# FIXING THE JOBS ACT AND INVITING THE TOKENIZED FUTURE, THE NEED FOR CONGRESSIONAL ACTION

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## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>23</td>
</tr>
<tr>
<td>I. The Current Private Markets</td>
<td>24</td>
</tr>
<tr>
<td>II. Disparities in the Reg D-centric paradigm</td>
<td>26</td>
</tr>
<tr>
<td>A. Geographic Disparities</td>
<td>26</td>
</tr>
<tr>
<td>B. Demographic Disparities</td>
<td>27</td>
</tr>
<tr>
<td>III. Congress Enacted the JOBS Act to Create Opportunities Beyond Reg D</td>
<td>28</td>
</tr>
<tr>
<td>A. Regulation D 506(c)</td>
<td>29</td>
</tr>
<tr>
<td>B. Regulation A+</td>
<td>30</td>
</tr>
<tr>
<td>C. Regulation Crowdfunding</td>
<td>33</td>
</tr>
<tr>
<td>IV. The JOBS Act Failed to Create Expected Opportunities</td>
<td>35</td>
</tr>
<tr>
<td>A. Regulation D 506(c) so far</td>
<td>36</td>
</tr>
<tr>
<td>B. Regulation A+ so far</td>
<td>37</td>
</tr>
<tr>
<td>C. Regulation Crowdfunding so far</td>
<td>38</td>
</tr>
<tr>
<td>D. Critics contend JOBS Act disappointments mean its titles should be scrapped or curtailed</td>
<td>39</td>
</tr>
<tr>
<td>V. The JOBS Act Failure is a Failure of the Administrative State</td>
<td>40</td>
</tr>
<tr>
<td>A. SEC culture contributed to JOBS Act failures</td>
<td>40</td>
</tr>
<tr>
<td>B. Overemphasis on Investor Protection Hurts Entrepreneurs and Curtails Innovation</td>
<td>42</td>
</tr>
<tr>
<td>C. SEC JOBS Act Hostility was Open and Straightforward</td>
<td>45</td>
</tr>
<tr>
<td>D. Hostility to JOBS Act Innovations has Far-Reaching Consequences for the Future U.S. Economy</td>
<td>46</td>
</tr>
<tr>
<td>VI. The Final Rules will not Revive the JOBS Act or Encourage the Future Token Economy</td>
<td>48</td>
</tr>
<tr>
<td>A. Final Rules for Regulation D 506(c)</td>
<td>50</td>
</tr>
<tr>
<td>B. Final Rules for Regulation A+</td>
<td>50</td>
</tr>
<tr>
<td>C. Final Rules for Regulation Crowdfunding</td>
<td>51</td>
</tr>
<tr>
<td>VII. Fixing the JOBS Act</td>
<td>53</td>
</tr>
<tr>
<td>A. Lessons from Overseas</td>
<td>53</td>
</tr>
<tr>
<td>B. Regulators must Heed Private Exemption Costs</td>
<td>54</td>
</tr>
<tr>
<td>C. Where Congress Should Act</td>
<td>55</td>
</tr>
<tr>
<td>D. Where the SEC Should Act</td>
<td>61</td>
</tr>
<tr>
<td>Conclusion</td>
<td>62</td>
</tr>
</tbody>
</table>
INTRODUCTION

On November 2, 2020 the Securities and Exchange Commission (Commission or SEC) published its much anticipated private-offering framework revisions (Final Rules).1 A June 2019 Concept Release2 and March 2020 proposals3 requested comment and suggested ways the Commission could ease burdens on companies (issuers) seeking capital and expand private-market investor opportunities.4 Commenters offered numerous ways to smooth the discordant, confusing, and often exclusionary exemption rules.5 To its credit, the Commission recognizes the current disharmony and its negative impacts on certain entrepreneurs and small businesses, particularly related to geography and demography. Unfortunately, its fixes fall well short.

Congress tried to address existing inequities nearly a decade ago with the Jumpstart Our Business Startups Act of 2012 (JOBS Act).6 The JOBS Act created and expanded registration exemptions to open private investment to all Americans and give smaller issuers more capital options. For reasons described below, the JOBS Act failed that goal. Indeed, the Proposed and Final Rules devote much attention to JOBS Act underuse. Regrettably, the Commission’s revisions expose its worst instincts and highlight the need for further Congressional action. But a JOBS Act 2.0 will repeat past failure without a sober view of Commission priorities and culture.

To be sure, the Final Rules enhance the current framework.7 But progress must be measured against opportunity costs: time to enactment, conditions placed on them, and ignored alternatives that would have forthrightly bolstered capital formation and protected investors. Despite measured progress, the Commission hamstrings job creators through archaic rules, some used nowhere else. Without statutory direction the Commission will keep impeding American entrepreneurs’ capital needs in an increasingly competitive geo-environment. Commission-induced hardships will grow starker as tokenized systems evolve that ignore national borders.


4 This article analyzes “private” issuers, i.e. those that have not registered their securities pursuant to the Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§77a-77aa (2018)), and are not subject to reporting obligations under the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78aa (2018)).


7 The Final Rules become effective 60 days after publication in the Federal Register.
much less state-based sub jurisdictions. Particularly in exempting state-level review, offer regulation, and secondary trading, the Commission burdens issuers with restrictions and ambiguities that waste resources and invite crippling investigations.

While public-market advocates insist only more Commission-created barriers would protect investors and capital by forcing registration and thereby channeling issuers into the public markets, evidence suggests a better way. A lighter regulatory touch which encourages private ordering while maintaining fairness for entrepreneurs and investors would produce superior results at less cost. A second JOBS Act could accomplish this.

This article reviews the private-market milieu including what makes it incredibly successful but also exclusionary for most of the five million U.S. small businesses. It examines—including through market-actor perspectives—how SEC hostility thwarted the JOBS Act via empirically questionable investor protections. It also proposes statutory solutions to push American capital raising into the 21st century. These bright-line proposals abjure overreliance on SEC staff or state-equivalent interpretation and “facts and circumstances” analysis. These solutions may jar lawmakers accustomed to ceding discretion to agencies with immense power over the nation’s entrepreneurial spirit. But the world will not wait for the Commission to change cultures and the Final Rules prove if left alone it will remain inert.

I. THE CURRENT PRIVATE MARKETS

Former SEC Chair Jay Clayton describes the U.S. private capital markets as “unrivaled and coveted around the globe.” They foster U.S. economic might and help our firms become global powers. They catalyze unrivaled innovation in places like Silicon Valley, Boston, and New York. But this was not happenstance. Late 1970s economic turmoil, lack of entrepreneurial capital, and confusing Commission rules led Congress to pass the Small Business Investment Incentive Act of 1980. This law and resulting Commission action seeded the venture-capital

8 See infra Part IV.D.
14 In 1978, the Commission began reexamining the exemptions after complaints about hardships small businesses faced accessing private capital. This included a new rule, public hearings, a concept release, and a simplified form for registered small IPOs. Regulation D, the most important Commission action of the era was “a major response to the new Congressional mandate.” David B. H. Martin, Jr. & L. Keith Parsons, The Preexisting Relationship Doctrine Under Regulation D: A Rule Without Reason?, 45 WASH. & LEE L. REV. 1031, 1032 (1988), https://scholarlycommons.law.wlu.edu/wlulr/vol45/iss3/6.
explosion that propelled so many iconic companies in the 1980s and 1990s and nurtured American prosperity decades hence. Two private capital-raising hallmarks arose from this era: the “accredited investor”15 and Regulation D 506 (Reg D, private placements).16

In 1996 Congress enacted the National Securities Market Improvement Act (NSMIA).17 This statute “covered” Reg D securities,18 therefore exempting them from Blue Sky laws19 — state-level registration and merit review, depending on each state. The impact of these changes is irrefutable. In 2018, the SEC estimates exempt offerings raised $2.9 trillion while registered offerings raised $1.4 trillion. Reg D 506(b) alone outpaced public offerings with an estimated $1.5 trillion.20

**FIGURE 1: CAPITAL RAISED IN EXEMPT AND REGISTERED CAPITAL MARKETS 2009-2018**

Reg D dominates the private-capital landscape. Only accredited investors use it, severely restricting the potential-investor pool.21 But it requires minimal upfront effort and cost before capital becomes available. Issuers gauge interest (test the waters) with accredited investors in

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16 Unless otherwise noted “Reg D” refers to the current Regulation D 506(b) [17 C.F.R. § 230.506(b) (2019)].
18 Id. at §102(b)(4)(D) (codified as amended at 15 U.S.C. § 77r(b)(4)(F
19 The origin of the term Blue Sky law is subject to different theories. The most known is from Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917) (“The name that is given to the law indicates the evil at which it is aimed; that is . . . ‘speculative schemes which have no more basis than so many feet of ‘blue sky’. . . .”).
20 Concept Release, supra note 2, at 78.
21 As a technical matter Reg D is available to a limited number of unaccredited investors. See Id. at 79.
their circles before filing paperwork, accredited investors declare their status via “substantive, preexisting relationships” with issuers or their agents, the SEC only requires notice filing, and states cannot interfere. No monetary limits exist for investors or issuers. Investors, however, do not surrender their loot blindly. Reg D private-placement memorandums disclose issuer information about structures, plans, and risks. The reason is simple. According to Heritage Foundation Senior Fellow David Burton, “In the absence of meaningful disclosure about the business and a commitment, contractual or otherwise, to provide continuing disclosure, few would invest in the business and those that did so would demand substantial compensation for the risk they were undertaking by investing in a business with inadequate disclosure.” Further, federal law protects these offerees against misleading statements and fraud.

Reg D provides the private capital-raising model. Its success arose from balancing regulation with parties’ freedom to contract. Because investors are accredited the Commission accepts they can “fend for themselves” without mandatory disclosures. Wise policy may require extra safeguards when gauging exemptions open to all, as with certain JOBS Act titles. But lawmakers must test this purported need for higher scrutiny against what experience shows works.

II. DISPARITIES IN THE REG D-CENTRIC PARADIGM

Reg D-centered private-market success has a price; data reveals disturbing inequities. First, only 13% of U.S. households with sufficient annual income or net-worth use it. The dearth of private-investment opportunities for retail investors has been called “Securities Law’s Dirty Little Secret.” And as one might expect, this cohort is not evenly dispersed either geographically or demographically.

A. Geographic Disparities

Not only are 87% of households barred from Reg D but the eligible 13% mass in entrepreneurial hubs. Geographic outsiders often cannot access these funding channels. Indeed,
aggregate Reg D-capital concentrates where accredited investors cluster.\textsuperscript{29} This has real effects on American prosperity. One study found lack of access to accredited ‘angel’ networks experience reduced startup activity and compounded negative economic impacts.\textsuperscript{30}

**Figure 2: Aggregate Amount Raised in Reg D Rule 506 Offerings by Issuer Location, 2009-2018**

![Map showing aggregate amount raised in Reg D Rule 506 offerings by issuer location, 2009-2018.](source: Securities and Exchange Commission)

**B. Demographic Disparities**

Reg D exacerbates disparities and curbs wealth creation in other ways. If capital raising only occurs in select areas, exclusionary conventions and cultures will form. In 2019 the SEC Office of the Advocate for Small Business Capital Formation found 29.5\% of angel investors and 11\% of venture capitalist were women and 71\% of venture capital firms had no women.\textsuperscript{31} From 2013-2017 venture capital backed-businesses were 1\% Black, 2\% Latino, 2\% Middle Eastern, 18\% Asian, and 77\% White.\textsuperscript{32} Moreover, new black-owned businesses start with around three times


\textsuperscript{32} \textit{Id.} at 32 (internal citation omitted).
less capital than new white-owned businesses.\textsuperscript{33} Further, minority entrepreneurs report lack of capital disproportionately affects their profitability.\textsuperscript{34}

III. CONGRESS ENACTED THE JOBS ACT TO CREATE OPPORTUNITIES BEYOND REG D

Lawmakers saw how the flawed Reg D model failed small businesses and entrepreneurs outside select hubs or lacking certain profiles.\textsuperscript{35} Legislators sought to democratize investing for both entrepreneur and backer.\textsuperscript{36} A rare bipartisan moment birthed the JOBS Act. At a Rose Garden signing ceremony President Obama gushed about the law’s potential for unconventional capital formation and retail investors to support companies at their earliest and most lucrative stages. “Right now, you can only turn to a limited group of investors -- including banks and wealthy individuals -- to get funding. Laws that are nearly eight decades old make it impossible for others to invest. . . 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. For the first time, ordinary Americans will be able to go online and invest in entrepreneurs that they believe in.”\textsuperscript{37}

The JOBS Act contained three titles that expanded issuer access to investor pools.\textsuperscript{38} Title II directed the Commission to allow general solicitation for Regulation D. Title IV created a “new” Regulation A with higher limits and other enhancements open to “Qualified Purchasers.” Title III created a new “investment” or “equity” crowdfunding exemption.

The JOBS Act also crucially changed another capital-raising factor. Title V amended Section 12(g)(1)(A) of the Securities Exchange Act of 1934\textsuperscript{39} known as the ‘12(g) Rule.’ This rule states companies with $10 million in total assets and a class of equity securities “held of record” by a certain number of holders, must register their securities. Title V increased the threshold from 500 persons to 2,000 persons or 500 unaccredited investors. The JOBS Act directed the Commission to appropriately apply the 12(g) Rule to the law.

\textsuperscript{33} Id. at 30 (internal citation omitted).

