

A PLAGUE OF LOCUSTS: THE JOBS ACT AS FOE MORE THAN FRIEND

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SECURITIES LAW – THE JUMPSTART OUR BUSINESSES STARTUPS ACT–EMERGING GROWTH COMPANIES– The Act’s deregulation of a heavily regulated stock market flies in the face of the historical importance of disclosure in Securities Regulation and the potential dangers may be displayed in a case analysis of the Initial Public Offerings of Facebook, Inc. and Twitter, Inc.

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INTRODUCTION

The Jumpstart Our Businesses Startups Act (“JOBS Act”) was passed in April 2013 to do just what its name suggests, encourage startup businesses to go public. Once public, these startup businesses would then gain enough capital to hire more employees.¹ And, the growth of business and the growth of employment would both directly translate into growth of the American economy.²

Research supported this opinion. The National Venture Capital Association published a report, mainly about the statistics supporting the positive role of venture capital firms in backing companies, which stated, “IHS Global Insight research suggests that 92 percent of job growth for young companies occurs after their initial public offerings.”³ This statistic was cited by the IPO Task Force when it published “Rebuilding the IPO On-Ramp: *Putting Emerging Companies and the Job Market Back on the Road to Growth*.”⁴ A survey conducted by the Department of the Treasury of Post-IPO companies produced results that there is an average employment increase of 86% after going public.⁵ In addition, the Ewing Marion Kauffman Foundation reported in 2012 that 1.7 million American jobs were lost from 2002-2012, due to a 70% decline in IPOs.⁶

1. The White House Office of the Press Secretary, *President Obama to Sign Jumpstart Our Businesses Startups Act (JOBS) Act* (Apr. 5, 2012) <http://www.whitehouse.gov/the-press-office/2012/04/05/president-obama-sign-jumpstart-our-business-startups-jobs-act> (accessed Nov. 10, 2013).

2. Louis R. Dienes, *The Jumpstart Our Businesses Startups (JOBS) Act*, California Business Law Reporter 2012, Continuing Education of the Bar, University of California, http://ceb.com/info/The_Jumpstart_Our_Business_Startups.pdf (accessed Nov. 19, 2013).

3. National Venture Capitalist Association, *Venture Impact: The Economic Importance of Venture Capital-Based Companies to the US Economy, Version 6.0*, 4 (2012) http://webcache.googleusercontent.com/search?q=cache:JwarvmwzXgJ:www.nvca.org/index.php%3FoPON%3Dcom_docman%26task%3Ddoc_download%26gid%3D786+&cd=1&hl=en&ct=clnk&gl=us (Accessed Nov. 19, 2013).

4. US Department of the Treasury, 5 (Oct. 20, 2011) <http://www.wsgr.com/PDFs/rebuilding-IPO.pdf> (accessed Nov. 19, 2013).

5. *Id.* at 36.

6. Ewing Marion Kauffman Foundation, *Slump in Initial Public Offerings Bodes Poorly for U.S. Employment, Economic Growth, According to Kauffman Report* (May

ESTABLISHMENT DATA
Table B-1. Employees on nonfarm payrolls by industry sector and selected industry detail
 [In thousands]

Industry	Not seasonally adjusted				Seasonally adjusted				Change from: Sept. 2013 - Oct. 2013 ^P
	Oct. 2012	Aug. 2013	Sept. 2013 ^P	Oct. 2013 ^P	Oct. 2012	Aug. 2013	Sept. 2013 ^P	Oct. 2013 ^P	
Total nonfarm.....	135,241	136,002	136,600	137,540	134,225	136,187	136,350	136,554	204
Total private.....	112,987	115,239	114,855	115,308	112,337	114,330	114,480	114,692	212
Goods-producing.....	18,712	19,041	18,982	18,980	18,421	18,645	18,672	18,707	35

Research demonstrates that the JOBS Act has had some success. The Bureau of Labor Statistics of the US Department of Labor’s October 2013 “Employment Situation” Report does show some employment growth from last year to this, and from September 2013 to October 2013, as shown above.⁷ Renaissance Capital’s data shows that the number of IPOs has increased dramatically from January to October of 2013, as demonstrated in the bar graphs below.⁸ Thomson-Reuters has released research that most filings are emerging growth companies, also seen in a bar graph below.⁹ And, the National Venture Capital Association has stated that 90% of the companies that qualify as emerging growth companies have chosen to file as such.¹⁰

