issuers
- Relaxed rules for triggering 1934 Act registration

Background

Origins



- Much of the JOBS Act can be traced to recommendations made by the IPO Task Force to the Treasury Department in October 2011.
- The Task Force included venture capitalists, executives, public investors, securities lawyers, academicians and investment bankers.

IPO-Related Costs

Post-IPO CEO Survey: Costs of Going and Staying Public Are High

Average Cost \$2.5M to Go Public



Annual Cost \$1.5M to Stay Public



Costs Including SOX, Legal, Accounting

Source: IPO Task Force CEO Survey August 2011, of incremental costs of an IPO. Sample set consists of 35 CEOs of companies that went public since 2006. Consistent With Independent Review of Public Filings for 47 2011 IPO's Raising Less Than \$200M (Avg. Cost of \$3M for IPO)

- The IPO Task Force found that IPO activity was being constrained by the significant costs of going public and remaining public.
- The view was expressed that much of these costs related to compliance requirements designed with larger companies in mind.

Rationale



- The JOBS Act was promoted in Congress as a way to help stimulate American economic recovery.

Opposition to the JOBS Act



SEC Chairman
Mary Schapiro



American
Association of
Retired Persons



Council of
Institutional
Investors

- However, many felt that the JOBS Act would seriously impair the protections afforded investors under the U.S. securities laws, and opposed the legislation.

Enactment



- Despite the opposition, the JOBS Act passed both houses of Congress and was signed by President Obama on April 5.

Emerging Growth Company

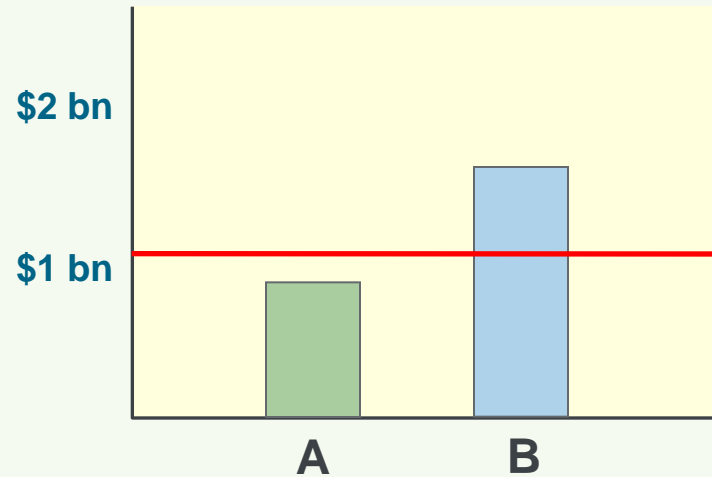
Emerging Growth Company



- The centerpiece of the JOBS Act is the “emerging growth company”, or EGC.
- By removing obstacles to IPOs by EGCs, the JOBS Act seeks to stimulate investment and employment.

Emerging Growth Company Definition

Revenues



Company A: Emerging growth company, eligible for JOBS Act benefits

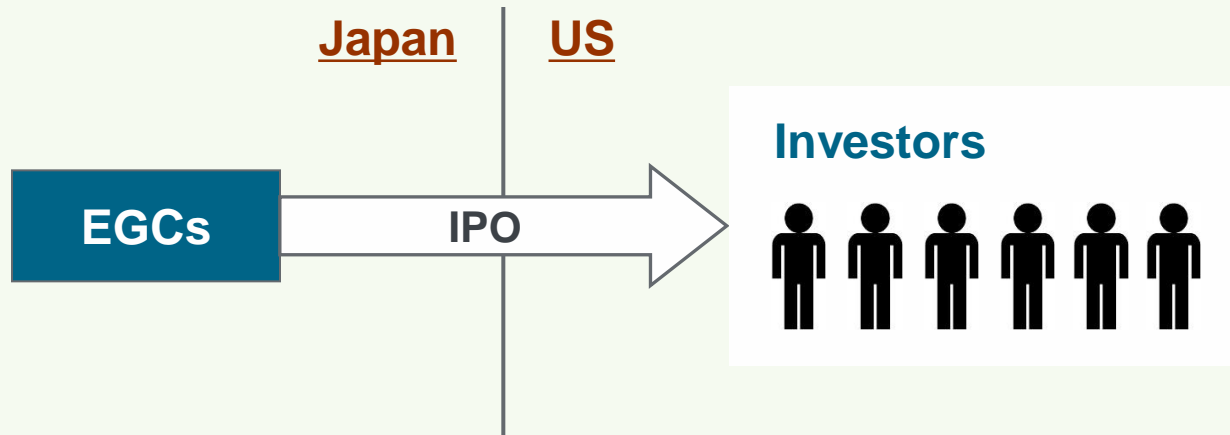
Company B: Not an emerging growth company

- An emerging growth company is an issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year.
- The \$1 billion threshold will be indexed for inflation by the SEC every five years.

Total Annual Gross Revenues

- The term “total annual gross revenues” is not defined.
- The Division of Corporation Finance indicated in one of its April 16, 2012 FAQs that “total annual gross revenues” “means total revenues as presented on the income statement presentation under U.S. GAAP (or IFRS as issued by the IASB, if used as the basis of reporting by a foreign private issuer).”
- If a foreign private issuer prepares its financial statements in a currency other than US dollars, it should calculate total annual gross revenues using the exchange rate as of the last day of its most recently completed fiscal year.

Foreign EGCs



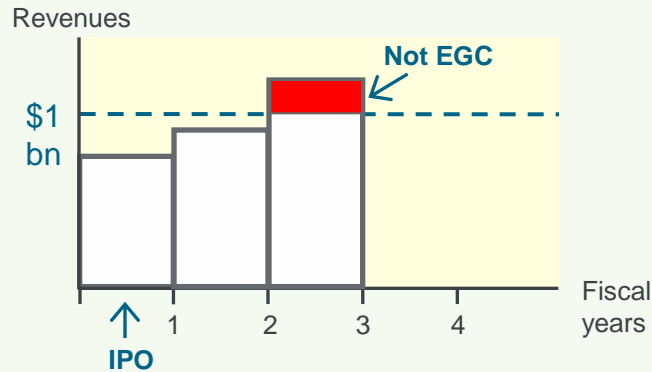
- The definition of EGC is not limited to U.S. issuers.
- Consequently, the streamlined IPO process under the JOBS Act should be available to foreign EGCs.

