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Cover Page Footnote

J.D. The Catholic University of America, Columbus School of Law, 2017; B.A., Marquette University, 2014. The author especially would like to thank Mr. Andrew Brady for graciously providing his expertise and guidance through the research, writing, and editing process of this Note. The author is also grateful for the support of his family and friends. Finally, the author would like to extend his thanks to the Catholic University Law Review for its assistance in publishing this Note.

TITLES II OR III: WHERE WILL THE WISDOM OF THE CROWD TAKE INVESTORS?

William Lane[+]

It is unlikely that the name "Zack Danger Brown" sounds familiar to much of the world. But, to approximately 7,000 individuals who funded his Kickstarter campaign, Brown is not only well known, but also worthy of their financial support in his attempt to make a potato salad.[1] Brown's Kickstarter campaign highlights the widespread interest in crowdfunding, "a relatively new and evolving method of using the Internet to raise capital,"[2] and how even an amateur campaign can raise a significant amount of funding.[3]

Crowdfunding, in its purest form, is an approach to raise large amounts of capital through small monetary contributions from a wide group of investors, referred to as the "crowd."[4] Crowdfunding is often organized in varying

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1. During the summer of 2014, over a thirty-day period, 6,911 individuals pledged one dollar or more so that Brown could make potato salad. Zack Danger Brown, *Potato Salad*, KICKSTARTER, https://www.kickstarter.com/projects/zackdangerbrown/potato-salad/description (last visited Mar. 8, 2017).

2. Crowdfunding, 80 Fed. Reg. 71,388, 71,388 (Nov. 16, 2015) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 268, 274).

3. Brown's story is not the only example of outlandish crowdfunding campaigns. *See, e.g.*, Jonah Bromwich, *Crowd-Funding Gets Wacky*, N.Y. TIMES (Dec. 17, 2014), http://www.nytimes.com/2014/12/18/style/crowd-funding-on-kickstarter-gets-wacky.html (discussing how an independent musician's fan created a crowdfunding campaign in response to the musician's offer to produce an album "rapping over nothing but cat sounds"). Another example occurred when a Chicago-based art student raised $1,050 to rate "the tastiness of a Chipotle chicken burrito." *Id.* This is not to suggest, as a one commenter pointed out, that all projects are bad or silly. "Kickstarter has funded many, many worthwhile projects." Jbarber873, Comment to *Trepidation and Restrictions Leave Crowdfunding Rules Weak*, N.Y. TIMES (Oct. 29, 2013, 5:10 PM), http://dealbook.nytimes.com/2013/10/29/trepidation-and-restrictions-leave-crowdfunding-rules-weak/?_r=0. For example, between April 11, 2012, and May 18, 2012, 68,929 backers pledged $10,266,845 to Pebble Technology for its Pebble smartwatch. Pebble Technology, *Pebble: E-Paper Watch for iPhone and Android*, KICKSTARTER, https://www.kickstarter.com/projects/597507018/pebble-e-paper-watch-for-iphone-and-android (last visited Mar. 8, 2017).

4. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 5 (2012); *see also* 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, 1737 (2012) ("Since crowdfunding is designed to reach a large number of people, limiting the fundraising request to a small amount from each donor can provide meaningful funding."). Members of the "crowd" are those "[i]ndividuals interested in

categories,[5] with equity[6] and reward-based[7] being the most prominent.[8] A variety of crowdfunding websites have emerged after the concept gained popularity in 2003 with the launch of ArtistShare.[9] Still, without complying with securities laws and regulations, these websites lack the ability to provide any security instrument to supporters.[10]

Recently approved regulations, however, permit securities-based crowdfunding by certain private companies without registering the offering with

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the crowdfunding campaign." Crowdfunding, 80 Fed. Reg. at 71,388. In 2014, "3.3 million people from nearly every country on the planet backed a project," pledging $529 million to Kickstarter projects. *2014: By the Numbers*, KICKSTARTER, https://www.kickstarter.com/year/2014/data (last visited Mar. 8, 2017).

5. *Compare* Bradford, *supra* note 4, at 14–15 (categorizing crowdfunding into five types: "(1) the donation model; (2) the reward model; (3) the pre-purchase model; (4) the lending model; and (5) the equity model"), *with* Robert H. Steinhoff, Comment, *The Next British Invasion is Securities Crowdfunding: How Issuing Non-Registered Securities Through the Crowd Can Succeed in the United States*, 86 U. COLO. L. REV. 661, 669 (2015) ("Crowdfunding has evolved into four general models: donation, reward, debt, and equity.").

6. Equity crowdfunding is where an individual gives money in exchange for "a piece of the venture," i.e., some form of security. RYAN TAYLOR, U.S. SMALL BUS. ADMIN., ISSUE BRIEF NO. 5, EQUITY-BASED CROWDFUNDING: POTENTIAL IMPLICATIONS FOR SMALL BUSINESS CAPITAL 1 (2015), https://www.sba.gov/sites/default/files/advocacy/Issue-Brief-5-Equity-Based-Crowdfunding2.pdf.

7. Reward crowdfunding, such as the types of campaigns hosted on Kickstarter and Indiegogo, involves an individual giving money "in exchange for a clearly defined good." *Id*.

8. Karsten Strauss, *What Startup Entrepreneurs Need to Know About Raising Money Through Equity Crowdfunding*, FORBES (Nov. 4, 2015, 1:17 PM), http://www.forbes.com/sites/karstenstrauss/2015/11/04/what-startup-entrepreneurs-need-to-know-about-raising-money-through-equity-crowdfunding/. Although interesting legal concerns regarding the other categories of crowdfunding certainly exist, this Note focuses exclusively on the recent changes regarding equity crowdfunding.

9. David M. Freedman & Matthew R. Nutting, *A Brief History of Crowdfunding*, FREEDMAN-CHICAGO.COM 1, http://www.freedman-chicago.com/ec4i/History-of-Crowdfunding.pdf (last updated Nov. 5, 2015). In response to the success of ArtistShare, other crowdfunding websites were started, including Indiegogo in 2008 and Kickstarter in 2009. *Id*. at 2.

10. *See* Hazen, *supra* note 4, at 1737–38 ("[A] business seeking investors through crowdfunding implicates the securities laws which provide investor protection by requiring disclosure and, in many instances, registration of securities offered to the public. Investor protection becomes an issue when social networks are used for widespread solicitation of funds for business enterprises, regardless of the amount being sought from each investor."); *see, e.g.*, *Our Rules*, KICKSTARTER, https://www.kickstarter.com/rules?ref=footer (last visited Mar. 8, 2017) ("Projects can't offer incentives like equity, revenue sharing, or investment opportunities."); *Pressroom*, KICKSTARTER, https://www.kickstarter.com/press?ref=hello (last visited Mar. 8, 2017) ("Project creators keep 100% ownership of their work. Kickstarter cannot be used to offer financial returns or equity, or to solicit loans. Some projects that are funded on Kickstarter may go on to make money, but backers are supporting projects to help them come to life, not to financially profit."); *What Can I Not Offer as Perks?*, INDIEGOGO, https://support.indiegogo.com/hc/en-us/articles/204255166-Prohibited-Perks (last visited Mar. 8, 2017) ("Campaign owners are not allowed to offer any form of 'security' . . . . This means that campaign owners are not allowed to offer perks such as notes, stocks, treasury stocks, security futures, security-based swaps, bonds or debentures.").

the Securities and Exchange Commission (the "SEC" or the "Commission"). On April 5, 2012, Congress passed, and President Barack Obama signed, the Jumpstart Our Business Startups Act (JOBS Act) into law.[11] The stated goal of the JOBS Act was "[t]o increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies."[12] Along with other provisions, the JOBS Act required the SEC to eliminate the general solicitation ban and general advertising prohibition for certain private securities offerings, and fashion an exemption allowing equity crowdfunding.[13] Before signing the JOBS Act into law, President Obama highlighted how "[l]aws that are nearly eight decades old" prevent the general public from investing in small businesses.[14] The President remarked, "[small businesses] can only turn to a limited group of investors—including banks and wealthy individuals—to get funding."[15] Congress passed the JOBS Act intending for new small-business start-ups to have access to capital.[16] The President explained, "because of this bill, start-ups and small business will now have access to a big, new pool of potential investors—namely, the American people."[17]

In an effort to provide increased access to capital to small business and start-ups, the JOBS Act "loosen[s] various Securities and Exchange Commission regulations."[18] Many small to moderate-sized businesses simply cannot afford the costs of the specialized accountants, underwriters, and attorneys necessary to meet the new obligations that come with being a public company.[19] The

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11. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

12. *Id.* at 306.

