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

PAUL H. JOSSEY*

CONTENTS

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 Release[2] and March 2020 proposals[3] 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

---

[*] Principal Attorney, Jossey PLLC and founder of thecrowdfundinglawyers.com. The author thanks George W. Dent, Jr., Professor Emeritus of Law, Case Western Reserve University for his helpful comments on this article. All errors are mine.

[1] Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Release Nos. 33-10884; 34-90300 (November 2, 2020) https://www.sec.gov/rules/final/2020/33-10844.pdf [hereinafter Final Rules].

[2] Concept Release on Harmonization of Securities Offering Exemptions, 84 Fed. Reg. 30460 (June 26, 2019), https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf [hereinafter Concept Release].

[3] Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10763 (Mar. 4, 2020) https://www.sec.gov/rules/proposed/2020/33-10763.pdf [hereinafter Facilitating Capital Formation].

[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)).

[5] Section 5 of the Securities Act of 1933 prohibits the sale of securities without an effective registration statement unless the issuer claims a valid exemption. 15 U.S.C. §77e(c) (2018). Exempt offerings are not "public offerings." *See e.g.*, SEC v. Ralston Purina, 346 U.S. 119, 122 (1953) (interpreting Securities Act Section 4(a)(2) transactions "not involving a public offering."). Smaller businesses and startups typically offer securities through exemptions because they cannot meet the rigors of registration. *See* Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns*, 4 N.Y.U. J. L. & Bus. 1, 7–10 (2007) (discussing the impracticality of registration for smaller issuers), http://scholarship.law.ufl.edu/faculty/pub/248.

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

[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,[8] 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.[9] 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[10] describes the U.S. private capital markets as "unrivaled and coveted around the globe."[11] 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.[12] 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.[13] This law and resulting Commission action[14] seeded the venture-capital

---

[8] *See infra* Part IV.D.

[9] According to data from the Small Business Administration, in 2015 there were 5.27 million U.S. firms with less than 20 employees. These firms employed around 20 million people. U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., 2018 SMALL BUSINESS PROFILE (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf.

[10] Mr. Clayton ended his tenure as SEC Chair on December 23, 2020. *See*, Letter from Jay Clayton, SEC Chairman, to President Donald J. Trump (Dec. 23, 2020) (available at https://www.sec.gov/news/public-statement/clayton-2020-12-23).

[11] Jay Clayton, Chairman, U.S. Sec. and Exch. Comm'n, Remarks to the Economic Club of New York, (Sept. 9, 2019) (transcript available in U.S. Securities and Exchange Commission), https://www.sec.gov/news/speech/speech-clayton-2019-09-09).

[12] *See National Venture Capital Association 2020 Yearbook*, Nat'l Venture Cap. Ass'n 2020 Y.B., 5, https://nvca.org/wp-content/uploads/2020/04/NVCA-2020-Yearbook.pdf ("Outside of California, Massachusetts, and New York, median VC fund size reached $43 million in 2019, an increase of 57% compared to 2018, but still relatively small to the dominant venture hubs—the median for California, Massachusetts, and New York, collectively, was $100 million.").

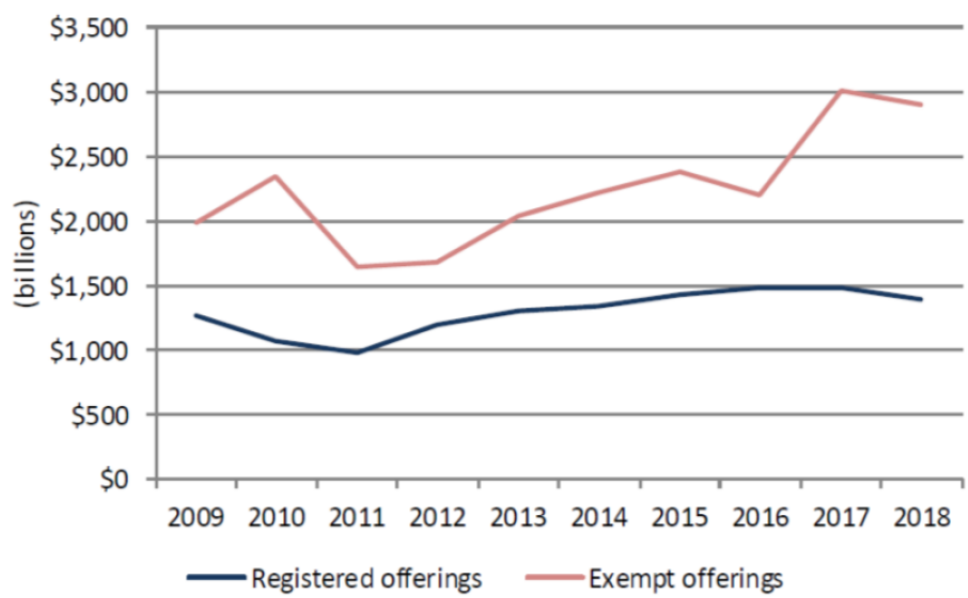
[13] Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275 (1980).

[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 laws[19]—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



Source: Securities and Exchange Commission

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

[15] The Commission had defined accredited investors before the passage of the statute. *See* Exemption of Limited Offers and Sales by Qualified Issuers, Securities Act Release No. 33-6180, 45 Fed. Reg. 6462 (Jan. 28, 1980). (Rule 501(a) [17 C.F.R. § 230.501(a) (2019)] contains the current definition. For natural persons it includes net worth and annual income thresholds. In August 2020, the SEC expanded the Accredited Investor definition to add sophistication criteria enabling natural persons to qualify beyond financial indicia. *See*, Accredited Investor Definition, Securities Act Release Nos. 33-10824; 34-89669, 85 Fed. Reg. 64234 (Oct. 9, 2020).

[16] Unless otherwise noted "Reg D" refers to the current Regulation D 506(b) [17 C.F.R. § 230.506(b) (2019)].

[17] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).

[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,[22] the SEC only requires notice filing, and states cannot interfere. No monetary limits exist for investors or issuers.[23]

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."[24] Further, federal law protects these offerees against misleading statements and fraud.[25]

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.[26] 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.[27] The dearth of private-investment opportunities for retail investors has been called "Securities Law's Dirty Little Secret."[28] 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,

---

[22] Broker Dealers are not subject to general solicitation prohibitions who solicit existing customers from a pre-determined, screened list of potential investors. *See, e.g.*, Arthur M. Borden, SEC Staff No-Action Letter, 1978 SEC No-Act. LEXIS 2001 (Oct. 6, 1978).

[23] 17 C.F.R. § 230.500 (2019); *cf.* Joe Wallin et al., Comment Letter on SEC Concept Release (Sept. 23, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6182683-192407.pdf (describing the procedure for Reg D 506(b) raises).

[24] David R. Burton, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6193328-192495.pdf [hereinafter Burton Letter].

[25] *Frequently asked questions about exempt offerings*, U.S. SEC. AND EXCH. COMM'N, (July 12, 2019), https://www.sec.gov/smallbusiness/exemptofferings/faq; *cf.* 15 U.S.C. § 77q ("All securities transactions, even exempt transactions, are subject to the antifraud provisions of the federal securities laws.").

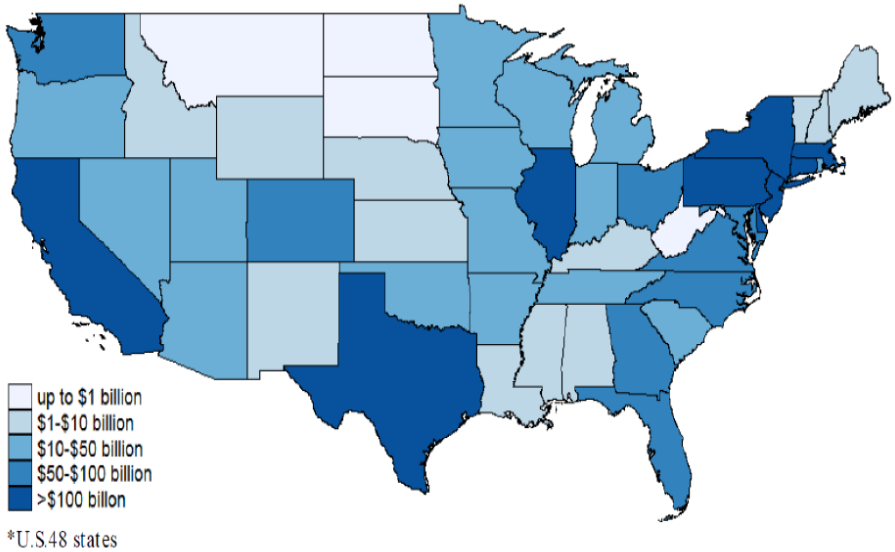
[26] *See* Regulation D Revisions; Exemption for Certain Employee Benefit Plans, 52 Fed. Reg. 3015 (Jan. 30, 1987).