IPO by a Foreign Issuer

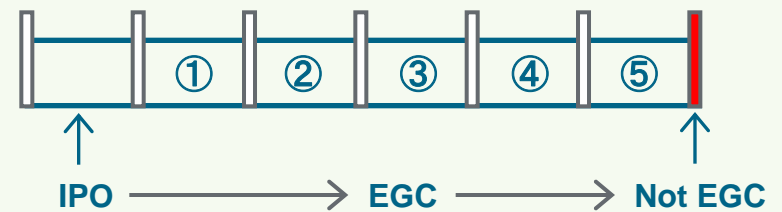
- For purposes of the JOBS Act, IPO means the first offering of equity securities registered with the SEC under the Securities Act.
- Thus, it appears that a foreign issuer already public in its home country may qualify to conduct a U.S. IPO as an EGC.

Losing EGC Status

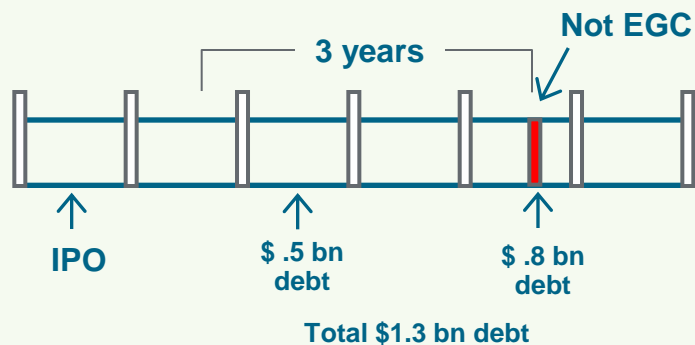
\$1 billion revenues



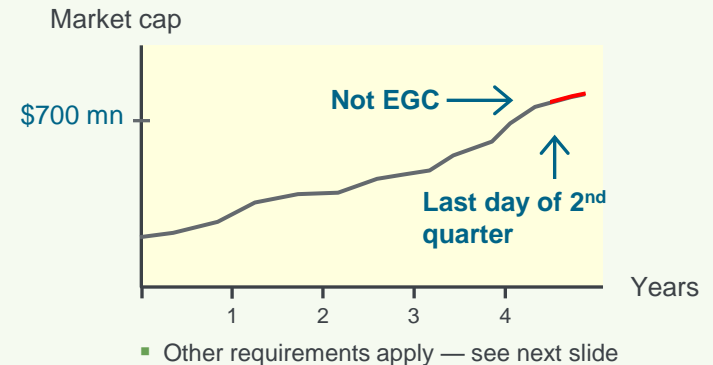
5 fiscal years after IPO



\$1 billion straight debt in 3 years*



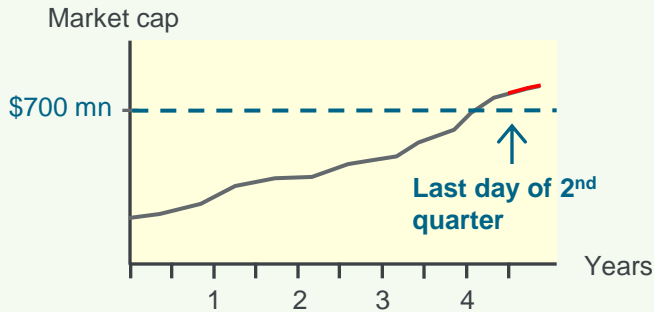
Large accelerated filer*



* In its April 16, 2012 FAQs, the Division of Corporation Finance said that the test contemplates a rolling three-year period and includes all debt securities that have been issued by an EGC in both SEC-registered and Rule 144A and other private transactions during the period. The test does not include other debt (such as bank loans).

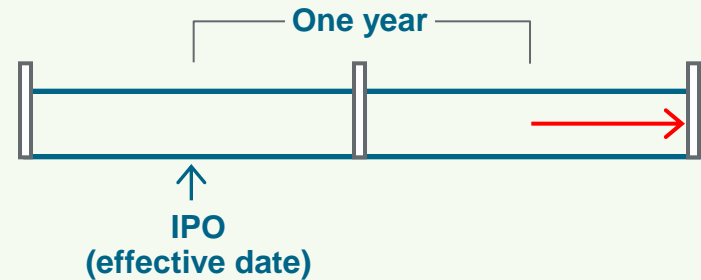
Large Accelerated Filer

\$700 million market cap



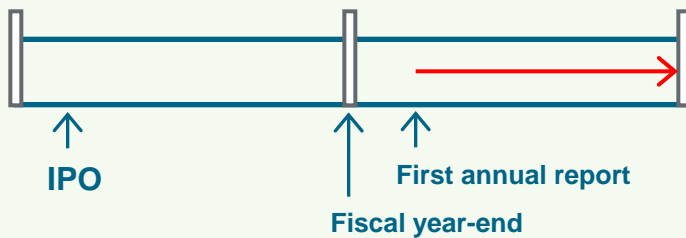
- Aggregate worldwide market value of voting & nonvoting common equity held by nonaffiliates of \$700 million or more, as of last day of most recently completed second quarter

1934 Act reporting



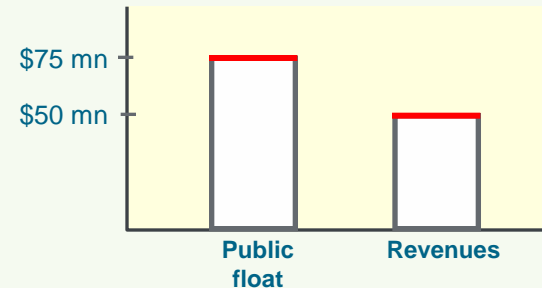
- Issuer has been subject to Section 13(a) or 15(d) of the 1934 Act for at least 12 calendar months