13. *Id.* at 313–14.

14. Barack Obama, Remarks by the President at JOBS Act Bill Signing (Apr. 5, 2012, 2:36 PM), https://www.whitehouse.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing.

15. *Id.* (alteration in original). In his remarks, the President is referring to the Securities Acts of 1933 and 1934.

16. H.R. REP. NO. 112-406, at 7–8 (2012), *reprinted in* 2012 U.S.C.C.A.N. 278, 279–81.

> As the number of U.S. IPOs fell precipitously, fewer small companies have gone public. Small companies are critical to economic growth in the United States . . . . To encourage small companies to go public in the U.S., to spur economic growth, and to create jobs, Representatives Fincher and Carney introduced H.R. 3606 on December 8, 2011.

Id. See also 126 Stat. at 306; Eric Cantor, Commentary, *Implement JOBS Act Crowdfunding Rule Now*, CNBC (July 31, 2015, 6:39 AM), http://www.cnbc.com/2015/07/31/implement-jobs-act-crowdfunding-rule-now-commentary.html; Seung Min Kim, *JOBS Act Heads to Obama*, POLITICO (Mar. 27, 2012, 2:22 PM), http://www.politico.com/story/2012/03/jobs-bill-heads-to-obama-074539.

17. Obama, *supra* note 14.

18. Kim, *supra* note 16.

19. DAVID R. BURTON, THE HERITAGE FOUND., BACKGROUNDER NO. 2924, REDUCING THE BURDEN ON SMALL PUBLIC COMPANIES WOULD PROMOTE INNOVATION, JOB CREATION, AND ECONOMIC GROWTH 1, 3–4 (June 20, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2924.pdf.

JOBS Act contains seven titles aimed at "making it easier for companies [both to go public and] to raise capital privately and stay private longer."[20] The Act creates new ways for small businesses to raise money that previously did not exist.

Imagine, for example, a small business or start-up is looking to raise capital. There are a variety of ways this company could raise capital.[21] Through the enactment of the JOBS Act, two new possibilities for the company to raise capital come to mind: Regulation D, 506(c) (Title II)[22] and Crowdfunding (Title III).[23] However, both options raise concerns for the company.

Under Title II, the company is limited to certain types of accredited investors[24]—investors who are both financially sophisticated and do not require heightened levels of protection under legislation.[25] Under Crowdfunding, the company can have a wide variety of ordinary investors but is unable to generally solicit their offering without qualifying under an existing exemption.[26] This company may produce a great product with a cult following, yet lack the type of financial success or typical business plan accredited investors expect in an investment.[27] Therefore, if interest by accredited investors cannot be roused, the

20. Anne Coughlan, *Audit Considerations for JOBS Act Offerings*, TRANSACTION ADVISORS 1 (Jun. 2015) (alteration in original), https://www.transactionadvisors.com/insights/audit-considerations-jobs-act-offerings.

21. "New options include exemptions for crowdfunding, a more useful version of Regulation A, generally solicited Regulation D Rule 506 offerings and an easier path to registration of an initial public offering (IPO) for emerging growth companies." *Id.* An issuer also has the option to take out a loan. *See* Hazen, *supra* note 4, at 1744–49 (discussing other small issue exemptions from the 1933 Act registration requirements); Rick Newman, *3 Myths Contained in the JOBS Act*, U.S. NEWS & WORLD REP. (Apr. 5, 2012, 3:13 PM), http://www.usnews.com/news/blogs/rick-newman/2012/04/05/3-myths-contained-in-the-jobs-act (explaining that "most businesses would probably benefit more from better access to old-fashioned bank loans, which are still hard to get").

22. *Id.* § 201, 126 Stat. at 314.

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

24. It should be noted that on February 1, 2016, the Fair Investment Opportunities for Professional Experts Act, which revises the accredited investor definition, passed the House of Representatives. H.R. 2187, 114th Cong. (2d Sess. 2016). Although this is a suggestion that surfaces occasionally, the future of this bill is unclear. But still, any "change in the definition of accredited investors could materially reduce the pool of investors eligible to make such investments, potentially reducing the amount of capital raised by the issuers and the platforms that support them." Devin Thorpe, *SEC Mulls Changes to Accredited Investor Standards, 18 Crowdfunders React*, FORBES (July 15, 2014, 12:32 PM), http://www.forbes.com/sites/devin thorpe/2014/07/15/sec-mulls-changes-to-accredited-investor-standards-18-crowdfunders-react/#204784036489.

25. *See* § 201, 126 Stat. at 314–15.

26. *Id.* § 302(a).

27. For example, in its first iteration, Pebble Technology Corporation was unable to attract investors. Davin O'Dwyer, *Pebble Founder Eric Migicovsky Wears His Success Well*, THE IRISH TIMES (Nov. 12, 2015, 7:00 AM), http://www.irishtimes.com/business/technology/pebble-founder-eric-migicovsky-wears-his-success-well-1.2425597. Instead, the corporation turned to

company may choose to use crowdfunding as a way to raise the capital they desire. Conversely, if the company shows great returns and potential for growth but lacks much grass-roots support, the company might choose an offering using the Title II exemption because it is an attractive option to accredited investors.[28]

This Note examines Titles II and III of the JOBS Act and explores whether these new additions to securities regulations will meet their respective objectives. In Part I, this Note reviews selected laws and regulations surrounding capital formation via public and private offerings. Then, this Note introduces the JOBS Act, specifically focusing on Titles II (Rule 506(c)) and III (Crowdfunding). Part II discusses the significance of these specific sections of the JOBS Act. Part III narrows in on Title II and III of the JOBS Act, analyzing whether these new additions to securities regulations will result in Congress's intended goals. Ultimately, this note concludes that while Title II is already widely used, Title III is unlikely to receive significant use and certainly not to the extent that was expected.

Kickstarter and was incredibly successful in harnessing the power of the crowd. *See supra* note 3 and accompanying text.

28. Another possibility is for the hypothetical company to do both through a parallel offering. "Do a Regulation Crowdfunding offering for the unaccredited investors and at the same time a Title II offering, which allows for general solicitation of accredited investors and does not have the $1 million cap." Sherwood Neiss, *The SEC's New 685-Page Crowdfunding Rules: What You Need to Know*, VENTUREBEAT.COM (Nov. 2, 2015, 12:00 PM), http://venturebeat.com/2015/11/02/the-secs-new-685-page-crowdfunding-rules-what-you-need-to-know/.

I. SELECTED SECURITIES LAWS AND THE JUMPSTART OUR BUSINESS STARTUPS ACT

A. Securities Act of 1933 and the Securities Exchange Act of 1934

In response to issuers engaging in the fraudulent offering and sale of securities[29] that contributed to the Wall Street crash of 1929,[30] Congress enacted two pieces of legislation intended "to preserve and facilitate U.S. capital markets":[31] the Securities Act of 1933 (the "1933 Act" or "Securities Act")[32] and the Securities Exchange Act of 1934 (the "1934 Act" or "Exchange Act").[33] Primarily a disclosure statute,[34] the 1933 Act focuses on disclosures surrounding securities publicly distributed while balancing investor and public interests.[35]

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29. Statutorily speaking, a security is,

> [A]ny note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security[,]" or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1) (2012). Professor Hazen highlights the broad statutory meaning of security when he asks,

> What do the following have in common: scotch whiskey, self-improvement courses, cosmetics, earthworms, beavers, muskrats, rabbits, chinchillas, animal breeding programs, cattle embryos, fishing boats, vacuum cleaners, cemetery lots, coin operated telephones, master recording contracts, pooled litigation funds, and fruit trees? The answer is that they have all been considered securities . . . .

THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 1.6[1], at 38–39 (6th ed. 2009) (footnotes omitted). The Supreme Court has also waded into the discussion of a security. In *Reves v. Ernst & Young*, the Court focused less on "legal formalisms" and more on the nature of the instruments. 494 U.S. 56, 61 (1990).

30. Following the Wall Street crash of 1929, Congress investigated the factors that caused the economic catastrophe. *See* Claire Suddath, *Brief History of the Crash of 1929*, TIME (Oct. 29, 2008), http://content.time.com/time/nation/article/0,8599,1854569,00.html. These hearings exposed a variety of factors such as an absence of meaningful disclosures to inform investors; a lack of accountability from underwriters and brokers to their customers; high pressure, boiler-room sales tactics; insufficient market information; insider trading; market manipulation; and the lack of a federal cause of action for fraud with securities. *See generally* H.R. REP. NO. 73-85 (1933).

31. Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333, 363 (2006).

32. *See* HAZEN, *supra* note 29, § 1.2[3][A], at 19–20.

33. Securities Exchange Act of 1934 §§ 1–39, 15 U.S.C. §§ 78a–78pp (2012).

34. CHARLES J. JOHNSON, JR., JOSEPH MCLAUGHLIN & ERIC S. HAUETER, CORPORATE FINANCE AND THE SECURITIES LAWS § 1.01, at 1-6 (5th ed. Supp. 2016).

35. *See* HAZEN, *supra* note 29, § 1.2[3], at 19.

The 1933 Act was not designed to monitor whether or not an investment was sound.[36] Instead, the 1933 Act is akin to—if not directly stemming from—the well-known rule of *caveat emptor*, where the seller has a burden of telling the whole truth.[37] In effect, investors use the 1933 Act's required disclosures to make investment decisions.

The 1934 Act primarily pertains to the trading of securities. Additionally, the 1934 Act created the SEC, which enforces the 1933 Act as well as a variety of other federal securities laws.[38] Both the 1933 and 1934 Acts "form the foundation of securities regulation in the United States."[39] Together these "laws are conceived as advancing equity by punishing malefactors and benefiting victims."[40]

Most important to this note's discussion of capital formation is the 1933 Act.[41] Generally speaking, the Securities Act requires that companies disclose true information about securities at the time of issuance.[42] To achieve the disclosure objective, companies conducting a public offering must do the following: prepare, file, and distribute a disclosure document; limit certain communications during the offering period; lengthen the offering process; and assign federal liability for material misstatements or omissions and any other fraud in these transactions.[43] The Securities Act consists of four essential elements:

> (a) registration of securities and accompanying mandatory full disclosure in a registration statement filed with the [Commission], (b) SEC review during a "waiting period," at the end of which sales could

36. Hazen, *supra* note 4, at 1741.

37. *See* 77 CONG. REC. 937 (1933) (message from President Franklin D. Roosevelt) ("This proposal adds to the ancient rule of caveat emptor, the further doctrine, 'Let the seller also beware.' It puts the burden of telling the whole truth on the seller."); *see also* Elisabeth Keller & Gregory A. Gehlmann, Introductory Comment, *A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 338–39 (1988).

38. 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES LAW HANDBOOK § 1:1, at 3 (2016 ed. 2016); JOHN C. COFFEE, JR. & HILLARY A. SALE, SECURITIES REGULATION 56–57 (12th ed. 2012); *see generally* Securities Act of 1933 §§ 1–28, 15 U.S.C. §§ 77a–77aa (2012); Securities Exchange Act of 1934 §§ 1–39, 15 U.S.C. §§ 78a–78pp (2012); Investment Company Act of 1940 §§ 1–65, 15 U.S.C. §§ 80a-1 to 80a-64 (2012); Investment Advisors Act of 1940 §§ 201–24, 15 U.S.C. §§ 80b-1 to 80b-21 (2012); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2012).

39. *See* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.01, at 1-6.

40. *See* Cross & Prentice, *supra* note 31, at 365. The need for a thriving equity market is well known. *Id.* at 338 n.19.

41. 15 U.S.C. §§ 77a–77mm. The 1934 Act is still important and will be referenced in this note. After an offering is conducted, the 1934 Act "imposes periodic disclosure requirements on . . . companies that have gone public through a 1933 Act [offering]." HAZEN, *supra* note 29, § 2.0, at 66 (alteration in original).

42. *See* Cross & Prentice, *supra* note 31, at 363–64. The requirement that issuers disclose "true" information caused the 1933 Act to be referred to as the "Truth in Securities Act." HAZEN, *supra* note 29, § 1.2[3], at 18.

43. *See* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.02, at 1-9.

> commence, (c) mandatory delivery of a prospectus at or before the delivery of the security[,] and (d) civil liabilities for untrue statements and for certain omissions.[44]

These four elements serve to protect investors and the public from fraudulent securities.[45] By mandating that companies either comply with these disclosure requirements or face liability, the 1933 Act limits risk "by helping assure that investors and gatekeepers are sufficiently informed of the corporate situation and by providing a remedy to deter managerial opportunism."[46]

i. Non-Exempt Filings

a. 1933 Act Registration Requirements

When a company publicly offers securities, the 1933 Act requires the offer and sale to be registered with the Commission.[47] Registration is designed to ensure that the information necessary to make an informed investment decision is filed with the Commission and distributed to investors interested in the offering.[48] The 1933 Act also limits the type and manner in which the company makes offers for its securities, what the company and its representatives are allowed to write or say about the offering, and how the sale of its securities are effected.[49] In addition to the imposed limits, the 1933 Act requires the company to disclose certain information in its registration statement, unless an exemption applies.[50] However, if an applicable registration exemption exists under the 1933 Act, the requirements described above may not be compulsory.[51]

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44. *Id.* (alteration in original).

45. *See* HAZEN, *supra* note 29, § 1.2[3][A], at 19 ("The theory behind the federal regulatory framework is that investors are adequately protected if all relevant aspects of the securities being marketed are fully and fairly disclosed."); *see also* COFFEE & SALE, *supra* note 38, at 96 ("The Securities Act of 1933 has two basic objectives: (1) to provide investors with material financial and other information concerning new issues of securities offered for sale to the public; and (2) to prohibit fraudulent sales of securities.").

46. *See* Cross & Prentice, *supra* note 31, at 364.

47. *See* HAZEN, *supra* note 29, § 1.7, at 66–67 (discussing how "participants that are required to register under the Exchange Act are made subject to a variety of duties").

48. *See* BLOOMENTHAL & WOLFF, *supra* note 38, § 5:1, at 269.

49. *See* HAZEN, *supra* note 29, § 1.7, at 66–67 (listing the variety of duties that participants are subject to under the Act including, "capital and margin requirements, extensive reporting and recordkeeping, business conduct standards, disclosure duties, risk management obligation, and many other operational mandates").

50. The basic disclosure document required by the 1933 Act is the registration statement. *Id.* § 3.2, at 120. Generally, combinations of the following factors justify mandatory disclosures: (1) the protection of consumers; (2) the need for financial stability by minimizing systemic risk; (3) the investors' informational needs; (4) the lack of adequate incentives to disclose; (5) the allocative efficiency "to ensure the accuracy of securities prices"; (6) the need to mitigate "agency costs" problems; (7) the desire for "economic growth, innovation, and access to capital"; and (8) the desire to maintain a competitive market by decreasing the relative costs of capital. COFFEE & SALE, *supra* note 38, at 2–8.

51. Securities Act of 1933 § 7(a)(1), 15 U.S.C. § 77g(a)(1) (2012).

Section 5 of the 1933 Act is transactional and requires an issuer to register offers and sales of securities with the Commission and deliver a prospectus.[52] Exemptions to section 5 are "based on the nature of the security . . . , the nature of the transaction[,] . . . or the nature of the issuer."[53] When an issuer claims an exemption, that issuer must prove the availability of that exemption when filing.[54]

Because section 5 is a strict liability statute, during the "pre-filing period," it is generally unlawful for an issuer to make an offer to sell without having filed a registration statement.[55] A slight exemption from this rule, however, permits early negotiations "between the issuer and any underwriter" and between "underwriters who are or are to be in privity of contract with an issuer."[56]

After initially filing a registration statement with the Commission, but before the effective date of the registration statement, there is a "waiting period."[57] Section 8 of the 1933 Act provides that a registration statement becomes effective twenty days after filing except when the Commission accelerates the registration statement, issues a refusal order, or issues a stop order.[58] However, a registration statement is not effective until declared so by Commission staff.[59] Although the 1933 Act instructs that a registration statement becomes effective twenty days after filing, the SEC staff does not—rather, is often unable to—follow this timeline.[60] Instead, issuers regularly delay

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52. *See* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-23 to -24; COFFEE & SALE, *supra* note 38, at 96–97 (explaining that the overall purpose of Section 5 "is to require that new issues of securities offered . . . shall be registered with the commission, and that a prospectus (filed as a part of the registration statement) shall be furnished to the purchaser").

53. *See* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-23 (alteration in original).

54. *See id.*

55. 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, GOING PUBLIC AND THE PUBLIC CORPORATION § 1:41, at 1-72.22 to -72.24 (release 28, 12/2016 ed. 2016). Professor Louis Loss is responsible for the three-period registration-distribution process explanation: pre-filing, waiting, and post-effective periods. *Id.* § 1:37, at 1-72.6; *see also* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-30.

