statements communicated to investors. The Court limited liability to those persons who actually "make" (or utter) a statement, consistent with the language of Rule 10b-5 itself, which makes it unlawful to "*make* any untrue statement of a material fact."[19] In *Morrison v. National Australia Bank Ltd.*, the Court addressed the applicability of Rule 10b-5 to stock transactions that occur on foreign stock exchanges. The *Morrison* Court rejected tests developed by the lower courts in favor of a bright-line rule that rejected extraterritorial application in light of the Exchange Act's silence on the matter.[20] These recent opinions show that the Supreme Court narrowly construes the private rights of action arising under the federal securities laws to curb the development of novel and expansive theories of liability that Congress did not contemplate or expressly authorize.

NOTES

1. *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, Fed. Sec. L. Rep. (CCH) P 96764 (2012).
2. *See* 15 U.S.C.A. § 78p(a)(1).
3. *See* 15 U.S.C.A. § 78p(a)(3); 17 C.F.R. § 240.16a-3(a).
4. *See* 15 U.S.C.A. § 78p(b).
5. *See* 15 U.S.C.A. § 78p(b).
6. *Simmonds*, 132 S. Ct. at 1418.
7. *Simmonds* at 1418.
8. *Simmonds* at 1418.
9. *Simmonds* at 1418-19.
10. *Simmonds.* (citing *Whittaker v. Whittaker Corp.*, 639 F.2d 516, Fed. Sec. L. Rep. (CCH) P 97871, 31 Fed. R. Serv. 2d 263, 67 A.L.R. Fed. 819 (9th Cir. 1981) (abrogated by, *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, Fed. Sec. L. Rep. (CCH) P 96764 (2012)).)
11. *Simmonds* at 1419-20.
12. *Simmonds* at 1421
13. *Simmonds* at 1419.
14. *Simmonds* at 1419.
15. *Simmonds* at 1419-20.
16. *Simmonds* at 1420.
17. *Simmonds* at 1421 n.7 (citing *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, Fed. Sec. L. Rep. (CCH) P 92725 (2d Cir. 2004) (abrogated by, *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, Fed. Sec. L. Rep. (CCH) P 96764 (2012)).)
18. *Simmonds* at 1421 n.7.
19. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 180 L. Ed. 2d 166, Fed. Sec. L. Rep. (CCH) P 96327 (2011) (quoting 17 CFR § 240.10b-5(b)) (emphasis added).
20. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 177 L. Ed. 2d 535, Fed. Sec. L. Rep. (CCH) P 95776, R.I.C.O. Bus. Disp. Guide (CCH) P 11932, 76 Fed. R. Serv. 3d 1330 (2010).

The JOBS Act from a Securities Litigation Perspective

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Though it is primarily addressed at jumpstarting the initial public offering (IPO) market for start-ups and emerging growth companies (EGCs), the recently enacted Jumpstart Our Business Startups (JOBS) Act may be a boon for securities litigators. The Act includes a number of provisions that disrupt the *status quo* and increase the litigation risk associated with the IPO process. Here is a summary of some of the JOBS Act's provisions that may lead to an increase in filed securities litigation actions:

Title I—IPO On-Ramp, Section 105

If the Wall between Research & Banking Comes Down, Will Securities Litigation Grow in Its Place?

The JOBS Act removes the research/investment banking wall that was created as a result of the Global Analyst Research Settlements reached in 2003 for "emerging growth companies" (new public companies with total annual gross revenues of less than $1 billion). As a direct result of the settlements, the research and investment banking functions were kept separate so that a bank that was being paid to market an IPO of a company would not be tempted to issue inaccurate research that is favorable to the company. The JOBS Act specifically allows a bank that is marketing an IPO of an emerging growth company to also issue research reports about the company *before* the IPO and in the period immediately following the IPO.

Thus, the temptation for biased research reports has returned. With the temptation to issue reports in support of a firm's investment banking clients, comes the potential for litigation based on research reports (whether they are inaccurate as a result of an investment banking-driven bias or if the reports are truly objective). Because research will be available before the IPOs of emerging growth companies, if the stock price of one of these EGCs drops precipitously after the IPO, the bank issuing the research might face litigation concerning the validity of the research report issued prior to the IPO.