One annual report



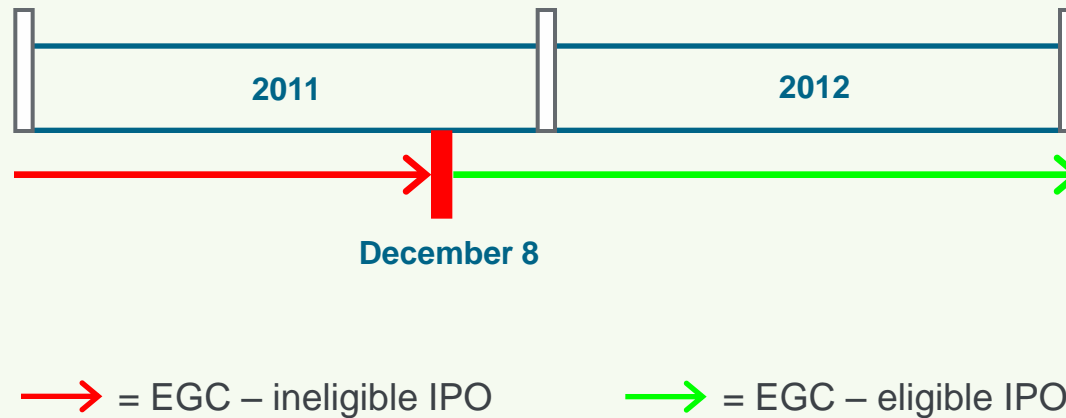
- Issuer has filed at least one 1934 Act annual report

Not a "smaller reporting company"



- Public float of less than \$75 million
- If \$0 public float, revenues less than \$50 million

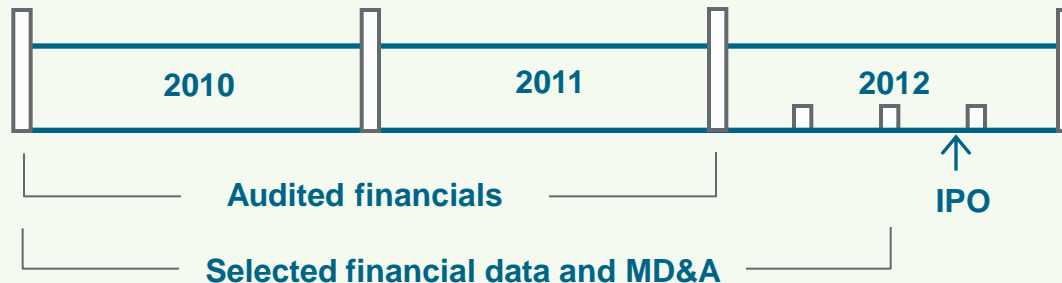
EGC Cutoff Date



- Companies that first sold stock in in an IPO on or before December 8, 2011 are not EGCs.

IPO Process Reforms for EGCs

IPO Process Reforms for EGCs

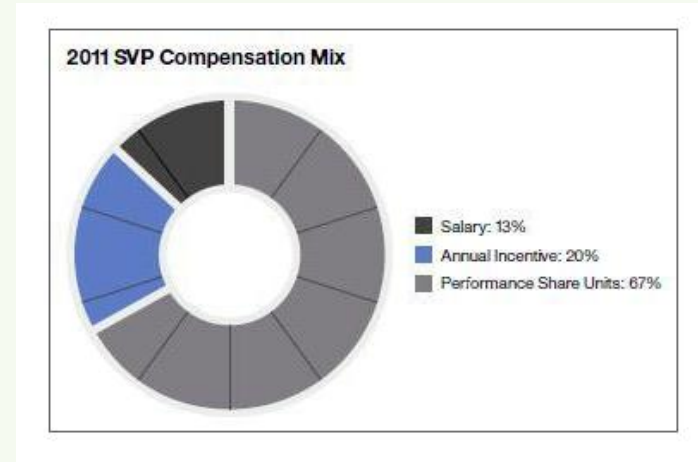
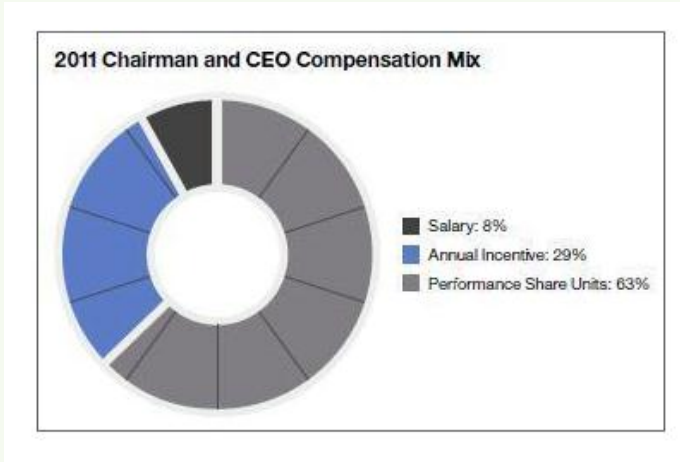


- An EGC may provide two years of audited financial statements instead of three in IPO registration statements.
- An EGC may omit selected financial data for any period prior to the earliest audit period. (5 years of data required for other companies.)
- An EGC may limit its MD&A to periods covered by its audited financial statements plus interim periods.

Financial Statement Relief for FPIs

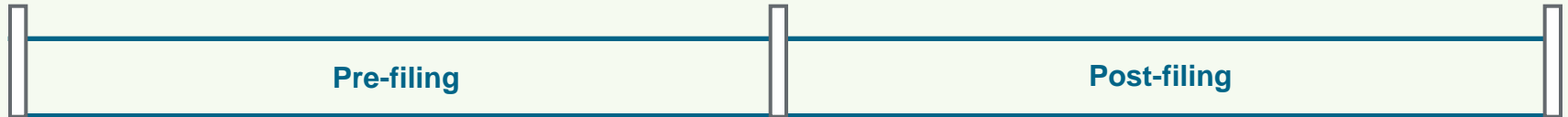
- The ability to limit financial statement disclosure to the two most recent fiscal years may not be relevant to foreign private issuers accessing the U.S. market for the first time. Such issuers already have the ability to limit financial disclosure to the two most recent fiscal years (as well as required interim periods).