56. BLOOMENTHAL & WOLFF, *supra* note 55, § 1:51, at 1-72.50 to -72.51. The policy behind this exception stems from the challenging task of preparing the registration statement and prospectus. *See* BLOOMENTHAL & WOLFF, *supra* note 38, § 5:3, at 273. Preparing these documents requires great coordination between the employees, attorneys, accountants, and underwriters of a company. *See id.*

57. *See* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-30 to -31.

58. *See id.* § 1.06[C], at 1-31 to -32; COFFEE & SALE, *supra* note 38, at 234.

59. *See* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-30 to -31. During the review period, the SEC is not evaluating whether the investment will be good. *See Fast Answers: Registration Under the Securities Act of 1933*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/regis33.htm (last modified Sept. 2, 2011) [hereinafter *Registration Under the Securities Act of 1933*]. Rather, the SEC "may examine a company's registration statement to determine whether it complies with [the] disclosure requirements." *Id.*

60. JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-31 to -32; *see* COFFEE & SALE, *supra* note 38, at 234–35; *see also* HAZEN, *supra* note 29, § 2.2, at 74–76

the twenty-day period by filing a delaying amendment, "which prevents the registration statement from becoming effective until the company has responded to any SEC staff comments on the contents of the registration statement and is ready to price and sell its securities."[61]

During the waiting period, Commission staff review and comment on the registration statement.[62] The Commission's review of offering documents is done on a "selective basis."[63] The registration statement of a company conducting its initial public offering will, however, "almost always be selected for full review by the staff."[64] After its review, the Commission's staff will include any questions or suggestions regarding the registration statement in a comment letter to the issuer.[65]

Throughout the waiting period, which is generally a "significant period of time,"[66] it is illegal to affect a sale, but specific types of offers are allowed.[67] During the waiting period, an issuer may make an oral offer to sell, distribute a "Tombstone Advertisement,"[68] distribute a preliminary prospectus,[69] circulate a summary prospectus,[70] or disseminate a free writing prospectus.[71] These exemptions allow for interested investors to discover and understand more about the offering without the pressure of having to decide on the spot.[72] Even though the Commission allows a variety of offers, it is important to remember that it is unlawful to sell the security until the statement becomes effective.[73] After the

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(demonstrating the statute's timeline and explaining that "this informal give and take with the SEC will generally go beyond the twenty-day statutory period").

61. JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-31 to -32; *see also* COFFEE & SALE, *supra* note 38, at 234.

62. JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-30 to -32.

63. *Id.* § 3.06[A], at 3-90.

64. *Id.*

65. *Id.* § 3.06[B], at 3-93 to -94.

66. BLOOMENTHAL & WOLFF, *supra* note 38, § 16:13, at 1057.

67. *See* 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 2.4[2], at 262 (6th ed. 2009) ("With regard to offers to sell, there are essentially five types of permissible offers to sell that may be made during the waiting period: oral communications, identifying statements, qualifying preliminary prospectuses, certain summary prospectuses, and a 'free writing prospectus.'").

68. *See id.* § 2.4[2][B], at 264–65 (explaining that a tombstone advertisement can be used to solicit offers during the waiting period if there is a preliminary prospectus and contains the statutory language). "Tombstone ads may appear in newspapers or other hard print media, they may be mailed, and they may appear online." *Id.* § 2.4[2][B], at 264 (footnotes omitted).

69. *Id.* § 2.4[2][C], at 269 (discussing how a rule 430 prospectus "may contain substantially the same information as a full-blown section 10(a) statutory prospectus" and permits mention of the offering price).

70. *Id.* § 2.4[2][D], at 270. Rule 431 allows a reporting company registered under the 1934 Act to utilize a summary prospectus if the 1934 Act reports are current. *Id.*

71. *Id.* § 2.4[2][E], at 270–71.

72. BLOOMENTHAL & WOLFF, *supra* note 38, § 5:3, at 272.

73. HAZEN, *supra* note 67, § 2.4[1], at 258.

issuer addresses the concerns in the Commission's comment letters and files an amended registration statement, the offering becomes effective.[74]

b. 1934 Act Reporting Requirements

As described above, the 1933 Act imposed registration and prospectus delivery requirements for public offerings but "made no provision for continuous disclosure."[75] The registration and reporting provisions of the Exchange Act ensure that investors have access to adequate disclosure about publicly traded or otherwise public companies.[76] The Exchange Act disclosure regime applies to any company that has incurred a reporting obligation as a result of registered offerings under the Securities Act or has a class of securities registered under the Exchange Act that must be listed on an exchange.[77] Additionally, issuers with more than $10 million in total assets *and* 500 shareholders of record are required to register and report under the Exchange Act.[78] These types of companies are required to abide by the periodic disclosure system formed under several provisions of the Exchange Act.[79]

c. Regulation D: Exempted Offerings

Under the 1933 Act, any offering "must either be registered with the SEC or meet an exemption."[80] To rebut the initial presumption that an offering must be

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74. BLOOMENTHAL & WOLFF, *supra* note 38, § 5:3, at 272; *see* JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 1.06[C], at 1-31 to -32 (explaining that the registration does not become effective until the company responds to the SEC staff's comments).

75. *See* BLOOMENTHAL & WOLFF, *supra* note 38, § 12:1, at 759.

76. *See* 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 9.0, at 456–57 (6th ed. 2009).

77. Securities Act of 1934 § 15(d)(1), 15 U.S.C. § 78o(d)(1) (2012 & Supp. III 2015); 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 9:3, at 473–74 (7th ed., rev. vol. 2016).

78. Originally the number of shareholders was 500 or more. Securities Exchange Act of 1934 § 12(g)(1), 15 U.S.C. § 78*l*(g)(1) (2012) (requiring that companies comply with registration requirements when the company has at least 500 shareholders of record and more than ten million dollars in total assets). However, the JOBS Act amended this provision and "increase[d] the threshold from 500 to 2,000 shareholders of record but retain[ed] the lower 500-record-holder threshold with respect to investors who are not accredited investors." Hazen, *supra* note 4, at 1742–43 (alteration in original); *see* COFFEE & SALE, *supra* note 38, at 139 n.1; *see also* HAZEN, *supra* note 77, § 9:3, at 474–75.

79. Combined, sections 12 and 13 of the 1934 Act require "listed" or "reporting" companies to register and file "certain periodic reports to keep current the information supplied in the initial registration statement." COFFEE & SALE, *supra* note 38, at 550; *see also Fast Answers: The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/laws.shtml (last modified Oct. 1, 2013) [hereinafter *The Laws That Govern the Securities Industry*] ("The Act also empowers the SEC to require periodic reporting of information by companies with publicly traded securities.").

80. *Fast Answers: Regulation D Offerings*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/regd.htm (last modified Oct. 28, 2014) [hereinafter *Regulation D Offerings*]. It is

registered, the issuer must establish the exemption being relied upon.[81] Three sections of the 1933 Act provide statutory exemptions: sections 3, 4, and 28.[82] In the United States, most offerings rely on an exemption derived from these three sections—with "the overwhelming majority of exemptions [being] grounded in section 3 or 4 of the [1933] Act."[83] One reason for exempted transactions is "the efficacy of those exemptions."[84]

For the most part, section 3 of the 1933 Act generally exempts *securities*, while section 4 exempts *transactions*.[85] Another important difference between the exemptions in sections 3 and 4 involves the legal interpretation of each section.[86] Section 3 exemptions are "expressly designated as exempt securities," leaving little room for legal interpretation.[87] For example, the express language of section 3 exempts the securities of governments and banks from complying with the provisions of the 1933 Act.[88] In contrast, because section 4 developed through no-action letters, court decisions, and adjustments in regulations,[89] establishing a section 4 exemption relies entirely on the legal interpretations of these developments.[90]

Statutorily speaking, section 4 lists the following six types of exempted transactions:

> [1] nonpublic offerings by issuers, [2] transactions by persons other than issuers, underwriters and dealers, [3] unsolicited brokers' transactions, [4] certain dealer transactions occurring after the effective date, [5] transactions involving certain mortgage notes secured by real property, and [6] transactions up to five million dollars that are offered and sold only to "accredited investors."[91]

The most utilized exemption, and the one this note primarily considers, is section 4(a)(2). Under section 4(a)(2), the provisions of section 5 do not apply to "transactions by an issuer not involving any public offering."[92] Transactions

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also important to remember that the exemptions provided by the 1933 Act do not provide exemptions from anti-fraud provisions. HAZEN, *supra* note 67, § 4.1[2], at 438.