[27] Concept Release, *supra* note 2, at 36. *See supra* note 15 for a recent, but yet-quantified Commission expansion of natural persons eligible for Accredited Investor classification.

[28] Usha Rodrigues, *Securities Law's Dirty Little Secret*, 81 FORDHAM L. REV. 3389, 3390–91 (2013), https://digitalcommons.law.uga.edu/fac_artchop/939 [hereinafter Rodrigues, *Dirty Secret*] ("The dirty little secret of U.S. securities law is that the rich not only have more money-they also have access to types of wealth-generating investments not available, by law, to the average investor."); *Id.* at 3422 ("Although not driven by malicious intent, this regulatory evolution [of the private markets] had the effect of creating a world divided into investing haves and have-nots.").

aggregate Reg D-capital concentrates where accredited investors cluster.[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.[30]

FIGURE 2: 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.[31] From 2013-2017 venture capital backed-businesses were 1% Black, 2% Latino, 2% Middle Eastern, 18% Asian, and 77% White.[32] Moreover, new black-owned businesses start with around three times

[29]Jason Rowley, *Where Venture Capitalists Invest and Why*, TECHCRUNCH (Nov. 9, 2017), https://techcrunch.com/2017/11/09/local-loyalty-where-venture-capitalists-invest-and-why/ (describing how venture-capital funds tend to invest in firms within close geographic proximity); *cf.* Dana M. Warren, *Venture Capital Investment: Status and Trends*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 12 (2012) ("Venture capital investment almost always involves significant participation in and oversight of each of the portfolio companies by the venture capital professionals. As a result, simple logistics makes venture capital investment an inherently local, or at most regional, activity.").

[30] LAURA ANNE LINDSEY & LUKE C.D. STEIN, ANGELS, ENTREPRENEURSHIP, AND EMPLOYMENT DYNAMICS: EVIDENCE FROM INVESTOR ACCREDITATION RULES (Sixth Annual Conference on Financial Market Regulation 2019), https://ssrn.com/abstract=2939994.

[31] SEC, OFF. OF THE ADVOC. FOR SMALL BUS. CAP. FORMATION, ANNUAL RPT. FOR FISCAL YR. 2019, at 28, https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf.

[32] *Id.* at 32 (internal citation omitted).

less capital than new white-owned businesses.[33] Further, minority entrepreneurs report lack of capital disproportionately affects their profitability.[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.[35] Legislators sought to democratize investing for both entrepreneur and backer.[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."[37]

The JOBS Act contained three titles that expanded issuer access to investor pools.[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[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.

---

[33] *Id.* at 30 (internal citation omitted).

[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.").

[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).

[36] U.S. SEC. AND EXCH. COMM'N, GOV'T-BUS. F. ON SMALL BUS. CAP. FORMATION, FINAL RPT. (2019) at 20, https://www.sec.gov/info/smallbus/gbfor37.pdf [hereinafter 2018 Forum Report], (discussing the intent of Regulation Crowdfunding).

[37] President Barack Obama, Remarks by the President at JOBS Act Bill Signing (Apr. 5, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing.

[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.

[39] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306, 325 (2012) (codified as amended at 15 U.S.C. § 78l(g)(1)(A)).

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.[49] 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) "transactions by an issuer not involving any public offering," the Commission curtailed the exemption by "clarifying" limitations on its availability. *See* U.S. Sec. and Exch. Comm'n, Non-Public Offering Exemption, Release No. 33-4552, 27 Fed. Reg. 11316 (Nov. 6, 1962)..

[41] *See supra* note 14.

[42] 15 U.S.C. § 77d(a)(2).

[43] U.S. Sec. and Exch. Comm'n, Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Release No. 33-6389, 47 Fed. Reg. 11251 (Mar. 16, 1982).

[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).

[47] The Commission repealed Reg D 505 in 2016. *See* Exemptions to Facilitate Intrastate and Regional Securities Offerings, Release No. 33-10238, 81 Fed. Reg. 83494 (Nov. 21, 2016). Reg D 505 ceased on May 22, 2017.

[48] Kellye Y. Testy, *The Capital Markets in Transition: A Response to New SEC Rule 144A*, 66 IND. L.J. 233, 242 (1990). Testy uses the term 'private placement' which connotes securities sold under Securities Act Section 4(a)(2), not only Regulation D its Commission-created nonexclusive safe harbor. But as experience shows and noted by Testy, Reg D is the primary means of effectuating private placements.

[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 sate Title II.[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

---

[50] *See* 15 U.S.C. § 77r(b)(4)(F) (2018); 17 C.F.R. § 230.506(a) (2019).

[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.”).

[52] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306, 313–15 (2012).

[53] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415, 78 Fed. Reg. 44771 (July 24, 2013).

[54] *Id.* at 17-18.

[55] *Id.* at 27-28.

[56] 17 C.F.R. § 230.506(c)(2)(ii)(A).

[57] 17 C.F.R. § 230.506(c)(2)(ii)(B).

[58] 17 C.F.R. § 230.506(c)(2)(ii)(C).

1933 to shield smaller issuers from registration.[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.[60] The exemption floundered despite the Commission repeatedly raising the offer limit and eventually loosening communication rules.[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.[62] Issuers spurned Regulation A because of its complexities, time-consuming qualification process, lack of Blue Sky preemption, low limits, and Reg D options.[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+.[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.[65] It also "covered" the securities from Blue Sky laws for "Qualified Purchasers," a term Congress charged the Commission with defining.[66]

The Commission adopted final rules on March 25, 2015.[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.[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.[69] Tier 2 accredited investors were uncapped but the Commission limited unaccredited investors to the greater of 10% annual income or net

---

[59] *See generally* Amend. to Rules of Prac., Securities Act of 1933 Release No. 33-632 (West) (Jan. 21, 1936).

[60] *Compare Get Your Reg A+ Offering Qualified by the SEC*, MANHATTAN STREET CAPITAL, https://www.manhattanstreetcapital.com/faq/for-fundraisers/get-your-reg-a-offering-qualified-sec (last visited Sept. 21, 2020) (pegging average time at 71 days and "dealing with the SEC is likely to be a multi-step process"), *with* Rod Turner, *These 32 Companies Raised $396 Mill Using Regulation A+, Entrepreneurs: You Have A New Option*, FORBES (Mar. 14, 2017, 6:54 AM), https://www.forbes.com/sites/rodnturner/2017/03/14/how-they-did-it-32-companies-successfully-raised-capital-via-regulation-a/#6e4c45f37cde (pegging the average at 78 days).

[61] Concept Release, *supra* note 2, at 86 n.272. The initial Regulation A offering limit was $100,000. *Id.* The Commission raised it several times thereafter. *Id.* Finally, in 1992, it raised it to $5 million and allowed 'testing the waters' communications. *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).

[62] A. NICOLE CLOWERS, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-839, SECURITIES REGULATION: FACTORS THAT MAY AFFECT TRENDS IN REGULATION A OFFERINGS (2012), at 8-9.

[63] See Rutheford B. Campbell, Jr., Article, *Regulation A: Small Businesses' Search for "A Moderate Capital"*, 31 DEL. J. CORP. L. 77 (2006) and Brian T. Kloeblen, Comment, *Splitting the Baby: The Death of Small Business*, 48 SETON HALL L. REV. 535 (2018), for a review of Regulation A's lack of use prior to the JOBS Act.

[64] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 401, 126 Stat. 306, 324 (2012) (codified as amended at 15 U.S.C. § 77c(b)(2–5)); 17 C.F.R. §§ 230.250–263.

[65] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 401, 126 Stat. 306, 323–25 (2012) (codified as amended at 15 U.S.C. § 77c(b)(2–5)).