Executive Compensation Disclosure

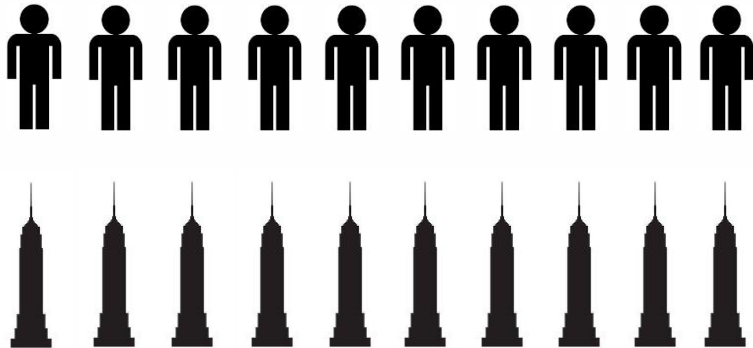


- An EGC may provide reduced executive compensation disclosure and omit Compensation Discussion and Analysis (CD&A).
- These disclosure requirements do not apply to foreign private issuers in any event, so the relief provided by the JOBS Act is not relevant to them.

Testing the Waters



Testing the waters

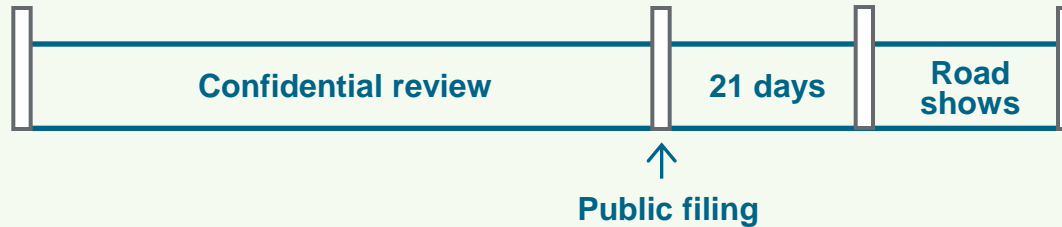


- An EGC and its designees may “test-the-waters” or gauge investor interest in their securities prior to an offering through communications with QIBs or institutional accredited investors.
- However “offers” (as defined in the Securities Act of 1933) may not be made until a registration statement is publicly filed with the SEC.

Testing the Waters *(cont.)*

- A common practice in non-U.S. deals is to hold investor meetings with sophisticated investors to gauge interest in an offering, before a prospectus is completed.
- Prior to the JOBS Act, such meetings would have constituted offers in violation of the 1933 Act.
- The JOBS Act permits an EGC to engage in oral and written communications with potential investors that are qualified institutional buyers (“QIBs”) or accredited investors to determine whether such investors might have an interest in a contemplated securities offering.
- The SEC will likely clarify that formal solicitations and bookbuilding are still prohibited during these meetings.
- In its FAQ document published on August 22, 2012 the SEC explained that generally, if an underwriter is requesting from a customer a non-binding indication of interest that includes the amount of shares the customer might purchase in the potential offering at particular price levels – but does not ask the customer to commit to purchase the relevant securities – the underwriter, absent other factors, would likely not be soliciting a customer order for purposes of Rule 15c2-8(e). The FAQ document may be found at <http://www.sec.gov/divisions/marketreg/tmjjobsact-researchanalystsfaq.htm>

Confidential SEC Review



- An EGC may file its IPO registration statement confidentially, provided the confidential submission and related amendments are filed publicly at least 21 days before the EGC conducts a road show.
- Confidential review not available after a sale of common equity under a Form S-8 registration statement for an employee benefit plan or a registered secondary sale by a selling shareholder.
- However, a prior registered sale of debt or other securities will not disqualify the EGC from confidential review of its initial registration of common equity.

Confidential Review — Procedures

- Send as text-searchable PDF file on CD or DVD, or alternatively in paper format.
- Draft not required to be signed or to include consent of auditors or other experts; however, signed audit report is required.
- Price and offering-related information may be omitted, but drafts otherwise should be substantially complete.
- Transmittal letter from the company must confirm its EGC status.
- No registration fee required until public filing on EDGAR.
- Not necessary to make submission under cover of confidential treatment request.

Confidential Review for Foreign Issuers

Elect EGC treatment

or

Decline EGC treatment

- EGC benefits
 - Public filing 21 days before road shows
- No EGC benefits
 - Public filing before road shows
-
- Foreign issuers that qualify as EGCs and are eligible for confidential review of their registration statements under the SEC's pre-existing review policy may elect to take advantage of that policy.
 - In that case, they must decline to take advantage of any EGC benefits provided by the JOBS Act.

Confidential Review for Foreign Issuers — Eligibility

- Foreign issuers are eligible for confidential SEC review under the SEC's pre-existing review policy where the issuer is:
 - a foreign government registering its debt securities
 - a foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange
 - a foreign private issuer that is being privatized by a foreign government
 - a foreign private issuer that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.
- In addition, shell companies, blank check companies and issuers with no or substantially no business operations will not be permitted to use the non-public submission procedure.