81. HAZEN, *supra* note 67, § 4.1[3], at 440–41.

82. Securities Act of 1933 §§ 3, 4, 28, 15 U.S.C. §§ 77c, 77d, 77z-3 (2012).

83. *See* HAZEN, *supra* note 67, § 4.1[1], at 437–38 (alteration in original).

84. 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, GOING PUBLIC AND THE PUBLIC CORPORATION § 4:6, at 4-21 (release 10, 12/2007 ed. 2007).

85. HAZEN, *supra* note 67, § 4.1[1], at 437–38. There is an exception to this general rule in section 3(a)(9) where the exemption is transactional. Securities Act of 1933 § 3(a)(9).

86. HAZEN, *supra* note 67, § 4.1[1], at 437–38.

87. *Id.* § 4.1[5], at 443.

88. Securities Act of 1933 § 3(a)(2)–(3); *see* Leonard Lane, *Securities Exemptions for Small Corporations*, 8 CLEV.-MARSHALL L. REV. 152, 153 (1959).

89. Barbara v. MarineMax, Inc., No. 12-CV-0368 (ARR)(RER), 2013 U.S. Dist. LEXIS 120286, at *30 (E.D.N.Y. Aug. 22, 2013).

90. *See* HAZEN, *supra* note 67, § 4.1[1], at 438.

91. *Id.* at 443 (footnotes omitted).

92. Securities Act of 1933 § 4(a)(2).

utilizing this exemption are often called "private placements."[93] When contrasted with public offerings, it is clear why private offerings are utilized more often—private offerings involve lower costs and reduced liabilities with less time commitments and fewer governmental approval requirements.[94]

Private offerings began as a "vague and imprecise concept."[95] However, this concept transformed into a clearly defined standard in 1982 when the SEC adopted Regulation D "to streamline the requirements applicable to private offerings and sales of securities."[96] Private placements generally do not have the same disclosure requirements as public offerings and "investors in private placements are generally on their own in obtaining the information they need to make an informed investment decision."[97]

"[D]esigned to simplify and clarify existing exemptions, to expand their availability, and to achieve uniformity between [f]ederal and state exemptions in order to facilitate capital formation consistent with the protection of investors,"[98] Regulation D "codifies the private placement safe harbor but also relies upon the [section] 3(b) small issue exemption."[99] It allows some issuers to "offer and sell their securities without having to register the securities with the SEC."[100] According to Professors John C. Coffee and Hillary A. Sale, Regulation D was the most commonly used method of capital formation in 2010.[101] Title II of the JOBS Act is almost guaranteed to increase Regulation D's popularity.[102]

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93. HAZEN, *supra* note 67, § 4.24[1], at 562–63.

94. COFFEE & SALE, *supra* note 38, at 328. Although private offerings do not have the same heightened levels of liability as public offerings, private placements are still subject to the anti-fraud provisions of the 1933 and 1934 Acts. *Id.* at 329. Additionally, brokers and underwriters who participate in these private placements are still regulated by the SEC and Financial Industry Regulatory Authority ("FINRA"). HAZEN, *supra* note 67, § 2.1[3], at 199.

95. COFFEE & SALE, *supra* note 38, at 330.

96. *Id.* at 351. However, this is not to suggest that the transformation was quick or easy. The statutory exemption was initially vague and required judicial interpretation. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 122–27 (1953) (interpreting, in the absence of clear guidance from the language of the registration exemption, the meaning of private offerings by focusing on the exemption's statutory purpose to protect investors from making uninformed decisions); Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900 (5th Cir. 1977) ("The term, 'private offering,' is not defined in the Securities Act of 1933. The scope of the [section] 4(2) private offering exemption must therefore be determined by reference to the legislative purposes of the Act.").

97. U.S. SEC. & EXCH. COMM'N, *Investor Bulletin: Private Placements Under Regulation D*, INVESTOR.GOV (Sept. 24, 2014), http://www.investor.gov/news-alerts/investor-bulletins/investor-bulletin-private-placements-under-regulation-d.

98. Revision of Certain Exemptions, Securities Act Release No. 6,389, 24 SEC Docket 1166 (Mar. 8, 1982) (alteration in original).

99. COFFEE & SALE, *supra* note 38, at 351 (alteration in original).

100. *Regulation D Offerings*, *supra* note 80.

101. COFFEE & SALE, *supra* note 38, at 351.

102. *See* discussion *infra* Section III.B (discussing whether Title II, by removing the ban on general solicitation, will convince investors to use the exemptions under Regulation D more often).

Regulation D consists of six rules, Rules 501–506, that establish three exemptions from public offering registration requirements.[103] Pursuant to these rules, an offering may be exempt under Regulation D depending on the type and number of offerees and the dollar amount of the offering.[104] Rules 501–503 define the terms and conditions for the exemptions established under Rules 504–506.[105] This note focuses on Rule 506.[106]

Originally, Rule 506 was a distinct exemption.[107] It permitted private placements to be made to an unlimited amount of "accredited investors," thereby potentially raising an unlimited amount of capital.[108] Individuals who invested through a Rule 506 private placement received "restricted securities."[109] However, the disadvantage of Rule 506 was the general solicitation ban.[110] "'General solicitation' includes advertisements published in newspapers and magazines, public websites, communications broadcasted over television and radio, and seminars where attendees have been invited by general solicitation or general advertising."[111] This disadvantage disappeared, to a degree, with the passage of the JOBS Act.[112]

B. The Jumpstart Our Business Startups Act

President Obama signed the Jumpstart our Business Startups Act into law on April 5, 2012.[113] The law—"aimed at helping small businesses and startups more easily raise capital by loosening various Securities and Exchange Commission regulations"[114]—moved through the House of Representatives and

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103. HAZEN, *supra* note 29, § 4.20[1], at 186; *see* BLOOMENTHAL & WOLFF, *supra* note 38, § 9:15, at 608.

104. *See* HAZEN, *supra* note 29, § 4.20[1], at 186.

105. *Id.*

106. Rules 504 and 505 pose fascinating questions but fall outside the scope of this article.

107. *See* CHARLES J. JOHNSON, JR., JOSEPH MCLAUGHLIN & ERIC S. HAUETER, CORPORATE FINANCE AND THE SECURITIES LAWS § 7.04[A], at 7-16 (5th ed. Supp. 2015).

108. JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 7.01, at 7-6.

109. *Fast Answers: Rule 506 of Regulation D*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/rule506.htm (last modified Oct. 6, 2014) [hereinafter *Rule 506 of Regulation D*]. "Restricted" securities are securities acquired in an unregistered, private sale from the issuing company or from an affiliate of the issuer. *Id.* They typically bear a restrictive legend clearly stating that you may not resell them in the public marketplace unless the sale is exempt from the SEC's registration requirements. *Id.*

110. JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 7.01, at 7-6.

111. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/info/smallbus/secg/general-solicitation-small-entity-compliance-guide.htm (last modified Sept. 20, 2013) [hereinafter *Eliminating the Prohibition*].

112. *See* discussion *infra* Section I.B.1 (discussing creation of the two-track system for private offerings: one track with general solicitation via rule 506(c) and another without general solicitation via rule 506(b)).

113. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

114. Kim, *supra* note 16.

the Senate with strong bipartisan support and passed by an overwhelming 380–41 vote in the House and 73–26 vote in the Senate.[115] Although the JOBS Act received strong bipartisan support and was approved by majorities in both chambers of Congress, skeptics still criticized the law. For example, after the House of Representatives approved the law, SEC Commissioner Luis A. Aguilar vocalized concerns that the law had the potential to hurt investors "with little to no corresponding benefit."[116] Similarly, Professor Thomas L. Hazen cautioned that "any exemption applicable to crowdfunding should be conditioned on mandatory disclosures."[117]

Although the JOBS Act was generally aimed at easing regulations for companies looking to go public, the law was also created to "reduce barriers to capital formation, particularly for smaller companies."[118] This Note focuses on Titles II (Access to Capital for Job Creators) and III (Crowdfunding), which concern the JOBS Act's edicts to lift the general solicitation ban for certain offerings and to allow companies to offer and sell securities through the crowd.

