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CROWDFUNDING'S IMPACT ON START-UP IP STRATEGY

Sean M. O'Connor[*]

INTRODUCTION

"Crowdfunding" has been heralded as a revolutionary and democratic way to connect ordinary individuals with innovative projects they would like to support. Congress endorsed this concept by including the CROWDFUND Act in the Jumpstart Our Business Startups Act ("JOBS Act" or "Act") of 2012.[1] The statute was not directed at well-known crowdfunding sites such as Kickstarter and IndieGoGo—sites that facilitate "project crowdfunding" through a lightly regulated donation model. Rather, the JOBS Act provides a mechanism for ordinary investors and start-ups to use "enterprise crowdfunding," in which the start-ups can offer and sell their stock widely through the Internet. These activities were effectively prohibited under pre-JOBS Act securities laws.

While the JOBS Act was credited with creating a legal pathway for enterprise crowdfunding, start-ups cannot avail themselves of it until the Securities and Exchange Commission ("SEC") promulgates the rules mandated under the Act.[2] At the same time, the Act mandates other changes in securities regulations which may make enterprise crowdfunding less appealing than other private financing options. The Act generally relaxed mandatory information disclosure requirements and the ability to use the Internet to solicit investment under these other options, even as it erected

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[1] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§ 301-305, 126 Stat. 306, 315 (2012).

[2] Crowdfunding, 78 Fed. Reg. 66,428 (Nov. 5, 2013) [hereinafter Crowdfunding]. The comments period ends February 3, 2014. Thus, a final rulemaking authorizing equity crowdfunding might be promulgated in spring or summer 2014. On October 23, 2013, the SEC issued proposed rules for "Regulation Crowdfunding." Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Proposal on Crowdfunding (Oct. 23, 2013), *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540017677#.Uv-5-aDDhG4.

significant disclosure requirements for the new enterprise crowdfunding pathway.[3]

A number of commentators are highly skeptical of enterprise crowdfunding or of the JOBS Act as a means to enable it. Some are worried about the potential for fraud and abuse.[4] Others worry that small-time "retail investors" who invest through crowdfunding in tech start-ups will not understand the dilution risks they face from later venture capital ("VC") financing rounds.[5] And a number fear that the regulatory hurdles required by the JOBS Act, and underscored in the SEC's proposed rulemaking, will simply make the costs of enterprise crowdfunding too high for firms that might benefit from it.[6]

Notwithstanding these criticisms, enterprise crowdfunding will become a reality sooner rather than later, and tech start-ups will be among the first to explore using it. Yet no one appears to have written about the effects of enterprise crowdfunding on start-ups' intellectual property ("IP") strategies. Because IP is arguably the most important asset a start-up holds, this relationship is worth considering. This Paper provides preliminary thoughts about this topic.

The Paper proceeds in Part I by reviewing the crowdfunding landscape and its potential benefits for start-ups, especially with regard to IP strategies. Part II examines the provisions of the JOBS Act and argues that the disclosure requirements of the CROWDFUND Act title will make the latter less attractive than other start-up financing options and may negatively affect start-ups' IP strategies, in part by risking the disclosure of enabling aspects of patentable inventions. Part III explores issues arising from the widespread involvement of many potentially unsophisticated investors who have no connection to the start-up. This contrasts with current unsophisticated investors in start-ups who are usually limited to friends and family of the founders. The lack of a direct connection means that unsophisticated crowdfunding investors may neither understand the realities and risks of

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[3] Jumpstart Our Business Startups Act § 302, 126 Stat. at 316 (codified at 15 U.S.C. § 77d-1(a)(3), (b)(1)(G) (2012)).

[4] *See, e.g.*, Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735, 1763-66 (2012); Alan R. Palmiter, *Pricing Disclosure: Crowdfunding's Curious Conundrum*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 373, 389 (2012) ("Despite its promise, crowdfunding under the JOBS Act could fizzle or bomb. . . . There is . . . a chance that crowdfunding will become a tool for Internet frauds and schemes, at first harming investors and eventually scaring them away.").

[5] *See* John S. (Jack) Wroldsen, The Social Network *and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists' Dilution of the Crowd*, 15 VAND. J. ENT. & TECH. L, 583, 616-19 (2013).

[6] *See* C. Steven Bradford, *The New Federal Crowdfunding Exemption: Promise Unfulfilled*, 40 SEC. REG. L.J. 195, 216-17 (2012); Stuart R. Cohn, *The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 FLA. L. REV. 1433, 1439 (2012).

start-ups' IP portfolios nor have the inside access to information and management that traditional friend and family investors enjoy. The Paper concludes with suggestions for how start-ups should manage these issues, as the popular appeal of crowdfunding virtually ensures that start-ups will use it once the SEC promulgates the final rules implementing the CROWDFUND Act.

I. THE CROWDFUNDING LANDSCAPE AND ITS POTENTIAL FOR START-UPS

While there seems to be no official definition of "crowdfunding," it is generally understood to be the web-based general solicitation of funding for a venture, with the expectation that many contributors might each commit to only a small amount.[7] In the aggregate, the amount contributed will hopefully be enough to fund the designated project or venture. Some legal commentators view all crowdfunding through the lens of "investments"—even as they acknowledge that much of it does not involve equity or debt but rather donations or rewards.[8] This misconception is unfortunate because it obscures crowdfunding's origins and continuing vitality as a funding mechanism for cultural or nonprofit projects that will neither be "commercial" nor profitable. Thus, there is neither an "investment" (other than as we might say that a philanthropist "invests" in a charitable project) nor interest in financial return. The most famous crowdfunding sites—Kickstarter[9] and IndieGoGo[10]—are by their own terms and intent *not* investment oriented. Likewise, Kiva, the famous crowdfunded micro-lending site, intends to economically benefit *only* the poor individuals who receive micro-loans through it.[11]

One accepted taxonomy breaks crowdfunding into four categories: (1) donation sites; (2) reward and pre-purchase sites; (3) lending sites (both those offering interest and those that do not); and (4) equity sites.[12] This framework is reasonable based on the nature of the "transaction." It also aids analyses of whether particular kinds of transactions might be considered "securities" that fall within the regulation of the securities laws—an issue of major concern to all involved with crowdfunding of any stripe.

For the purposes of this Paper, a simple bifurcation suffices: "project crowdfunding," in which contributors fund a defined *project*; and "enter-

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7 *See, e.g.*, *Crowdfunding*, WIKIPEDIA, http://en.wikipedia.org/wiki/Crowdfunding (last visited Mar. 12, 2014).

8 *See, e.g.*, C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 10-27 (referring to even charitable donors as "investors").

9 KICKSTARTER, http://www.kickstarter.com (last visited Mar. 12, 2014).

10 INDIEGOGO, http://www.indiegogo.com (last visited Mar. 12, 2014).

11 *About Us*, KIVA, http://www.kiva.org/about (last visited Mar. 12, 2014).