Ongoing Relief for EGCs

Ongoing Relief for EGCs

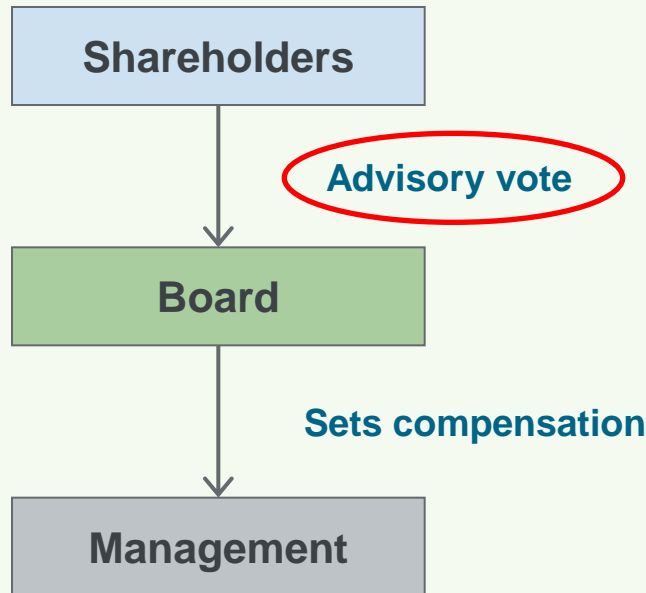
- 404 auditor reports
- Voting on executive compensation
- New GAAP accounting pronouncements
- Auditor rotation
- Auditor discussion and analysis

Auditor Attestation Report



- An EGC is exempt from the requirement to provide an auditor's attestation report on internal controls, as otherwise mandated by Section 404(b) of the Sarbanes-Oxley Act.
- Without JOBS Act relief, companies are required to provide their first auditor attestation report in their second annual report following the IPO.
- Management's assessment of internal controls appears still to be required.

Shareholder Votes on Compensation

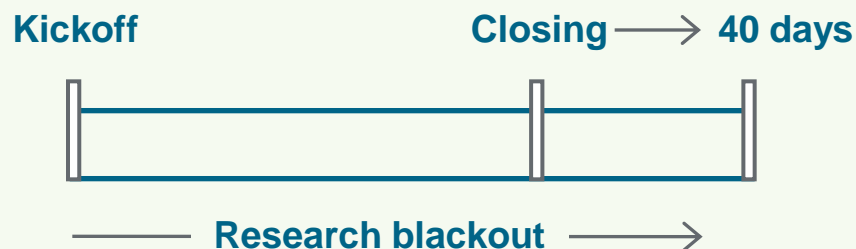


- An EGC is exempt from the requirement to hold shareholder advisory votes on executive compensation — referred to as “say on pay”.

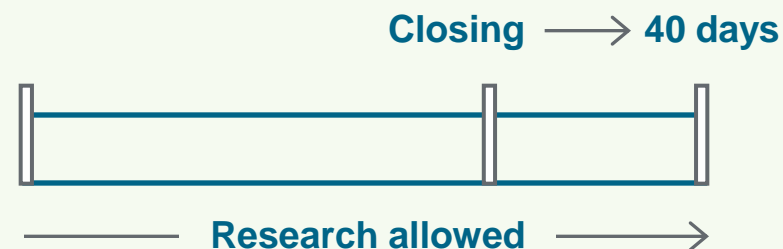
IPO Research

IPO research allowed

Pre – JOBS Act



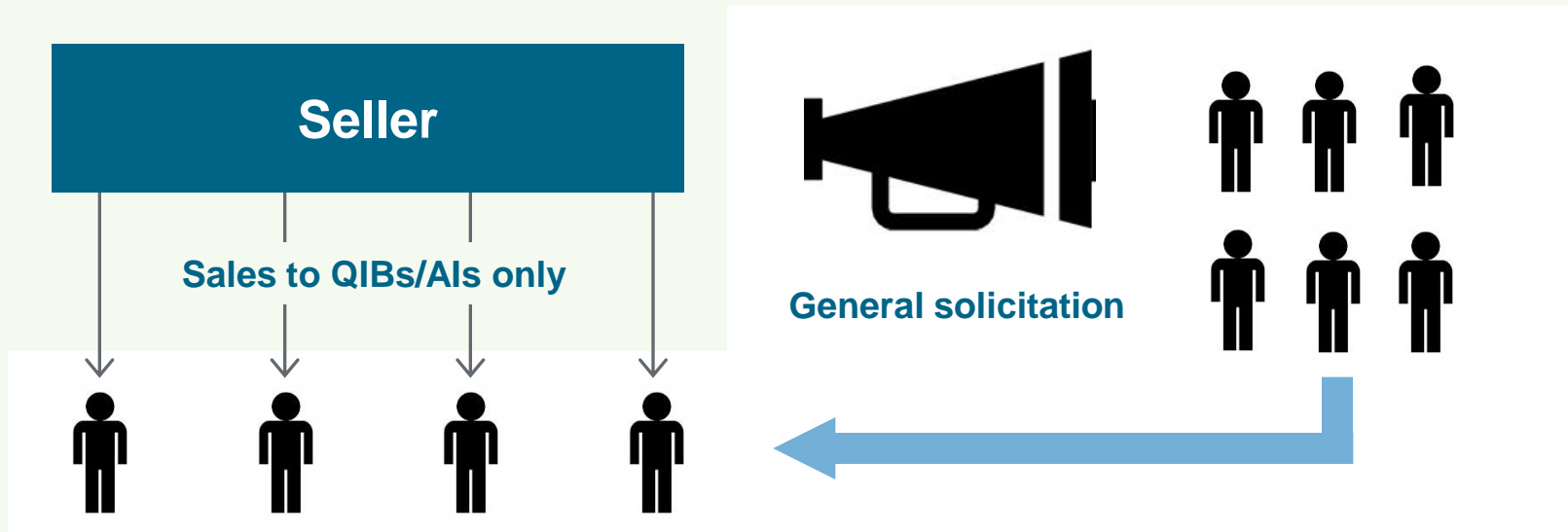
Post – JOBS Act



- A broker-dealer is permitted to publish or distribute a research report related to an EGC prior to the EGC's proposed IPO or other equity offering.
- Under current rules, investment banks participating in an IPO cannot publish research in advance of the IPO or until 40 days after completion of the offering and must cease publishing research for a period of 15 days before and after the release or expiration of any lock-up agreement.
- This research will not be subject to liability under the Securities Act, though Rule 10b-5 liability for knowingly (or at least recklessly) misleading research remains.