\textsuperscript{34} Id. at 31 (internal citation omitted); cf. Kendrick Nguyen, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 24, 2019), at 2, https://www.sec.gov/comments/s7-08-19/s70819-6189775-192417.pdf (“[F]emale, minority, veteran and immigrant entrepreneurs, as well as entrepreneurs based in Middle America, often struggle to obtain exposure to and capital from traditional venture investors.”).

\textsuperscript{35} See, e.g., 157 Cong. Rec. S8458-02 (daily ed. Dec. 8, 2011) (statement of Sen. Jeff Merkley) (“In recent years, small businesses and startup companies have struggled to raise capital. The traditional methods of raising capital have become increasingly out of reach for many startups and small businesses. . . Low-dollar investments from ordinary Americans may help fill the void, providing a new avenue of funding to the small businesses that are the engine of job creation.”); cf. Seth C. Oranburg, Bridgefunding: Crowdfunding and the Market for Entrepreneurial Finance, 25 CORNELL J. L. & PUB. POL’Y 397, 413–14 (2015) (discussing funding gap between $1-5 million where businesses fail for lack of capital access).


\textsuperscript{38} This article covers only the private exemptions in the JOBS Act, other titles such as Title I, Reopening American Capital Markets to Emerging Growth Companies, Pub. L. No. 112-106, 126 Stat. 306, 307 (2012), which eases private company transition into the public markets are beyond its scope. It also does not cover changes to Rule 144A. 17 C.F.R. § 230.144A (2019); Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a)(2), 126 Stat. 306, 314 (2012). Compare with note 132.

A. Regulation D 506(c)

JOBS Act Title II did not expand the investor pool per se. Instead it loosened communication rules, allowing accredited-investor searches beyond familiar circles. As noted above, Reg D reigned well before the JOBS Act. Reg D arose from 1970s political and economic turmoil. Oil crises, weak economic growth, high interest rates, plunging stock prices, and an SEC determined to force registration\(^{40}\) meant entrepreneurs struggled to raise capital.

After the 1980 statutory push,\(^{41}\) in 1982 the Commission created Reg D as a safe harbor to ensure compliance with nonpublic offerings defined in Securities Act Section 4(a)(2).”\(^{42}\) Reg D sought to simplify and clarify rules and harmonize state and federal exemptions.\(^{43}\) Reg D allowed unlimited numbers of accredited investors to join these offerings without investment limits or mandatory disclosures. It also allowed small numbers of unaccredited investors to join with daunting mandatory disclosure\(^{44}\) and sophistication thresholds.\(^{45}\) The Commission also created two lesser-used exemptions, Regulation D 504\(^{46}\) and Regulation D 505.\(^{47}\) None of these exemptions preempted Blue Sky laws.

After Reg D, private placements grew from $18 billion in 1981 to $202 billion in 1988.\(^{48}\) In 1996 Congress further nurtured Reg D with NSMIA.\(^{39}\) This Act amended Securities Act Section

\(^{40}\) As more issuers offered securities under what is now Section 4(a)(2) of the Securities Act, 15 U.S.C. § 77d(a)(2)


\(^{41}\) See supra note 14.


\(^{44}\) Although Reg D 506(b) allows up to 35 unaccredited investors, issuers wishing to accept such investors must provide disclosures pursuant to Rule 502(b) 17 C.F.R. § 230.502(b)(2)(i)-(vii)) (2019). Previously the financial disclosures for non-reporting companies operated on a tri-tiered basis depending on offer amount, 17 C.F.R. § 230.502(b)(2)(i)(B)(1-3) (2019), The Final Rules simplified and slightly relaxed these disclosures to align them with Reg A+ Tier 1 requirements (offerings up to $20 million) and Reg A+ Tier 2 Requirements (offerings above $20 million). Final Rules, supra note 1, at 115-116, 118. The SEC estimates in 2015, 2016, 2017, and 2018 unaccredited investors joined only 6% of Reg D 506(b) offerings and raised between 2%-3% of Reg D 506(b) capital during that time. Concept Release, supra note 2 at 79.

\(^{45}\) 17 C.F.R. § 230.506(b)(2)(ii).

\(^{46}\) Reg D 504 permits issuers to raise up to $5 million in a 12-month period from an unlimited number of investors without regard to whether those investors are accredited. The Final Rules raised the offer limit to $10 million. Facilitating Capital Formation, supra n. 1 at 140. Issuers conducting a Rule 504 offering are not subject to the information requirements in Rule 502(b) but are subject to Blue Sky laws. 17 C.F.R. § 230.504 (2019).


\(^{49}\) See supra note 17.
18 to “cover” certain securities from Blue Sky laws, including Commission safe harbors under Securities Act Section 4(a)(2).\(^{50}\) After NSMIA, the private-placement market exploded.\(^{51}\) JOBS Act Title II required the Commission to adopt rules for generally solicited accredited investors. Instead of a simple declaration, issuers needed to verify status through “reasonable steps.” Congress directed the Commission to define “reasonable steps.” It also exempted broker dealer registration for website offers under the title meeting certain requirements.\(^{52}\)

The Commission finalized rules on July 10, 2013.\(^{53}\) It split Reg D into two parts. Reg D 506(b) would remain the “old” Reg D that forbade general solicitation. Reg D 506(c) would state Blue Sky registration and qualification laws with respect to Rule 506 offerings since the enactment of the National Securities Market Improvement Act (15 U.S.C. § 77r(b))(4)(F)\(^{(2018)}\)) at 9, https://www.sec.gov/comments/s7-08-19/s70819-6240706-192714.pdf [hereinafter Campbell Letter] (“The migration to the Rule 506 exemption was driven by state blue sky laws requiring registration. State registration authority over Rule 506 offers was preempted by the National Securities Market Improvement Act (15 U.S.C. § 77r (2019)).”); cf. Burton Letter, supra note 23, at 32 (“Regulation D is a success story. . . . It is a success because it is a lightly regulated means of raising capital and because of the preemption of state Blue Sky registration and qualification laws with respect to Rule 506 offerings since the enactment of the National Securities Markets Improvement Act of 1996.”).\(^{54}\)

The Commission defined two “reasonable steps” methods. First was “principles based.” The second was a non-exhaustive list of verification documents.

For the first, issuers could reasonably determine status by analyzing each purchaser and transaction via ‘facts and circumstances.’ The Commission listed factors such as the nature of the purchaser and the type of accredited investor the purchaser claimed; the amount and type of information the issuer had about the purchaser, the offering nature, such as how the issuer solicited the purchaser, and the offering terms, such as minimum investment.\(^{55}\)

The non-exhaustive verification documents were imposing. Verifying through income included: two most recent years of IRS forms including W2, 1099, Schedule K-1 to Form 1065, and Form 1040, and a declaration stating the purchaser reasonably expected to reach necessary income levels during the current year.\(^{56}\) Net-worth verification included: bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and independent third-party appraisal reports. With respect to liabilities: a consumer report from at least one nationwide consumer-reporting agency. And a declaration stating the purchaser had disclosed all liabilities needed to determine net worth. All only valid if dated within three months.\(^{57}\) The Commission also allowed certain third-party professionals such as broker dealers, investment advisors, attorneys, and CPAs to verify status.\(^{58}\)

**B. Regulation A+**

Unlike Reg D, issuers had mostly shunned Regulation A. The Commission adopted Regulation A under the authority of Securities Act Section 3(b) soon after the Securities Act of

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51 Rutheford B. Campbell, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (June 18, 2019) at 9, https://www.sec.gov/comments/s7-08-19/s70819-6240706-192714.pdf [hereinafter Campbell Letter] (“The migration to the Rule 506 exemption was driven by state blue sky laws requiring registration. State registration authority over Rule 506 offers was preempted by the National Securities Market Improvement Act (15 U.S.C. § 77r (2019)).”); cf. Burton Letter, supra note 23, at 32 (“Regulation D is a success story. . . . It is a success because it is a lightly regulated means of raising capital and because of the preemption of state Blue Sky registration and qualification laws with respect to Rule 506 offerings since the enactment of the National Securities Markets Improvement Act of 1996.”).
54 Id. at 17-18.
55 Id. at 27-28.
1933 to shield smaller issuers from registration.\textsuperscript{59} Current Regulation A issuers must traverse a Commission-led qualification process, which averages over two months and involves back and forth between issuer and staff.\textsuperscript{60} The exemption floundered despite the Commission repeatedly raising the offer limit and eventually loosening communication rules.\textsuperscript{61} Use spiked slightly after 1992 changes but quickly crested. Issuers filed 116 Regulation A offerings in 1997, dropping to 19 in 2011. Qualified offerings dropped from 57 in 1998 to 1 in 2011.\textsuperscript{62} Issuers spurned Regulation A because of its complexities, time-consuming qualification process, lack of Blue Sky preemption, low limits, and Reg D options.\textsuperscript{63}

Congress again tried to boost Regulation A with JOBS Act Title IV, which added Section 3(b)(2) to Regulation A statutory authority in Securities Act Section 3(b). This became known as Reg A+.\textsuperscript{64} It increased the offer limit from $5 million to $50 million, securities could be offered and sold publicly, were “unrestricted” under federal law, and issuers could ‘test the waters.’ Congress also, however, mandated disclosure and compliance obligations including audited financial statements and periodic reports. It also limited available security types. It ordered biennial offer-limit reviews and commissioned a Government Accountability Office report on Blue Sky-law impact.\textsuperscript{65} It also “covered” the securities from Blue Sky laws for “Qualified Purchasers,” a term Congress charged the Commission with defining.\textsuperscript{66}

The Commission adopted final rules on March 25, 2015.\textsuperscript{67} It split Reg A+ into two tiers. The Commission limited Tier 1 to $20 million annually, while Tier 2 retained the $50 million limit.\textsuperscript{68} It cabined how much selling securityholders could sell at first offering and within the following 12 months to 30% aggregate offering price. And further limited affiliates to a hard ceiling. Federally, Reg A+ shares would be freely tradable.\textsuperscript{69} Tier 2 accredited investors were uncapped but the Commission limited unaccredited investors to the greater of 10% annual income or net


\textsuperscript{61} Concept Release, \textit{supra} note 2, at 86 n.272. The initial Regulation A offering limit was $100,000. \textit{Id.} The Commission raised it several times thereafter. \textit{Id.} Finally, in 1992, it raised it to $5 million and allowed ‘testing the waters’ communications. \textit{Id.; see generally} Small Business Initiatives, FR-391 (July 30, 1992) (as codified by 57 FR 36442-01 (Aug. 13, 1992)); Small Business Initiatives, Release Nos. 33-6949, 34-30968, 39-2287 (West) (July 30, 1992).


\textsuperscript{68} 17 C.F.R. § 230.251.

\textsuperscript{69} Regulation A Release, \textit{supra} note 67, at 35 n. 98.
worth. It defined Qualified Purchasers as any Tier 2 purchaser. The Commission conditionally exempted Tier 2 from the 12(g) Rule provided issuers remained compliant with ongoing reporting, hired a transfer agent, and remained under certain public float or revenue thresholds, in addition to 12(g) Rule recordholder and asset criteria.

The Commission made offering circulars and disclosures akin to smaller registered offerings, especially for Tier 2. This meant ongoing reporting including annual reports, semi-annual reports, and “current event” reports. Annual reports cover among other topics: three years’ business operations, interested transactions, beneficial ownership of voting securities, identities of directors, officers, and significant employees, executive compensation, management discussion and analysis of liquidity, capital resources, two years’ operation results, and two years’ audited financial statements. Semi-annual reports include additional management discussion and analysis and financial statements similar to registered offering’s Form 10-Q. Moreover Tier 2 issuers must disclose within four business days any Commission-deemed “significant and substantial” event. The final rules did not require Tier 1 ongoing reporting. These issuers must only file Form 1-Z exit reports 30 days after completing or terminating an offering. This contains only summary information including qualification date, amount of securities qualified, amount sold, price, amount sold by selling security holders, fees, and net proceeds.

The Commission reversed itself in one respect and failed to act in others. It originally proposed to exempt offers from Blue Sky laws for both tiers and sales for Tier 2. But the final rules exempted only offers and sales for Tier 2, Tier 1 offers and sales would be subject to state-by-state compliance. The Commission reasoned Tier 1’s anticipated local nature should portend state regulatory authority. After a vigorous and coordinated effort to kill Reg A+ preemption, the North American Securities Administrators Association (NASAA), the state regulators’ association, responded to the JOBS Act and complaints about onerous double review

70 The Commission deserves credit for defining “Qualified Purchasers” in Tier 2 as purchasers of those securities without additional complexities requested by state regulators and consumer groups. See generally 17 C.F.R. § 230.251(d)(2)(C) (2020); Regulation A Release, supra note 67, at 208–10 and attending footnotes.
71 17 C.F.R. § 230.256.
72 17 C.F.R. § 240.12g-1(a)(7).
73 17 C.F.R. § 240.12g-1.
74 Regulation A Release, supra note 67, at 98.
75 17 C.F.R. § 230.257(b)(1).
76 17 C.F.R. § 230.257(b)(3).
77 17 C.F.R. § 230.257(b)(4).
78 Part II of Form 1-K.
79 See Regulation A Release, supra note 67, at 170. Part I (Financial Information) of Form 10-Q, does not include other parts of Form 10-Q like quantitative and qualitative market risk, controls and procedures, updates to risk factors, or defaults on senior securities. Form 10–Q, for Quarterly and Transition Reports Under Sections 13 or 15(d) of the Securities Exchange Act of 1934, 17 C.F.R. § 249.308a (2020).
81 17 C.F.R. § 230.257(a).
82 17 C.F.R. § 230.257(b)(4); Regulation A Release, supra note 67, at 160.
83 Id. at 206, 213–214.
with a “Coordinated Review Plan” it claimed would “ease regulatory burdens for filers without sacrificing investor protection.” The Commission also declined to exempt Reg A+ secondary trading despite commenter support. The Commission stated it needed time to “review and consider changes” but preempting secondary trading would not be “appropriate at the outset.” Thus, despite Congress designating Reg A+ securities unrestricted, the Commission ensured Tier 1 offers, sales, and resales and Tier 2 resales would face state scrutiny.