12 Bradford, *supra* note 8, at 14-27.

prise crowdfunding," where investors contribute capital that can be used as capital for ongoing general operating and development expenses of an *organization*.[13] Kickstarter and IndieGoGo are firmly in the project camp, and this helps them avoid securities law issues. Kiva engages in enterprise crowdfunding, but through micro-loans that do not generate interest or any direct economic benefit to the funders. Part II briefly reviews the fundamentals of what makes something a security and how those fundamentals bear on whether a particular type of crowdfunding will be deemed a security.

The bifurcation model is important because building an IP portfolio for a start-up is a long-term capital expense.[14] Individual IP assets can of course arise from discrete projects, but the funding model for each project often does not include monies for IP procurement. This situation is especially true for patents, which will take a year or more and tens of thousands of dollars to prosecute. Prolonged litigation can quickly diverge from the project timeline. Further, it is hard to know during advance financial planning for a project whether inventions will arise that need to be budgeted for. Thus, such funding may be left out of project budgets. Cash-strapped start-ups, particularly those run by first-time entrepreneurs, often do not budget for patent prosecution because they have not thought of it, do not understand the magnitude of costs, or simply cannot do it due to lack of forecasted investments and revenues.

For those start-ups that do seek to budget for IP, the question is where to get the money. Technology start-ups generally will have no revenue for a number of years while developing their products/services and business model. Even when revenues come in, the monies may barely offset fixed costs of salaries, facilities, and supplies. Hence the start-up metric of "burn rate"—the amount of money beyond revenues the company will burn each month as it develops products/services. An IP budget will be far down the list of expenses to be budgeted for. Thus, it will have to come from capital investments.

VC-funded start-ups can usually budget for IP expenses. Venture capital fund managers ("VCs") understand both burn rate and the need for IP protection. In fact, anecdotally speaking, VCs balk at a possible investment if the founders seem to be low-balling their burn rate and expenses. VCs *expect* relatively high burn rates—the focus is on fast development, launch, and growth, not penny-pinching. While there is mixed evidence as to the insistence of VCs for *patent* protection in some industries (e.g., software),

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13 Professor Mirit Eyal-Cohen pointed out to me that nonprofits could use enterprise crowdfunding as well. They would of course need another mechanism besides equity to accomplish this.

14 Many of the comments in the remainder of this Part are derived from personal experience as counsel to start-up companies over 10 years in private practice and through the Entrepreneurial Law Clinic at UW Law School ("UW ELC"). *Entrepreneurial Law Clinic*, U. OF WASH. SCH. OF L., http://www.law.washington.edu/clinics/entrepreneurial (last visited Mar. 12, 2014).

in other industries it is imperative.[15] And in all industries, VCs will still want to see *some* form of IP protection (if only trade secrets) at least until/unless first mover advantage is achieved. Law firms representing start-ups involved in a professional money raise from VCs will counsel founders to include these kinds of capital needs in the discussions and in the amount sought.

Angel-funded start-ups can be in a different position. Sophisticated tech-focused angels, such as those in Silicon Valley and Seattle, will operate similarly to VCs with regard to burn rate and IP expenses. Angels in those markets are often former tech professionals who had a great exit as either an employee or founder of another tech company, and so they know the importance of IP and fast-growth funding.[16] But angels in other markets may not understand the start-up trajectory and needs. In those cases, IP budget funding may not be available, with potentially deleterious consequences on the start-up's ability to monetize its investment in R&D.

The acute problem, however, is for start-ups that are bootstrapping[17] or relying (so far) only on friend and family investments. Unless the friends and family are quite generous and savvy to the needs for fast-growth and IP funding, they may not be willing to invest funds for patent procurement.[18] Where there are no funds, there will be no ability to pursue patent applications.[19] The opportunity for pursuing patent applications is also not especially flexible. Should the start-up deliver products or services embodying

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15 *See* Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1259, 1295-1302 (2009); Ted Sichelman & Stuart J.H. Graham, *Patenting by Entrepreneurs: An Empirical Study*, 17 MICH. TELECOMM. & TECH. L. REV. 111, 113, 117-19 (2010).

16 I adopt the definition of "angels" as high-net-worth individuals investing directly in a start-up (or at most through a personal investment vehicle). By contrast, "VCs" are the managers of a VC fund who make portfolio company investment decisions on behalf of the fund. They may "co-invest" their own money alongside that of the fund, but their main function is as fund managers.

17 Using the founders' own money and, often, their personal credit card debt.

18 Procurement of other forms of IP is far less expensive than that for patents. Trade secrets are "free" in that they only require physical protections against disclosure and legally binding agreements such as nondisclosure or confidentiality agreements with those who need to practice them on behalf of the start-up or its suppliers. Copyright is "free" in that it inheres automatically upon the fixation of the expression in a tangible medium; registration with the Copyright Office is required in order to bring court enforcement actions of one's copyright, and is advisable earlier for full protection of rights, but is fairly inexpensive. Trademarks and trade dress rights are also "free," as they accrue as a matter of state law on use of the mark on products/services in commerce. Federal registration is desirable, and requires basic examination by the U.S. Patent and Trademark Office ("USPTO"), but the cost to do this is still relatively low.

19 Some law school clinics, such as UW ELC, provide limited low- or no-cost patent application services to low-income inventors, with the inventor responsible only for out-of-pocket costs such as USPTO fees. The USPTO has also coordinated development of consortiums of pro bono patent attorneys in certain markets to deliver low- or no-cost patent applications on a similar basis. Programs currently exist in Minneapolis, Seattle, and other cities across the country. *See, e.g.*, *Pro Bono*, U.S. PATENT & TRADEMARK OFFICE, www.uspto.gov/inventors/proseprobono (last visited Mar. 12, 2014).

the invention, before filing a patent application, it may lose its rights to file under Section 102(b)(1).[20] Similarly, public use or disclosure of the invention before filing the application may also lead to a loss of patent rights.[21] The rules are effectively the same in many other countries. For fast-growth companies with global ambitions, this result could be quite detrimental to their plans. At the same time, the possible need for foreign filings will only add to the expected patent procurement budget.[22]

Start-ups arguably need patents even more than established firms do. Patents provide a critical tool in the David-and-Goliath competition they will have with larger incumbents in the field they seek to disrupt.[23] Incumbents can wait for the start-up to invest significant resources in developing and launching a valuable new good or service and then simply copy it, using their economies of scale, existing manufacturing, and lack of R&D costs to deliver the good or service more cheaply and broadly. While some could argue this benefits society and is in the nature of free market competition, it seems likely to discourage start-ups that will not be able to obtain fair returns on their R&D. With so much innovation coming from start-ups, these hurdles will likely reduce overall innovation, producing a net social cost (assuming one sees innovation as a desideratum). Patents allow start-ups to appropriate the value of their R&D results by giving them legally enforceable exclusive rights that can be exercised against large incumbents seeking to copy the start-ups' innovations.[24]

Given the need for patents and other IP, start-ups desperately need funds to procure these rights. If they cannot secure them from VCs, angels, friends and family, or their own personal resources, they need another avenue. Given the interest in funding innovation evinced by contributors to Kickstarter, IndieGoGo, and similar sites, crowdfunding seems to be a natural fit. But the existing sites allow only project funding. Thus, a start-up

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20 35 U.S.C. § 102(b)(1) (Supp. V 2012).

