

The following blog spotlights potential unintended consequences of the JOBS Act:

TRUNCATED TRANSPARENCY: The JOB Act's Compressed IPO Cycle and its Hidden Implications for Market Fairness

Welcome to the new era of clandestine compliance.

The newly passed JOBS Act (Jumpstart Our Business Startups Act) has come under withering attack by an influential chorus of critics. They are sounding the alarm that the Act dangerously dials back the disclosure obligations of "emerging companies" seeking to go public.

To be clear, we are not talking about mom-and-pop operations here. In Washington's grandiose way of thinking, 'start ups' are defined as having revenues of up to \$1 billion annually. In other words, the majority of companies opting to go public will now get up to a five-year exemption from many of today's more stringent disclosure requirements.

The controversial legislation has drawn fire from leading journalists, including Andrew Ross Sorkin of The New York Times, securities regulators, including SEC Chairman Mary Schapiro, and shareholder advocates, including Barbara Roper of The Consumer Federation of America. The consensus view is that the JOBS Act is a regressive measure that threatens to erode many longstanding investor safeguards. Clever acronyms aside, the JOBS Act is broadly portrayed as weakening the safety net for investors.

The JOBS Act does create new channels for pre-IPOs to communicate with the investment community. However, the Act effectively closes the blinds on the closely monitored IPO pipeline, precluding the ability of investors to delve deeply into the dealings of companies under consideration. Under the new ground rules, prospective IPOs are now protected by a cloak of sanctioned secrecy during the protracted filing period leading up to their public offering.

The result is that clarity has given way to opaqueness. IPOs are now able to engage in confidential discussions with the SEC about their plans to tap the capital markets, until 21 days before the IR Road Show cavalcade begins.

Critical corporate information that was previously made available to investors months in advance -- including financials and insights into the company's organizational structure -- can now be legitimately withheld from public scrutiny until three weeks before the investor marketing process gets underway.

What this means in practice is that investors essentially have about a month or so to evaluate the financial viability of a company preening to go public; previously, interested investors had a minimum of several months to do their due diligence.

There also is a more subtle side effect to today's cloistered IPO process, one that further distorts the dynamics of a fair and competitive marketplace.

The SEC approved a rule change last December that allows NASDAQ to offer "free" corporate IR services, e.g. press release distribution, IR Web hosting, to IPOs and companies that transfer their listings from the NYSE.

Coincidentally, all these corporate services are provided by NASDAQ's wholly owned subsidiaries, thwarting competition. The ability of NASDAQ to bundle IR services with its listing fees effectively elbows other service providers -- many with superior, more advanced product offerings -- out of the equation.

The agency's approval came despite what we believe was a preponderance of evidence that the practice was anti-competitive. Ironically, SEC Chairman Schapiro was recently called to testify before a Congressional committee looking into the agency's lack of economic analysis in its rule-making process. Clearly, the SEC should have done a lot more home work before rendering a decision in favor of NASDAQ's rule change.

For all its political promise and good intentions, the JOBS Act has made a bad situation worse. Any pretense of market fairness during the IPO birthing process has now lost all credibility.

Today's closed environment allowing IPOs to silently snake their way through the filing process has reinforced NASDAQ's unfair competitive advantage, eliminating any premise of meaningful competition. Not only does NASDAQ have the inside track, but the track itself is now largely hidden from public view.

In perhaps the cruelest irony, the JOBS Act may result in the ultimate unintended consequence: potentially destroying jobs in a robust industry that has long thrived based on a model of fair and open competition.

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