[66] 15 U.S.C. § 77r(b)(4)(D)(ii).

[67] Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Release No. 33-9741 (West) (Mar. 25, 2015) [hereinafter Regulation A Release]; 80 Fed. Reg. 21805 (Apr. 20, 2015).

[68] 17 C.F.R. § 230.251.

[69] Regulation A Release, *supra* note 67, at 35 n. 98.

worth.[70] It defined Qualified Purchasers as any Tier 2 purchaser.[71] 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,[72] in addition to 12(g) Rule recordholder and asset criteria.[73]

The Commission made offering circulars and disclosures akin to smaller registered offerings, especially for Tier 2.[74] This meant ongoing reporting including annual reports,[75] semi-annual reports,[76] and "current event" reports.[77] 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.[78] Semi-annual reports include additional management discussion and analysis and financial statements similar to registered offering's Form 10-Q.[79] Moreover Tier 2 issuers must disclose within four business days any Commission-deemed "significant and substantial" event.[80] 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.[81] 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.[82]

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.[83] 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,[84] 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. § 240.12g5-1(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).
[80] Form 1-U, 17 C.F.R. § 230.257(b)(4).
[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.
[84] Rutheford B. Campbell, Jr., *The SEC's Regulation A+: Small Business Goes under the Bus Again*, 104 KY. L.J. 325, 334 (2016), https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1589&context=law_facpub [hereinafter Campbell, *Under the Bus*]; *cf.* Letter from NASAA to Mary Jo White, Chair, Sec'y, U.S. Sec. and Exch. Comm'n (Feb. 19, 2014), https://www.nasaa.org/wp-content/uploads/2014/02/NASAA-Letter-Regarding-Reg-A+_021914.pdf [NASAA Letter]

with a "Coordinated Review Plan"[85] it claimed would "ease regulatory burdens for filers without sacrificing investor protection."[86] The Commission also declined to exempt Reg A+ secondary trading despite commenter support.[87] The Commission stated it needed time to "review and consider changes" but preempting secondary trading would not be "appropriate at the outset."[88] 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).[89] Issuers could raise $1 million per 12-months with periodic inflation adjudgments.[90] In 2017, the Commission adjusted the limit to $1.07 million.[91] 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.[92] Issuers would sell through broker dealers or a new statutory creation: funding portal intermediaries (portals).[93]

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.[94] The statute restricted first-year resales except to certain offerees.[95] It directed the Commission to exempt Title III securities "conditionally or unconditionally" from the 12(g) Rule,[96] and preempted Blue Sky laws.[97] Congress also limited state filing fees to issuer principal place of business or where it sold 50% or more securities.[98] Title III also ordered

[85] *NASAA's Coordinated Review Program for Regulation A Offerings*, NASAA, https://www.nasaa.org/industry-resources/securities-issuers/coordinated-review/regulation-a-offerings/. Some states do not participate in program including Arizona, Florida, and New York. *See* NASAA, APPLICATION FOR COORDINATED REVIEW OF REGULATION A OFFERING, https://www.nasaa.org/wp-content/uploads/2016/09/20160721-Coordinated-Review-Application-Sec-3b.pdf [hereinafter NASAA APPLICATION].
[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.
[89] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306, 315–23 (codified as amended at 15 U.S.C. § 77d(a)(6)).
[90] *Id.* § 302(a)(6)(A) (codified as amended at 15 U.S.C. § 77d(a)(6)(A)).
[91] Inflation Adjustments and Other Technical Amendments under Titles I and III of the JOBS Act (Technical Amendments; Interpretation), Release No. 33-10332, 82 Fed. Reg. 17545 (Apr. 12, 2017).
[92] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 302(a)(6)(B), 126 Stat. 306, 315 (2012) (codified as amended at 15 U.S.C. § 77d(a)(6)(B)).
[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)).
[98] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 305(c)(F), 126 Stat. 306, 315 (2012), (codified as amended at 15 U.S.C. § 77r(c)(2)(F)).

certain portal requirements[99]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 and 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

---

[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)).
[101] Crowdfunding, Release No. 33-9974, 80 Fed. Reg. 71387 (Nov. 16, 2015) [hereinafter Crowdfunding Release]. Regulation Crowdfunding became effective on May 16, 2016.
[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).
[107] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 4A(b)(1)(F), 126 Stat. 306, 317 (2012) (codified as amended at 15 U.S.C. § 77d–1(b)(1)(F)); 17 C.F.R. § 227.201(g).
[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).
[112] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 4A(b)(1)(I), 126 Stat. 306, 318 (2012) (codified as amended at 15 U.S.C. § 77d–1(b)(1)(I)).
[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,[117] a narrative discussion and analysis by management of financial condition, including, to the extent material, liquidity, capital resources, and historical operation results.[118] 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."[119] And it required disclosure of any missed annual reports.[120] 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.[121]

The Commission also limited issuer communication aligned with and beyond the statute. First it required all transactions occur through portals.[122] This essentially forbade in person investor meetings.[123] The Commission restricted issuer advertising outside portals to "tombstone" ads[124] that contained statutory "terms" and other factual information about issuer legal identity, location, contact information, and a brief business description.[125] 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.[126] The Commission did provide flexibility for the online and social-media environs offers would appear.[127]

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.[128] 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. § 230.134.
[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

Exemption	Amounts Reported or Estimated as Raised in 2019
Rule 506(b) of Regulation D	$ 1,492 billion
Rule 506(c) of Regulation D	$ 66 billion
Regulation A: Tier 1	$ 0.044 billion
Regulation A: Tier 2	$ 0.998 billion
Rule 504 of Regulation D	$ 0.228 billion
Regulation Crowdfunding	$ 0.062 billion
Other exempt offerings	$ 1,167 billion

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]

---

[129] Peter Rasmussen, *ANALYSIS: Rule 506(c)'s General Solicitation Remains Generally Disappointing*, BLOOMBERG L., May 26, 2017, 3:00 PM, https://www.bna.com/rule-506cs-general-b73014451604/; *cf.* Sec. Indus. & Fin. Mkts. Ass'n, Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 24, 2019), at 3, https://www.sec.gov/comments/s7-08-19/s70819-6193329-192494.pdf (stating that the reliance on Reg D 506(c) is "lower than expected"); Xavier Becerra. et al., Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Sept. 24, 2019), at 6, https://www.sec.gov/comments/s7-08-19/s70819-6193375-192522.pdf [Becerra Letter] (stating that participation in Reg CF and Reg A+ "significantly less than anticipated" referencing comments by SEC Investor Advocate).

[130] Campbell Letter, *supra* note 51 at 18.

[131] Consumer Fed'n of Am., Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions (Oct. 1, 2019), at 56, https://www.sec.gov/comments/s7-08-19/s70819-6235037-192692.pdf [hereinafter Consumer Federation Letter] (referring to Reg A+).

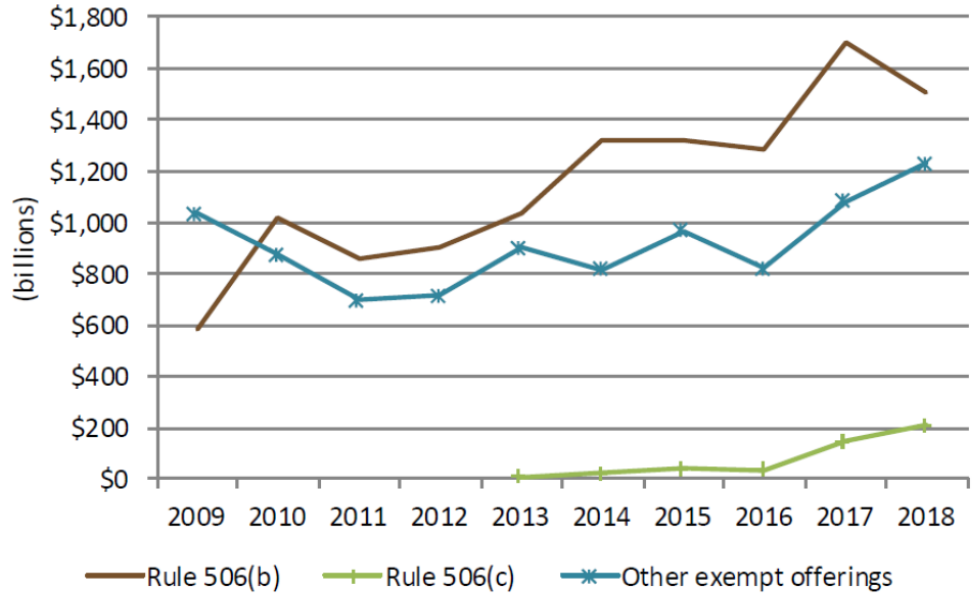
[132] Usha R. Rodrigues, *Financial Contracting with the Crowd*, 69 EMORY L.J. 397, 400 (2019), http://law.emory.edu/elj/content/volume-69/issue-3/articles/financial-contracting-with-crowd.html [hereinafter Rodrigues, *Financial Contracting*] (referring to Reg CF); *cf.* Burton Letter, *supra* note 23, at 47 ("Few firms have proven willing to deal with the costs and obligations of Regulation CF to raise under a million dollars.").