C. Regulation Crowdfunding

JOBS Act Title III created a crowdfunding tool for smaller issuers and retail investors. It amended the Securities Act to add Section 4(a)(6). Issuers could raise $1 million per 12-months with periodic inflation adjustments. In 2017, the Commission adjusted the limit to $1.07 million. The law set individual limits based on an aggregate net worth, annual-income formula. Investors could devote $2,000 or 5% of annual income or net worth if either was less than $100,000 (it did not specify which financial marker applied, for instance ‘greater of’ or ‘lesser of’ the two) or 10% if either was equal or more than $100,000, with a maximum aggregate cap of $100,000. Issuers would sell through broker dealers or a new statutory creation: funding portal intermediaries (portals).

The statute set issuer disclosures, including business plan, officers and directors, capital structure, tiered financial documents up to audits, use of proceeds, amount sought, valuation, risks, and promoter compensation. It restricted communication about offers and sales and required annual reports. The statute restricted first-year resales except to certain offerees. It directed the Commission to exempt Title III securities “conditionally or unconditionally” from the 12(g) Rule, and preempted Blue Sky laws. Congress also limited state filing fees to issuer principal place of business or where it sold 50% or more securities. Title III also ordered

86 See NASAA Letter, supra note 84, at 1.
87 Regulation A Release, supra note 67, at 212 n. 791 (listing commenters supporting state preemption of secondary trading).
88 Id. at 228 n. 833.
93 Id. at § 302(a)(6)(C) (codified as amended at 15 U.S.C. § 77d(a)(6)(C)).
94 Id. at § 4A(b) (codified as amended at 15 U.S.C. § 77d–1(b)).
95 Id. at § 4A(e) (codified as amended at 15 U.S.C. § 77d–1(e)).
96 Id. at § 303 (codified as amended at 15 U.S.C. § 78l(g)(6)).
97 Id. at § 305 (codified as amended at 15 U.S.C. § 77r(b)(4)(C)).
certain portal requirements and exempted them from state interference with respect to their businesses as such.100

The Commission adopted Regulation Crowdfunding (Reg CF) rules on October 30, 2015.101 The rules restricted Reg CF further where the Commission deemed public interest required and did not expand any material rules. For instance, despite warnings the modest $1 million statutory limit would hamper use,102 the Commission kept it for consistency and because of Reg CF’s novelty.103 The Commission also conservatively approached individual limits. The final rules clarified limits applied to all Reg CF investors, even accredited investors. The Commission recognized the capital-formation burden but justified it on Congressional intent to minimize investor risk in crowdfunding transactions.104 Final rules required investors to meet the $100,00 threshold for both annual income and net worth for the 10% bracket and $100,000 cap. If investors did not meet both they faced the lower 5% bracket. And it imposed the lesser of annual income or net worth as the limit once in either bracket. The Commission kept the statutory tiered financial-statements review but did exempt first-time issuers from audits.105 It also kept the statutory discussion of risk factors.106

The Commission required further disclosures beyond statutory mandates.107 For example, while the statute only required director and officer names (and any persons occupying a similar status or performing similar functions) the Commission required three-years’ business experience including principal occupation and employment, including positions with other corporations or organizations.108 It also regulated oversubscriptions,109 how investors could complete or cancel investments,110 and required investors reconfirm commitments after material changes, or the investment would cancel and funds automatically return.111

The Commission required several other ‘public interest’ disclosures.112 These included intermediary compensation and other interests in the transaction,113 number of issuer employees,114 material indebtedness,115 past three years of exempt capital raises,116 transactions by interested persons including officers, directors, major equity holders, promoters, or family

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99 Id. at § 304 (codified as amended at 15 U.S.C. § 78(c)–(h)).
100 Id. at § 305(d) (codified as amended at 15 U.S.C. § 78o(i)(2)).
102 Id. at 16 n. 21.
103 Id. at 17.
104 Id. at 25, 28.
105 17 C.F.R. § 227.201(t)(3).
106 17 C.F.R. § 227.201(f).
108 17 C.F.R. § 227.201(b).
109 Id. at § 227.201(h).
110 Id. at § 227.201(j).
111 Id. at § 227.201(k).
113 17 C.F.R. § 227.201(o).
114 Id. at § 227.201(e).
115 Id. at § 227.201(p).
116 Id. at § 227.201(q)
members that exceed a commission-defined 5% threshold, a narrative discussion and analysis by management of financial condition, including, to the extent material, liquidity, capital resources, and historical operation results. The Commission also mandated issuers include additional material information to make the disclosures not misleading “in light of the circumstances in which they were made.” And it required disclosure of any missed annual reports. As for the 12(g) Rule the Commission conditionally exempted Reg CF provided issuers remained current in reporting, had less than $25 million in assets, and hired a registered transfer agent.

The Commission also limited issuer communication aligned with and beyond the statute. First it required all transactions occur through portals. This essentially forbade in person investor meetings. The Commission restricted issuer advertising outside portals to “tombstone” ads that contained statutory “terms” and other factual information about issuer legal identity, location, contact information, and a brief business description. Adverts could not include more information but instead must hyperlink to portals. The Commission further clarified “terms” as amount of securities offered, security type, price, and offer closing date. The Commission did provide flexibility for the online and social-media environs offers would appear.

IV. THE JOBS ACT FAILED TO CREATE EXPECTED OPPORTUNITIES

Despite President Obama’s hope, the JOBS Act changed little. Eight years hence, it has not democratized investing. Critics have labeled various provisions “generally

117 Id. at § 227.201(r).
118 Id. at § 227.201(s).
119 Id. at § 227.201(y).
120 Id. at § 227.201(x).
121 Id. at § 240.12g–6.
122 Id. at § 227.100(a)(3).
123 Crowdfunding Release, supra note 101, at 31-32.
124 17 C.F.R. § 227.204.
125 17 C.F.R. § 227.204(b).
126 Instruction to 17 C.F.R. § 227.204.
127 Crowdfunding Release, supra note 101, at 140-141.
128 2018 Forum Report, supra note. 36
disappointing,”129 a “dismal failure,”130 “unmitigated disaster for investors,”131 and “widely regarded as not being worth the effort.”132

Data confirm the sour labels. Through 2019 all JOBS Act titles had at least three-and-half years to mature. Yet the SEC estimates Reg D still captured 95.7% of the main private investment market.133

**Table 1: Overview of the Amounts Raised in the Exempt Markets in 2019**

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Amounts Reported or Estimated as Raised in 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule 506(b) of Regulation D</td>
<td>$1.492 billion</td>
</tr>
<tr>
<td>Rule 506(c) of Regulation D</td>
<td>$66 billion</td>
</tr>
<tr>
<td>Regulation A: Tier 1</td>
<td>$0.044 billion</td>
</tr>
<tr>
<td>Regulation A: Tier 2</td>
<td>$0.998 billion</td>
</tr>
<tr>
<td>Rule 504 of Regulation D</td>
<td>$0.228 billion</td>
</tr>
<tr>
<td>Regulation Crowdfunding</td>
<td>$0.062 billion</td>
</tr>
<tr>
<td>Other exempt offerings</td>
<td>$1.167 billion</td>
</tr>
</tbody>
</table>

Source: Securities and Exchange Commission

**A. Regulation D 506(c) so far**

Reg D 506(c) sought to widen accredited investor circles beyond known funding channels through general solicitation. But Reg D 506(c) only dots the private-placement landscape capturing 4.2% of the Reg D market.134 Reg D beats Reg D 506(c) both in aggregate and average.135

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130 Campbell Letter, supra note 51 at 18.


133 This figure does not count “Other Exempt Offerings” which contain mainly Rule 144A buyers and Regulation S. Rule 144A is a nonexclusive safe harbor for resales of restricted securities. It typically involves a two-step process involving a sale to a financial institution and a resale to a “Qualified Institutional Buyer.” Regulation S transactions involve offshore transactions not involving direct selling in the U.S. See Concept Release, supra note 2, at 19–20; 15 U.S.C. § 77d(a)(2).

134 See Table 1.

135 Concept Release, supra note 2, at 80.
B. Regulation A+ so far

From June 2015 through 2019, Reg A+ issuers raised $2.446 billion.\textsuperscript{136} Issuers preferred Tier 2 raising about 91% despite ongoing reporting.\textsuperscript{137} Even issuers who sought amounts within Tier 1 range and thus could choose either often chose to avoid state-level review. According to the Commission, “The larger Tier 2 offering limit does not appear to be the sole factor for issuers’ decision between tiers, given that approximately 43% of filed Tier 2 offerings and 41% of qualified Tier 2 offerings sought amounts not exceeding the Tier 1 offering limit of $20 million.”\textsuperscript{138} The reasons Tier 1 should be abandoned are discussed below. But after five years, its disfavor is manifest.


\textsuperscript{137} Id. at 9.

\textsuperscript{138} Id.
C. Regulation Crowdfunding so far

Unlike Reg A+ and Reg D 506(c), Reg CF had no analog and was Congress’s boldest move. It has also disappointed though adoption has steadily grown as awareness increased and successes emerged. Crowdfund Capital Advisors, which curates Reg CF data estimates that from May 2016 through 2019 issuers raised almost $263 million, with gaudy 2018-2019 year-to-year growth of 37%, and had pumped almost one billion into local economies.139

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Despite impressive Reg CF growth,\textsuperscript{140} Reg D still dwarfs it with almost $1.5 trillion raised in 2019.\textsuperscript{141} Comparing Reg D within Reg CF constraints, differences remain stark. By SEC data, from mid-2016 through 2018 Reg CF had 519 completed raises totaling $108.2 million. During that time and within Reg CF limits, approximately 12,700 Reg D issuers raised $4.5 billion.\textsuperscript{142}

\textbf{D. Critics contend JOBS Act disappointments mean its titles should be scrapped or curtailed}

Despite progress and allowing issuer and regulator adjustment time, the JOBS Act has mostly floundered. The Commission admits “modest” use.\textsuperscript{143} This has led hostile interests—state

\textsuperscript{140} Due in part to the COVID-19 pandemic, which has limited in-person issuer-investor interaction, Reg CF has enjoyed exponential growth in 2020. According to Crowdfund Capital Advisors, as of October 31, 2020 nationwide online investment is up 62.5\% and the number of investors is up 80\% from the first ten months of 2019. Crowdfund Capital Advisors, \textit{Monthly Funding Recap October 2020: Highest Amount Ever for Investments as SEC Increases Maximum Raise to $5M}, (November 12, 2020), https://crowdfundcapitaladvisors.com/monthly-funding-recap-october-2020-highest-amount-ever-for-investments-as-sec-increases-maximum-raise-to-5m/.

\textsuperscript{141} Final Rules, \textit{supra} note 1 at 9.

\textsuperscript{142} Concept Release, \textit{supra} note 2, at 148.

\textsuperscript{143} Facilitating Capital Formation, \textit{supra} note 3, at 119 (“While the 2015 amendments have stimulated the Regulation A offering market, aggregate Regulation A financing levels remain modest relative to traditional IPOs and the Regulation D market.”); Facilitating Capital Formation, \textit{supra} note 3, at 265 (“[T]he use of Regulation A by reporting companies has been modest to date.”); Facilitating Capital Formation, \textit{supra} note 3, at 126 (“The study found that during the considered period, while the [Regulation Crowdfunding] market exhibited growth . . . the number of offerings and the total amount of funding were relatively modest.”).
regulators, consumer groups, and academics—to call for its elimination or severe curtailing. In support they cite underuse and fraud concerns. Under this view only the bulwark of registration and revitalized public markets can protect retail investors and revive gloried mid-20th century days. But this path would hinder U.S. global competitiveness, particularly with the emerging token economy, which will never conform to registered offerings.

V. THE JOBS ACT FAILURE IS A FAILURE OF THE ADMINISTRATIVE STATE

A. SEC culture contributed to JOBS Act failures

Instead of scrapping the JOBS Act, a more fruitful analysis may explain why these exemptions underperformed. This task must begin with the legal authority and people who made the rules. The bureaucratic mindset is self-regarded, slow, ponderous, and risk averse. Bureaucrats view themselves as ‘white hat’ protectors, defending the public from dodgy private-sector actors. This view pervades Western tradition. But it did not originally enconce the

144 See e.g., Consumer Federation Letter, supra note 131, at 103–04, (“[G]iven the abysmal performance of Reg A+ securities since the JOBS Act was adopted, the Commission should give serious consideration to whether the exemption should be scaled back or eliminated entirely.”); Americans for Fin. Reform Educ. Fund & AFL-CIO, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 30, 2019), at 3, https://www.sec.gov/comments/s7-08-19/s70819-6233332-192690.pdf (stating that further proposed expansion of private exemptions to encourage utilization is “highly disturbing”); Letter from Tyler Gellasch, Exec. Dir., Healthy Markets to the SEC on the Concept Release (Sept. 30, 2019), at 29, https://www.sec.gov/comments/s7-08-19/s70819-6233891-192709.pdf (“[W]e urge the Commission to consider curtailing or eliminating some of the obvious failures of past efforts to spur capital formation.”); Erik Gerding et al., Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 24, 2019), at 9.15, https://www.sec.gov/comments/s7-08-19/s70819-6193340-192501.pdf (commenting that retail investors should be “encouraged” and “steered” into low-cost index funds of public securities and stating that “Congress and the Commission may need to take more aggressive action to usher firms into the public markets”); Christopher Gerold, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions, (Oct. 11, 2019), at 1, https://www.sec.gov/comments/s7-08-19/s70819-6288085-193367.pdf [hereinafter Gerold Letter] (“NASAA supports a reexamination of the private offering framework with a goal towards strengthening and growing our public securities markets and rejects the view that modernizing the securities regulatory framework requires expanding the availability of private offerings.”).