21 *Id*. There is a limited grace period for public disclosures of inventions in some circumstances, but inventors should not rely on it without careful guidance from a patent attorney.

22 Under the Patent Cooperation Treaty, inventors who are in Paris Convention signatory countries can file in their home jurisdiction as either "domestic" or "international" applicants and then file national applications in other Paris Convention countries within the year. *See PCT FAQs*, WORLD INTELL. PROP. ORG., http://www.wipo.int/pct/en/faqs/faqs.html (last visited Oct. 10, 2013). But these rights will only be available if the applicant files in his or her home jurisdiction *before* any sale, public use, or disclosure.

23 Picard v. United Aircraft Corp., 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring); *see also* Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1577–87 (2009); Stephen H. Haber, F. Scott Kieff & Troy A. Paredes, *On the Importance to Economic Success of Property Rights in Finance and Innovation*, 26 WASH. U. J.L. & POL'Y 215, 222 (2008) ("[P]atents are powerful antimonopoly weapons—the vital slingshots 'Davids' use to take on 'Goliaths.'").

24 Even with patents, many start-ups face significant challenges from deep-pocketed incumbents who may seek to infringe the start-up's rights anyway, forcing the start-up to engage in expensive and distracting litigation.

would have to seek project-based contributions for patent and other IP expenses. It is not clear that crowdfunding recipients are accountable for their use of funds received by the sites' terms and conditions (or otherwise).[25] Conceivably, a start-up could simply hope to raise enough project funding to cover the costs of the projects, any rewards that must be delivered (including delivery costs!), and procurement of IP arising from the project. So long as the rewards are fulfilled when the project is completed, then this appears to discharge the project creator's obligations under the terms and conditions. However, given the project-based sites' insistence that only *projects* be funded, the nature of patent prosecution costs as arguably enterprise capital expenses may mean that something beyond a *project* is being funded. At the same time, nothing in the terms and conditions of these sites indicate that a project creator is limited to the collection of the actual costs of developing and delivering the project rewards. Presumably, the creator can set any contribution levels for rewards, including a "profit" margin. The market will determine whether contributors want to contribute that amount. This "loophole" likely just underscores the origins of these crowdfunding sites as a means to fund otherwise un-fundable projects—meaning things not expected to be profitable. Whatever the intent, at this point the financing of IP procurement from project crowdfunding may sit in a contractual gray area.

Equity enterprise crowdfunding would remove any uncertainty about the use of funds for IP procurement. Monies received would be capital investments based on issuance of stock, bonds, or debentures.[26] Unless the terms of such instruments limited the use of proceeds and excluded IP expenses, the start-up could use the funds for any lawful capital expenses.[27] What often surprises first-time entrepreneurs is that patent procurement expenses may be the single largest cash outlay they will have to make. While the fair market value of salaries will be larger, the actual cash outlay is only a fraction of that total value because significant portions of compensation will be through stock grants and options. Some other costs can be mitigated by issuance of stock options as well.[28] But few good patent attorneys will take equity for their services. There is too much quality-billable-hour-paying work from established companies for patent attorneys to

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[25] *See, e.g.*, *Terms of Use*, KICKSTARTER, http://www.kickstarter.com/terms-of-use?ref=footer (last visited Mar. 12, 2014); *Guidelines*, KICKSTARTER, http://www.kickstarter.com/help/guidelines?ref=footer (last visited Mar. 12, 2014).

[26] The SEC supports the full range of debt and equity securities for crowdfunding. *See* Crowdfunding, *supra* note 2, at 66,457-58.

[27] Under the proposed "Regulation Crowdfunding," as it is known, the issuer must disclose the use of proceeds in any crowdfunding offering. *Id.* at 66,440.

[28] Founders sometimes become too cavalier in using equity to pay for things. This can lead to a bloated capitalization table (the table showing how the company is capitalized), which in turn can deter later professional investors such as VCs. This is discussed further in Part II.

speculate on equity.[29] Thus, crowdfunding could turn into a critical source of cash to procure patents in a timely fashion.

Enterprise crowdfunding is needed for start-ups to plan and execute proper IP strategies, which in turn provide bedrock value assets for the firm. While angel- or VC-funded start-ups will not have this same need, they are the minority of start-ups. Project crowdfunding might enable some start-ups to fund IP procurement, but this likely cannot be an explicit goal of such fundraising (under the most popular sites' terms of service). Plus the crowdfunding "market" might be unwilling to allow start-ups to covertly price IP procurement into contribution amounts (i.e., potential funders will not contribute to a campaign, correctly deeming the value of the express project's reward lower than the amount requested). Any use of funds raised for the "project" which instead go to IP procurement may fall into a legal gray zone with regard to the start-up's contractual relationship with the crowdfunding site and the quasi-contract relationship with funders. Accordingly, enterprise crowdfunding presents the "cleanest" solution to the problem. But selling unregistered equity, such as that issued by pre-IPO start-ups, through mass-market channels was one of the core prohibitions of the securities laws before passage of the JOBS Act. Thus, the next Part unpacks the changes the Act makes to securities laws to allow enterprise crowdfunding and other avenues for general solicitation of investors through the Internet. In particular, it focuses on the disclosure requirements for these different avenues.

II. JOBS ACT DISCLOSURE REQUIREMENTS' IMPACT ON CROWDFUNDING START-UPS

The core premise of the federal securities laws is that the government should not review the merits of investments represented by offers of securities, but rather simply mandate disclosures from the issuers of these securities so that investors can make reasonably informed decisions.[30] The form and scope of disclosure sought by lawmakers at the time of drafting the laws would have placed prohibitive costs on smaller issuers. Thus, a distinction was created between "private" and "public" issuers.[31] Some securities issued by private issuers are exempted from registration with the SEC,

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[29] Admittedly there might be more upside for the attorney who takes equity—and the client's stock becomes highly valuable—but in most cases equity stakes turn out to be worthless. Thus, patent attorneys in private practice strongly prefer hourly cash rates, and high ones at that, given their expertise. Those who want to take the equity route will often go in-house and become part of the team. This gives them more access to information on where the start-up is going, greater potential to help guide the start-up, a higher rate of equity compensation, and the excitement of being part of the team.

[30] *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 34 (1959).

[31] *Id*. at 37.

and the issuer is not subject to mandatory disclosure, under Section 3 of the Securities Act of 1933 (the "Securities Act").[32] Securities of private issuers not exempted could still be sold without registration in certain exempted *transactions* under Section 4 of the Securities Act.[33] Further sales of those securities would need to be pursuant to registered offerings or another exempt transaction. In either case, the key to maintaining "private" status was to *not* engage in "general solicitations" or "public offerings."