[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.

FIGURE 3: CAPITAL RAISED IN REGULATION D RULE 506(B), RULE 506(C), AND OTHER EXEMPT OFFERINGS, 2009-2018



Source: Securities and Exchange Commission

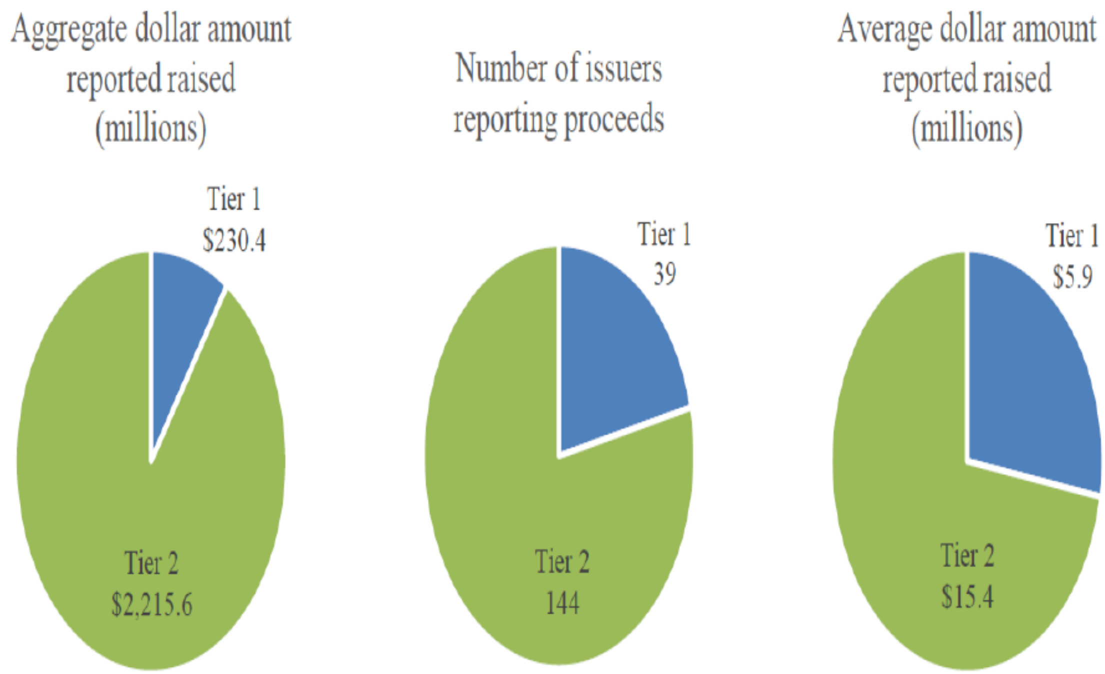
B. *Regulation A+ so far*

From June 2015 through 2019, Reg A+ issuers raised $2.446 billion.[136] Issuers preferred Tier 2 raising about 91% despite ongoing reporting.[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."[138] The reasons Tier 1 should be abandoned are discussed below. But after five years, its disfavor is manifest.

---

[136] RPT. TO THE COMM., REGULATION A LOOKBACK STUDY AND OFFERING LIMIT REVIEW ANALYSIS, at 5 (Mar. 4, 2020), https://www.sec.gov/files/regulationa-2020.pdf [hereinafter Regulation A Report].
[137] *Id.* at 9.
[138] *Id.*

FIGURE 4: CAPITAL REPORTED RAISED UNDER REGULATION A, 2015-2019



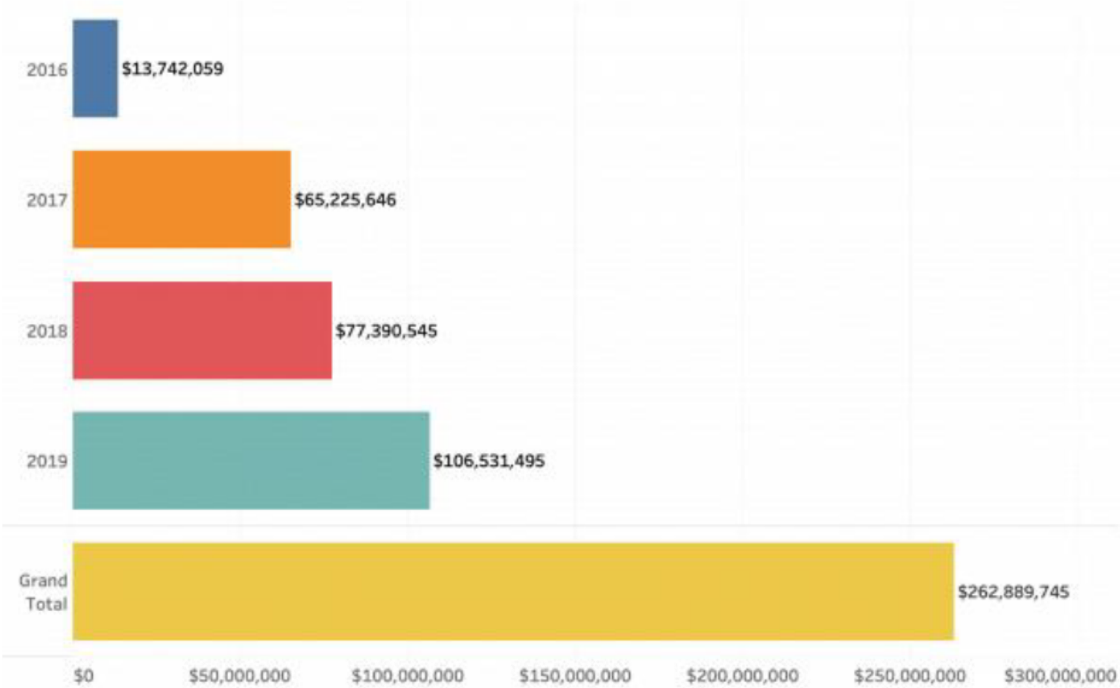
Source: Securities and Exchange Commission

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]

[139] JD Alois, *Sherwood Neiss of Crowdfund Capital Advisors Updates on Reg CF Progress: "Successful Reg CF companies have pumped almost $1 billion into local economies."* CROWDFUND INSIDER (Feb. 10, 2020), https://www.crowdfundinsider.com/2020/02/157163-sherwood-neiss-of-crowdfund-capital-advisors-updates-on-reg-cf-progress-successful-reg-cf-companies-have-pumped-almost-1-billion-into-local-economies/.

FIGURE 5: PROCEEDS INTO REGULATION CROWDFUNDING CAMPAIGNS/YEAR



Source: Crowdfund Capital Advisors

Despite impressive Reg CF growth,[140] Reg D still dwarfs it with almost $1.5 trillion raised in 2019.[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.[142]

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.[143] This has led hostile interests—state

[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, *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/.
[141] Final Rules, *supra* note 1 at 9.
[142] Concept Release, *supra* note 2, at 148.
[143] Facilitating Capital Formation, *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, *supra* note 3, at 265 ("[T]he use of Regulation A by reporting companies has been modest to date."); Facilitating Capital Formation, *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,[144] particularly the 12(g) Rule.[145] In support they cite underuse and fraud concerns.[146] 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.[147] Bureaucrats view themselves as 'white hat' protectors, defending the public from dodgy private-sector actors. This view pervades Western tradition.[148] But it did not originally ensconce 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.").