The JOBS Act also removes the restriction based on job function (*i.e.* research v. investment banking) as to who at a broker-dealer may arrange for communications between a securities analyst and a potential investor. Securities analysts may now participate in communications, such as meetings, with management of an EGC even if those meetings are also attended by an investment banker. If there is a suggestion that favorable research was promised in exchange for letting the bank participate on the IPO, it is likely that these joint meetings will be the subject of future litigation.

Further, the removal of the quiet periods (the time period between the filing of the registration statement and 40 days after the IPO) opens the door to the potential for research firms and investment banks to pump up the price of a stock immediately after it goes public by issuing favorable statements. As a direct result of this potential for abuse, the risk of litigation with any public offering of an EGC increases.

Title II—Access to Capital for Job Creators

Could the Use of "Reasonable Steps" Lead to Possible Missteps and Potential Litigation?

This provision requires the U.S. Securities and Exchange Commission (SEC) to allow general solicitation and advertisement of private offerings made to accredited investors or qualified institutional investors so long as the company offering the securities takes *reasonable steps* to verify that the purchasers of the securities are accredited investors or qualified institutional investors.

If a general solicitation or advertisement of a private offering leads to sales of securities to unqualified or unaccredited investors, there will likely be litigation over whether the company took reasonable steps to verify the status of the investors and indeed, what steps are reasonable.

Title III—Crowdfunding (the CROWDFUND Act)

Brokers & New Funding Portals Must Comply with Crowdfunding Rule Requirements on Investor Net Worth

The CROWDFUND Act exempts certain small transactions of securities from the registration statement requirement of § 5 of the Securities Act of 1933.

The CROWDFUND exemption applies if the aggregate amount of securities sold to all investors is not more than $1 million and if the aggregate amount sold to any one investor is not greater than: (*i*) $2,000 or 5% of the investor's annual income or net worth if the annual income or net worth of the investor is less than $100,000; or (*ii*) 10% of the annual income or net worth of the investor, not to exceed $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000. The exemption only applies if the transaction is conducted through a broker or funding portal that complies with new registration and disclosure requirements, including certain measures meant to reduce fraud, and the company selling the securities files certain information with the SEC, including details on ownership, nature of the business, financial condition of the business, intended use of the proceeds, target offering amount, etc.

The SEC must issue rules to carry out the CROWDFUND Act within 270 days of its enactment. The rules must also provide for the protection of investors. There may be new litigation concerning alleged fraud committed by the broker or funding portals that attempt to evade the rules.

Title IV—Small Company Capital Formation

More Companies May be Exempt From SEC Rules, but Still Have to Follow Some Rules

This section takes away some of the discretion previously afforded the SEC and requires the SEC to create a new class of securities exempt from the Securities Act of 1933.

To the extent this section removes discretion and sets fixed parameters for companies that will not be subject to the Securities Act of 1933, it likely decreases the risk of litigation. The SEC, however, is still required to impose other terms, conditions, or requirements that it determines to be necessary in the public interest for the protection of investors. Thus, these additional terms, conditions, or restrictions may include discretionary terms or sliding scale application. If so, this may be another area of the Act ripe for new litigation.

Title V—Private Company Flexibility & Growth

"Held of Record" Definition and Safe Harbor May Lead to Confusion

This section of the JOBS Act requires the SEC to revise the definition of "held of record" to provide that securities held by employees pursuant to an employee compensation plan in transactions exempted from the registration requirements of § 5 of the Securities Act are not included in the definition of "held of record." The SEC is also required to adopt safe harbor provisions in connection with the definition and to determine if new enforcement tools are necessary to guard against evasion in reliance on the new definition.

There is likely to be litigation over the meaning of "held of record" and the SEC's determinations of for whose benefit shares are held. Further, the safe harbor provisions may lead to greater uncertainty and, thus, increased litigation risk.

Title VI—Capital Expansion

Banks & Bank Holding Companies Can Stay Private for Longer With More Investors

This provision makes it easier for banks and bank holding companies to have a large number of investors before registering as public companies.

As a result, more bank and bank holding companies are likely to remain private for as long as possible, with as many investors as possible before reaching the registration threshold. Companies that do not need to register and make their books and records public may be hiding improper accounting or bad business results. At least some investors are likely to lose money based on their investments in these types of entities. If they do, there is likely to be an increase in litigation against nonpublic bank and bank holding companies with large numbers of private investors.

Conclusion

The JOBS Act is replete with uncertainty regarding how it is to be carried out, and with such uncertainty likely comes increased litigation risk.