

# THE STA

## SECURITIES TRANSFER ASSOCIATION, INC.

September 17, 2012

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CAROL A. GAFFNEY

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: JOBS Act Implementation**

Dear Ms. Murphy:

I am writing to you on behalf of the Securities Transfer Association Inc. ("STA") in response to the Securities and Exchange Commission's ("SEC" or "Commission") request for comment on relevant provisions of the Jumpstart Our Business Startups Act ("JOBS Act" or "Act"). The JOBS Act is intended to expand access to capital for businesses by providing conditional exemptions from registration under the Securities Act of 1933 ("1933 Act") and from the registration and periodic reporting requirements under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"). In addition, the Act creates new classes of intermediaries – "Funding Portals" - that will not be registered as broker-dealers under the Exchange Act.

The STA is an organization whose membership is comprised of the majority of large and small transfer agents in the United States. Founded in 1911, The STA membership includes more than 150 registered transfer agents maintaining records of more than 100 million registered shareholders on behalf of more than 15,000 issuers. Our members provide essential transfer agent services on behalf of a wide range of issuers - from the largest public companies to small privately held companies. Our involvement with many smaller issuers and their investors, in particular, provides us with a unique and important perspective on the issues that the SEC will encounter with respect to its mandate under the JOBS Act.

## I. Overview

As the Commission is aware, portions of the JOBS Act raise significant investor protection concerns. The legislation is designed to reduce the impediments that smaller companies face in raising capital. At the same time, however, it also potentially exposes many investors to the risk of fraudulent schemes. While most comments have addressed concerns arising from sales efforts that may target potentially unsophisticated investors, little attention has been directed to shareholder servicing and the safeguards necessary to protect the interests of these same investors after they have committed their savings.

Accurate shareholder records are essential. However, under the JOBS Act critical shareholder services, including recordkeeping and ongoing operational functions, may be entrusted to issuers or other entities that are not professional recordkeepers who are unfamiliar with the types of challenges that they will encounter if faced with potentially large numbers of small investors. These services also may be provided without the benefit of existing regulations and oversight by regulators designed to protect investor interests.

The Commission should understand that the failure to accurately record or maintain shareholder records of an issuer, or to prevent fraudulent transfers, can have the same devastating effect on an investor as if his or her savings were stolen or obtained through fraud. If an investor is informed that the issuer has no record of his or her ownership, proving ownership and assigning any liability to the issuer or an intermediary may be an impossible task. Particularly where the investments are small in size, the investor may be left with little practical recourse through the courts or otherwise.

## II. The JOBS Act Creates a Gap in Regulation.

Since 1975, our members have been required to become registered with the Commission pursuant to Section 17A of the Exchange Act in order to provide transfer agent services. Once registered, transfer agents are subject to examination by the Commission and must comply with regulations that are designed to protect investors by assuring that the transfer agent maintains accurate records and that investor assets are held by regulated depositories. Registered transfer agents also must comply with rules relating to fingerprinting of personnel, disclosure of control persons (to avoid involvement of persons who may have disciplinary records), timeliness of order processing, reporting of lost and stolen securities, and annual independent audits of their control environment. They also are subject to laws designed to protect the privacy of investor information and assure that investors have accurate records for tax reporting. In addition to formal regulations, the Commission has further sought to impose obligations on transfer agents to prevent transfers of restricted securities in violation of the 1933 Act.

Persons who provide transfer agent services<sup>1</sup> to issuers relying on the JOBS Act provisions, however, may not be subject to these same regulations. Under Section 17A of the Exchange Act, persons who provide transfer agent services only become subject to the transfer agent registration requirements, and corresponding regulations, if they provide those services on behalf of public companies that have a class of securities subject to the registration and periodic reporting requirements under Section 12 of the Exchange Act. Historically, only a limited number of intermediaries providing transfer agent functions have not been required to register.<sup>2</sup>

The JOBS Act, however, significantly expands the number of investors that may hold shares in any company before it must become registered under Section 12. One indirect consequence of the Act is that it significantly increases the possibility that the persons responsible for maintaining records of each individual's investment or assuring that their funds are properly safeguarded will not be subject to regulatory oversight.<sup>3</sup> In addition, the STA is concerned that these persons, whether issuers or other intermediaries, will also not have the necessary experience, recordkeeping systems or controls to perform the function appropriately.

The STA would question, for example, whether many small issuers seeking to rely on an exemption under the JOBS Act will have the internal resources and sophistication to properly execute even the routine functions that registered transfer agents provide. Among other things, this would include procedures to record and balance registered shareowner positions; follow shareholder instructions (and retain records of the instructions) to change an address or transfer their interests as a result of death, divorce, or sale (including signature guarantees where necessary); escheat unclaimed assets under state laws; or address lost or stolen certificates. Issuers, or their transfer agents, whether or not registered, also must comply with UCC requirements, state and Federal privacy laws, as well as IRS regulations relating to, among other things, transferee and cost basis reporting.

Moreover, it is equally unlikely that the many small investors that potentially would participate in offerings conducted in reliance on the JOBS Act would have the sophistication to inquire about these operational safeguards. Thus, even apart from any deliberate fraud, we foresee the very likely possibility of innumerable investor complaints

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<sup>1</sup> Section 3(a)(25) of the Exchange Act defines a "transfer agent" as "any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates.

<sup>2</sup> Once registered, the SEC has stated that its transfer agent regulations apply to all types of issuers and securities serviced by the transfer agent.