1. Title II: Amending Rule 506 of Regulation D

On July 10, 2013, the Commission adopted rules implementing Title II of the JOBS Act lifting the ban on general solicitation or general advertising.[119] As explained above, Rule 506 of Regulation D provides issuers a safe harbor.[120] Issuers making a private offering under Rule 506 are able to raise an unlimited amount of capital.[121] Title II amends Rule 506 to "permit[] an issuer to engage in general solicitation or general advertising in offering and selling securities pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors."[122] Two distinct exemptions under Rule 506 emerged from the enactment of the JOBS Act.

a. Rule 506(b)

Rule 506(b) ensures the availability of the section 4(a)(2) exemption if a company satisfies five standards.[123] These standards are as follows: (1) the

115. *Id.*

116. Public Statement by Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Investor Protection Is Needed for True Capital Formation: Views on the JOBS Act (Mar. 16, 2012), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171490120. Commissioner Agular separates the singular act of raising capital from the much broader concept of capital formation. *Id.*

117. Hazen, *supra* note 4, at 1763.

118. *Eliminating the Prohibition*, *supra* note 111.

119. *Id.*

120. *See supra* text accompanying notes 98–104.

121. *See supra* text accompanying notes 107–12.

122. Eliminating the Prohibition Against General Solicitation and General Advertising, 78 Fed. Reg. 44,771, 44,771 (July 24, 2013) (to be codified at 17 C.F.R. pts. 230, 239, 242).

123. *Rule 506 of Regulation D*, *supra* note 109.

company must not generally solicit or advertise the offering;[124] (2) the company may sell its securities to thirty-five non-accredited investors[125] and an indefinite amount of accredited investors;[126] (3) the company must provide the non-accredited investors with the same information it provides to accredited investors as well as standard disclosure documents;[127] (4) the company must answer questions from prospective investors; and (5) an independent certified public accountant must have certified the companies' financial statements.[128] If these requirements are satisfied, the offers and sales by the company are exempt from registration under section 4(a)(2) of the 1933 Act.[129] However, the company is required to file a "Form D"[130] statement with the Commission.[131]

b. Rule 506(c)

Through the JOBS Act, Congress mandated that the Commission remove the ban on general solicitation and general advertising.[132] In response to this mandate, the Commission created Rule 506(c). Rule 506(c)'s safe harbor provision permits an issuer to rely on section 4(a)(2) to "offer securities through means of general solicitation"[133] if the following three conditions are satisfied: "[1] all terms and conditions of Rule 501 and Rules 502(a) and 502(d) must be satisfied; [2] all purchasers of securities must be accredited investors; and [3] the issuer must take reasonable steps to verify that the purchasers of the securities are accredited investors."[134]

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124. 17 C.F.R. § 230.502(c) (2016).

125. *Id.* § 230.506(b)(2); *see also Rule 506 of Regulation D*, *supra* note 109 (explaining that "all non-accredited investors, either alone or with a purchaser representative, must be sophisticated—that is, they must have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment").

126. *See* 17 C.F.R. § 230.501(e) (stating that accredited investors are not included for purposes of calculating the number of purchasers in a transaction).

127. *Id.* § 230.502(b) (listing financial and non-financial statements as information that must be furnished to non-accredited investors and specifying certain types of information that must be disclosed if an issuer is subject to certain provisions of the Exchange Act).

128. *Id.* §§ 230.502(b)(2)(i)(B)(2)–(3), .502(b)(2)(v).

129. *Id.* § 230.506(b)(1).

130. *Rule 506 of Regulation D*, *supra* note 109 ("Form D is a brief notice that includes the names and addresses of the company's promoters, executive officers and directors, and some details about the offering, but contains little other information about the company.").

131. 17 C.F.R. § 230.502(c)(2).

132. JOHNSON, MCLAUGHLIN & HAUETER, *supra* note 34, § 7.01, at 7-6.

133. Eliminating the Prohibition Against General Solicitation and General Advertising, 78 Fed. Reg. 44,771, 44,776 (July 24, 2013) (to be codified at 17 C.F.R. pts. 230, 239, 242).

134. *Id.* (alteration in original) (footnotes omitted).

2. *Title III: Crowdfunding*

Title III of the JOBS Act "amends [s]ection 4 of the Securities Act to create a new exemption for offerings of 'crowdfunded' securities."[135] The JOBS Act mandated that the Commission proscribe rules allowing for the offer and sale of crowdfunded securities.[136] On October 30, 2015, the Commission adopted "Regulation Crowdfunding" as the final rules for Title III.[137] Now, under the new section 4(a)(6) registration exemption, companies are permitted to raise up to $1 million through crowdfunding intermediaries.[138]

To receive the benefit of the section 4(a)(6) exemption, eligible issuers must comply with several requirements.[139] Most importantly, an issuer is limited in the amount of capital it can raise and must conduct the offering through a registered intermediary.[140] Another important requirement is the investment limitations for individual investors.[141]

a. *Dollar Amount of the Securities that May Be Sold*

The first section 4(a)(6) requirement limits the total amount of securities that may be sold.[142] The JOBS Act states, "the aggregate amount of securities sold to all investors by the issuer in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) during the [twelve-month] period preceding the date of such offer or sale, including the securities offered in such transaction, shall not exceed $1 million."[143] The Commission determined that this "approach" to limit offerings to $1 million follows the JOBS Act mandate and would "provide for a meaningful addition to the existing capital formation options for smaller companies while maintaining important investor protections."[144] Of the comments received by the Commission regarding this requirement, the SEC cited four letters in support of the $1 million limit and thirty letters against it.[145] Opponents to this requirement commented that the ratio of transaction costs to

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135. *Jumpstart Our Business Startups Act: Frequently Asked Questions About Crowdfunding Intermediaries*, U.S. SEC. & EXCH. COMM'N (May 7, 2012), https://www.sec.gov/divisions/marketreg/tmjobsact-crowdfundingintermediariesfaq.htm.

136. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§ 302–04, 126 Stat. 306, 315–22 (2012) (listing miscellaneous provisions requiring parties to comply with rules established by the Commission).

137. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Permit Crowdfunding (Oct. 30, 2015), http://www.sec.gov/news/pressrelease/2015-249.html.

138. *See* Jumpstart Our Business Startups Act § 302(a).

139. Crowdfunding, 80 Fed. Reg. 71,388, 71,390 (Nov. 16, 2015) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 268, 274).

140. *Id.* at 71,389.

141. *Id.*

142. *Id.* at 71,391.

143. *Id.* at 71,537 (alteration in original).

144. *Id.* at 71,391.

145. *Id.* at 71,391 nn.20–21.

the potential amount raised was too high.[146] In other words, the limit should be more than $1 million.

b. Dollar Amount that an Individual May Invest in a Twelve-Month Period

The second requirement sets investment limits for individual investors who make up the "crowd."[147] Specifically, the requirement reads:

> (2) The aggregate amount of securities sold to any investor across all issuers in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) during the [twelve-month] period preceding the date of such transaction, including the securities sold to such investor in such transaction, shall not exceed:
>
> (i) The greater of $2,000 or [five] percent of the lesser of the investor's annual income or net worth if either the investor's annual income or net worth is less than $100,000; or
>
> (ii) [Ten] percent of the lesser of the investor's annual income or net worth, not to exceed an amount sold of $100,000, if both the investor's annual income and net worth are equal to or more than $100,000[.][148]

Commenters were split on this requirement. Many "supported some type of investment limit,"[149] while others suggested that the Commission increase the aggregate amount an investor could invest during the twelve-month period.[150] The Commission concluded that the expected failure rate of companies relying on the crowdfunding exemption warranted concerns about investors "incurring unaffordable losses." [151] Ultimately, the Commission chose to impose investment limits to "minimiz[e] an investor's exposure to risk in a crowdfunding transaction,"[152] while acknowledging that the limits "could place constraints on capital formation."[153]

c. Transactions Conducted Through a Registered Intermediary

The third crowdfunding condition requires transactions to be effected through a registered intermediary, either as a "broker-dealer" or as a "funding portal."[154]

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146. Letter from Mathew Delloros, Chief Exec. Officer, WealthForge Holdings, Inc., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Feb. 3, 2014), https://www.sec.gov/comments/s7-09-13/s70913-246.pdf.

147. Crowdfunding, 80 Fed. Reg. at 71,537.

148. *Id.* (alteration in original).

149. *Id.* at 71,393.

150. *Id.* (explaining that many commenters "generally opposed any type of investment limit," while "[a] number of commenters recommended changes to the proposed limits").

151. *Id.* at 71,394.

152. *Id.* (alteration in original).

153. *Id.*

154. *Id.* at 71,507.