[145] Elisabeth de Fontenay, The Deregulation of Private Capital and the Decline of the Public Company, 68 HASTINGS L. J. 445, 469 (2017) (stating that JOBS Act rendered Rule 12(g) "toothless"); *cf.* Written Testimony of Renee M. Jones (Sep. 11 2019), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-jonesr-20190911.pdf ("The most effective way for Congress to shore up shrinking public equity markets is to reverse the JOBS Act amendments to Section 12(g)."); Usha R. Rodrigues, *The Once and Future Irrelevancy of Section 12(G)*, 2015 U. ILL. L. REV. 1529 (2015).

[146] Corrie Driebusch & Juliet Chung, *IPO Shortcuts Put Burden on Investors to Identify Risk*, WALL ST. J., (Feb. 6, 2018), http://on.wsj.com/2p4n8kf (stating that questionable offerings and fraud allegations have plagued some early Reg A+ offerings as it finds its market footing); Bill Alpert et al., *Most Mini-IPOs Fail the Market Test*, BARRON'S, (Feb. 13, 2018), https://www.barrons.com/articles/most-mini-ipos-fail-the-market-test-1518526753?mod=rss_barrons_this_week_magazine; Alexander Osipovich, *Exchanges Shy Away From Mini-IPOs After Fraud Concerns*, WALL ST. J., (June 10, 2019), https://on.wsj.com/2lrPWET.

[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.[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.[150] In the decades since, these administrative-state features have rarely been questioned.[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.[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.[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."[154] And its aim to "promulgate rules that are clearly written, easily understood, and tailored toward specific ends."[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

[149] R. J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 SOCIAL PHILOSOPHY AND POL'Y, 16–54 (2007).
[150] R. J. Pestritto, *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.").
[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.").
[152] 15 U.S.C. § 78d. Congress created the Commission under Section 4 of the Securities Exchange Act of 1934. *Id.*
[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. *See* Cohn & Yadley, *supra* note 5, at 25-28.
[154] *Fiscal Year 2018 Cong. Budget Justification Ann. Performance Plan*, U.S. SEC. & EXCH. COMM'N, at 22, https://www.sec.gov/files/secfy18congbudgjust.pdf [hereinafter *2018 Cong. Budget*].
[155] *Id*.

consequences are difficult to foresee and figuring out how it fits into existing regulatory frameworks is difficult."[156]

The Commission's enforcement-first mindset further augurs resistance to innovation and outsiders.[157] The SEC Enforcement Division has 1,400 Full Time Equivalent staff, more than any other.[158] The division's FY 2019 budget request was its largest at almost $532 million.[159] The Commission's enforcement approach explains stocked personnel and massive budgets. Staff wrench potential violations through "facts and circumstances" analysis.[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.[161] One securities lawyer described SEC investigations like "living in hell without dying."[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."[163]

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."[164] But in practice, protecting investors always trumps

[156] Hon. Hester M. Peirce, Sec. & Exch. Comm'n Comm'r, Regulation: A View from Inside the Machine, Keynote Address at the university of Missouri school of law's symposium Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for Optimal Regulation (Feb. 8, 2019) *in* 3 Bus. Entrepreneurship & Tax L. Rev., 2019, at 267.

[157] Hon. Hester M. Peirce, Sex. & 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).

[158] *Fiscal Year 2019 Cong. Budget Justification Ann. Performance Plan*, U.S. SEC. & EXCH. COMM'N, at 15, https://www.sec.gov/files/secfy19congbudgjust.pdf [hereinafter *2019 Cong. Budget*].

[159] *Id.* at 17.

[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.

[161] The number is 53% per the Commission's latest data. *2019 Cong. Budget, supra* note 158, at 109.

[162] Amy Wan, *First Regulated Initial Coin Offering Conference ICO 2.0 Summit Dives Deep into ICO Legal, Regulatory & Economic Implications*, CROWDFUND INSIDER (Nov. 13, 2017), https://www.crowdfundinsider.com/2017/11/124483-first-regulated-initial-coin-offering-conference-ico-2-0-summit-dives-deep-ico-legal-regulatory-economic-implications/.

[163] *2018 Cong. Budget, supra* note 154, at 35.

[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.").

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!"[170] 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 hallmarked federal securities law since the Commission's advent. Congress championed it among policy

---

[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.
[167] Richard E. Rustin & Mitchell C. Lynch, *Apple Computer Set to Go Public Today: Massachusetts Bars Sale of Stock as Risky*, THE WALL ST. J. (Dec 12, 1980), at 5, http://online.wsj.com/public/resources/documents/AppleIPODec12_1980_WSJ.pdf.
[168] Burton Letter *supra* note 24, at 13.
[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.").
[170] Silicon Prairie Portal and Exchange, Comment Letter on Concept Release on Harmonization of Securities Offering Exemption (Sept. 24, 2019) [hereinafter Barker Letter].
[171] Burton Letter, *supra* note 24, at 17.
[172] SEC Commissioner Hester Peirce earned the moniker 'Crypto Mom' making these points in her dissent in the Winklevoss Bitcoin Trust, Bats BZX Exchange case. Commissioner Hester M. Peirce, Dissent of Commissioner Hester M. Peirce to Release No. 34-83723; File No. SR-BatsBZX-2016-30, (July 26, 2018) https://www.sec.gov/news/public-statement/peirce-dissent-34-83723.

alternatives.[173] 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.[174] 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?"[175] Scholars have criticized burdens on public companies for this difficult-to-quantify benefit.[176] 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.[177] 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.[178] Comparing Reg A+, Reg D, and Reg CF illustrates this. Critics point to questionable Reg A+ issuers in the first few years,[179] and state regulators complain about Reg D fraudsters.[180] 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.").

[174] *See, e.g.*, George J. Stigler, *Public Regulation of the Securities Markets*, 19 BUS. LAW. 721, 725 (1964) (examining the effects on new-issue stock returns before and after the SEC imposed mandatory disclosure); *Cf.* George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132 (1973) (examining the effects of the Exchange Act's financial disclosure requirements); Robert Daines & Charles M. Jones, *Truth or Consequences: Mandatory Disclosure and the Impact of the 1934 Act* (draft working paper) (May 2012) https://www.law.stanford.edu/publications/truth-or-consequences-mandatory-disclosure-and-the-impact-of-the-1934-act; Paul M. Healy & Krishna G. Palepu, *Information Asymmetry, Corporate Disclosure, and The Capital Markets: A Review of the Empirical Disclosure Literature*, 31 J. OF ACCT. AND ECON., 405–440 (2001), https://www.sciencedirect.com/science/article/pii/S0361368217300132; J. Richard Zecher, *An Economic Perspective of SEC Corporate Disclosure*, 7 U. PA. J. INT'L L. 307 (1985). https://scholarship.law.upenn.edu/jil/vol7/iss3/7; Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2176&context=journal_articles.

[175] The JOBS Act in Action Part II: Overseeing Effective Implementation that can Grow American Jobs, 112th Cong. 26 (June 28, 2012) (testimony of the Hon. Mary L. Schapiro, Chair of the SEC).; *Cf.* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation after the JOBS Act*, 101 GEO. L. J., 337, 361 (2013), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1985&context=facpub (describing securities regulation as "educated guesswork.").

[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[181] likely because portals are liable but as shown below private-ordered systems function just as well.[182] Thus of the three exemptions, the most regulated had the highest proportion of questionable issuers. Yet not even the Commission shares critics gloomy view, noting the dearth of legal actions under Reg A+.[183] 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."[184] 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.[185] 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."[186] Commission opposition pervaded both drafting and implementation.[187] 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.").

[184] Hon. Mary L. Schapiro SEC Chair letter to Chair Hon. Tim Johnson Chair and Ranking Member Hon. Richard Shelby, Ranking Member, Comm. on Banking, Housing, and Urban Affairs, U.S. Sen. (Mar. 13, 2012). https://www.aicpa.org/Advocacy/Issues/DownloadableDocuments/404b/3-13-12_SEC_Chm_Schapiro_Letter_to_Johnson.pdf. *Cf.* David S. Hilzenrath, *Jobs Act Could Remove Investor Protections, SEC Chair Schapiro Warns,* WASH. POST (Mar. 14, 2012), http://www.washingtonpost.com/business/economy/jobs-act-could-open-a-door-to-investment-fraud-sec-chief-says/2012/03/14/gIQA1vx1BS_story.html; Edward Wyatt, *Senate Seeks to Toughen a Bill Aimed at Startups*, N.Y. TIMES (Mar. 19, 2012), https://www.nytimes.com/2012/03/20/business/senate-seeks-to-toughen-jobs-bill-aimed-at-easing-rules-on-start-ups.html.