While the line between offerings subject to registration and disclosure and those exempted was based on the public-private distinction, the exact nature of general solicitations or public offerings was not detailed in the Securities Act. Case law on the subject centered on tests of whether the offerees were part of a limited, defined set of persons who either had a substantial connection to the issuer or were sophisticated investors who could negotiate for the information and/or control rights that would enable them to make reasonable decisions as to initial investment and the period during which they might continue to hold the security.[34] But there was great uncertainty about how to ensure that any particular offering would be considered exempt. At the same time, structuring an offering incorrectly—even with good faith intent to avoid a public offering—meant that the offering could later be deemed to have violated Section 5 of the Securities Act as an unregistered public offering.[35] Potential penalties include rescission of the offer, fines, and even prohibition of future offerings.[36]

A. *Regulation D*

The uncertainty surrounding the proper structuring of private or limited offerings arguably led to fewer such offerings than would be optimal for small-firm capital raising and prompted the SEC in 1980 to promulgate Regulation D ("Reg D").[37] Three safe harbors for private offerings were created that, if complied with, would allow the issuer greater certainty that the offering would not later be deemed an illegal unregistered public offering. Rule 504, promulgated under Section 3 for exempt securities, allows an issuer to sell up to $1 million of unrestricted stock to any number of pur-

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[32] Securities Act of 1933, ch. 38, 48 Stat. 74, 75-77 (1933) (current version at 15 U.S.C. § 77c (2012)).

[33] *Id*. at 77 (current version at 15 U.S.C. § 77d).

[34] *See, e.g.*, SEC v. Ralston Purina Co., 346 U.S. 119, 124-25 (1953).

[35] 48 Stat. at 77-78 (current version at 15 U.S.C. § 77e).

[36] 15 U.S.C. §§ 77k, 77l.

[37] Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, 47 Fed. Reg. 11,251, 11,262 (Mar. 16, 1982) (to be codified at 17 C.F.R. §§ 230.501-.506).

chasers.[38] Rule 505, promulgated under Section 4 for exempt *transactions*, allows an issuer to sell up to $5 million of restricted stock to up to thirty-five non-accredited investors, plus any number of accredited investors.[39] The stock must be restricted because it was exempted from Section 5's registration requirements only for the particular Rule 505-compliant offering. The purchaser buys under the express restriction—listed in a legend on the face of the stock certificate itself—that she may not resell it absent registration by the issuer or another exempt transaction. Likewise, Rule 506, also promulgated under Section 4, allows an issuer to sell an unlimited dollar value of restricted stock to up to thirty-five non-accredited investors, and an unlimited number of accredited investors, but only where the non-accredited investors are themselves, or with their purchaser representative, "sophisticated."[40]

All of the safe harbors were originally subject to Rule 502's prohibition on general solicitations.[41] This condition was congruent with the securities laws' focus on registering offerings of securities to the general public so that the SEC might ascertain that the information disclosed to potential investors adequately conveyed the nature and risks of the investment. Thus, the narrowly limited exception for general solicitations under Rule 504 was reserved for those offerings that were registered and subject to adequate information disclosure under a state's securities laws.[42] The prohibition on general solicitation meant that mass distribution channels of communicating offers to potential investors, such as the Internet, could not be used. This prohibition in turn effectively eliminated crowdfunding, at least under the current popular model facilitated by websites.

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38 17 C.F.R. § 230.504 (2013). However, the issuer must offer and sell in compliance with state laws requiring registration and public filing of the registration statement, together with delivery of a substantive disclosure document to investors.

39 *Id.* § 230.505. Accredited investors include: (1) banks; (2) private business development corporations; (3) 501(c)(3) tax-exempt organizations and "Massachusetts or similar" trusts or business partnerships (not formed for the express purpose of buying the securities) with over $5 million in assets; (4) directors, executive officers, and/or general partners of the issuer; (5) natural persons, alone or with their spouse, having more than $1 million in net worth (not including value of primary residence); (6) natural persons who have had an annual income over $200,000 for the past two years, or who with their spouses have had an annual income over $300,000 for the past two years, and have a reasonable expectation of reaching the same income level in the current year; (7) any trust with over $5 million in assets (not formed for the express purpose of buying the securities), where the purchase of the securities is guided by a "sophisticated person" (as defined under Rule 506(b)(2)(ii)); and (8) any entity in which all entity owners are accredited purchasers. *Id.* § 230.501(a).

40 *Id.* § 230.506. A "sophisticated" investor is one who "alone, or with his purchaser representative(s), has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description." *Id.* § 230.506(b)(2)(ii).

41 *Id.* § 230.502(c). Issuers could engage in general solicitation as part of a Rule 504 offering so long as they sold only to accredited investors.

42 *Id.* § 230.504(b)(i).

The limitations on offers and sales to non-accredited investors in Reg D offerings presented another serious impediment to crowdfunding. A cap of thirty-five non-accredited investors under Rule 505 and Rule 506 offerings hardly rises to the level of what we think of as crowdfunding. While it is true that the number of *accredited* investors is not capped, the nature of such investors—as relatively wealthy individuals or entities—conflicts with the ambitions of crowdfunding to democratize investment. At the same time, Rule 504's allowance of an unlimited number of non-accredited investors is tempered for the purposes of crowdfunding by the limit of the offering amount to $1 million. In the realm of project crowdfunding this change might seem to be no problem at all. Raising money through hundreds or thousands of relatively small contributions is exactly what many Kickstarter and IndieGoGo campaigns do. In fact, the $1 million limit is probably higher than is raised in the average campaign. But start-ups that seek enterprise crowdfunding will likely need to raise more than $1 million. Even where the $1 million cap is not a hindrance, the start-up would still need to comply with the restrictions on general solicitation in order to run an Internet-based enterprise crowdfunding campaign. State-compliant offerings are still allowed but are arguably limited to state-by-state registration, disclosure, and sales.[43] They also require the costs of state registration and disclosure, which the start-up might not be able to afford (and if it could, it might just as well be able to register the offering for nationwide offers and sales with the SEC).

The state of the Reg D safe harbors before passage of the JOBS Act effectively prohibited enterprise crowdfunding. Funding limits, general solicitation requirements, and limitations on the number of non-accredited investors conspired in the aggregate to limit enterprise crowdfunding to state-registered offerings of no more than $1 million. Bold issuers could seek to embark on an enterprise crowdfunding campaign claiming it was not a public offering, and thus exempt under Section 4(2) of the Securities Act. But the very use of a widely available website to advertise the fundraising would almost certainly be deemed a general solicitation, and because offers likely would not be limited to a certain group of investors, the offering would not fall under Section 4(2). The clamor for enterprise crowdfunding, in an ongoing recession, and in light of the success of project crowdfunding, did not go unnoticed by Congress and the Obama administration.

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43 At least one company has engaged in a state-based enterprise crowdfunding campaign. *See Ownership*, BOGUS BREWING, http://www.bogusbrewing.com/ownership/ (last visited Mar. 12, 2014). Bogus Brewing engaged in a state-registered crowdfunding offering in Idaho, claiming an exemption from federal registration under Rule 504. However, it might equally have claimed the intrastate exemption under Section 3(a)(11) of the Securities Act. Thanks to Garrett Hall for bringing this example to my attention.