This section reads:

> (3) The transaction is conducted through an intermediary that complies with the requirements in section 4A(a) of the Securities Act (15 U.S.C. 77d-1(a)) and the related requirements in this part, and the transaction is conducted exclusively through the intermediary's platform; and
>
> . . . .
>
> (4) The issuer complies with the requirements in section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) and the related requirements in this part; *provided, however*, that the failure to comply with §§ 227.202, 227.203(a)(3) and 227.203(b) shall not prevent an issuer from relying on the exemption provided by section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)).[155]

II. WOULD SIMPLER REGISTRATION AND REPORTING REQUIREMENTS MAKE LIFE EASIER FOR SMALL BUSINESSES?

As President Barack Obama explained, "no matter how good their ideas are, if an entrepreneur can't get a loan from a bank or backing from investors, it's almost impossible to get their businesses off the ground."[156] Between 2004 and 2007, the average annual number of initial public offerings (IPOs) was 186.[157] Although the number of companies that held IPOs increased to 304 in 2014, only 196 companies held IPOs in 2015.[158] Still, these figures are a far cry from the 845 IPOs held in 1996.[159] Pointing to an exact reason for the decrease in the number of IPOs is difficult. The lack of any IPOs in January 2016—the first time since the markets were silent following the September 11 attacks—could have been due to trouble in the markets at that time.[160] Nonetheless, private offerings might have been responsible for the decrease.[161] Or, it could have been a combination of both.

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155. *Id.* at 71,537.

156. Obama, *supra* note 14.

157. WILMERHALE, 2015 IPO REPORT 2 (2015), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2015-WilmerHale-IPO-Report.pdf.

158. DEREK THOMSON, CHRIS BENKO & STEPHANIE HOGUE, PRICEWATERHOUSECOOPERS, 2016 ANNUAL U.S. CAPITAL MARKETS WATCH 13 (2017), http://www.pwc.com/us/en/deals/publications/assets/pwc-2016-annual-capital-markets-watch.pdf.

159. WILMERHALE , *supra* note 157, at 2.

160. Matt Egan, *The Silence in the IPO Market Is Deafening*, CNN MONEY (Feb. 2, 2016, 12:41 PM), http://money.cnn.com/2016/02/02/investing/ipo-stock-market-none-2016/; *see* Tim Mullaney, *Market Turmoil Taking Toll on Once-Invincible IPO Market*, CNBC (Oct. 12, 2015, 8:10 AM), http://www.cnbc.com/2015/10/12/market-turmoil-taking-toll-on-once-invincible-ipo-market.html.

161. *See* Paresh Dave, *Nosedive in Number of IPOs This Year Reflects "Cold Market"—But Is It Thawing?*, L.A. TIMES (Oct. 7, 2015, 1:27 PM), http://www.latimes.com/business/la-fi-1008-q4-ipo-outlook-20151006-story.html; *see also* ERNST & YOUNG, EY GLOBAL IPO TRENDS 2, 4 (2015), http://www.ey.com/Publication/vwLUAssets/EY-global-ipo-trends-2015-q2/$FILE/EY-

Another possible explanation for the decrease in IPOs could be due to high regulatory costs. Estimates show the regulatory compliance cost of an IPO is $2.5 million.[162] After a public offering, the company can be expected to pay approximately $1.5 million per year in ongoing compliance costs to ensure regulatory compliance with the 1934 Act.[163] These costs have grown so large that instead of new private companies going public, the general trend has reversed and some public companies are returning to their status as a private company.[164]

Responding to the declining number of IPOs and barriers to capital for small businesses, Congress passed the JOBS Act to afford small business more access to capital and alleviate the traditional regulatory hurdles for investors.[165] The JOBS Act "amounts to the most sweeping change to the regulation of capital-raising by private companies—and many of those looking to go public—since the post-Enron Sarbanes-Oxley Act a decade ago."[166]

President Obama outlined the issue of barriers to capital, such as regulatory compliance costs, when he signed the JOBS Act into law.[167] To address the lack of capital for small businesses or entrepreneurs and the prohibitive reporting costs, President Obama "called on Congress to remove a number of barriers that were preventing aspiring entrepreneurs from getting funding."[168] However, the JOBS Act continued the long-standing investor-protection objective through "rigorous oversight."[169]

Before the JOBS Act passed, the cost of raising capital for certain small and medium-sized companies was prohibitively high.[170] The changes enacted by the

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global-ipo-trends-2015-q2.pdf ("IPOs are currently just one choice among a widening range of options to create and realize value.").

162. BURTON, *supra* note 19, at 2.

163. *See id.* at 2 n.10.

164. *Id.* at 4–5 ("In effect, there is a $1.5 million toll charge for being a public company."). For a more thorough discussion regarding the phenomenon of companies returning to their status as a private company and its implications, a topic outside the scope of this article, see Jesse M. Fried, *Firms Gone Dark*, 76 U. CHI. L. REV. 135 (2009).

165. Jose Pagliery, *JOBS Act Opens Fundraising Doors for Small Firms*, CNN MONEY (Apr. 6, 2012, 10:20 AM), http://money.cnn.com/2012/04/05/smallbusiness/jobs-act/; *see also* Richard Waters, *Effects of the Jobs Act Are Hard to Predict*, FINANCIAL TIMES (Apr. 4, 2012), https://www.ft.com/content/c8c09d6c-7e65-11e1-b20a-00144feab49a ("With one stroke of the president's pen, the drought in tech IPOs that followed the dotcom bust of the late-1990s could come to an end.").

166. Waters, *supra* note 165.

167. Obama, *supra* note 14.

168. *Id.*

169. *Id.*

170. BURTON, *supra* note 19, at 1. Many of the SEC regulations "impose very high costs on companies seeking to access the public securities markets." *Id.*; *see also* DEREK THOMSON, PRICEWATERHOUSECOOPERS, CONSIDERING AN IPO? AN INSIGHT INTO THE COSTS POST-JOBS ACT 15 (2015), http://www.pwc.com/us/en/deals/assets/pwc-ipo-costs-considerations-pwc-

JOBS Act were "designed to facilitate smaller companies' ability to access the capital markets."[171] Ultimately, the question remains whether the JOBS Act will in fact, as Senator Pat Toomey stated, "make it easier for small and growing companies to raise the capital they need to keep growing and to hire more workers."[172]

III. ANALYZING THE JOBS ACT'S ATTEMPT TO SIMPLIFY REQUIREMENTS AND PROMOTE JOB GROWTH

In response to these high costs surrounding capital formation, Titles II and III of the JOBS Act attempt to resolve the lack of capital formation faced by smaller-sized businesses.[173] However, whether the legislation will be successful remains to be determined.

A. Title III of the JOBS Act: Boom or Bust?

Trying to capitalize on the recent success and popularity of crowdfunding, Title III attempts to lower barriers to capital by providing small to medium-sized businesses with the ability to raise funds through "low dollar offerings of securities, featuring relatively low dollar investments by the 'crowd.'"[174] Despite the excitement surrounding crowdfunding, Congress exercised caution in its final iteration of Title III by including purposeful limitations.[175] In passing Regulation Crowdfunding, the Commission further balanced the need for investor protection with low barriers to entry for companies seeking to raise capital. However noble Congress's and the Commission's intentions, the burdensome disclosure requirements—even when scaled back—weaken the viability of this exemption for small businesses.[176]

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deals.pdf ("In a recent PwC survey of newly public companies, approximately [sixty] percent of respondents spent more than $1 million annually on recurring costs as a result of being public.").

171. U.S. SEC. & EXCH. COMM'N, 2014 SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION 12 (2015), https://www.sec.gov/info/smallbus/gbfor33.pdf.

172. Edward Wyatt, *Senate Passes Start-Ups Bill, with Amendments*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/business/senate-passes-start-ups-bill-with-amendments.html; *see also* Steve Case, Commentary, *Hey, Washington, the JOBS Act You Passed Is Working*, WALL STREET J. (Apr. 2, 2014, 7:13 PM) http://www.wsj.com/articles/SB10001424052702304418404579469312174499556 ("More initial public offerings mean more jobs, more quickly.").

173. BURTON, *supra* note 19, at 6.

174. Crowdfunding, 80 Fed. Reg. 71,388, 71,388 (Nov. 16, 2015) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 268, 274).

175. *Id.* at 71,389–90.