Rule 144A/Reg D Solicitation

Rule 144A/Reg D Solicitation



- Eliminates the prohibition on general solicitations and general advertising that has applied to sale of restricted securities made in reliance on Rule 144A or Regulation D under the 1933 Act.
- It is unclear, however, whether and to what extent the Regulation S restriction on “directed selling efforts” will be relaxed.
- On August 29, 2012, the SEC released a proposed rule soliciting comments on this issue, among others. Comments are due within 30 days after publication of the proposed rule in the Federal Register.

Private Placement Platform Exemption

Private Placement Platform Exemption

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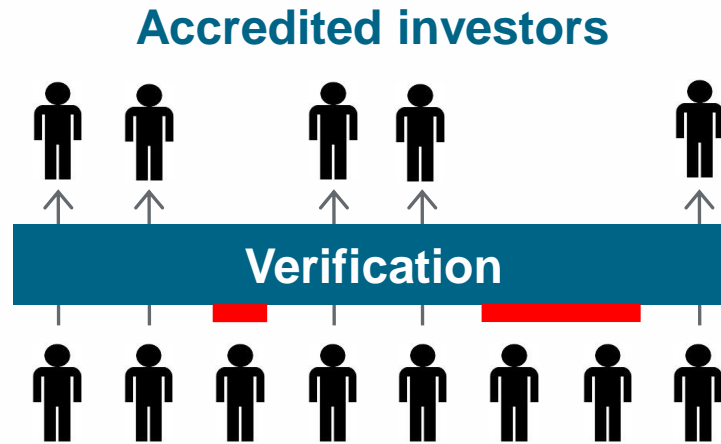
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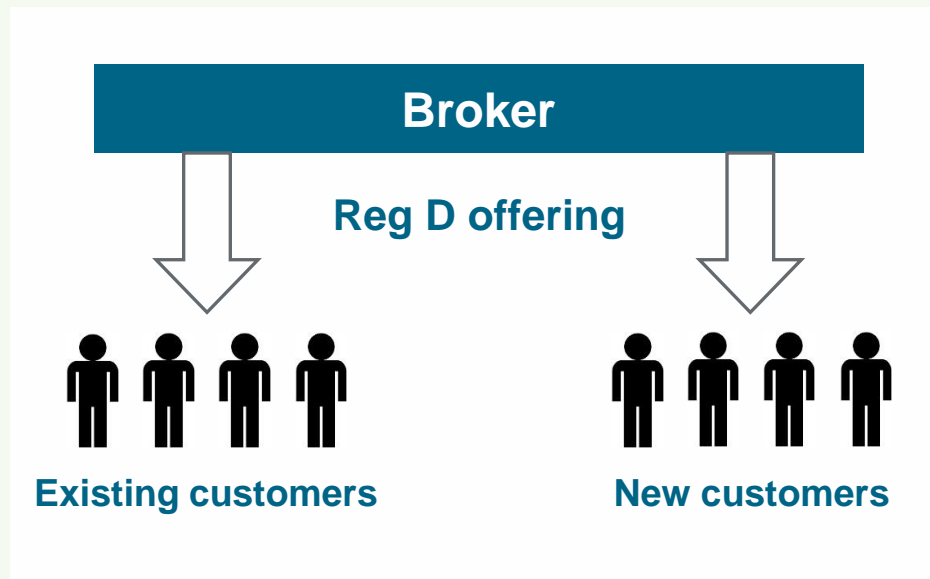
- The Act exempts from broker-dealer registration a person who maintains a platform to facilitate private placements.

Verifying Accredited Investor Status



- Issuers to take reasonable steps to verify that purchasers are accredited investors “using such methods as determined” by the SEC.
- In the August 29, 2012 proposed rule, the SEC noted that whether the steps taken were “reasonable” is an objective determination, based on the particular facts and circumstances of each transaction.
- The SEC further noted that issuers would consider a number of factors in determining reasonableness, and provided the following examples:
 - The nature of the purchaser and the type of accredited investor that the purchaser claims to be;
 - The amount and type of information that the issuer has about the purchaser, and
 - The nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

Pre-Existing Relationship with Investors



- The lifting of the general solicitation and general advertising prohibition means that a broker-dealer will not have to demonstrate a “pre-existing relationship” with an investor before a broker-dealer offers a private placement to the investor.

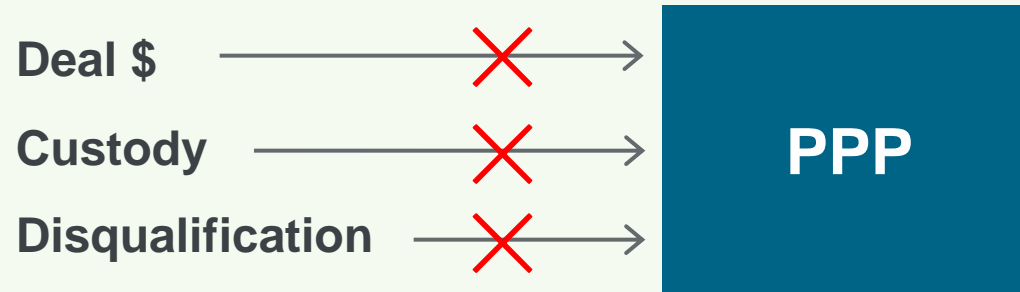
Permitted Activities

PPP permitted activities

- Co-investment
- Due diligence services
- Standardized documents

- A person maintaining a private placement platform or an associated person may co-invest in the securities or provide “ancillary services”.
- “Ancillary services” includes providing due diligence services or standardized documents to issuers and investors, if the person does not negotiate the terms of the documents, and issuers are not required to use the standardized documents.