[185] The JOBS Act in Action Part II: Overseeing Effective Implementation that can Grow American Jobs, *supra* note 175, at 26-7.

[186] Hon. Luis A. Aguilar, SEC Comm., quoted in speech by Sen. Jack Reed (Mar. 16, 2012), https://www.reed.senate.gov/news/speeches/jobs-act.

[187] CrowdFund Beat, *The JOBS Act – Legislative History and Future Opportunities* (May 11, 2017), https://www.youtube.com/watch?v=zn97Cwzg5YA (Dina Ellis Rochkind discussing SEC opposition to the JOBS Act during bill formation).

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."[188]

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.[189] 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.[190]

After ICOs exploded in 2017, the Commission flooded issuers with subpoenas and enforcement actions. To be sure, many ICOs were frauds deserving prosecution.[191] Still, good-faith actors requested Commission guidance. The Commission spent at least six months[192] forming a 13-page "Framework for 'Investment Contract' Analysis of Digital Assets."[193] 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,[194] it expounded further factors that conceivably could trap anything from baseball cards to premier liquors.[195] 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

[188] The JOBS Act at Five: Examining Its Impact and Ensuring the Competitiveness of the U.S. Capital Markets, H.R. Doc. No. 115-9 (1st Sess. Mar. 22, 2017) (testimony of Mr. Edward Knight, Exec. Vice Pres. and Gen. Coun., NASDAQ).
[189] Laura Shin, *Here's The Man Who Created ICOs And This Is The New Token He's Backing*, FORBES (Sept. 17, 2017), https://www.forbes.com/sites/laurashin/2017/09/21/heres-the-man-who-created-icos-and-this-is-the-new-token-hes-backing/#37fa4f0d1183. *Cf.* Ivona Skultetyova, *Short History of ICOs: From Crypto Experiment to Revolution in Startup Financing*, MEDIUM (Feb. 2, 2018), https://medium.com/@ehvLINC/short-history-oficos-from-crypto-experiment-to-revolution-in-startup-financing-709c23839ffc.
[190] Press Release, SEC, SEC Names Valerie A. Szczepanik Senior Advisor for Digital Assets and Innovation, (June 4, 2018) (on file with author).
[191] A *Wall Street Journal* study of 1,450 ICOs revealed 271 with fraud concerns, including "plagiarized investor documents, promises of guaranteed returns and missing or fake executive teams." Shane Shifflett & Coulter Jones, *Buyer Beware: Hundreds of Bitcoin Wannabes Show Hallmarks of Fraud*, WALL ST. J. (May 17, 2018), https://www.wsj.com/articles/buyer-beware-hundreds-of-bitcoin-wannabes-show-hallmarks-of-fraud-1526573115.
[192] Nikhilesh De, *SEC's Crypto Token Framework Falls Short of Clear and Actionable Guidance*, COINDESK (Apr. 4, 2019), https://www.coindesk.com/secs-crypto-token-framework-falls-short-of-clear-and-actionable-guidance.
[193] Strategic Hub for Innovation and Financial Technology, *Framework for "Investment Contract" Analysis of Digital Assets, Securities and Exchange Commission* (Apr. 3, 2019), https://www.sec.gov/files/dlt-framework.pdf.
[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.
[195] JD Alois, *When Howey, the SEC & CorpFin Met Bourbon*, CROWDFUND INSIDER, (May 29, 2019), https://www.crowdfundinsider.com/2019/05/147688-when-howey-the-sec-corpfin-met-bourbon/.

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."[196]

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."[197] She later opined 'prescriptive rules' may allow sneaky entrepreneurs to evade law.[198] 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.[199] 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.[200] It cost more than the average IPO for issuers with revenue less than $100 million.[201] 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,[202] as SEC Director of Corporate Finance Bill Hinman approved in theory.[203] But should SEC staff decide "facts and circumstances" dictate prolonged reporting it could sue Blockstack and kill the project.

---

[196] Hon. Hester M. Peirce, SEC Comm'r., How We Howey, (May 9, 2019) (transcript available at https://www.sec.gov/news/speech/peirce-how-we-howey-050919).

[197] Brady Dale, *SEC's Valerie Szczepanik at SXSW: Crypto 'Spring' Is Going to Come*, COINDESK, (May 16, 2019), https://www.coindesk.com/secs-valerie-szczepanik-at-sxsw-crypto-spring-is-going-to-come.

[198] Valerie Szczepanik, Address, ACT-IAC 2018 Blockchain Forum (Apr. 3, 2018), quoted in Kik Wells Submission, In re Kik *Interactive* (HO-13388), (Nov. 16, 2018) at 30, https://cdn.crowdfundinsider.com/wp-content/uploads/2019/02/Kik-wells_response.pdf. This sentiment pervades the SEC. *See* Manuel F. Cohen & Joel J. Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 LAW & CONTEMP. PROBS. 691, 699 (1964) (noting twenty-two rules issued by the Securities and Exchange Commission but denying that the Commission has "sought to develop a group of rules to comprehend all, or even most, fraudulent practices.").

[199] *About Blockstack*, BLOCKSTACK, https://blockstack.org/about.

[200] Paul Vigna, *SEC Clears Blockstack to Hold First Regulated Token Offering*, WALL ST. J., (July 10, 2019), https://www.wsj.com/articles/sec-clears-blockstack-to-hold-first-regulated-token-offering-11562794848.

[201] PwC, CONSIDERING AN IPO TO FUEL YOUR COMPANY'S FUTURE? INSIGHT INTO THE COSTS OF GOING PUBLIC AND BEING PUBLIC 6, 8–9 (2017), https://www.pwc.com/us/en/deals/publications/assets/cost-of-an-ipo.pdf.

[202] *See* BLOCKSTACK PBC, ANNUAL RPT. PURSUANT TO REGULATION A, FORM 1-K 4–5 (2019), https://www.sec.gov/Archives/edgar/data/1693656/000119312520124379/d918967dpartii.htm.

[203] William Hinman, Dir., SEC Div. of Corp. Fin., Digital Asset Transactions: When Howey Met Gary (Plastic), (June 14, 2018), (Transcription available at https://www.sec.gov/news/speech/speech-hinman-061418). For a discussion of decentralization as a component of securities law *see* Angela Walch, *Deconstructing 'Decentralization': Exploring the Core Claim of Crypto Systems* (Jan. 30, 2019). Crypto Assets: Legal and Monetary Perspectives (OUP, Forthcoming), https://ssrn.com/abstract=3326244.

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.[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.[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.[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 issuer planning and focus. All receivers of these solicitations would be offerees for federal antifraud law.[207] Rule 241 also includes logical disclaimers like legends, no acceptance of funds, and no binding commitments.[208] But Rule 241 is likely dead on arrival[209] because it fails

---

[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] Letterfrom 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., Proffessor of Ky. Coll. of Law, to Vanessa A. Countryman, 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.[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.[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."[212] It then defines "angel investor groups."[213] It also bans sponsor investment advice, recommendations or negotiations, bans fees for introductions and limits sponsors to "reasonable administrative fees."[214] The Commission avers sponsor limitations will deter "profit motive."[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.[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.[217] The Commission's policy goal is to prevent the Demo Day event from devolving into a de facto mini-road show.[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."[219] Finally the Commission restricted the audience in virtual Demo Days,[220] lest scores of unaccredited individuals have the opportunity to attend.[221] The Commission describes this as a "tailored approach." Time will tell

---

[210] 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").

[211]Facilitating Capital Formation,, *supra* note 3, at 342-344.

[212] Facilitating Capital Formation, *supra* note 3, at 342.

[213] *Id.* at 343-344, Instructions to paragraph (a).

[214] *Id.*

[215] *Id.* at 82.

[216] *Id.* at 342.

[217] *Id.* at 343.

[218] Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), at 67, https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf.

[219] Hanks Letter, *supra* note 209, at 8-9, (listing commonly asked questions the presenter would have to find various ways to decline to answer).