147 Burton Letter, supra note 24, at 14.

148 Indeed, the morality of government actors traces from Plato (The Republic) and Aristotle (Politics) to the present. See e.g., Cass R. Sunstein & Adrian Vermeule, The Morality of Administrative Law, 131 Harv. L. Rev. 1924 (2018). But see Richard A. Epstein, The Dubious Morality of Modern Administrative Law 240 (Rowan & Littlefiend, Manhattan Institute, 2020).
American project. It prevailed only after intense early 20th Century battles.\textsuperscript{149} The thesis professed during the Progressive Era and accepted during the New Deal was modern life was too complex and its problems too complicated for legislators. A government of administration was needed, one staffed with apolitical technocrats.\textsuperscript{150} In the decades since, these administrative-state features have rarely been questioned.\textsuperscript{151} Administrative experts bathe in minutia. They disdain hard rules in favor of nuanced multi-factor analysis. This provides officials maximum flexibility and impedes courts from second guessing them.

Created as a direct response to the country’s worst economic crisis, the SEC, perhaps more than any other agency, typifies the New Deal mindset.\textsuperscript{152} This culture tracks the larger government mindset but is particularly pronounced given Commission prominence. Staff write prolix rules, reserve immense power for themselves, are skeptical of innovation, and distrustful of outsiders. Cultural hostility manifests through rules designed for established and familiar actors.\textsuperscript{153} Despite stated Commission belief its “rules and regulations should be drafted to enable market participants to clearly understand their obligations under the federal securities laws and to conduct their activities in compliance with law.”\textsuperscript{154} And its aim to “promulgate rules that are clearly written, easily understood, and tailored toward specific ends.”\textsuperscript{155} Reality is different. Smaller issuers must traverse sprawling rules, many strewn with unweighted factors, that confuse even seasoned securities lawyers.

As Commissioner Hester Peirce stated in 2019, “Entrepreneurship and innovation do not have the happiest of relationships with regulation. Regulators get used to dealing with the existing players in an industry, and those players tend to have teams of people dedicated to dealing with regulators. . . . Regulators . . . tend to be skeptical of change because its


\textsuperscript{150} R. J. Pestritto, \textit{The Birth of the Administrative State: Where It Came from and What It Means for Limited Government}, HERITAGE FOUND. 4–5, 7 (Nov. 20, 2007), https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited (“[T]he fathers of progressive liberalism envisioned a delegation of rulemaking, or regulatory, power from congressional lawmakers to an enlarged national administrative apparatus, which would be much more capable of managing the intricacies of a modern, complex economy because of its expertise and its ability to specialize.”).

\textsuperscript{151} Mistretta v. United States, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); cf. Gillian E. Metzger, The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1, 7 (2017) (“[T]he administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government. Those delegations are necessary given the economic, social, scientific, and technological realities of our day.”).


\textsuperscript{153} It must be noted whatever regulatory burdens the SEC placed on registered companies, in the first two decades after the Securities Act, nonregistered issuers had fairly straightforward paths to capital. That changed starting in 1953. \textit{See} Cohn & Yadley, supra note 5, at 25-28.


\textsuperscript{155} \textit{Id.}
consequences are difficult to foresee and figuring out how it fits into existing regulatory frameworks is difficult.”\textsuperscript{156}

The Commission’s enforcement-first mindset further augurs resistance to innovation and outsiders.\textsuperscript{157} The SEC Enforcement Division has 1,400 Full Time Equivalent staff, more than any other.\textsuperscript{158} The division’s FY 2019 budget request was its largest at almost $532 million.\textsuperscript{159} The Commission’s enforcement approach explains stocked personnel and massive budgets. Staff wrench potential violations through “facts and circumstances” analysis.\textsuperscript{160} This can mean intrusive years-long investigations that bleed companies dry. The Commission meets its stated goal to bring enforcement actions within two years of investigation starts barely half the time.\textsuperscript{161} One securities lawyer described SEC investigations like “living in hell without dying.”\textsuperscript{162} The Commission boasts (though in bureaucratic terms) of its power to bleed companies that may or may not have violated a law. “In addition to victories in the cases the agency brings to trial, the SEC’s litigation efforts also help the SEC obtain strong settlements in other cases by providing a credible trial threat and making it clear that the SEC will go deep into litigation and to trial, if necessary, in order to obtain appropriate relief.”\textsuperscript{163}

\textbf{B. Overemphasis on Investor Protection Hurts Entrepreneurs and Curtails Innovation}

The Commission justifies its approach through laudable investor-protection goals. The Commission’s mission is tripartite, to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”\textsuperscript{164} But in practice, protecting investors always trumps

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{157} Hon. Hester M. Peirce, Sec. & Exch. Comm’n Comm’r, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference, (May 18, 2019) (describing the SEC’s ‘broken windows’ approach to enforcement and the pressure staff felt to continually boost enforcement actions, opining tongue-in-cheek the agency should have been renamed the “Sanctions” and Exchange Commission. This era supposedly lasted from 2013-2016).
\item \textsuperscript{159} Id. at 17.
\item \textsuperscript{160} Search of the phrase “fact and circumstances” yielded 6,151 results, SEC. & EXCH. COMM’N (last visited July 5, 2020) https://secsearch.sec.gov/search?affiliate=secsearch&query=%22facts+and+circumstances%22.
\item \textsuperscript{161} The number is 53% per the Commission’s latest data. 2019 Cong. Budget, supra note 158, at 109.
\item \textsuperscript{163} 2018 Cong. Budget, supra note 154, at 35.
\item \textsuperscript{164} What we do, SEC. & EXCH. COMM’N (June 10, 2013), http://www.sec.gov/about/whatwedo.shtml#intro; see Securities Exchange Act of 1934 §3(f), 15 U.S.C. §77b(b); and see Securities Act of 1933 §2(b), 15 U.S.C. §77b(b) (“Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”).
\end{itemize}
\end{footnotesize}
its conflicting prongs.165 States go even further. Currently, thirty conduct merit review or reserve the right to,166 despite past glaring failures.167

In balancing its conflicting mission, the Commission not only over-relies on investor protection but also one type. David Burton states four investor-protection ideas.168 First is prosecuting fraud. This is a clear government function and securities regulation reifies antifraud. The second is providing potential investors with issuer background for informed decisions. This requires weighing useful disclosure to ensure company validity with issuer-bourne costs. It is worth noting Reg D has succeeded without mandatory disclosure.169 Third is protecting investors from what regulators deem imprudent choices. The Commission does this by investment limits, barring unaccredited-investor opportunities, favoring certain exemptions through policy, and subjecting some exemptions to state-level registration and merit review. One Concept Release commenter put it colorfully, “It feels absurd that the average person can buy a $5,000 wedding cake and sit down in front of the bakery to eat the whole thing in one sitting… BUT they cannot invest that same amount in a technology business. People make bad financial decisions every day: drive cars they can’t afford, blow their whole paycheck at the casino, have a $50,000 wedding followed by a $50,000 divorce a year later… and the law is silent!”167 Fourth is protecting investors’ freedom to risk their money. This was and remains a major flaw in the Reg-D-centric regime the JOBS Act sought to change.

The latter two investor-protection concepts are dubious government functions. Protecting people from what regulators consider “bad” choices through either limits, “creeping federal merit review,”171 or barred opportunities is paternalistic.172 Regulators are naturally risk averse and have no special market acumen. Further, as explained below, private-ordering systems where large investors perform due diligence and retail investors join has worked elsewhere.

Mandatory disclosure has sturdier foundation but questionable utility. This is particularly true for small issuers and must be weighed against imposed costs. Disclosure has hallmarkd federal securities law since the Commission’s advent. Congress championed it among policy

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165 Professor Usha Rodrigues suggests political risk and lack of private-sector rewards reinforces Commission focus on investor protection. Rodrigues, Dirty Secret, supra note 28, at 3396 (“[R]egulators’ incentives are skewed against enlarging investment access in an area that (1) offers little for the rent-seeking regulator and (2) could cause average investors to lose their shirts.”); Id. at 3397 (“[P]ublic choice theory suggests that the status quo may well continue: those who stand to benefit most are rationally uninterested, and the SEC would face political risk far outweighing reward were it to push for change.”).
166 See NASAA APPLICATION, supra note 85.
169 But see Becerra et al., supra note 129, at 9 (“Rule 506/Reg D is often associated with fraudulent investment schemes, making exempt offerings under this category particularly risky.”).
171 Burton Letter, supra note 24, at 17.
alternatives. Disclosure follows the aphorism “Sunlight is the best disinfectant.” But it has nebulous empirical value. In fact, much scholarly disclosure research shows no definitive benefits. As former SEC Chair Mary Schapiro testified, “It is notoriously hard to quantify the benefits of any regulation. How do you quantify the benefits of preventing a fraud?” Scholars have criticized burdens on public companies for this difficult-to-quantify benefit. Those companies can presumably absorb imposed costs. But it does not translate to smaller companies the JOBS Act tried to help.

Regulators have not balanced fraud-prevention goals with its impact on legitimate issuers and investors’ freedom to contract. No regulatory regime even in principle should aim to be completely free of fraud. Costs are too high, and the goal contradicts human nature. And it has proven impossible despite the best intentions, decades of experience, and rules designed solely to prevent it. Comparing Reg A+, Reg D, and Reg CF illustrates this. Critics point to questionable Reg A+ issuers in the first few years, and state regulators complain about Reg D fraudsters. Yet Reg A+ issuers undergo a thorough Commission-led qualification process to ensure adequate disclosure and accurate financial status. Reg D with the least oversight garners more capital than public markets—an impossibility if investors feared fraud. Reg CF has avoided

173 De Fontenay, supra note 145, at 474 (“Many options exist for regulating the offering and trading of securities. The federal securities laws introduced in the New Deal overwhelmingly favor one approach: mandatory disclosure, primarily by securities issuers themselves.”).


176 Mercantus Center, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 24, 2019) at 5 [hereinafter Mercantus Center Letter] (“Prospectuses in public offers and annual reports from public companies are constantly criticized for prolixity, complexity, obfuscation, and repetitiveness.” (collecting scholarly authorities)).

177 Burton Letter, supra note 24, at 13 (discussing the balance needed in designing regulatory regimes and presence of some degree of fraud is inherent in human nature).

178 Cohn & Yadley, supra note 5, at 72, “[E]xamination of the securities violations that are of principal concern reveals that no amount of technical exemption requirements will hinder the fraud artists from their endeavors. . . Fraudulent and deceptive schemes have unfortunately continued unabated and independent of formal registration or exemption requirements.”

179 See supra note146.

180 See Gerold Letter, supra note 144, at 3 n. 9 (collecting cases).
substantive fraud accusations thus far likely because portals are liable but as shown below private-ordered systems function just as well. Thus not even the Commission shares critics gloomy view, noting the dearth of legal actions under Reg A+. The contradiction should augur a reexamination of the current Commission balance between investor protection and individual and investor freedom.

C. SEC JOBS Act Hostility was Open and Straightforward

These factors: penchant for prolix rules, distrust of outsiders and innovation, and overemphasis on investor protection converged in the Commission’s hostile attitude to the JOBS Act.

Commissioners flaunted enmity from its start. While Congress debated, Chair Schapiro wrote the Senate Committee on Banking, Housing, and Urban Affairs concerned the act would subject investors to “fraudulent schemes designed as investment opportunities.” She specifically deigned crowdfunding as lacking sufficient safeguards. In a later hearing Rep. Patrick McHenry (R-NC) described the letter as “being sideswiped by a regulatory body at the eleventh hour” and lamented the Chair hadn’t earlier addressed her concerns to the bill’s sponsors. Fellow Commissioner Luis Aguilar was forthright, “I cannot sit idly by when I see potential legislation that could harm investors. This bill seems to impose tremendous costs and potential harm on investors with little or no corresponding benefit.” Commission opposition pervaded both drafting and implementation. Edward Knight, Executive Vice President and General Counsel of NASDAQ, testified in a congressional hearing: “From the outset the SEC’s view of [equity crowdfunding] was they were not for this they and made it, shall I say, needlessly complicated

181 Securities and Exchange Commission, RPT. TO THE COMM. ON REGULATION CROWDFUNDING (Jun. 18, 2019), at 42 [hereinafter SEC, REGULATION CROWDFUNDING].
182 See infra Part VII.A.
183 Regulation A Report, supra n. 136 at 25 (While acknowledging concerns with certain Reg A+ issuers that obtained exchange listings, describing “relatively few” legal proceedings and stating, it was “not clear additional investor protections are necessary at this time.”).
185 The JOBS Act in Action Part II: Overseeing Effective Implementation that can Grow American Jobs, supra note 175, at 26-7.
and did not approach it except as this this was something where the public is going to get harmed and we need to narrow it as much as possible.”