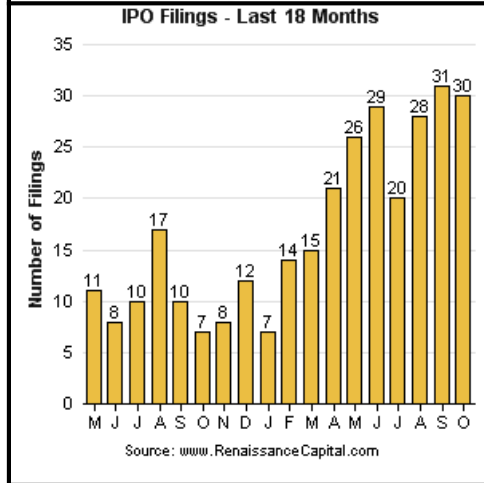
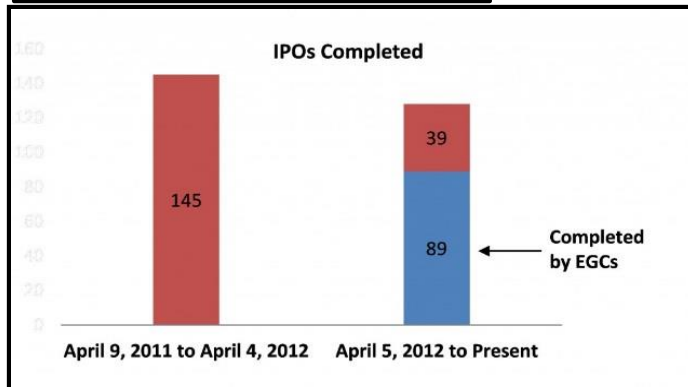
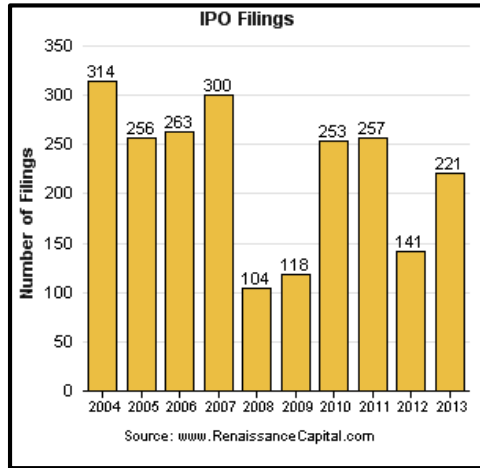
21, 2012) <http://www.kauffman.org/newsroom/2012/06/slump-in-initial-public-offerings-bodes-poorly-for-us-employment-economic-growth-according-to-kauffman-report> (accessed Nov. 19, 2013).

7. Department of Labor Bureau of Labor Statistics, *The Employment Situation* (October 2013) <http://www.bls.gov/news.release/pdf/empisit.pdf> (accessed Nov. 19, 2013).

8. Renaissance Capitol IPO Center, *IPO Filings*, <http://www.renaissancecapital.com/ipohome/press/ipofilings.aspx> (accessed Oct. 28, 2013)

9. Martin Wellington & Sarah Solum, *On Its One-Year Anniversary, Two Cheers For The JOBS Act*, *Forbes Op/Ed*, <http://www.forbes.com/sites/realspin/2013/03/28/on-its-one-year-anniversary-two-cheers-for-the-jobs-act/> (Mar. 28, 2013) (accessed Oct. 27, 2013) (citing Thomson Reuters. IPO data includes U.S.-listed IPOs by U.S. and non-U.S. issuers excluding closed-end funds, blank check companies, and best efforts or non-underwritten offerings.).

10. See National Venture Capital Association, *JOBS Act: The First 12 Months of the IPO On-Ramp*, NVCA Today: The National Venture Capital Association Monthly Newsletter (Mar 27, 2013) <http://nvcatoday.nvca.org/index.php/from-our-sponsors/jobs-act-the-first-12-months-of-the-ipo-on-ramp.html> (accessed Nov. 7, 2013) (stating that, since the JOBS Act’s enactment more than 90% of companies that qualify as emerging growth companies have chosen to submit a confidential draft to the SEC in lieu of a public filing with subsequent drafts. And, further quoting Brett Paschke, head of William Blair & Company equity capital markets group, as advising



that the major impediment for smaller companies from going public was the fear of divulging “competitive information.”).

When faced with those statistics, it is easy to proclaim the JOBS Act's success.¹¹ But its success cannot just be measured by the number of IPOs and overall unemployment rates.¹² Viewing the forest through the trees requires an understanding of the JOBS Act in comparison with previous securities regulation.

First, it defines a specified class of companies, termed emerging growth companies. Then, it protects these companies from the dangerous effects of revisions of the registration statement, as seen with the IPO of Facebook, Inc. in 2012.¹³ But, it does so by reversing the federal government's policy of disclosure, an accumulation of responses to at least 3 large market scandals within the last 90 years and put in place to avoid specific "market evils."¹⁴

In sum, the well-meaning legislative intent is negated by allowing every company that qualifies as an emerging growth company to avoid public dissemination of their registration statement until shortly before the actual IPO (just 21 days before the roadshow or 21 days before the effective date of the registration statement).¹⁵ Then, these companies may potentially avoid external, independent auditor attestation to their financial statements for five years, and avoid both shareholder votes on executive compensation and golden parachute compensation and reporting on the comparison of executive compensation and average employee compensation as long as they retain that classification.¹⁶

11. *See id.*

12. *See cf.* Jessica Holzer, *JOBS Act Sputters on IPOs*, The Wall Street Journal, <http://online.wsj.com/news/articles/SB10001424127887323361804578386833083221620> (Mar. 27, 2013) (accessed Oct. 27, 2013) (stating that IPOs are "on track to fall 21%, to 63 from 80 in the year prior," but then goes on to state that the "IPO market is showing signs of improved health.").

13. 15 U.S.C.A. § 77f(e) (Westlaw 2012).

14. Khadeeja Safdar, *Facebook, One Year Later: What Really Happened in the Biggest IPO Flop Ever*, The Atlantic (May 20, 2013) <http://www.theatlantic.com/business/archive/2013/05/facebook-one-year-later-what-really-happened-in-the-biggest-ipo-flop-ever/275987/> (accessed Oct. 27, 2013).

15. *See* 15 U.S.C.A. § 77f(e).

16. *See* 15 U.S.C.A. § 77f(e)(1), 78n-1(e)(2) (Westlaw 2012), 7262(b) (Westlaw 2012).

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