[220] Facilitating Capital Formation, *supra* note, 3 at 343.

[221] 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).

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 beforehand[230] and technical amendments to smooth the filing process.[231] These will likely have little adoption effect.

---

[222] Letter from Tom Quaadman, Exec. Vice President, Chamber of Commerce Ctr. for Capital Mkts. Competitiveness, to Vanessa A. Countryman, Sec'y, U.S. Sec. and Exch. Comm'n. 5 (Sept. 24, 2019) (Chamber Letter), https://www.sec.gov/comments/s7-08-19/s70819-6193319-192490.pdf [hereinfafter Quaadman Letter] ("In practice, the enhanced accredited investor verification requirements have discouraged many issuers from taking advantage of Rule 506(c), and issuers continue to rely primarily on the Rule 506(b) exemption, which continues to prohibit general solicitation."); *Cf.* Manning G. Warren, *The Regulatory Vortex for Private Placements*, 45 SECS. REG. L.J. 9 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037492 (discussing chilling effect Reg D 506(c) requirements to turn over sensitive documents); Letter from Patrick Gouhin, CEO, et al., Angel Capital Ass'n, to Hon. Jay Clayton, Chairman, U.S. Sec. and Exch. Comm'n. 5(Sept. 23, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6170303-192393.pdf ("Many angels view getting a three-month certification from a third party as being expensive and time-consuming and a major risk in terms of sensitive personal and financial data.").

[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.

[227] *See* Pub. L. No. 112-106, § 401(b)(5), 126 Stat. 325 (15 U.S.C. § 77c(b)(5) (2018)); *Cf.* Facilitating Capital Formation, *supra* note 3, at 134.

[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.

---

[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.[244] 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.[245] 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 unwieldly 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.[246] 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[247] will limit its utility, forcing issuers into a cost-benefit analysis.[248]

While the proposed rule purports to solve the capitalization table and 12(g) Rule issue, the Commission larded in 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."[249] 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."[250]

While supportive of the crowdfunding vehicle concept, critics panned the rule's costs and complexities.[251] Wefunder, the largest portal by investment volume, has already stated it will not support it.[252] 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

---

[244] Pub. Jumpstart our Business Startups Act, Pub. L. No. 112-106, § 4A(f)(3), 126 Stat. 306, 320; (2012) (banning investment companies as defined in Section 3 of the Investment Company Act of 1940 [15 U.S.C. § 80a-3(a)(1)] or those excluded from the definition of investment company by Sections 3(b) and (c) of that Act [15 U.S.C. §§ 80a-3(b), (c)] from participating in Title III transactions). *See also* 15 U.S.C. § 77d-1(f)(3) (2018); 17 C.F.R. § 227.100(b)(3) (20192020).

[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.[253] 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.[254] His New Zealand study is particularly useful because it copied Regulation Crowdfunding yet stripped it of obstacles domestic entrepreneurs face.[255] 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.[256]

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[257] 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."[258] One difference is the U.K. "Regulatory Sandbox." Sandbox tools include "restricted authorization, individual guidance, informal steers, waivers and no enforcement action letters."[259] Within its first two years the Sandbox accepted 89 firms

---

[253] JD Alois, *Crowdfunding Industry Insider Criticizes SEC Proposal on Special Purpose Vehicles for Reg CF*, CROWDFUND INSIDER (Apr. 15, 2020, 3:00 PM), https://www.crowdfundinsider.com/2020/04/160187-crowdfunding-industry-insider-criticizes-sec-proposal-on-special-purpose-vehicles-for-reg-cf/.
[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].
[255] Andrew Schwartz, *Equity Crowdfunding in New Zealand*, 2018 NEW ZEALAND L. REV. 243 (2018).
[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.
[259] *Regulatory Sandbox*, FINANCIAL CONDUCT AUTHORITY, https://www.fca.org.uk/firms/innovation/regulatory-sandbox (last visited Jan. 30, 2022).

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."[260] It recently announced a partnership with the City of London Corporation to support firms addressing the COVID-19 challenge.[261] Commissioner Peirce has proposed the same concept, though with less hands-on government guidance, for U.S.-based token projects.[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.[263] In relative costs, Reg CF is potentially worse. The Commission estimates average Reg CF campaigns cost almost $22,500 and 241 manhours.[264] Reg D 506(c) is not only more costly than Reg D but invites substantial

---

[260] *A Journey Through The FCA Regulatory Sandbox, The Benefits, Challenges, and Next Steps*, DELOITTE, (2018) at 2, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fca-regulatory-sandbox-project-innovate-finance-journey.pdf.

[261] JD Alois, *UK Financial Conduct Authority Partners with City of London Corporation to Pilot Digital Sandbox Supporting Firms Addressing COVID-19 Challenge*, CROWDFUND INSIDER (July 16, 2020, 8:40 AM), https://www.crowdfundinsider.com/2020/07/164130-uk-financial-conduct-authority-partners-with-city-of-london-corporation-to-pilot-digital-sandbox-supporting-firms-addressing-covid-19-challenge/.

[262] Hon. Hester M. Peirce, Comm'r, SEC Comm., Speech: Running on Empty, A Proposal to Fill the Gap Between Regulation and Decentralization (Feb. 6, 2020), https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06.

[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-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).

[264] SEC, REGULATION CROWDFUNDING, *supra* note 181, at 25; *cf. A Financial System That Creates Economic Opportunities Capital Markets*, U.S. DEPT. OF THE TREASURY, at 40 (Oct. 2017), https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf ("[M]arket participants have expressed concerns about the cost and complexity of using crowdfunding compared to private placement offerings."); Letter from David V. Duccini, Founder & CEO, Silicon Prairie Holdings, Inc., to the SEC on the Concept Release, at 8 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6184555-192415.pdf [Duccini Letter] ("REG-CF is literally the MOST EXPENSIVE cost of capital option."); Campbell Letter, *supra* note 51, at 21("The costs of ex ante and ex post disclosures of investment information and the costs of the limitations on reasonable marketing strategies (i.e., limiting selling strategies to posting offers on third party

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

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 *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."[267] Third, states should not conduct additional reviews or require fees that do not protect investors but harm entrepreneurs.

Regulate sales not offers. Offer regulation has hallmarked U.S. securities law since its federalization.[268] The Commission interprets offers broadly and beyond common-law understandings.[269] That offers, in effect, *speech* can harm potential investors, even those not

websites) overwhelm the value of the Crowdfunding exemption for small businesses."); Schwartz Letter, *supra* note 254, at 2 ("By imposing significant disclosure and regulatory hurdles, Regulation Crowdfunding imposes high costs on issuers relative to the low level of funding startups can and do obtain, dissuading issuers from relying on the exemption.").

[265] Final Rules, *supra* note 1, at 87–88; *cf.* Letter from Anthony Chereso, President & CEO, Inst. for Portfolio Alternatives, to the SEC on the Concept Release, at 4 (Sept. 24, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6193369-192518.pdf (discussing privacy concerns and fear of rescission long after raise with principle-based verification method); Quaadman Letter, *supra* note 222, at 5 ("In practice, the enhanced accredited investor verification requirements have discouraged many issuers from taking advantage of Rule 506(c)."); Burton Letter, *supra* note 24, at 35 ("Many investors are reluctant to provide such sensitive information to issuers with whom they have no relationship as the price of making an investment and, given the potential liability, accountants, lawyers and broker-dealers are unlikely to make certifications except perhaps for very large, lucrative clients."); Letter from Stuart M. Rigot, Esq., Wyrick Robbins LLP, to the SEC on the Concept Release, at 3 (Sept. 17, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6132204-192257.pdf ("[S]ophisticated funds and/or high net-worth angel investors are very much reluctant to share sensitive financial information, whether about themselves or their limited partners.").

[266] Letter from Nicholas Tommarello, CEO, Wefunder, to the SEC on the Concept Release, at 13 (Sept. 13, 2019), https://www.sec.gov/comments/s7-08-19/s70819-6132124-192256.pdf [hereinafter Tommarello Letter] (also noting about 10% of accredited investors dropped out of potential investments because of the verification hassles, even if they had previously verified the year before).

[267] Rodrigues, *Dirty Secret*, *supra* note 28, at 3427.

[268] *See* 15 U.S.C. § 77b(a)(3) (2018); 15 U.S.C. § 77e.