D. Hostility to JOBS Act Innovations has Far-Reaching Consequences for the Future U.S. Economy

Commission hostility plagues more than Reg CF issuers raising small amounts. The JOBS Act is currently the best available emissary to the approaching token economy because it can meld network users and investors. Ongoing Commission grapples with token sales and blockchain thwart this potential. These innovations will never fit registered offerings and thus issuers must use private exemptions. Bitcoin, the first public blockchain, emerged out of the 2008-2009 financial crisis. The first Initial Coin Offering (ICO)—selling crypto tokens that act as potential keys and currency on future blockchain ventures—occurred in 2013. Yet digital assets so flummoxed the Commission, in 2018 it created a Senior Advisor for Digital Assets and Innovation post and filled it with career SEC bureaucrat Valerie Szczepanik.

After ICOs exploded in 2017, the Commission flooded issuers with subpoenas and enforcement actions. To be sure, many ICOs were frauds deserving prosecution. Still, good-faith actors requested Commission guidance. The Commission spent at least six months forming a 13-page “Framework for ‘Investment Contract’ Analysis of Digital Assets.” But instead of clarifying, the document obfuscated. The guidance steeped numerous factors over already unclear direction. While the unsigned document reiterated prior Commission statements it would determine compliance via individual “facts and circumstances” grounded in the decades-old Howey test, it expounded further factors that conceivably could trap anything from baseball cards to premier liquors. Commissioner Peirce described the guidance as a “Jackson Pollock painting,” further explaining, “While Howey has four factors to consider, the framework lists 38 separate considerations, many of which include several sub-points. A seasoned securities lawyer might be able to infer which of these considerations will likely be

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194 The Howey test, derives from SEC v. W.J. Howey Co., 328 U.S. 293 (1946). It is the foundational case on whether nontraditional assets qualify as “investment contracts” and therefore fall under SEC domain.
controlling and might therefore be able to provide the appropriate weight to each. . . . I worry that non-lawyers and lawyers not steeped in securities law and its attendant lore will not know what to make of the guidance.”

The confusion should not surprise given Ms. Szczepanik’s disposition. When queried she stated, “The lack of bright-line rules allows regulators to be more flexible.” She later opined ‘prescriptive rules’ may allow sneaky entrepreneurs to evade law. From the entrepreneur standpoint this creates worry. First Commission “flexibility” under years-long investigations and “facts and circumstances” analysis may benefit regulators but destroys companies exploring new technologies and ideas. Unweighted multi-factor analyses that leave even Commissioners guessing lends itself not to law but relationships. Clear rules and open competition, not which law firm hires former regulators should dictate market winners.

When innovative companies try following the rules, Commission “flexibility” leads to legal limbo and obscene bills. During the 2017 ICO craze Blockstack’s approach was different. Blockstack is a decentralized platform trying to create a more user-controlled and directed internet through blockchain, decentralized applications, and a tokenized ecosystem. Instead of testing Commission resolve or wrangling with the Howey test, Blockstack ensured compliance through Reg A+. The qualification process reportedly took 10 months and cost $2.8 million in legal fees. It cost more than the average IPO for issuers with revenue less than $100 million. While “bleeding edge” companies can except higher costs, six-seven figure compliance budgets will remain unviable for all but the most well-funded startups. And Blockstack’s qualification does not end potential liability. It plans to stop reporting once “Stacks Tokens” are fully decentralized, as SEC Director of Corporate Finance Bill Hinman approved in theory. But should SEC staff decide “facts and circumstances” dictate prolonged reporting it could sue Blockstack and kill the project.

199 About Blockstack, BLOCKSTACK, https://blockstack.org/about.
VI. THE FINAL RULES WILL NOT REVIVE THE JOBS ACT OR ENCOURAGE THE FUTURE TOKEN ECONOMY

The Commission’s Final Rules expose its lack of imagination and boldness. The Final Rules repeatedly fall short despite some welcome steps such as higher overall and individual limits. The Commission even mars outwardly promising changes with the incrementalism. In the years since President Obama described JOBS Act provisions as “game changers,” the Commission has proven incapable of fostering its lofty goals. Indeed, despite the thoroughness of the review, its impact will likely be slight. And like the JOBS Act, commenters may years later diagnose its failure. The Final Rules are a microcosm of why Congress must act.

Strikingly, the Commission avers—allegedly satisfied by Concept Release commenters—that major changes are unnecessary.\(^\text{204}\) Some exemptions like Reg D work well. But recalling the JOBS Act goals of expanding retail-investor wealth opportunities and capital options for underserved entrepreneurs, the exemptions falter. The Final Rules do not substantively address these goals.\(^\text{205}\)

A second theme is Commission belief it can solve underuse by raising overall or individual limits. From a relative standpoint these moves lower capital costs. But they do not address underlying issues that plague exemptions save Reg D. Only rarely does the Commission recognize its own or states’ rules as hardships. And any movement toward relaxing those rules is cautious and halting—a movement befitting the Commission’s New Deal pedigree but misaligned with modern capital raising.

Rule 241 is emblematic.\(^\text{206}\) Piggybacking on Regulation A Rule 255, Rule 241 exempts issuers generally soliciting interest before committing to a particular exemption. This rule could help novice issuers and those living outside areas concentrated with securities lawyers or angel networks. Discerning appetite for a raise and addressing investor concerns beforehand could tighten investor planning and focus. All receivers of these solicitations would be offerees for federal antifraud law.\(^\text{207}\) Rule 241 also includes logical disclaimers like legends, no acceptance of funds, and no binding commitments.\(^\text{208}\) But Rule 241 is likely dead on arrival\(^\text{209}\) because it fails

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\(^{204}\) Final Rules, supra note 1, at 9 and n.15 collecting supporting comments. (“[A] consistent theme . . . was that many elements of the current structure work effectively and a major restructuring is not needed.”); Cf. Facilitating Capital Formation, supra note 3, at 6.

\(^{205}\) According to SEC data Regulation A and Regulation CF along with Rule 504 account for only 0.1% of private capital raised through exemptions. Regulation D 506(c) part of the JOBS Act boosts this total but only minimally, see Facilitating Capital Formation, supra note 3, at 115.

\(^{206}\) Facilitating Capital Formation, supra note 3, at 349-350.

\(^{207}\) Id. at 349.

\(^{208}\) Id. at 350.

\(^{209}\) Letter from Sara Hanks, CEO, Crowdcheck, Inc., to Vanessa A. Countryman, Sec’y, Sec. & Exch. Comm’n (June 11, 2020) (on file with author) (“We believe that the lack of state preemption would make the exemption almost useless.”) [hereinafter Hanks Letter]; Cf. Letter from David Burton, Senior Fellow, Heritage Found. To Vanessa A. Countryman, Sec’y, Sec. & Exch. Comm’n (June 1, 2020) (on file with author) (discussing added costs and delays of Blue Sky laws and ineffectiveness of federal provisions that don’t preempt them.) [hereinafter Burton Letter]; Letter from Rutheford B. Campbell, Jr., Professors of Ky. Coll. of Law, to Vanessa A. Country man, Sec’y, Sec. & Exch. Comm’n (August 3, 2020) (on file with author) (“Rule 241 will be impossible (or at least nearly so) for an issuer to use. This outcome is a result of the failure of the Commission to exercise its delegated authority to preempt state registration requirements for an issuer’s testing the water under Rule 241.”) [hereinafter Campbell Letter].
to preempt these solicitations of interest from Blue Sky laws.\textsuperscript{210} If from nothing else, the Commission should have learned from its Reg A+ Tier 1 experiment, issuers will rarely suffer state-level processes.

Rule 148 the Commission’s new “Demo Day” rule exempting some actions from the throes of ‘general solicitation’ also shows its chary approach.\textsuperscript{211} Demo Days are sponsored events where founders discuss their companies with potential investors. After years of questions about whether these events invoke dreaded general solicitation, the Commission addressed the issue. To be sure, after endless handwringing a limited safe harbor is welcome. But as proposed, the rules may provide issuers and lawyers trouble, or may ultimately be ignored. The Commission defines a discrete set of forums exempt from general solicitation. Specifically, the exemption would cover “a seminar or meeting in which more than one issuer participates that is sponsored by a college, university, or other institution of higher education, State or local government or instrumentality thereof, nonprofit organization, or angel investor group, incubator, or accelerator.”\textsuperscript{212} It then defines “angel investor groups.”\textsuperscript{213} It also bans sponsor investment advice, recommendations or negotiations, bans fees for introductions and limits sponsors to “reasonable administrative fees.”\textsuperscript{214} The Commission avers sponsor limitations will deter “profit motive.”\textsuperscript{215}

Most concerningly, are restrictions the Commission places on advertising, founder demo “pitches,” and audience. Sponsor advertising cannot mention the Demo Day presenters are offering or plan to offer securities.\textsuperscript{216} Founders are limited to a list of four bits of offer information: (i.) the issuer is offering or planning to offer securities; (ii.) the type and amount of securities offered; (iii.) the intended use of proceeds; and (iv.) the unsubscribed amount the offering.\textsuperscript{217} The Commission’s policy goal is to prevent the Demo Day event from devolving into a de facto mini-road show.\textsuperscript{218} But the limitations hinder Demo Day presenters from answering basic and common questions about the investment and founders may just ignore them in the adrenaline-infused rush of post-presentation Q&A. One commenter likened the restrictions to forcing founders to read out tombstone advertisements on a platform and compared letter-of-the-law compliance to a “Monty Python Cheese Shop sketch.”\textsuperscript{219} Finally the Commission restricted the audience in virtual Demo Days,\textsuperscript{220} lest scores of unaccredited individuals have the opportunity to attend.\textsuperscript{221} The Commission describes this as a “tailored approach.” Time will tell

\begin{footnotesize}
\begin{enumerate}
\item See Final Rules, supra note 1, at 77; Cf. Facilitating Capital Formation, supra note 3, at 95 (describing its refusal to preempt Blue Sky laws as a “measured approach”).
\item Facilitating Capital Formation, supra note 3, at 342\textendash{}344.
\item Facilitating Capital Formation, supra note 3, at 342.
\item \textit{Id.} at 343\textendash{}344, Instructions to paragraph (a).
\item \textit{Id.}
\item \textit{Id.} at 82.
\item \textit{Id.} at 342.
\item \textit{Id.} at 343.
\item Hanks Letter, supra note 209, at 8\textendash{}9, (listing commonly asked questions the presenter would have to find various ways to decline to answer).
\item Facilitating Capital Formation, supra note 3, at 343.
\item Facilitating Capital Formation, supra note 3, at 84 (agreeing with commenters worried large numbers of non-accredited investors could be exposed to “broad offering-related communications” and thus imposing virtual Demo Day restrictions).
\end{enumerate}
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how workable it is, but Commission efforts to police human interaction with the precision of a fitted suit are foreboding.

A. Final Rules for Regulation D 506(c)

The proposed Reg D 506(c) changes again typify Commission plodding. The Commission realizes Reg D 506(c) has disappointed and proffers why: (i) the principles-based methodology for “reasonable steps” heaps uncertainty on issuers fearful regulators will deem their steps “unreasonable”; and (ii) the non-exhaustive documents list has privacy concerns.222 The Commission admits the list, as the only surefire way to avoid “facts and circumstances” inquiries, “may be creating uncertainty for issuers and inadvertently encouraging [them] . . . to rely only on the non-exclusive list.”223 In Commission fashion, after years’ experience, it proposes slight progress by adding investors may declare themselves accredited on subsequent raises after previous verification.224 But in a change from the Proposed Rules, the Final Rules added a five-year limit to this verification method.225

B. Final Rules for Regulation A+

The most important Reg A+ change is to raise the offer limit to $75 million.226 This marks the first time the Commission upped the limit Congress requires it to review biennially.227 It also raises the maximum amount security holders could sell under Tier 2 from $15 million to $22.5 million,228 consistent with its established 30% marker.229 Other Reg A+ changes involve redacting confidential information from certain Form 1-A exhibits instead of having to apply for confidential treatment beforehand230 and technical amendments to smooth the filing process.231 These will likely have little adoption effect.

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223 Final Rules, supra note 1, at 87.
224 Id. at 88; Facilitating Capital Formation, supra note 3 at 108.
225 Facilitating Capital Formation, supra note 3, at 109; Cf. id. at 359, § 230.506(c)(2)(ii)(E).
226 Facilitating Capital Formation, supra note 3, at 350.
228 Facilitating Capital Formation, supra note 3, at 350.
229 Id. at 135 n. 380.
230 Id. at 120-22.
231 These include changes to how issuers make nonpublic correspondence public via EDGAR, the SEC database, incorporating by reference previously filed financial statements in Form 1-A, and an amendment to the abandonment provision of Regulation A, Rule 259(b). Id. at 113–14 (17 C.F.R. § 230.259(b) (2019)). See generally Final Rules, supra note 1, at 119-127 (explaining these changes).
C. Final Rules for Regulation Crowdfunding

The biggest disappointment is Reg CF. The Final Rules do make progress.\(^{232}\) For example Reg CF issuers can now ‘test the waters’ before filing the legal document, Form C.\(^{233}\) The SEC would require these solicitations to disclaim the inability to accept funds until filing and the offer’s nonbinding nature.\(^{234}\) But importantly, because Reg CF offers are “covered” under 15 U.S.C. § 77r(b)(4)(c), Blue Sky laws are preempted.\(^{235}\) This change should benefit novice issuers or those living outside entrepreneurial hotspots. Issuers must choose Reg CF beforehand to avoid Rule 241 state processes. The Final Rules also helpfully clarify that issuers may discuss offers orally after filing if they follow Rule 204 proscriptions.\(^{236}\)

In response to comments, however, the Commission added two additional terms: “use of proceeds” and “progress toward funding goals.”\(^{237}\) The Commission describes this as an “incremental increase” in useful, nonharmful information for investors.\(^{238}\) In reality, it has likely burdened issuers by further limiting “non-terms communications” allowed outside the portal or beyond the strictures of tombstone adverts.\(^{239}\)

Raising the aggregate offer limit from $1.07 million to $5 million also helps.\(^{240}\) Although this contradicts the statute, the Commission used its general exemptive authority under Securities Act Section 28.\(^{241}\) For individual limits, Congress hamstrung the Commission with confusing text. But the Commission further clouded the situation by using “lesser of” instead of “greater of” in the ambiguous statutory formula and not exempting accredited investors. The Commission now seeks to remedy this by exempting accredited investors\(^{242}\) and using “greater of” for unaccredited investors.\(^{243}\) However, welcomed unaccredited investor limits are still confusing and unenforceable.