B. *The JOBS Act*

In an effort to do something to help the still-ailing economy, Congress passed the JOBS Act in 2012.[44] President Obama signed it into law on April 5, 2012.[45] It contained many different titles, loosely centered on ways to help start-ups raise capital. While the CROWDFUND Act within the JOBS Act for enterprise crowdfunding received significant attention, it is only one of the many titles within the overall bill. Some of the others may well have a bigger impact on start-ups than will the CROWDFUND Act. This Section briefly reviews all the titles within the JOBS Act.

1. "Emerging Growth Companies"

Title I creates a new issuer classification of "emerging growth companies" that enjoy relaxed mandatory disclosure rules.[46] "Emerging growth companies" are simply issuers that had less than $1 billion in total annual gross revenues during their most recently completed fiscal year.[47] This benchmark covers some fairly large businesses, so it is a generous cap. Such issuers are exempted from some of the disclosure requirements on executive compensation for reporting companies.[48] They also need only disclose two years' worth of audited financial statements upon registration for an initial public offering ("IPO").[49] Emerging growth companies do not need to have their internal control systems evaluated by their outside auditors.[50] They also are provisionally exempted from the auditor rotation and supplemental audit information required of reporting companies under the Sarbanes-Oxley Act.[51] Perhaps most importantly, Title I relaxes the restrictions on securities analysts, brokers, and dealers for communications made before, during, or immediately after an emerging growth company's IPO, especially with regard to qualified institutional buyers and institutional accredited investors.[52] It also permits emerging growth companies to submit confidential "draft" registration statements for their IPOs—in direct con-

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44 Pub. L. No. 112-106, 126 Stat. 306 (2012).

45 *Id.*; *President Obama Signs the JOBS Act*, WHITEHOUSE.GOV (Apr. 5, 2012), http://www.whitehouse.gov/photos-and-video/video/2012/04/05/president-obama-signs-jobs-act.

46 § 101(a), 126 Stat. at 307.

47 *Id.*

48 § 102(a), 126 Stat. at 308-09.

49 § 102(b)-(c), 126 Stat. at 309-10. Other issuers need to disclose three years' worth of audited financial statements at the time of registration.

50 § 103, 126 Stat. at 310.

51 § 104, 126 Stat. at 310.

52 § 105, 126 Stat. at 310-11.

trast with the existing regime in which any submitted registration statement is immediately made public through the EDGAR system.[53]

2. General Solicitations Allowed for Rule 506 Offerings

Title II requires the SEC to amend Rule 506 to allow general solicitations for offerings under it.[54] However, this exemption from the prohibition on general solicitations under Rule 502 is only available where *all* purchasers of such offers are accredited investors.[55] The Act also directs the SEC to modify the regulations of Rule 144A resales to allow offers to persons other than qualified institutional buyers, so long as such resales are only made to persons whom the seller, or its agent, reasonably believes is a qualified institutional buyer.[56] Protections are also given to persons who create platforms for new Rule 506 general solicitation offerings and Rule 144A resales offerings.[57]

3. Crowdfunding

As can be Congress's penchant, Title III was given an awkward formal title so that it could be turned into the acronym "CROWDFUND Act."[58] The parameters through which it mandates the SEC to promulgate formal rules permitting a new class of exempt transactions under Section 4 of the Securities Act are complicated. The new exemption will cover only those offers and sales of a private issuer that:

* raise no more than $1 million in the aggregate with all such similarly exempt offerings in a twelve-month period;
* do not exceed $2,000 or 5 percent of any particular investor's net worth or annual income (where the net worth or annual income is less than $100,000) aggregated with all purchases by the investor of the issuer's stock in a twelve-month period;

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53 § 106(a), 126 Stat. at 312.

54 § 201, 126 Stat. at 313-15. The SEC issued its final rules relaxing the prohibition on general solicitations for Rule 506 offerings in July 2013. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44,771 (proposed July 24, 2013) (to be codified at 17 C.F.R. pts. 230, 239, 242).

55 § 201(a)(1), 126 Stat. at 313-14.

56 § 201(a)(2), 126 Stat. at 314.

57 § 201(c), 126 Stat. at 314-15.

58 § 301, 126 Stat. at 315 (dubbing the Act "the 'Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012' or the 'CROWDFUND Act'").

∗ do not exceed 10 percent, with a maximum cap of $100,000, of any particular investor's annual income or net worth where the investors annual income or net worth are equal to or greater than $100,000; and

∗ are conducted through a broker or funding portal complying with a new Section 4A added to the Securities Act, and the issuer complies with the provisions of Section 4A as well.[59]

Crowdfunding issuers will have liability for material misstatements and omissions in disclosed material similar to that of IPO issuers.[60] And crowdfunded securities will be subject to a one-year holding period, with limited exceptions.[61] Issuers must use the private market intermediary portals[62] mandated under the CROWDFUND Act, but this means that such portals must be created.[63] These portals will have significant responsibilities (and therefore potential liabilities) for obtaining and distributing information on the issuers and background checks on officers, directors, and other persons holding more than 20 percent of an issuer's securities.[64] The portal also needs to ensure that investors are not exceeding their investment caps.

The CROWDFUND Act also imposes substantial disclosure requirements on crowdfunding issuers. They must disclose to the SEC, the portal handling the offering, and investors the following:

- name, legal status, physical address, and website address of issuer;
- names of directors, officers, and other persons holding greater than 20 percent of the issuer's securities;
- description of issuer's business and a business plan;
- certain financial disclosures, depending on which of the following three tiers they fall into:
    - *Offerings of $100,000 or Less*: most recent year's income tax return; financial statements certified by principal execu-

[59] § 302(a), 126 Stat. at 315. The SEC has clarified an ambiguity in the investor income thresholds. Because the JOBS Act refers both to "annual income *or* the net worth of the investor is less than $100,000," *id.*, and "annual income *or* net worth of the investor is equal to or more than $100,000," *id.*, someone with, for example, annual income less than $100,000 but net worth greater than or equal to $100,000 would seem to fall into both categories. The SEC proposes to treat both categories as conjunctions (and not disjunctions), such that the lower category includes all those with annual income *and* net worth (each) less than $100,000, and the higher category includes all those with annual income *and* net worth (each) greater than or equal to $100,000. Crowdfunding, *supra* note 2, at 66,429-30.

[60] 15 U.S.C. § 77d-1(c) (2012).

[61] *Id.* § 77d-1(d)-(e).

[62] §§ 302, 304, 126 Stat. at 315-22.

[63] § 302, 126 Stat. at 315-21. The SEC has extensive rules for such portals, or intermediaries, in its proposed "Regulation Crowdfunding." *See generally* Crowdfunding, *supra* note 2, at 66,458-96.