[269] Securities Offering Reform, Release No. 33-8591, [70 FR 44722 (Aug. 3, 2005)], at 39 n. 88 (July 19, 2005) ("The term 'offer' has been interpreted broadly and goes beyond the common law concept of an offer."(citing Diskin v. Lomasney & Co., 452 F.2d 871 (2d. Cir. 1971); SEC v. Cavanaugh, 1 F. Supp. 2d 337 (S.D.N.Y. 1998))). *cf.* Securities Act of 1933 §2(a)(3), 15 U.S.C. § 77b(a)(3) (noting that an offer includes "every attempt to dispose of a security or interest in a security, for value; or any solicitation of an offer to buy a security or interest in a security."); Cohn & Yadley, *supra* note 5, at 38 ("Although the 1933 Securities Act's use of the term "offer" could readily be interpreted in a contract sense, the SEC has interpreted the provision to encompass statements or notices that fall far short of normal contractual concepts.").

investing is a uniquely American concept.[270] And its repeal has been bandied since at least the 1990s.[271] No one is harmed by receiving investment opportunities[272] 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.[273]

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."[274] It considers this limitation an investor protection.[275] Yet, it then states potential investors can meet afterwards "outside of the event setting" to get further disclosure.[276] Thus, the same information that requires shielding at the event loses its investor-protection function at a next-day lunch meeting.

---

[270] 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].

[271] 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.

[272] 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/s70819-6297110-193413.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.").

[273] 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 ("[Those] seeking 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).

[274] Final Rules, *supra* note 1, at 85.

[275] *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 . . . .").

[276] *Id.* ("[P]otential investors will be able to seek additional disclosure about the investment opportunity outside of the event setting.").

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.[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.[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,[279] as well as Reg CF's goal to democratize private investing.[280] Offer strictures not only harm Reg CF issuers pre-raise but also during, limiting term communications outside portals to nondescript 'tombstone' ads.[281] This confuses novice issuers and investors alike and factors into Reg CF's soft start.[282] The rules force even knowledgeable issuers into vagaries and weasel words lest they trip the "terms" – "nonterms" dichotomy.[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.[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,'

---

[277] *Id.* at 84-85.

[278] *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.").

[279] Barker Letter, *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, *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.").

[280] *See* 2018 Forum Report, *supra* note 36, at 20.

[281] 17 C.F.R. § 227.204.

[282] *See* Campbell Letter, *supra* note 51, at 19 (pointing toward limitations in marketing strategies as one reason Reg CF has failed).

[283] Quinn Letter, *supra* note 272, at 6; Engler Letter, *supra* note 279, at 6 (describing "very careful line" businesses must walk when promoting their Reg CF raises); Tommarello Letter, *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).

[284] Hanks Letter, *supra* note 270, at 8.

and the general desire to shield investors from information to protect them is paternalistic[285] and discordant with the nation's free speech values.[286]

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.[287] Impairing investor liquidity does not protect investors.[288] The Commission has broad authority to preempt Regulation A securities.[289] But it refuses to act despite habitual cajoling both inside[290]

---

[285] Mercantus Center Letter, *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.").

[286] U.S. CONST. amend. I.

[287] Dowd Letter, *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, *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, *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, *supra* note 1, at 137 n. 389, 148 n. 439 (stating any change would come through a specific proposal with notice and comment).

[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, *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.").

[289] The Court of Appeals in *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).

[290] *See generally* ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES: RECOMMENDATIONS REGARDING SECONDARY MARKET LIQUIDITY FOR REGULATION A , TIER 2 SECURITIES (May 15, 2017), https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-secondary-liquidity-recommendation.pdf (recommending Commission preempt from state regulation the secondary trading in securities of Tier 2 Regulation A issuers current in their ongoing reports); FINAL RPT. OF THE 2019 SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION, at 10 (Aug. 2019), https://www.sec.gov/files/small-business-forum-report-2019.pdf; 2018 Forum Report, *supra* note 35, at 21; FINAL RPT. OF THE 2017 SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION, at 17 (Mar. 2018), https://www.sec.gov/files/gbfor36.pdf (recommending Commission preempt Blue Sky laws for secondary trading of securities issued under Tier 2 of Regulation A and consider overriding advance notice requirements and limit fees); FINAL RPT. OF THE 2016 SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION, at 16 (Nov. 2016), https://www.sec.gov/info/smallbus/gbfor35.pdf (recommending preempting all secondary sales of Reg A+ Tier 2); FINAL RPT. OF THE 2015 SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION, at 23 (Nov. 2015), https://www.sec.gov/info/smallbus/gbfor34.pdf (describing the status of issuers that have satisfied for the past two years and are current in their reporting obligations); FINAL RPT. OF THE 2014 SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION, at 29 (May 2015), http://www.sec.gov/info/smallbus/gbfor33.pdf (including Tier 1); U.S. Treasury Dep't, *supra* note 264, at 40 (recommending state securities regulators update their regulations to exempt from state registration and qualification requirements secondary trading of securities issued under Tier 2 of Regulation A or alternatively that the Commission use its authority to preempt state registration requirements for such transactions). Unfortunately, this is not a new development. *See* Cohn & Yadley, *supra* note 5, at 3–4 ("The Small Business Forum, mandated by Congress as an annual SEC event, has resulted in 25 years of repeated and strongly-worded recommendations from small business advocates to lessen the SEC's regulatory burdens on raising capital. Yet, with rare exception, the SEC has turned a deaf ear to the Forum's recommendations and concerns.").

and outside government.[291] 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.[292] 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."[293] A quarter century hence, the Commission has not materially acted without Congressional mandate.[294]

Secondary trading also has massive future implications. Blockchain-based endeavors and tokenized systems are incompatible with state-by-state secondary-trading regimes.[295]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[296] others cannot even define the term.[297] 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.[298] Reg A+ fees are littered with waste, inconsistencies, and timing issues, with no related benefit.[299] This model departs from Reg D, where issuers

---

[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.").
[292] National Securities Markets Improvement Act of 1996 §18(b)(3), 15 U.S.C. § 77r(b)(3).
[293] 15 U.S.C. § 77b(b).
[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.").
[295]*See* Schonberger Letter, *supra* note 288, at 9–10 (discussing Reg A+ potential for blockchain-related endeavors).
[296] Gregory Barber, *The Newest Haven for Cryptocurrency Companies? Wyoming*, WIRED (June 6, 2019, 7:00 AM), https://www.wired.com/story/newest-haven-cryptocurrency-companies-wyoming/.
[297] Preston J. Byrne, *The States Can't Blockchain*, COINDESK (Mar. 2, 2020), https://www.coindesk.com/the-states-cant-blockchain.
[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[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.[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 hinderance completely. The 12(g) Rule constantly foments angst for growing companies.[302] Even if applied to Reg D, where investors are likely accredited, it should not worry issuers crowdfunding investment from ordinary Americans.[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.[304] Given the usual pace it may be several more years before it is raised again, despite Congressional directive.[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.[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.[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.[308] A hard inflation-adjusted

---

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.").

[300] *About EDGAR*, U.S. SECURITIES AND EXCHANGE COMMISSION, (Aug. 24, 2020), https://www.sec.gov/edgar/about.

[301] 15 U.S.C. § 77r(c)(2)(F).

[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).

[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.)").

[304] *See* Final Rules, *supra* note 1, at 117–120 for Commission rationale.

[305] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, sec. 401(a)(5), 126 Stat. 325 [15 U.S.C. § 77c(b)(5)].

[306] *See*, *supra* note 140.

[307] Final Rules, *supra* note 1, at 147-148.

[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+.[309] 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.[310] These reports are expensive and time consuming. Moreover, audits make no sense for companies with little operating history.[311] 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.[312]

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.[313] It sometimes dryly

---

[309] 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).
[310] 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.").

[311] 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.").
[312] 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.
[313] 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 . . . .").

notes how Blue Sky laws affect exemption use[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.[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.[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.[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.[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.[319] One must wonder what raising the Reg D 504 limit to $10 million will achieve.[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

---

[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.")..

[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").

[316] Burton Letter, *supra* note 24, at 38 ("The NASAA 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).

[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).

[318] Facilating Capital Formation, *supra* note, 3 at 125.

[319] *Id.* at 122-123.

[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.

---

[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.