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\(^{232}\) One area of progress came from a Commission reversal. The Proposed Rules sought to eliminate certain nontraditional Reg CF financial instruments including Simple Agreements for Future Equity (SAFE), token instruments, and revenue shares. Final Rules, supra note 1, at 157 & n. 351. The Final Rules rejected this proposal in favor of adequate disclosure of the terms of these instruments. Final Rules, supra note 1, at 185.

\(^{233}\) Final Rules, supra note 1, at 333.

\(^{234}\) Id. Rule 206(b) [§ 227.206(b)].

\(^{235}\) 15 U.S.C. § 77r(a)(2)(A); Cf. Final Rules supra note 1 at 149 (“Currently, securities issued pursuant to the exemption under Section 4(a)(6) are deemed to be “covered securities” and thus the offer and sale of such securities by an issuer are not subject to State securities law registration and qualification requirements pursuant to Section 18 of the Securities Act.”). To allay any confusion about the covered nature of these offers and sales, the Commission added 17 CFR 227.504. Id. It defines a “qualified purchaser” for the purposes of Section 18(b)(3) of the Securities Act, as any Reg CF offeree or purchaser. Id. at 149 & n. 443, 338.

\(^{236}\) Final Rules, supra note 1, at 84–85; Cf. 17 C.F.R. § 227.204 (listing advertisement requirements).

\(^{237}\) Final Rules, supra note 1, at 103; Cf. Id. at 332-333 (providing instructions to § 227.204).

\(^{238}\) Id. at 103.

\(^{239}\) See Crowdcheck Letter, supra note 209, at 12 (“Most communications outside the investment platform are either through social media, which by virtue of the character limits are limited to basic information about the company, or are designed to be “non-terms communications” in which the issuer can freely discuss its business without discussing any term of the offering. Adding additional categories of information to be considered “terms of the offering” would work to limit what issuers may say, rather than enable additional disclosure about use of proceeds or progress of the offering. This would have the effect of suppressing communications rather than providing more flexibility”).

\(^{240}\) See Final Rules, supra note 1, at 325.

\(^{241}\) Final Rules, supra note 1 at 148.

\(^{242}\) Final Rules, supra note 1, at 154.

\(^{243}\) Id. at 325-26.
Unfortunately, other Proposed Rules will likely have little impact despite positive baby steps. First are the long-clamored-for Special Purpose Vehicles (SPVs). The JOBS Act Title III prevented use of certain “investment companies” as defined or excluded in the Investment Company Act of 1940. Practically, this means SPVs that invest in only one company could not participate in Reg CF. From the start, government and market actors recognized how disallowing SPVs would thwart Reg CF growth. In theory, SPVs could ease regulatory burdens for Reg CF issuers by cabining all Reg CF investors in a separate legal entity. Concerns focus on unwieldy numbers of record holders on issuers’ capitalization tables for the 12(g) Rule and other administrative hurdles linked to unaccredited investors. The SEC proposed an exception to the JOBS Act statutory prohibition through a “crowdfunding vehicle” SPV, that would channel all Reg CF investors into one bucket. But in typical fashion, the Commission’s rule-heavy approach may kill this innovation before it flourishes. At the least, the Commission admits its crowdfunding-vehicle exception will limit its utility, forcing issuers into a cost-benefit analysis.

While the proposed rule purports to solve the capitalization table and 12(g) Rule issue, the Commission larded investor protections that will retard use. The Commission’s proposed design “would serve merely as a conduit for investors to invest in a single underlying issuer and would not have a separate business purpose.” The instrument’s structure “provide[s] investors in the crowdfunding vehicle the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer.”

While supportive of the crowdfunding vehicle concept, critics panned the rule’s costs and complexities. Wefunder, the largest portal by investment volume, has already stated it will not support it. Wefunder, the largest portal by investment volume, has already stated it will not support it. As envisioned, one raise may require multiple crowdfunding vehicles. The SPV also saddles the issuer with cost burdens, substantially increasing upfront outlays for an already expensive option. Even with proxies, the need to gain permission from security holders for transactions will cost time and money. There are also additional disclosure obligations and

245 See Crowdfunding Release, supra note 101, at 36-37 and n. 94; Cf. Final Rules, supra note 1, at 140-144; Final Rules, supra note 1, at 158-59 (noting that by requiring investors to hold the investment in their own name, issuers are somewhat restrained).
246 See Proposed Rule 3a-9 under the Investment Company Act, Final Rules, supra note 3, at 144.
247 See generally Final Rules, supra note 1, at 375-77. The Commission also altered the 12(g) Rule to ensure natural persons investing through crowdfunding vehicles may be excluded when they are deemed to be co-issuers. Id. at 371.
248 See id. at 173-74 (acknowledging the “costs and burdens” of the crowdfunding vehicle’s structure and surmising the “balance of tradeoffs” will likely vary depending on a number of factors and influence use).
249 Final Rules, supra note 1, at 159-160, 162 n. 477.
250 Final Rules supra note 1, at 173, Cf. Id. at 177-178.
251 See e.g. Burton Letter, supra note 209, at 12 (describing SPV structure as “so utterly prescriptive that it is unlikely to be much used.”); Crowdcheck Letter, supra note 209, at 21 (describing SPV structure as “not workable in practice.”); Letter from Nicholas Tommarello CEO, Wefunder, to the SEC on the Proposed Rules at 5 (May 28, 2020), https://www.sec.gov/comments/s7-05-20/s70520-7246786-217248.pdf (describing SPV structure as “too costly with little benefit to either investors or issuers”) [Hereinafter Tommarello Letter].
252 Tommarello Letter, supra note 251, at 5.
questions about who will manage the crowdfunding vehicle and distribute required paperwork. These issues will hamper and may foreclose crowdfunding-vehicle use altogether.

VII. FIXING THE JOBS ACT

The JOBS Act has not reached its promise. Geographic and demographic disparities remain in who gets funded and who profits. Uncertainty also persists in Commission approaches to the JOBS Act role in tokenized structures. After eight years and a complete private-exemption framework review the Commission has few answers. Commissioners pay lip service to problems but overemphasis on investor protection, insistence on “fact and circumstances” analysis, and a lumbering bureaucracy thwart progress.

A. Lessons from Overseas

The United States is not alone in grappling with new capital-raising methods, token economics, and disruptions to calcified monetary systems. In aligning America’s entrepreneurial ambitions with changing global dynamics, we can see what works elsewhere and adapt our rules. Fulbright Scholar and University of Colorado professor Andrew Schwartz has researched equity crowdfunding models. His New Zealand study is particularly useful because it copied Regulation Crowdfunding yet stripped it of obstacles domestic entrepreneurs face. The result has been spectacular. Scaled for economy and focusing on the first year, New Zealand had thirteen times more crowdfunding campaigns and raised thirty times more capital. And did so without any reported fraud. Even accounting for Reg CF’s healthy year-to-year growth and other available options for U.S. entrepreneurs, New Zealand’s model is notable. New Zealand focuses on private ordering where portals and lead investors take responsibility for issuer quality. Reputational awareness and financial skin-in-the-game self-regulate the system without equivalents of Form Cs, Annual Reports, individual limits, or offer regulation.

While New Zealand’s model may be too radical for the current Congress it presents a striking alternative to the rule-heavy U.S. approach. Yet it is not only from this small country we can learn. The U.K. with a comparable financial system has also succeeded. According to the 2019 SEC Regulation Crowdfunding Report in 2017 alone U.K. equity-crowdfunding issuers raised $450 million, “significantly higher” than Reg CF’s first two-and-half-years. The SEC cautions about comparisons because of “differences in regulatory regimes and tax treatments of crowdfunding securities investments.” One difference is the U.K. “Regulatory Sandbox.” Sandbox tools include “restricted authorization, individual guidance, informal steers, waivers and no enforcement action letters.” Within its first two years the Sandbox accepted 89 firms

254 Letter from Prof. Andrew Schwartz, Professor of Law, Univ. of Colo., to the SEC on the Concept Release (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6193349-192506.pdf [hereinafter Schwartz Letter].
256 Professor Schwartz notes Australia has a flat individual limit of $5,000 instead of the clunky Regulation CF formula, which avoids privacy concerns and is straightforward. Schwartz Letter, supra note 254, at 5.
257 SEC, REGULATION CROWDFUNDING, supra note 181, at 16.
258 Id. at 16-17.
with innovative products. According to an outside report, “The unequivocal message is that the sandbox has delivered real value to firms, ranging from guidance relating to the application of regulation to innovative propositions, to ‘kicking the [tires]’ on the risks relating to their business model.”\textsuperscript{260} It recently announced a partnership with the City of London Corporation to support firms addressing the COVID-19 challenge.\textsuperscript{261} Commissioner Peirce has proposed the same concept, though with less hands-on government guidance, for U.S.-based token projects.\textsuperscript{262}

While this regulatory originality may or may not work for domestic firms, the U.K. embrace of innovation is in short supply across the Atlantic.

B. Regulators must Heed Private Exemption Costs

Currently, and including the Final Rules, the costs of forgoing Reg D for retail-investor raises are infeasible for most issuers. Reg A+ and Reg CF costs dwarf private-ordered Reg D. Reg A+ estimates range from lower six figures to well into seven figures.\textsuperscript{263} In relative costs, Reg CF is potentially worse. The Commission estimates average Reg CF campaigns cost almost $222,500 and 241 manhours.\textsuperscript{264} Reg D 506(c) is not only more costly than Reg D but invites substantial


\textsuperscript{263} JD Alois, How Much Does a Reg A+ Offering Cost?, CROWDFUND INSIDER (Nov. 6, 2019, 3:48 PM), https://www.crowdfundinsider.com/2019/11/153797-how-much-does-a-reg-a-offering-cost/ (“In total, on the low end, Manhattan Street Capital estimates a Reg A+ offering will cost $300,000 to complete. That amount will come straight off of the top of any funding raised – which means a percentage of investor money.”); Anzhela Knyazeva, REGULATION A+: WHAT DO WE KNOW SO FAR?, at 14 (Nov. 2016) (unpublished manuscript) (on file with the SEC Division of Economic and Risk Analysis), https://www.sec.gov/dera/staff-papers/white-papers/Knyazeva_RegulationA-.pdf (The average costs including using an intermediary at over $1 million, without an intermediary at $111k this doesn’t count other fees, for instance state filing fees which can be as much as $45k);

JD Alois, Report Updates on Reg A+ & Reg CF Investment Crowdfunding Progress During 2017, CROWDFUND INSIDER (Feb. 25, 2018, 7:22 AM), https://www.crowdfundinsider.com/2018/02/128794-report-updates-reg-cf-investment-crowdfunding-progress-2017/ (“The average company that reported costs associated with a Regulation A+ offering spent just over $93,000 in legal fees. The average audit cost was reported as approximately $33,735. Significantly fewer companies reported costs associated with remaining fees. From the limited data available, the average costs were as follows: sales commissions, $1.8 million; finders’ fees, $800,000; underwriters’ fees, $1.3 million; promoters’ fees, $529,630; and Blue Sky compliance fees, $19,819.”); Campbell Letter, supra note 50, at 13 (discussing how Reg A+ is cost prohibitive for small issuers).

privacy concerns.\textsuperscript{265} In fact, the Wefunder portal returned to Reg D after Reg D 506(c) compliance headaches.\textsuperscript{266} In examining how to bring Reg D opportunities to all, cost of capital must be paramount.

\section*{C. Where Congress Should Act}

In our deeply polarized time, the JOBS Act convened supporters across ideological and partisan lines to help America’s overlooked entrepreneurs. Unfortunately, one constituency not on board was the Securities and Exchange Commission. The results speak for themselves. It is Congress’s duty to intervene before another lost decade occurs. A JOBS Act sequel can succeed where the first failed by adhering to a few key insights. First the Commission will not fix the JOBS Act \textit{sua sponte}. The Final Rules show that. Second, Congress should trust citizens to make investment choices as they do other life choices. This means allowing options that fit their budgets, aspirations, and risk tolerance subject to federal antifraud law. As Professor Usha Rodrigues aptly states, “Securities law . . . in theory, as in practice, marginalizes the average investor without acknowledging that it does so, let alone justifying it.”\textsuperscript{267} Third, states should not conduct additional reviews or require fees that do not protect investors but harm entrepreneurs.