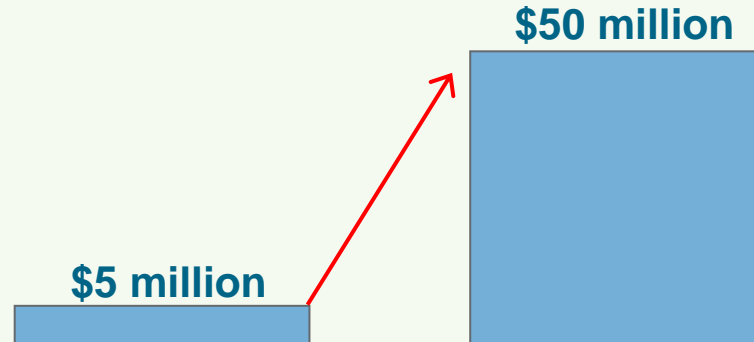
Conditions to Private Placement Platform Exemption



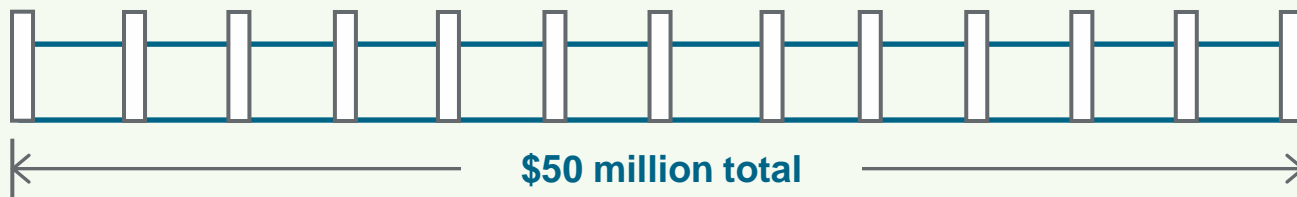
- No transaction-based compensation
- No possession of customer funds or securities
- Not subject to a statutory disqualification (1934 Act Section 3(a)(39))

Regulation A Offerings

Small Issues Exemption



- The ceiling for small issue offerings exempt from SEC registration is increased from \$5 million to \$50 million.



- The \$50 million ceiling is measured over a trailing 12-month period.

Requirements for Small Issues Exemption

Eligible securities

- Equity
- Debt
- Convertible debt
- Exchange debt

Offering statement

- File with SEC
- Distribute to investors

Audited financials

- File with SEC annually

Crowdfunding

Crowdfunding

Year

①

②

③

④

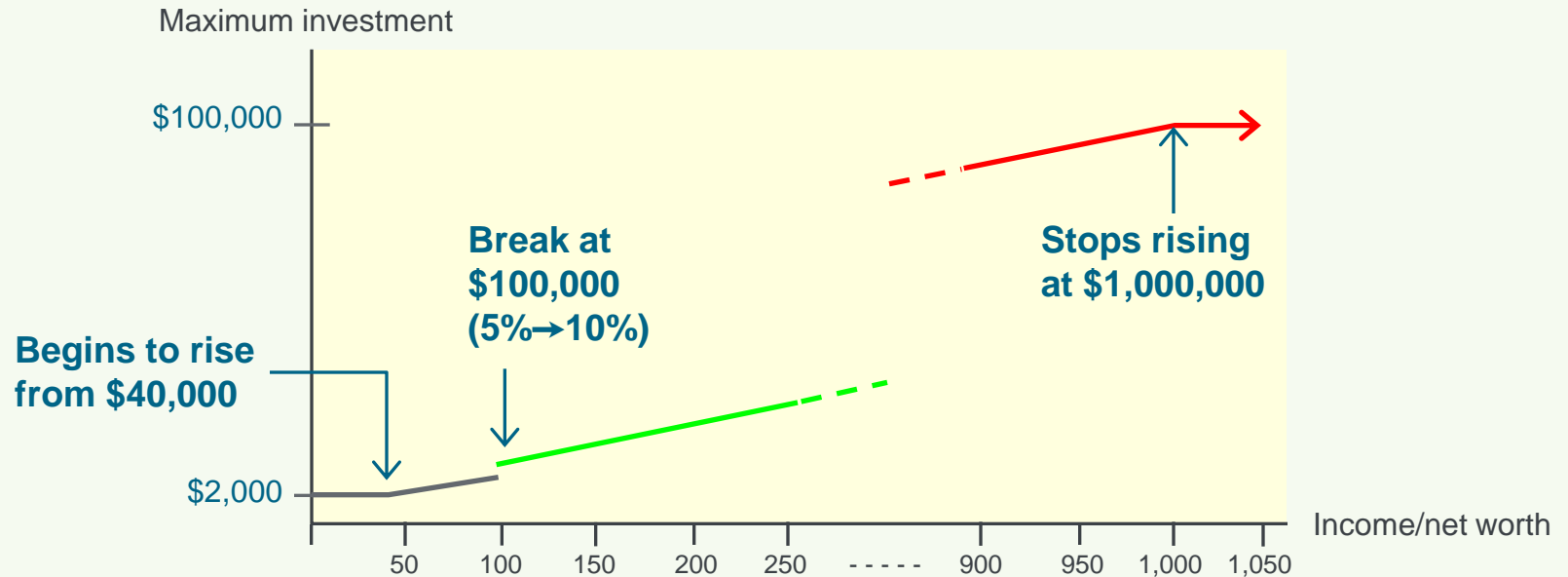


- “Crowdfunding” offerings by an issuer of up to an aggregate of \$1 million annually are exempt from registration.
- The crowdfunding provisions of the JOBS Act are only available to an issuer organized under U.S. law.

Conditions

- Transactions effected through registered broker-dealer or funding portal.
- Advertising limited to notices directing investors to intermediary.
- Clear disclosure of promoter compensation.
- Issuer must file disclosure material with the SEC.
- Securities treated as restricted securities.
- Per-investor amount limitation.