<sup>3</sup> In addition, the JOBS Act will create a large number of investors holding shares that are subject to ongoing restrictions on transfers in the secondary market that must be observed to assure compliance with the securities laws.

attributable to inaccurate recordkeeping or the failure to follow instructions in a timely manner. As we noted above, in the absence of any regulated entity, small investors are likely to have little practical recourse when confronted with recordkeeping problems.

As an investor protection safeguard, the STA believes strongly that the Commission should condition an issuer's ability to raise funds pursuant to the exemptions afforded by the JOBS Act on the use of a registered transfer agent to maintain records of share ownership and transfers. This would afford investors the protection of rules that the SEC has developed over many years to protect their interests. In addition, the SEC and Federal and state banking regulators would more easily be able to conduct routine inspections and examinations of issuer records held at the transfer agent. Equally as important, they would have a jurisdictional basis to address investor complaints and to conduct "cause examinations" in instances in which they may suspect fraud or negligent recordkeeping.<sup>4</sup>

### III. Title III – The Crowdfunding Exemption

Provisions of the Crowdfunding Exemption under Title III of the Act particularly raise concerns because the exemption allows issuers to gain access to the smallest, potentially least sophisticated and more vulnerable investors - without any assurance that their investments will be properly invested, recorded or maintained.<sup>5</sup> Without specific recordkeeping requirements and controls, such as those imposed on registered transfer agents, there is a much higher likelihood that fraudulent practices will be hard to detect in a timely fashion.<sup>6</sup> Consequently, the STA believes very strongly that the Commission should specifically consider requiring the use of registered transfer agents in connection with offerings made pursuant to the Crowdfunding Exemption. The STA does not believe that funding portals are adequately equipped to service the needs of investors on an ongoing basis. Further, when an issuer does elect to become a publicly traded company they will need the services of a registered transfer agent.

In addition to the rules that presently apply to registered transfer agents, the SEC may also wish to consider more narrowly tailored provisions as well. Below, we have highlighted two specific recommendations.

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<sup>4</sup> The STA also notes that multiple provisions of the Act require accurate recordkeeping and controls on transfers to ensure compliance with limitations on shareholders and transfers restrictions by those seeking to rely on specific exemptions.

<sup>5</sup> While these comments are focused on the Crowdfunding Exemption, similar concerns are present with respect to offerings conducted under the expanded general solicitation provisions under Section 204 of the Act.

<sup>6</sup> Depending on the nature of the offering, privately offered securities may not be held in retail brokerage accounts. Instead, investors are "registered owners" and evidence of their share ownership is reflected directly on the books of the issuer or its transfer agent. Shares received by investors in offerings under the Crowdfunding Exemption or Access to Capital exemptions under Title II may not be required to be held in customer accounts of broker-dealers that are subject to customer protection requirements.

*A. Require Book-Entry Ownership*

While physical certificates are used for some purposes today, the SEC should consider whether it wishes to mandate by rule that shares sold pursuant to the Crowdfunding Exemption be held in book-entry form. The SEC has promoted the immobilization of shares for many years to facilitate transfers of shares and orderly settlement. However, in the specific context of the Crowdfunding Exemption, the use of physical certificates also increases the possibility of over issuance of shares and of the sale or transfer of forged or falsified certificates.<sup>7</sup>

*B. Require Investor Capital to be Held by Depository Institutions Prior to Closing*

The Crowdfunding Exemption also requires the SEC to adopt rules to assure that funds are released to issuers only after any conditions in the offering are satisfied.<sup>8</sup> The STA further notes that Funding Portals in Title III and funding platforms in Title II are specifically prohibited from having possession of investor funds or securities. The STA generally recommends that investor assets be retained by qualified escrow agents which are regulated banks or trust companies prior to their release to the issuer. In situations in which there is a condition associated with closing, such as meeting a minimum level of commitments, the STA believes that the SEC should consider adopting a new rule patterned after Exchange Act Rule 15c2-4<sup>9</sup>.

IV. Cost - Benefit Concerns.

The STA understands that the SEC must engage in an analysis that involves balancing the potentials costs of any regulations against the need to safeguard the interests of investors. The majority of STA members also are small businesses and acutely aware of the cost of regulation. However, the registered transfer agent industry is highly competitive and we believe strongly that many of our members can develop business models that will suit the needs of small issuers and at the same time provide adequate protection to investors. The STA does not anticipate that most small issuers, for example, would require services, including the processing of dividends, that would make professional recordkeeping

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<sup>7</sup> In addition, the use of physical shares in widespread offerings also is likely to, among other things, reduce the ability of issuers to maintain accurate shareholder records for annual reporting of "results of operations" under the exemption.

<sup>8</sup> Section 302(b).

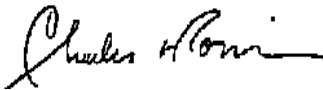
<sup>9</sup> Rule 15c2-4 under the Exchange Act, which applies to broker-dealers, states: (b) If the distribution is being made on an "all-or-none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (1) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto, or (2) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the persons entitled thereto when the appropriate event or contingency has occurred."

unduly expensive. At the same time, we believe there are significant protections offered to investors by requiring professional, regulated transfer agents.

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The STA appreciates this opportunity to present its preliminary views on rulemaking under the JOBS Act. We welcome the opportunity to discuss the issues raised in this letter or address any other questions you may have. We also look forward to providing further comments once proposed rules are published for comment.

Sincerely,



Charles V. Rossi  
President  
The Securities Transfer Association, Inc.

cc:

Mary L. Shapiro, Chairman  
Elisse B. Walter, Commissioner  
Luis A. Aguilar, Commissioner  
Troy A. Paredes, Commissioner  
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Division of Corporation Finance  
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