\textbf{Regulate sales not offers.} Offer regulation has hallmarkd U.S. securities law since its federalization.\textsuperscript{268} The Commission interprets offers broadly and beyond common-law understandings.\textsuperscript{269} That offers, in effect, \textit{speech} can harm potential investors, even those not
investing is a uniquely American concept.\footnote{Letter from Sara Hanks, CEO, Crowdcheck, to the SEC on the Concept Release, at 6 (Oct. 30, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6368811-196431.pdf [hereinafter Hanks Letter].} And its repeal has been bandied since at least the 1990s.\footnote{Id.} No one is harmed by receiving investment opportunities\footnote{Final Rules, supra note 1, at 85.} and that speech is still subject to federal antifraud law. Speech policing factual information ties issuers and their lawyers in knots, ups legal bills, and foments less information. This is true even for Reg D where general solicitation squabbles spur angst, stalled raises, and minutia-level speech parsing.\footnote{Id. (finding the additional fourth prong “is unlikely to affect investor protection in light of the limits on the overall information about the offering that may be conveyed . . . ”).}

The Commission’s revised Demo Day rules illustrate the bizarre contradictions that can result from trying to police truthful information. As noted above, the Commission will allow presenters to state four information pieces: “(i.) Notification that the issuer is in the process of offering or planning to offer securities; (ii.) The type and amount of securities being offered; (iii.) The intended use of the proceeds of the offering; and (iv.) The unsubscribed amount in an offering.”\footnote{Id. (“[P]otential investors will be able to seek additional disclosure about the investment opportunity outside of the event setting.”).} It considers this limitation an investor protection.\footnote{Hanks Letter, supra note 270, at 2; Letter from Robert E. Buckholz Chair, Federal Regulation of Securities Committee ABA Business Law Section, to the SEC on the Concept Release, at 4 (Oct. 16, 2019), https://www.sec.gov/comments/s7-08-19/s70819-5716317-193413.pdf [hereinafter Buckholz Letter] (“Although the Securities Act regulates offers and sales, true damage rarely occurs unless there is an actual sale.”); Burton Letter, supra note 24, at 9 (“An offeree that never buys a security needs little ‘protection’. ”); Barker Letter, supra note 170 (“[I]nvestors need protection, but that belongs at the point-of-sale.”); Letter from Georgia Quinn, Gen. Couns., Coinlist, to the SEC on the Concept Release, at 6 (Sept. 26, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6220398-192608.pdf [hereinafter Quinn Letter] (“Instead of system of potential foot faults, issuers should be able to communicate broadly as long as before investing, potential investors are directed to the intermediary with appropriate education and risk disclosures.”); Campbell Letter, supra note 51, at 10 (“Issuers should be allowed and, indeed, encouraged to solicit broadly for investors, so long as the investor protection condition is imposed at sale.”).} Yet, it then states potential investors can meet afterwards “outside of the event setting” to get further disclosure.\footnote{Id. (“[T]he Staff’s guidance has been inconsistent at times and still leaves open a number of compliance uncertainties.”).} Thus, the same information that requires shielding at the event loses its investor-protection function at a next-day lunch meeting.

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\footnote{Linda Quinn, Dir. of SEC Div. of Corp. Fin., Speech: Reforming the Securities Act of 1933: A Conceptual Framework, reprinted in INSIGHTS, Vol. 10, No. 1 (Jan. 1996), https://www.sec.gov/info/smallbus/acsec/reformingsa33.pdf.} Quaadman Letter, supra note 222, at 5 (“Determining what activities constitute general solicitation or general advertising has been an area of uncertainty for years. . . . [T]he Staff’s guidance has been inconsistent at times and still leaves open a number of compliance uncertainties.”); Letter from Maria Wolvin, Vice President & Sr. Couns., Pub. Pol’y Ass’n for Corp. Growth, to the SEC on the Concept Release, at 6 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6190715-192477.pdf (“[T]he Staff seeks to undertake a Rule 506(b) offering [must] either navigate a host of SEC No Action Letters, staff guidance and enforcement activity, or expend resources to retain outside counsel to determine the parameters of prohibited and permissible activities under Rule 506(b).”); Hanks Letter, supra note 270, at 5 (unfamiliarity with general solicitation nuances “leads to pointless arguments between issuer and counsel as to what the issuer hopes to achieve with the communications they are making, and frantic efforts to ‘fix’ communications that the issuer has made without realizing the light in which the communication may be viewed by regulators.”); Letter from James P. Dowd, CEO, N. Cap. Inv. Tech., to the SEC on the Concept Release, at 2 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6193359-192511.pdf [hereinafter Down Letter] (describing decades-long issues with when an investor relationship is sufficiently “preexisting” and “substantive” to avoid general solicitation).
The virtual-audience restriction is also head-scratching. The Commission distinguishes in-person Demo Days, which have inherent physical limitations to curtail unaccredited investor attendance from virtual Demo Days which lack such barriers.\textsuperscript{277} The Commission limits attendance at these virtual events but allows certain unaccredited investors to attend, for instance students, faculty, and alumni of a university host. The Commission is wary that unaccredited persons may hear broad offering communications.\textsuperscript{278} But it does not explain why a student at the hosting college benefits by virtually attending the event but her friend at a nearby junior college or sibling saving to start a business does not.

Less experienced Reg CF issuers and investors are especially vulnerable to offer proscriptions. Regulating speech between these parties for small-dollar amounts and often where prior relationships exist runs counter to the crowdfunding model,\textsuperscript{279} as well as Reg CF’s goal to democratize private investing.\textsuperscript{280} Offer strictures not only harm Reg CF issuers pre-raise but also during, limiting term communications outside portals to nondescript ‘tombstone’ ads.\textsuperscript{281} This confuses novice issuers and investors alike and factors into Reg CF’s soft start.\textsuperscript{282} The rules force even knowledgeable issuers into vagaries and weasel words lest they trip the “terms” – “nonterms” dichotomy.\textsuperscript{283} These issues will keep plaguing raises as new communication methods emerge. One commenter described hours spent trying to format a Reg A+ solicitation in Instagram Stories with proper text and links.\textsuperscript{284}

The Final Rules embody Commission failure to address these concerns. Its refusal to preempt Rule 241 from Blue Sky laws, laborious and mine-laden definitions for ‘Demo Days,’

\begin{footnotesize}
\textsuperscript{277}\textit{Id.} at 84-85.
\textsuperscript{278}\textit{Id.} at 84, (“[S]ome commenters raised concerns about [Demo Day] events allowing for broad offering-related communications to non-accredited investors. We share this concern, particularly in light of the increasing prevalence of virtual “demo days” that are more accessible and widely attended by the general public.”).\textsuperscript{279} Barker Letter, \textit{supra} note 170 (“At this scale, the ROI for attempting to police the flow of information is futile at best and oppressive at worse.”); Letter from Ed Engler, Managing Partner, Pittsburgh Equity Partners, to the SEC on the Concept Release, at 6 (Sept. 30, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6231639-192668.pdf [hereinafter Engler Letter] (“The goal of Reg CF should be to increase investor access to information and transparency of the security being offered/sold.”); Letter from Mainvest, Inc. to the SEC on the Concept Release, at 1 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6193357-192513.pdf [Mainvest Letter] (discussing the localized nature of crowdfunding); Campbell Letter, \textit{supra} note 81, at 7 (“The idea that a neutral posting (my term) of investment with a third party, coupled with strict limitations on other contacts between the issuer and investors, would enable issuers to sell securities obviously was misplaced.”).
\textsuperscript{280} See 2018 Forum Report, \textit{supra} note 36, at 20.
\textsuperscript{281} 17 C.F.R. § 227.204.
\textsuperscript{282} See Campbell Letter, \textit{supra} note 51, at 19 (pointing toward limitations in marketing strategies as one reason Reg CF has failed).
\textsuperscript{283} Quinn Letter, \textit{supra} note 272, at 6; Engler Letter, \textit{supra} note 279, at 6 (describing “very careful line” businesses must walk when promoting their Reg CF raises); Tommarello Letter, \textit{supra} note 266, at 7 (describing “absurd result” that potential investors can’t look Reg CF issuers in the eye and ask them questions about their raise); Letter from Sherwood Neiss, Principal, Crowdfund Cap. Advisors, LLC, to the SEC on the Concept Release, at 7 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6190712-192475.pdf [hereinafter Neiss Letter] (suggesting only limitation on nonportal communication should be potential investors directed to portal for more information); Letter from Hon. Patrick McHenry (R-NC), Vice Chair, H. Comm. on Fin. Serv., to the SEC on the Concept Release, at 5 (Oct. 15, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6293559-193383.pdf [hereinafter McHenry Letter] (describing how current rules hamper issuers by limiting contact with third-party media).
\textsuperscript{284} Hanks Letter, \textit{supra} note 270, at 8.
\end{footnotesize}
and the general desire to shield investors from information to protect them is paternalistic\textsuperscript{285} and discordant with the nation’s free speech values.\textsuperscript{286}

\textbf{Exempt Secondary Trading for Regulation A+ and Regulation CF.} A major barrier for both Reg A+ and Reg CF is the lack of state preemption for secondary trading. Although federally both are freely tradable (Reg CF after one year), Blue Sky laws thwart its potential.\textsuperscript{287} Impairing investor liquidity does not protect investors.\textsuperscript{288} The Commission has broad authority to preempt Regulation A securities.\textsuperscript{289} But it refuses to act despite habitual cajoling both inside\textsuperscript{290}

\textsuperscript{285} Mercantus Center Letter, \textit{supra} note 176, at 5 (“The federal securities laws were meant to increase the flow of accurate information and not to protect investors in a paternalistic way from potentially bad investments. . . . Investor protection was the spirit of the federal securities laws, but it was protection consistent with the country's history and tradition of freedom and self-reliance.”).

\textsuperscript{286} U.S. CONST. amend. I.

\textsuperscript{287} Dowd Letter, \textit{supra} note 273, at 3 (“Simply put, without federal preemption, secondary markets for exempt securities are dead before launch. They will be crippled by the high cost of compliance. The failure of Reg A / Tier 1 offers convincing evidence of this point.”); Burton Letter, \textit{supra} note 24, at 38 (discussing unattractiveness of Reg A+ because the lack of Blue Sky preemption in the secondary trading market means, “investors have no cost-effective means of selling their investment.”); Hanks Letter, \textit{supra} note 270, at 47 (“[T]he patchwork of rules applying to [Reg A+] issuers and brokers facilitating secondary transactions makes secondary liquidity excessively expensive and unavailable to many small issuers. This poses a harm to investors as well, as they do not have any real opportunity for liquidity until an issuer is listed on a national securities exchange.”). The Final Rules reiterated the Commission’s refusal to preempt secondary trading for Reg A+ Tier 2. Final Rules, \textit{supra} note 1, at 137 n. 389, 148 n. 439 (stating any change would come through a specific proposal with notice and comment).

\textsuperscript{288} Letter from Mark Schonberger, Goodwin Proctor LLP, to the SEC on the Concept Release, at 9 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6193382-192525.pdf [hereinafter Schonberger Letter] (“Public policy suggests that impairing liquidity of securities does not protect investors.”); McHenry Letter, \textit{supra} note 283, at 7 (“The liquidity provided by a secondary market is an investor protection in and of itself, because it would allow individuals whose financial situation has changed to exit these investments in times of need.”).

\textsuperscript{289} The Court of Appeals in \textit{Lindeen v. SEC} confirmed the breadth of this delegation to the Commission to preempt state registration authority over Regulation A+ offerings. 825 F. 3d 646 (D.C. Cir. 2016).

and outside government. If Reg A+ and Reg CF are to emerge from novelty stage and counter Reg D dominance, Congress must cover resales. It is telling that well before the JOBS Act, the Commission had broad authority to “cover” securities to “Qualified Purchasers” which it could freely define, limited only by investor protection and public interest. Congress even amended Securities Act Section 2(b) to make the Commission “consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.” A quarter century hence, the Commission has not materially acted without Congressional mandate.

Secondary trading also has massive future implications. Blockchain-based endeavors and tokenized systems are incompatible with state-by-state secondary-trading regimes. As tokens express multiple uses acting as network keys, as well as having currency and security traits, it is imperative states with their stifling and dissonant rules not interfere. While some states have sought to brand themselves blockchain havens others cannot even define the term. Little reason exists to think this ineptitude will dissipate as technology advances and digital assets acquire more and varying functions.

**Preempt state filing requirements and notice fees for Regulation A+ and Regulation Crowdfunding.** State filing and notice fees serve no cognizable purpose. They do not protect investors, facilitate capital, or improve markets. They are regressive, expensive, and disproportionately hurt smaller issuers. Reg A+ fees are littered with waste, inconsistencies, and timing issues, with no related benefit. This model departs from Reg D, where issuers

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291 See SEC, *supra* note 87 (collecting support in Regulation A Release); cf. Burton Letter, *supra* note 24, at 38 (Reg A+ has been a disappointment because of two Commission decisions, “Probably the most important reason was the Commission’s decision to not preempt Blue Sky laws for Tier 1 offerings or Tier 2 secondary offerings.”); Dowd Letter, *supra* note 273, at 3 (“Simply put, without federal preemption, secondary markets for exempt securities are dead before launch.”); Schonberger Letter, *supra* note 288, at 9 (“[T]he pre-emption of state laws with respect to resales of Tier 2 offerings needs to be reviewed and addressed.”); Quinn Letter, *supra* note 272, at 5 (Blue Sky preemption would make Reg A+ Tier 2 more workable); Hanks Letter, *supra* note 270, at 47; Campbell Letter, *supra* note 51, at 15 (“The failure of the Commission to preempt, to the full extent of its Congressionally delegated power, state registration authority has been a significant failure on the part of the Commission.”).