Per-investor Amount Limitation



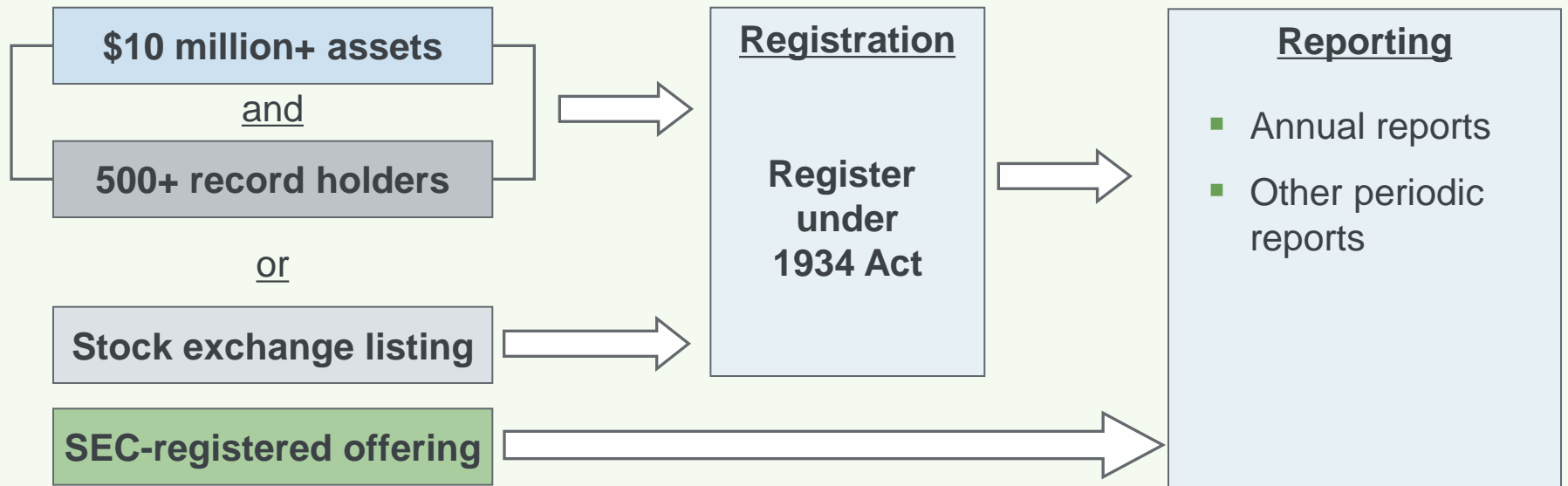
- No investor can invest in an issuer in any 12-month period more than the greater of
 - \$2,000, and
 - 5% of income or net worth (if under \$100,000), or
 - 10% of income or net worth (if over \$100,000), up to \$100,000

Thresholds for Public Company Reporting

Thresholds for Public Company Reporting



- The 1934 Act Section 12(g) “holders of record” threshold is increased from 500 to 2,000.
- Registration is required if the issuer has a class of equity securities held of record by either 2,000 persons or 500 non-accredited investors.
- Shareholders pursuant to an employee compensation plan are excluded from the calculation.
- The revised thresholds apply to all companies, not just EGCs.

Old Section 12(g)



- An issuer with \$10 million of assets and a class of equity securities held by 500 holders of record or more was required to register under the 1934 Act.
- A listed company is also required to register
- Issuers conducting SEC-registered offerings but not registered under the 1934 Act are also subject to 1934 Act periodic reporting

Counting Record Holders

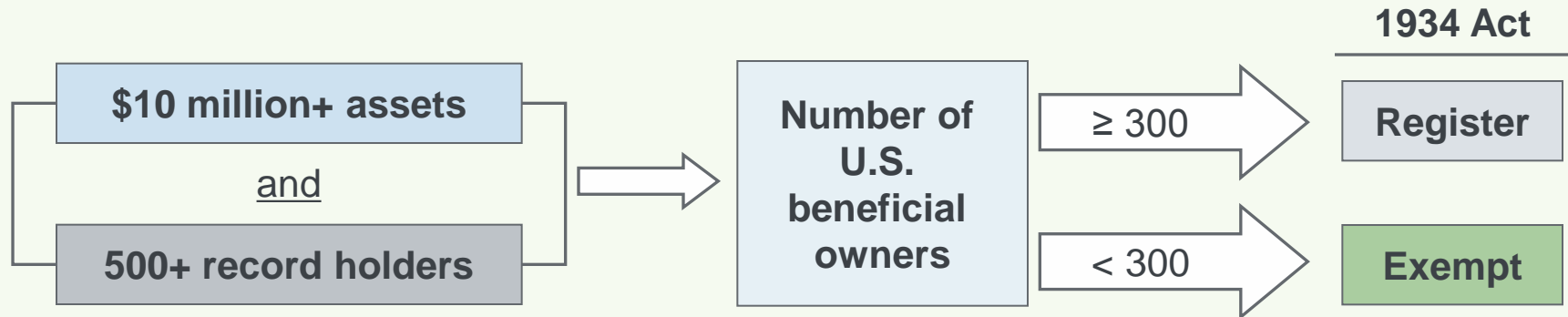
<u>Old 12(g)</u>	<u>Companies other than banks and BHCs</u>	<u>Banks and BHCs</u>
■ 500	■ 2000 or ■ 500 non-accredited	■ 2000
		
<u>Do not count:</u> <ul style="list-style-type: none">■ Securities under employee compensation plans■ Crowdfunding securities		

- The JOBS Act increases to 2000 the number of record holders triggering 1934 Act registration (or 500 non-accredited investors, in the case of issuers other than banks and bank holding companies).
- For this purpose, securities issued under employee compensation plans or pursuant to crowdfunding offerings are not included.

1934 Act Deregistration

Old Law	JOBS Act Companies other than banks and BHCs	Banks and BHCs
<ul style="list-style-type: none">■ Fewer than 300 record holders, <u>or</u>■ Fewer than 500 record holders <u>and</u> less than \$10 million	<ul style="list-style-type: none">■ Fewer than 300	<ul style="list-style-type: none">■ Fewer than 1200
<ul style="list-style-type: none">■ Eligibility to deregister under the 1934 Act is significantly relaxed.		

FPI Exemption



- In the case of foreign private issuers (FPIs), an exemption is available if the FPI has fewer than 300 beneficial owners in the United States.

FPIs: Avoiding SEC Registration

Section 12(g) inapplicable

- Under \$10 million of assets, or
- Satisfy 2000/500 record holder test, or
- Fewer than 300 U.S. beneficial holders

Rule 12g3-2(b) eligible

- Not listed on a U.S. exchange, and
- No SEC-registered public offering

- FPIs without a U.S. listing and not conducting an SEC-registered public offering will be able to avoid 1934 Act registration.