[64] Crowdfunding, *supra* note 2, at 66,437-38.

tive officer to be "true and complete in all material respects";
  - *Offerings Above $100,000, Up to $500,000*: financial statements reviewed by an independent public accountant using professional standards and procedures, or standards and procedures established by the SEC;
  - *Offerings Above $500,000*: audited financial statements
- description of stated purpose and intended use of proceeds;
- target offering amount, deadline to reach the target, and regular progress updates;
- price, or method for determining price, of securities;
- description of ownership and capital structure of issuer, including:
  - terms of all classes of issuer's securities, including how they may be modified and a summary of the differences among these classes, particularly how the rights of the crowdfunded securities might be limited, diluted, or qualified by the rights of any other class;
  - description of how principal shareholders' rights may negatively affect crowdfunding investors;
  - name and ownership level of each holder of more than 20 percent of the issuer's equity;
  - method of valuation for offered securities now and in the future;
  - risks to crowdfunding investors related to being minority investors, together with risks associated with corporate actions (including additional share issuances, sale of issuer or assets of issuer, and transactions with related parties); and
  - any other information the SEC may require.[65]

Following the offering, the issuer will have to file annual reports with the SEC which cover the results of operations and financial statements. Issuers must then provide the reports to investors. Under "Regulation Crowdfunding," as the proposal is known, the SEC would require issuers to submit disclosures through the EDGAR system for public access.[66] This disclosure requirement makes the crowdfunding exemption particularly problematic, as discussed in Part II.C below.

Creating a crowdfunding exemption also means that the reporting company triggers under Section 12(g) of the Securities Exchange Act (the "Exchange Act")[67] have to be amended. The large number of investors in a

65 15 U.S.C. § 77d-1(b); Crowdfunding, *supra* note 2, at 66,437-49.

66 Crowdfunding, *supra* note 2, at 66,449-54.

67 Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (current version at 15 U.S.C. §§ 78a-78pp (2012)).

single crowdfunded offering may well bring the number of issuer investors over the current cap of five hundred non-accredited investors.[68] Accordingly, the JOBS Act amends the Exchange Act to remove crowdfunding investors from the calculation of shareholders for purposes of triggering reporting company status.[69]

4. "Regulation A+"

On top of allowing general solicitations on Rule 506 offerings and creating the crowdfunding exemption, the JOBS Act also created what has been dubbed a "Regulation A+" exemption.[70] The SEC had promulgated Regulation A "mini-offerings" in 1992.[71] Under Regulation A, issuers can offer unrestricted stock in what is essentially a public offering, in amounts up to $5 million over a twelve-month period, without becoming a reporting company producing audited financial statements (unless they are otherwise available).[72] The issuer also has to prepare and submit an offering statement on Form 1-A, which is similar to a public offering registration statement. But under the new Regulation A+, issuers can offer up to $50 million on similar conditions as the original Regulation A.[73]

5. Raising the Triggers for Reporting Company Status

The JOBS Act increased various triggers so that more companies can stay out of reporting company status longer.[74] The number of shareholders was increased to two-thousand persons overall, or five hundred non-accredited investors.[75] Employees holding company securities obtained through employee compensation plans also do not now count toward these trigger levels.[76]

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68 15 U.S.C. § 78l(g) (2012); §§ 501-04, 126 Stat. at 325-26.

69 § 303, 126 Stat. at 321.

70 § 402, 126 Stat. at 325.

71 Small Business Initiatives, 57 Fed. Reg. 36,442, 36,468 (proposed Aug. 13, 1992) (to be codified at 17 C.F.R. pt. 230).

72 17 C.F.R. §§ 230.251-.263 (2012).

73 § 401, 126 Stat. at 323-25.

74 §§ 501-04, 126 Stat. at 325-26.

75 § 501, 126 Stat. at 325.

76 § 502, 126 Stat. at 326.

6. Raising the Triggers for Bank Registration

Title VI of the Act increases the triggers for banks and bank holding companies to have to register under Sections 12 and 15 of the Exchange Act.[77] This trigger seems to have been a response to the issue of banks' reduction of lending, especially to small businesses, in the wake of the 2008 financial crisis and subsequent recession. This solution seems a bit tangential to that problem.

7. Comparison of New and Amended Capital Raising Models

While crowdfunding has received the most attention—and not all of it positive—other sections of the JOBS Act may provide better models for start-up fundraising. Crowdfunding has many detractors, including apparently the SEC, which has delayed rulemaking beyond the 270 days allowed in the JOBS Act for implementation. In the interim, the SEC has promulgated the rules permitting general solicitation in Rule 506 offerings and general advertising in Rule 144A offerings.[78] As mentioned, there is no cap on the amount that can be raised under Rule 506, and the reporting requirements are not much more onerous than those for the crowdfunding exemption. The key difference is that general solicitation is only permitted if purchasers are restricted to accredited investors. So it is more like "high end" crowdfunding. At the same time, both Regulation A and Regulation A+ allow for general solicitation, higher offering amounts than available under the crowdfunding exemption, only somewhat more disclosure, and no restriction to accredited investors. Meanwhile, the existing Rule 504 allows general solicitation for offerings up to $1 million, so long as the offer is made exclusively in states that have their own registration systems for public offerings.[79] While this provision is then limited to certain states, as a practical matter such an offering may be adequate to raise $1 million—which is all that is permitted under the new crowdfunding exemption anyway. Accordingly, from a purely rational perspective, the new crowdfunding exemption may not be particularly compelling, especially if the SEC promulgates restrictive or onerous rules to implement it.

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[77] §§ 601-602, 126 Stat. at 326-27.

[78] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44,771 (proposed July 24, 2013) (to be codified at 7 C.F.R. pts. 230, 239, 242).

[79] 17 C.F.R. § 230.504(b)(i) (2012). As mentioned above, at least one company has relied on Rule 504 to conduct what it jokingly called an "IPO—Idaho Public Offering," using Idaho state registration procedures to conduct an enterprise crowdfunding selling equity. *See supra* note 43 and accompanying text.

C. *The CROWDFUND Act Disclosure Requirements May Present Serious Risks to Start-Ups' IP and Business Strategies*

Notwithstanding the serious questions about whether the crowdfunding exemption is advisable from a regulatory perspective, or truly helpful for start-ups, the popular appeal of crowdfunding is such that many start-ups will likely use it once it is available. On the positive side, it may be one more avenue for deserving start-ups to access the capital they need to launch and grow. The focus on equity provides just the kind of working capital needed for start-ups to get serious about developing their IP portfolios. But the disclosure required for crowdfunding may present challenges and risks to first-time entrepreneurs. The mandated disclosures will be made public through the EDGAR system.[80] While the SEC provides for the redaction of some sensitive, personally identifiable information (e.g., social security numbers in tax filings),[81] it is not clear how far redaction requests could go beyond this. In fact, the SEC takes seriously the relation between crowdfunding and crowdsourcing, stating:

> The proposed rules are intended to align crowdfunding transactions under Section 4(a)(6) [of the JOBS Act] with the central tenets of the original concept of crowdfunding, in which the public—or the crowd—is presented with an opportunity to invest in an idea or business and individuals decide whether or not to invest after sharing information about the idea or business with, and learning from, other members of the crowd. In this role, members of the crowd are not only sharing information about the idea or business, but also are expected to help evaluate the idea or business before deciding whether or not to invest.[82]

Thus, the SEC clearly intends enough information to be made public about the issuer that a large number of potential investors can pore over and share, and that they may use to compare details of its finances, management, business plan, and employees.