294 Campbell, *supra* note 84, at 348 (describing Commission’s decades-long failure to expand preemption over exempt offerings “even as states’ registration obligations have continued to choke small business capital formation and wreck the Commission’s rational, efficient exemptions from federal registration.”); Id. at 350 (“Indeed, a moment of reflection reveals that the only preemptions of state authority over exempt offerings by small businesses have been the result of statute, specifically the preemption over Rule 506 offerings and crowdfunding.”).


298 Engler Letter., *supra* note 279 at 2, (discussing burden of filing requirements and fees on Reg CF issuers).

299 Barker Letter., *supra* note 170 (discussing state regulators lack knowledge about newer exemptions and inability to interpret federal statutes, and in the case of Reg A+ issuers often pay fees by to states where no transaction occurs); Schonberger Letter, *supra* note 288, at 8 (“Tier 2 issuers, some issuers pay upwards of $25,000 per year in notice and filing fees to the 50 states – and, because this fee is paid before sales take place, it is a cost that issuers must incur regardless of whether an offering ultimately has a single investor in a given state in which the fee is paid.”); Hanks Letter, *supra* note 270, at 29 (“[T]he states have differing requirements with respect to the timing of notice filings ranging from requiring filing 21 days prior to ‘offers’ (which is not consistent with the ability to test
invoke state filing costs only after local sales. Reg A+ and Reg CF issuers place all offer documents on EDGAR\textsuperscript{300} making them publicly available for fraud investigations. At the least, Congress should reconcile Reg A+ issuers that often pay fees to all possible jurisdictions with Reg CF where at most issuers pay two.\textsuperscript{301}

**Exempt Regulation A+ and Regulation Crowdfunding from the 12(g) Rule.** The Commission in its familiar style conditionally exempts these issuers from the 12(g) Rule. Congress could simplify worries for those choosing these innovative exemptions by removing this hindrance completely. The 12(g) Rule constantly foments angst for growing companies.\textsuperscript{302} Even if applied to Reg D, where investors are likely accredited, it should not worry issuers crowdfunding investment from ordinary Americans.\textsuperscript{303}

**Raise the Regulation A+ Offer Limit to $100 million.** Congress should raise the Reg A+ 12-month aggregate offer limit to $100 million. After previous considerations, the Commission has now raised it to $75 million.\textsuperscript{304} Given the usual pace it may be several more years before it is raised again, despite Congressional directive.\textsuperscript{305} Congress should skip this potentially years-long wait while keeping Title IV’s biennial review.

**Raise the Regulation Crowdfunding Offer Limit to $20 million.** Congress should raise Reg CF’s 12-month aggregate offer limit to $20 million and add a statutory requirement like Reg A+ that the Commission biennially review it. The Commission raise to $5 million took almost four years and another change will likely follow this pace. Without significant encouragement to monied investors, Reg CF adoption will remain hampered despite recent spectacular gains.\textsuperscript{306}

**Simplify or eliminate individual limits for Regulation A+ and Regulation Crowdfunding.** Congress should remove individual formulas for unaccredited investors in Reg A+ and Reg CF and replace them with hard dollar amounts per investment, not aggregate per 12 months. The Commission has now eliminated Reg CF accredited investor limits.\textsuperscript{307} But both Reg A+ and Reg CF still impede unaccredited investors with annual income, net worth formulas. This confuses investors and invokes security and privacy concerns.\textsuperscript{308} A hard inflation-adjusted

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the waters under Rule 255) to requiring filing prior to qualification, to not accepting filings before qualification.“}); Buckholz Letter, supra note 272, at 12 (“State advance notice and filing fee requirements for Tier 2 offerings impose a substantial burden on the issuers without any corresponding benefit.”).


\textsuperscript{301} 15 U.S.C. § 77r(c)(2)(F).

\textsuperscript{302} Hanks Letter, supra note 270, at 24 (“Issuers and their counsel currently contort themselves into legal pretzels trying to structure deals in such a way that 12(g) is not triggered.”); cf. Concept Release, supra note 2, at 141 (discussing reluctance by issuers using Reg CF to take more than 500 unaccredited investors because of Rule 12(g) concerns).

\textsuperscript{303} Campbell Letter, supra note 51, at 14–15 (discussing how Rule 12(g) and reporting requirements impose “what amounts to penalties on small issuers using particular exemptions from registration, such as Regulation A+ (or Crowdfunding).”)

\textsuperscript{304} See Final Rules, supra note 1, at 117–120 for Commission rationale.


\textsuperscript{306} See, supra note 140.

\textsuperscript{307} Final Rules, supra note 1, at 147-148.

\textsuperscript{308} Schwartz Letter, supra note 254, at 5 (discussing privacy and security concerns investors have with the current model and the benefits of Australia’s hard-number model).
number would be simpler and straightforward. For instance, $10,000 per Reg CF investment and $20,000 per Reg A+.\footnote{Duccini Letter, supra note 264, at 8 (contrasting the simple $10,000/investor/year individual investment limit for the Minnesota intrastate crowdfunding to the “largely ineffective (and wholly unenforceable)” federal model).} Alternatively, Congress should remove the limits completely.

Limit financial and reporting requirements for Regulation A+ and Regulation CF. Without a robust secondary market, post-raise reports for Reg A+ and Reg CF make no sense.\footnote{Quinn Letter, supra note 272, at 5 (“It is not clear what the necessity of providing ongoing disclosure is if the securities cannot be transferred.”); cf. Rodrigues, Dirty Secret, supra note 28, at 3427 (“The secondary market is where the payoff for issuer disclosure really emerges.”).} These reports are expensive and time consuming. Moreover, audits make no sense for companies with little operating history.\footnote{Letter from Nicholas Tommarello, Chief Exec. Officer, Wefunder, to Countryman, Secretary, U.S. Sec. and Exch. Comm’n (Sept. 13, 2019) (on file with author) (“We know from three years of experience that the accounting requirements are the single most burdensome disclosure requirement (arguably, the only burdensome disclosure requirement) of Regulation Crowdfunding.”); Burton Letter, supra note 24, at 46 (“Requiring audited financial statements for a crowdfunding company is ludicrous. It is one of the most obvious examples of how the disclosure requirements do not fit together across exemptions. Issuers offering ten times this much (or more) need not obtain audited financials using other exemptions.”); Schwartz Letter, supra note 254, at 4 (“[A] significant percentage of crowdfunding issuers have very little income or assets to report, making financial statements practically irrelevant for them.”); Mainvest Letter, supra note 279, at 6 (“In most cases, adding the CPA review to the upfront costs, provides almost no value to investors and adds an often-prohibitive cost to entrepreneurs.”).} Congress should limit Reg A+ post-raise reports to annual and remove Reg CF post-raise reporting altogether. It should also end Reg CF audit requirements and allow CPA financial-statement reviews for all raises over $250,000, including subsequent raises.\footnote{Due to the COVID-19 pandemic, the Commission temporarily allowed Reg CF issuers offering under $250,000 in securities to have the principal executive officer certify the financial statements and certain information from the issuer’s Federal income tax returns instead of an independent public accountant. Temporary Amendments to Regulation Crowdfunding, 85 Fed. Reg. 27116 (proposed May 7, 2020)]. (to be codified at 17 C.F.R. pt. 227, 239). The Final Rules extended this relief until August 28, 2022. Final Rules, supra note 3, at 284-85.}

Combine Regulation D 506(b) and Regulation D 506(c) and allow accredited investor verification via affidavit. The Commission’s Reg D 506(c) “reasonable steps” verification methods are cumbersome and invasive. Congress should allow investors to represent under penalty of perjury they understand the accredited investor definition and meet the thresholds. If investors willfully lie, fault should lie with them.

Upon these changes, issuers may split between consumer-focused companies that thrive with heavy adoption choosing Reg A+/Reg CF and issuers with business to business focus choosing Reg D. Or issuers may tailor combinations. But under simplified rules accepting numerous unaccredited investors as brand ambassadors would be more appealing for issuers and potentially profitable for those investors. This is especially true of tokenized offerings.

D. Where the SEC Should Act

The Commission should recognize its failures. When state regulators meddle, policy failures occur. The Commission should not encourage state-review mechanisms.\footnote{Final Rules, supra note 3, at 125 (“We believe that raising the threshold would permit issuers to seek more capital at a lower marginal cost than under the current [Reg D 504] rule and may encourage regional multistate offerings and the use of state coordinated review programs, resulting in more issuers conducting offerings under the exemption . . . .”).} It sometimes dryly
notes how Blue Sky laws affect exemption use\textsuperscript{314} but never completely solves it. The Commission should admit private markets will never return to 1970s bad old days or pre-NSMIA. States should prosecute fraud after citizen complaints, in other words, reactive.\textsuperscript{315} No evidence shows career civil-service personnel have the acumen or mindset to evaluate new companies or ideas.

**Eliminate Regulation A+ Tier 1.** No issuer should be subject to double review. Federal processes suffice. Efforts by state regulators to streamline reviews have failed and should be acknowledged as such.\textsuperscript{316} After five years, the plague-like attitude toward Tier 1 should provide ample evidence the Commission should scrap it. Raising Reg CF to $20 million and Reg A+ to $100 million provides a better solution.\textsuperscript{317}

**Eliminate Regulation D 504.** The same issues that animate Reg A+ Tier 1 resound to Reg D 504. The Final Rules raise the Reg D 504 offer limit to $10 million from $5 million.\textsuperscript{318} The Commission should not keep trying to “fix” decades-old failures with higher caps without addressing underlying reasons for nonuse. Eliminating the Reg D 504 cap completely will not boost it given looming Blue Sky burdens. As it stands Reg D 504 (and the now-repealed Reg D 505) account for 2\% of all Regulation D raises under $5 million.\textsuperscript{319} One must wonder what raising the Reg D 504 limit to $10 million will achieve.\textsuperscript{320} Would raising the 2\% level to 5\% (an unlikely outcome) be good public policy? If so straightforward rules with three exemptions would be better.

**CONCLUSION**

Despite Commission belief, private-capital raising needs a paradigm shift. The Commission should recognize its presuppositions do not match the current age much less the one coming. Paternalistic investor protections that deter capital formation and efficient markets hamper America’s global competitiveness. Its tendency to include state brethren leads to policy

\textsuperscript{314} See, e.g., Regulation A Report, supra note 136, at 9 (“The larger Tier 2 offering limit does not appear to be the sole factor for issuers’ decision between tiers . . . Blue sky law preemption, facilitating nationwide solicitation and solicitation over the Internet, may have contributed to the popularity of Tier 2 offerings among issuers seeking the lower amount.”); Id. at 15 (“Some commenters have noted that state registration requirements for secondary market transactions in Regulation A securities limit liquidity in the Regulation A market.”); Concept Release, supra note 2, at 87 (discussing the vast differential in number of states issuers offer in Tier 2 compared to Tier 1, “We recognize that this differential observed in the data may be related to the fact that, under the 2015 Regulation A amendments, state registration requirements apply to Tier 1 but not to Tier 2 offerings.”).

\textsuperscript{315} Rutheford B. Campbell, Jr., Federalism Gone Amuck: The Case for Reallocating Governmental Authority over the Capital Formation Activities of Businesses, 50 WASHBURN L.J. 573, 573–574 (2011) (arguing that states should reallocate “scarce state resources to their most efficient use, which is the support of the states' enforcement of their antifraud provisions”).

\textsuperscript{316} Burton Letter, supra note 24, at 38 (“The NASA coordinated review program is a failure and should be acknowledged as such.”); cf. Campbell, Under the Bus, supra note 83, at 339 (describing previous failed NASSA attempts at uniformity).

\textsuperscript{317} Neiss Letter, supra note 283, at 4 (suggesting eliminating Reg A+ Tier 1 because Blue Sky laws make it impractical and replacing it with Reg CF at $20 million offering limit).

\textsuperscript{318} Facilitating Capital Formation, supra note, 3 at 125.

\textsuperscript{319} Id. at 122-123.

\textsuperscript{320} In 2016 the Commission raised the aggregate amount an issuer may offer and sell in any 12-month period for Reg D 504 from $1 million to $5 million but notes, “[The] data suggests that the higher threshold limits have not encouraged more issuers to conduct new offerings under the Rule 504 exemption, although those using the exemption are able to raise more capital in each offering and in the aggregate.” Id. at 124.
failures that can last decades. 321 The Commission recognizes these failures begrudgingly if at all. Its inability to adjust to innovation and New Deal era “fact and circumstances” analysis already harm domestic entrepreneurs.

As David Burton aptly states, “The core problem with the current U.S. securities regulation system is its negative impact on small, start-up and emerging growth companies and, therefore, the adverse impact it has on entrepreneurship and the growth potential of the economy.” 322 This is not a new insight. Four decades ago, Congress and the Commission recognized the capital-raising burdens it placed on small businesses and entrepreneurs. 323 In 2012, Congress tried to help via the JOBS Act. Unfortunately, even before enactment, the Commission treated the law as adversarial with predictable results. The future U.S. economy is too important to leave to well-intentioned Commission staff. Congress should improve the JOBS Act with a second try that fulfills the first’s promise while curtailing discretionary powers that caused it to falter.

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321 Campbell, Under the Bus, supra note 84, at 347 (describing Commission actions and inactions over the last 20 years that have enabled NASAA obstruction of small business capital formation); Id. at 350 (“Simply stated, my conclusion is that the Commission will continue to enable NASAA and state regulators to preserve a regime to makes it unnecessarily difficult, inefficient, and unfair for small businesses to access external capital. My other simple, related conclusion is that only Congress can break this gridlock by enacting statutory preemptions of state authority over registration.”).
322 Burton Letter, supra note 24, at 22.
323 See Martin & Parsons, supra note 14.