176. *See* ROBERT B. ROBBINS, PILLSBURY WINTHROP SHAW PITTMAN, PRACTICAL IMPLICATIONS OF THE JOBS ACT CHANGES TO PRIVATE PLACEMENTS: RULE 506(C), CROWDFUNDING, AND REG A+ 4–5 (2014), https://www.pillsburylaw.com/siteFiles/Publications/WhitePaperOct2014CorporateandSecuritiesPracticalImplicationsoftheJOBSActChanges.pdf ("Compliance with the disclosure requirements is likely to impose the most significant costs on a JOBS Act crowdfunding offering."). *See also* Christine Hurt, *Pricing Disintermediation: Crowdfunding and Online Auction IPOs*, 2015 U. ILL. L. REV. 217, 251–56 (2015) (listing several

1. Investment Limits Hinder Feasibility

Two groups are affected by investment limits: issuers and members of the crowd. Both are constrained by the crowdfunding rules in Title III.[177] These limits could seriously restrict the extent to which issuers decide to use Title III's crowdfunding exemption. For example, consider the company from the introduction—a small business or start-up looking to raise capital.[178] Although this company would be interested in using crowdfunding, Title III's restrictions would unfortunately hurt this small business.

a. Issuers

Under the crowdfunding rules in Title III of the JOBS Act, issuers may raise a maximum amount of $1 million during a one-year period.[179] However, the onerous costs of time and resources required to raise capital leave corporations hard pressed to justify the limited benefits under Title III. Moreover, companies might also find the $1 million limit too small. Ultimately, this surely will limit the types of offerings provided to small businesses.[180] The small business from earlier might need more than $1 million to buy the raw materials needed for manufacturing or to purchase property. With this restriction, the small business cannot use crowdfunding.

b. Members of the Crowd

Overlooking the $1 million limit, the small business tries to raise capital using crowdfunding. Fortunately for the small business, the founders know six of the original investors in Facebook. These investors love the small business's plan. Surely, the small business will be able to raise the $1 million from these six investors. Unfortunately, the business will not be successful.

Under the crowdfunding rules in Title III of the JOBS Act, individual investors with an annual income or net worth less than $100,000 are permitted to invest the greater of $2,000 or five percent of their annual income or net worth—whichever is lower.[181] If the investor's annual income and net worth

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reasons why "the outlook for equity crowdfunding looks doubtful"); Robb Mandelbaum, *What the Proposed Crowdfunding Rules Could Cost Businesses*, N.Y. TIMES (Nov. 14, 2013, 7:00 AM), http://boss.blogs.nytimes.com/2013/11/14/what-the-proposed-crowdfunding-rules-could-cost-businesses/ ("Though these requirements are, in fact, much less onerous than those faced by public companies, they will no doubt make crowdfunding a more expensive way to raise capital than some people may have imagined."); THOMSON, *supra* note 170, at 3 (explaining that the cost of an IPO depends on "both the costs of going public and being public" and that "[e]ven though the intention of the JOBS Act was to make accessing the capital markets more cost-effective, an IPO still has significant costs").

177. Crowdfunding, 80 Fed. Reg. at 71,388–89.

178. *See, e.g.*, Brown, *supra* note 1.

179. Crowdfunding, 80 Fed. Reg. at 71,389.

180. Robert J. Shiller, *Finding a Reliable Source*, WORLD FINANCE (Jan. 13, 2016), http://www.worldfinance.com/comment/finding-a-reliable-source.

181. Crowdfunding, 80 Fed. Reg. at 71,389.

are equal to or more than $100,000 then that investor is allowed to invest ten percent of his annual income or net worth—again, whichever is lower.[182] Neither of these investor classes are allowed to purchase more than $100,000 worth of securities.[183]

As Commissioner Piwowar explained, incredibly wealthy individuals like Bill Gates or Warren Buffet would be "limited to investing no more than $100,000 during any [twelve-month] period in all crowdfunding investments."[184] This sort of restriction seems unwarranted because federal securities laws focus on investor protection and consistently allow exceptions for high-net-worth individuals. Accordingly, this provision has the potential to influence issuers to use other types of offerings when raising capital where they might not be restricted in their offering efforts.

2. Crowdfunding Is Likely a Bust

The limited capital that a company can raise under Regulation Crowdfunding will hinder the success of the exemption. Under Regulation Crowdfunding, small businesses raising capital will still be required to follow disclosure and ongoing reporting requirements.[185] This means that many of the registration and reporting costs associated with the regulatory burdens of the 1933 and 1934 Acts are still present.[186] Ultimately, Regulation Crowdfunding makes it "unreasonably burdensome" for small businesses looking to raise capital.[187]

B. Title II of the JOBS Act: The Real Crowdfunding?

Although Regulation Crowdfunding attempts to lower barriers for companies to access capital, Title II of the JOBS Act provides private companies another option for capital formation.[188] It does this by eliminating the general

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182. *Id.*

183. *Id.*

184. Public Statement by Michael S. Piwowar, Comm'r, U.S. Sec. & Exch. Comm'n, Dissenting Statement at Open Meeting on Crowdfunding and Small Business Capital Formation (Oct. 30, 2015) (alteration in original), http://www.sec.gov/news/statement/piwowar-regulation-crowdfunding-147-504.html.

185. Crowdfunding, 80 Fed. Reg. at 71,397.

186. The required audit and annual filings almost certainly will "undermine the law's intent, potentially deterring entrepreneurs who might have thought about crowdfunding." J.D. Harrison, *New Crowdfunding Rules: The Good and Bad News for Entrepreneurs and Investors*, WASH. POST (Oct. 29, 2013), https://www.washingtonpost.com/business/on-small-business/new-crowdfunding-rules-the-good-and-bad-news-for-entrepreneurs-and-investors/2013/10/28/c634045e-3fe7-11e3-9c8b-e8deeb3c755b_story.html; *see also* Stacy Cowley, *S.E.C. Gives Small Investors Access to Equity Crowdfunding*, N.Y. TIMES (Oct. 30, 2015), http://www.nytimes.com/2015/10/31/business/dealbook/sec-gives-small-investors-access-to-equity-crowdfunding.html ("[B]ut some first-time issuers and those seeking less than $500,000 will not be required to have the statements audited—an important concession for those concerned about the cost of providing audited financials.").

187. ROBBINS, *supra* note 176, at 5.

188. *Id.* at 3–4.

solicitation or general advertising ban for private offerings relying on Rule 506(c).[189] As is the case with Rule 506(b), which is the most widely used exemption of offerings, Rule 506(c) has the potential for widespread use.[190] Without any limit on the amount that can be raised, and the ability to generally solicit, offerors may flock to this exemption.[191]

Unlike companies looking to raise capital under Regulation Crowdfunding, a small business that raises capital through Rule 506(c) is not burdened by an annual disclosure requirement.[192] Furthermore, the ability to stay private longer because of the heightened shareholder number[193] will allow companies like Facebook—that are forced to publicly file under the 1934 Act due to the high number of shareholders—to stay private longer.[194]

Ultimately, it remains to be seen if Rule 506(c) will entice companies to conduct offerings using general solicitation and general advertising.[195] More likely, however, companies that would have used a different rule under Regulation D might now use Rule 506(c). In this scenario, Title II of the JOBS Act is not necessarily growing new business, but rather, is giving businesses another way to raise capital.

IV. CONCLUSION

Although the JOBS Act was signed into law in early 2012, it is still too early to tell whether Titles II and III of the JOBS Act will be a success, failure, or something in between. With Titles II and III of the JOBS Act finally in play, the hypothetical company in the introduction of this Note now has two additional ways to raise capital,[196] each with its own advantages and disadvantages. Ultimately, the variety of ways a company can raise capital has expanded in a meaningful way after the full enactment of the JOBS Act.

When President Obama signed the JOBS Act into law, he prophesized a surge in investing under these Titles. Unfortunately, this may not be the case. At least for Regulation Crowdfunding, as seen with the hypothetical company, the costs of compliance and limits on capital could continue to pose barriers for small to mid-sized companies. Although Rule 506(c) will be utilized, the statute's intended demographic of companies is unlikely to be affected.

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189. *Id.* at 2.

190. Small businesses may be more eager to use 506(c) because accredited investors "are 'where the money is.'" *Id.* at 5.

191. *See id.* at 3–5 ("For these reasons, rule 506(c) is likely to be the 'real' crowdfunding exemption, as well as the dominant exemption for most other unregistered offerings.").

192. *Id.* at 3.

193. *See supra* notes 80–81 and accompanying text.

194. Felix Salmon, *Facebook: The Smart Money Exits*, REUTERS (May 16, 2012), http://blogs.reuters.com/felix-salmon/2012/05/16/facebook-the-smart-money-exits/.

195. Coincidently, while the JOBS Act makes capital formation through an IPO easier, it also makes it easier for currently private companies to continue to stay private. Waters, *supra* note 165.

196. *See* ROBBINS, *supra* note 176, at 2.