The crowdfunding issuer will become a kind of junior reporting company, yet without the experience and legal counsel of a company that makes it to a traditional public offering. By contrast, Reg D offerings require only the filing of Form D—which contains minimal information—with the SEC.[83] The more extensive disclosures required under Reg D are required to be made available only to *purchasers*, and thus need not be made public. At the same time, while private investors often negotiate for even more information rights than mandated by Reg D, they usually receive it under confidentiality provisions. The only equivalent requirement for public disclosures is under Regulation A and Regulation A+ offerings. But these al-

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80 Crowdfunding, *supra* note 2, at 66,453.

81 *Id*. at 66,446.

82 *Id*. at 66,430 (footnote omitted).

83 17 C.F.R. § 230.503; U.S. SEC. & EXCH. COMM'N, OMB NO. 3235-0076, FORM D, NOTICE OF EXEMPT OFFERING OF SECURITIES (2013), *available at* http://www.sec.gov/about/forms/formd.pdf.

low for much higher offering amounts ($5 million and $50 million, respectively, versus $1 million for the crowdfunding exemption). Also, the expense and sophistication needed to engage in one of these "mini-offerings" makes the model impractical for most of the early-stage start-ups that will likely pursue crowdfunding.

There are substantial risks for early-stage start-ups to enter into an extensive disclosure regime. Such companies rarely have specialized counsel that can help them navigate the risks involved. Companies pursuing a Regulation A offering or an IPO will generally have sophisticated securities attorneys, as well as IP attorneys if they have significant IP assets. Firms without such counsel risk disclosing patentable inventions—especially business methods—before applications have been filed and rights preserved. This issue will be particularly acute for ongoing periodic disclosures, which tend to put time pressure on reporting companies because the regular deadlines can seem relentless.[84] The likely place for such accidental disclosures will be in the mandated discussion of the firm's business and financial condition discussion (compared by the SEC to the management's discussion and analysis of financial condition and results of operations (known as the "MD&A") under Regulation S-K for reporting companies).[85] But as the issuer becomes a kind of junior reporting company, it will also come under increased pressure to make other public statements. These disclosures can be the most perilous, especially where they include live remarks by company representatives (whether verbal or through social media). Descriptions of the company's proposed products or services for purposes of soliciting support in the crowdfunded offering will risk destroying patent rights. Part of engaging with the "crowd" may be a broad dialogue in which all manner of potential investors draw out responses from company representatives (official or otherwise) which disclose too much about the company's plans and technologies. In fact, the SEC anticipates this happening and is already considering whether and how to make such disclosures part of the formal—and hence possibly liability-generating—disclosures under "Regulation Crowdfunding."[86]

In the event that potentially enabling disclosures of business methods or other inventions are made, the company will have to accelerate patent-filing decisions. But without the funding to prepare and file a strong application (lack of funding presumably being a major driver of the

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84 Besides regular periodic reporting, the SEC is contemplating requiring material event reporting, similar to Form 8-K filings under the Exchange Act. *See* Crowdfunding, *supra* note 2, at 66,450-52. This will put even more time pressure on and distract inexperienced start-ups, increasing the likelihood of accidental disclosure of sensitive information.

85 *Id*. at 66,437-44. Because the SEC at this time is not mandating the form of the business and financial condition disclosure reports, issuers may well overreport to stay on the safe side of an indeterminate line for compliance with Regulation Crowdfunding.

86 *Id*. at 66,452-54.

crowdfunding offering), the company may have to file an inferior application, or no application at all. Thus, the crowdfunding effort may negatively alter the company's IP strategy timeline.

Ultimately, the disclosure required under the crowdfunding exemption means that start-ups will need to retain expensive securities and IP counsel before starting the crowdfunding process. But if they could afford such counsel, they likely would not be engaged in crowdfunding. The downsides of mandatory disclosure and a broad investor base (that may or may not have voting power) should discourage companies from using this funding model unless they really need it.

Thus, the JOBS Act may unintentionally penalize the very firms that need its help the most. A number of commentators view the disclosure requirements as necessary to mitigate what might otherwise be a major new avenue for fraudulent securities scams.[87] However, Professor Edmund Kitch believes that it was a mistake for Congress to require public disclosures from crowdfunding companies.[88] But this is because he takes the controversial position that *all* mandatory disclosure requirements under the federal securities regulations system were a mistake.[89] In keeping with the arguments for the legalization of gambling and other risky activities, Kitch believes that individuals should have the right to invest their money wherever they choose, and through whatever means they want, without government intervention.[90] Thus, he does not have a reason to distinguish crowdfunding from other investment vehicles. All should be matters purely between issuers and investors with no government role as in mandatory disclosure regimes. But Congress did not take this path, and it arguably tended to the opposite pole by imposing significant disclosure obligations on certain classes of issuers, now including crowdfunding firms.

The crowdfunding provisions of the JOBS Act push start-ups into an advanced regulatory environment they may not be ready for. Whereas other titles in the JOBS Act allow emerging growth companies to stay private longer—giving them a longer period of privacy and confidentiality within which to develop business models, staff, and technologies—the

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87 *See, e.g.*, Hazen, *supra* note 4, at 1736-39.

88 *See, e.g.*, John Kuo, *Equity Crowdfunding Is Now Legal. How Can You Get Your Piece of the Action?*, NERDWALLET (Sept. 25, 2013), http://www.nerdwallet.com/blog/investing/2013/equity-crowdfunding-legal-piece-action/ (noting that "Professor Edmund Kitch warns that simpler securities laws are necessary for equity crowdfunding to truly thrive," and quoting Professor Kitch as saying, "If the government would simply create an open space for crowdfunding sites to operate, it could monitor their development and . . . pursue [specific] intervention. Unfortunately, the JOBS Act is enacted within the regulatory complexity of current securities law, and does not accomplish this simple goal" (internal quotation marks omitted)).

89 *See* Camilla Alexandra Hrdy, *Kitch & O'Connor: Should Crowdfunding Be Regulated?*, WRITTEN DESCRIPTION (Sept. 14, 2013), http://writtendescription.blogspot.com/2013/09/kitch-oconnor-should-crowdfunding-be.html.

90 *See supra* note 88.

CROWDFUND Act will rush start-ups who use it and force them to become junior reporting companies. And whereas other titles of the JOBS Act *relax* disclosure requirements for other kinds of offerings—including the new confidential IPO draft registration statement that Twitter recently used—the CROWDFUND Act imposes arguably a higher-than-usual amount of disclosure as compared to that required for similarly situated offerings (e.g., Rule 504 offerings can also raise $1 million but have none of the public disclosures of the CROWDFUND Act, unless the issuer relies on the state registration option). The period of privacy is critical for start-ups that have nearly impossible levels of uncertainty across their business model, technologies, and markets. Further, the ability to be disruptive often relies on the element of surprise. A potentially disruptive start-up that needs to telegraph details about its model and plans through public disclosures beginning at the earliest stages of the firm is likely to lose much of that element of surprise and find its ability to successfully disrupt an industry limited (as the incumbents will have been able to prepare to defend their entrenched interests).

III. MANAGING CROWDFUNDING INVESTORS' EXPECTATIONS ABOUT START-UP IP PORTFOLIOS

Beyond the disclosure issues affecting start-up IP strategies under the CROWDFUND Act, the crowdfunding concept generally presents issues for management's interaction with shareholders. Publicly traded companies develop significant expertise and staff just to deal with issues arising with a large, diffuse set of shareholders. Start-ups will be in no such position to deal with this kind of base. Further, they may use crowdfunding to avoid professional investors such as VCs, even though those professionals often bring valuable expertise that can guide the start-up to develop the sophistication to manage a base of public shareholders.

Professional or experienced start-up investors such as tech angels and VCs understand the value of IP. They often know more than the founders about the realities and expenses of building IP portfolios with limited resources. Tough decisions need to be made about what to patent among competing promising inventions. Timing decisions for applications also require experience. Likewise, some inventions may be protectable as trade secrets. And in some industries, such as software, copyright will play an equal role with patents for protection of the core products developed. On top of all this, a strong brand—manifested through distinctive, federally registered trademarks—may play a more important long-term role than patents on any particular technology. Unsophisticated investors, who may constitute a large percentage of crowdfunders, will not be able to offer any help on these matters.

Even if some crowdfunders have such expertise, a start-up would need to bring them into a special confidential relationship (such as often happens

with private placement investors) in order to give them privileged information necessary to help develop the IP strategy. But this in turn might run afoul of fair disclosure concepts, which seek to have all outside shareholders on the same footing with regard to company information. Insiders, by contrast, will have access to nonpublic information, but they are then restricted in their ability to trade in the company's stock based on such insider information. We do not yet know whether the SEC will treat a crowdfunded issuer as a kind of public company, which requires such insider-outsider distinctions for information dissemination.

Further, utilizing crowdfunding early in a start-up's life could deter professional investors from investing later. Many VCs already lament bloated cap tables from too many friend and family investors in companies the VCs are otherwise interested in financing. This situation means unpredictable votes on shareholder issues and more potential for litigation from early-stage investors who get substantially diluted in later rounds or disagree with the company's direction and management.

Angels and VCs also usually understand the risks of IP portfolio value during the life of the company and in bankruptcy or dissolution. Even though significant amounts of money may have been spent on procuring patents, the portfolio may be worthless if the product or service to which it is directed proves to be commercially unfeasible. Of course, the portfolio may be monetized in other ways, and experienced VCs may have guidance on this as well. But unsophisticated crowdfunders may wildly over- or underestimate the value of the start-up's portfolio. This shortcoming, in turn, could put them at odds with company management in how to manage and monetize the portfolio.

The upshot is that management may become more conservative because of pressure from crowdfunders with unrealistic expectations about IP portfolio development and management (as well as about other corporate matters!). This pressure could escalate into litigation, similar to the shareholder activism we increasingly see in publicly traded companies. Shareholder activism can provide helpful discipline to management of large entities that may get out of touch, but it may not be appropriate for early-stage start-ups that need a lot of room to maneuver while exploring risky technologies and business models. Some have suggested that crowdfunding only be done through non-voting stock with mandatory buyout provisions allowing the company to later reduce the cap table.[91] Such equity structuring could indeed reduce problems with crowdfunding shareholders. But the shareholders would have to agree to buy shares under these conditions. It remains to be seen whether a crowdfunding market could develop around such terms.

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[91] For example, Ted Sichelman offered ideas like this in an IPProfs listserv exchange on crowdfunding earlier this year.

Start-ups that employ crowdfunding will have to learn how to manage the expectations of a broad, diffuse base of shareholders, many of whom may be quite unsophisticated. In fact, given the "democratizing" effect of crowdfunding and the low investment amounts possible, the average crowdfunder may be far less sophisticated than the average retail investor in public markets. This knowledge gap will require "investor relations" skill and staff, which may be beyond the tool kit of the usual start-up founder or employee. Thus, the company may have to retain counsel or consultants to develop or administer the investor relations function, which will only add to the start-up's burn rate.

Provided that the start-up can muster the investor relations function, one of the main goals of such a program will have to be investor education about the realities of IP portfolio development and management. First, investors will need to know that patent procurement may be one of the start-up's single largest fixed costs recurring on an annual basis. Second, not everything will be patentable, nor will the company be able to patent everything that is patentable. Tough decisions will have to be made, and some seemingly valuable things will be left unprotected. Investors will likely *not* have a say in this—and will not know all the important inside information on the inventions and patent application decisions—and will have to be comfortable "going along for the ride." Because of the perceived nature and rhetoric of crowdfunding, crowdfunders may be more inclined than public market retail investors to believe they have an active ownership role in the company—including a say in important management decisions. Finally, investor relations staff must strive to educate investors that even expensive patents and impressive-looking IP portfolios may turn out to be worthless during the life of the company, as well as in bankruptcy or dissolution.

CONCLUSION

The JOBS Act reduces the disclosure required for many forms of financing emerging growth companies. Companies can stay private longer. They can file confidential draft registration statements for IPOs. Audited financial statements need only be provided for the preceding two years before going public, not three. Similarly, general solicitation is now available for certain Rule 506 offerings, and an enhanced "Regulation A+" allows for mini-public offerings up to $50 million.

Yet, the crowdfunding exemption seems to impose heavier regulation and mandatory disclosures than the relaxed standard for equivalent alternate offerings. For a meager $1 million raise, crowdfunded companies will need to become junior reporting companies. They will need to publicly disclose information about shareholders who hold more than 20 percent of their equity, as well as the ways in which such shareholders' equity rights could be used to harm crowdfunders' equity rights.

Despite this inferiority of crowdfunding to other funding avenues, it is expected that many start-ups will use it once the SEC promulgates the final rules. The populist and rhetorical appeal of the form—together with the success of project crowdfunding sites such as Kickstarter—virtually ensures there will be initial attempts to use it for enterprise crowdfunding. If it allows deserving start-ups to obtain funding they would not otherwise have received, then it may be worth it. This outcome could be especially valuable for start-ups who need funding to start developing and managing an IP portfolio.

Start-ups that use crowdfunding, however, face a number of potential issues. First, they will have a broad, diffuse ownership base more like that of a large public company than of a nimble start-up. Differences of opinion and challenges to management may be more widespread than in a traditional privately-held start-up. Second, such challenges may well be on IP strategies and tactics. Because the average crowdfunder is likely to be less sophisticated than the angels and VCs that usually invest in start-ups, he may balk at the expense of patent applications, while also expressing concern over the necessarily difficult decision to seek patent protection on one invention and not another. Third, the requirements of disclosure on inexperienced young companies may lead to compromised IP assets. Given the reluctance or inability of early-stage start-ups to hire specialized counsel in corporate law, securities law, and IP, their management may inadvertently make enabling disclosures that will jeopardize patent rights.

Crowdfunding may help some start-ups financially even as it may jeopardize their IP strategies and implementation. To minimize this harm, start-ups will need to develop strong investor relations staff that can manage the expectations of disparate crowdfunders even before the offering takes place. They will also need to hire experienced securities and IP counsel in advance of the offering. But both of these will require money that the start-up does not have (else it would not be engaging in the fundraising). This in turn may limit the effectiveness of enterprise crowdfunding of start-ups.