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The So-Called Democratization of Capital Markets: Why Title III of the JOBS Act Fails to Fulfill the Promise of Crowdfunding

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I. INTRODUCTION

Since the passage of the Jumpstart Our Business Startups Act1 (“JOBS Act”) in 2012, the topic of “crowdfunding” has garnered significant public attention.2 However, some confusion surrounds its definition and exactly how it may be used to raise money for a particular idea, project, or business.3 The Oxford English Dictionary defines crowdfunding as “[t]he practice of funding a project or venture by raising money from a large number of people, each of whom contributes a relatively small amount, typically via the Internet.”4 For instance, websites such as GoFundMe.com and Kickstarter.com provide Internet platforms for people to raise funds for their projects without actually giving up any ownership stake in the venture.5

3. See Hallie Davison, The Q&A: Perry Chen, Kickstarter, THE ECONOMIST (Oct. 22, 2010, 4:48 PM), http://www.economist.com/blogs/prospero/2010/10/crowd-funding_art (“I wonder if people really know what the definition of crowd-funding is. Or, if there’s even an agreed upon definition of what it is. We haven’t actively supported the use of the term because it can provoke more confusion.”).
5. Congress and the SEC recognize this definition and have passed legislation and sought to implement rules to integrate the sale of private securities through an online intermediary so that the “crowd” might have an equity stake rather than solely making donations. See Crowdfunding, 78 Fed. Reg. 66428, 66429 (Nov. 5, 2013) (discussing the need for a registration exemption for the online sale of securities to make offerings less costly and capital more accessible to small businesses); see also Our Rules, KICKSTARTER, https://www.kickstarter.com/rules?ref=footer (last visited Jan. 29, 2016) (noting that projects “can’t offer financial incentives like equity or repayment”); How It Works, GOFUNDME.COM, https://www.gofundme.com/tour/ (last visited Jan. 29, 2016) (indicating that the site allows users to “easily accept donations”).
Building on the concept of crowdfunding as a means to raise capital for a project, Congress designated Title III of the JOBS Act ("Title III") as the CROWDFUND Act, or Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, which set the foundation for equity or securities crowdfunding.\(^6\) On October 30, 2015, the Securities and Exchange Commission ("SEC") adopted a final rule that, once effective, will allow companies to issue securities through crowdfunding.\(^7\) As written, the rule will allow for the sale of qualified securities valued at or below $1 million and will exempt such securities from registration with the SEC, a departure from the Securities Act of 1933 rule.\(^8\)

President Barack Obama described the purpose of the JOBS Act when he signed the bill into law on April 5, 2012:

[F]or start-ups and small businesses, this bill is a potential game changer. 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. . . .

\(^6\)JOBS Act § 301 (codified as amended in scattered sections of 15 U.S.C.). Under Section 2(a) of the Securities Act of 1933, security is defined as:

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


\(^8\)See Jobs Act § 301, 15 U.S.C. § 77d (2012) (requiring any sale or offering of securities to be registered with the SEC unless provided by a certain exemption).
Because of this bill, start-ups and small businesses 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.9

Moreover, the JOBS Act required the SEC to revise existing rules, known as Regulation D and Regulation A, to expand the exemptions from registration.10 The new rules revising Regulation A have been dubbed “Regulation A+.”11 The SEC has also adopted a final rule for Title III crowdfunding.12 These changes have greatly expanded the options and methods to raise capital via “regulation crowdfunding” or “securities crowdfunding” for private businesses, now allowing the average American to gain equity interest.13

One expert has praised the recent growth of unregistered private securities offerings to non-accredited investors14 as a “glorious democratization of the private capital markets,”15 but in actuality, offerings to non-accredited investors have been relatively nonexistent.16 Although Title III of the JOBS Act promotes investment from average Americans, the incentives for start-ups and emerging businesses to raise

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14. An accredited investor is defined as a variety of investment companies, and any natural person whose individual net worth exceeds $1,000,000, excluding a primary residence, or if he or she has an income in excess of $200,000 over the past two years or a joint income with that person’s spouse in excess of $300,000. 17 C.F.R. § 230.501(a) (2015).
15. Freedman, supra note 13.
capital in this manner are marginal. Crowdfunding will likely be a viable capital raising method in limited circumstances, such as when a small business wants to turn its customers into investors, for both the benefits of added publicity and the provision of additional capital. Further, Title III may prove useful for issuers who are too small to attract institutional or angel investors, and may be a more appealing investment for current and potential customers. However, this is not for all start-ups and most companies seeking capital will likely find more practical avenues for raising it elsewhere.

This Note evaluates the existing securities regulation exemptions available to businesses. More importantly, this Note explores how Congress could further democratize access to capital markets by addressing the holes left in the current crowdfunding regime by the Regulation D, Regulation A+, and Title III exemptions. Specifically, this Note discusses the pros and cons of each type of offering and what might be done to harmonize the differences to decrease regulatory compliance costs and to increase investment from ordinary Americans.

This Note proceeds in four parts. Part II examines the role of Regulation D in securities offerings and analyzes the most recent changes to the rules. Part III looks at Regulation A+ and discusses how these

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17. See Robert B. Robbins & Amy Modzelesky, Can Regulation A+ Succeed Where Regulation A Failed?, THE AM. L. INST. CONTINUING LEGAL EDUC., 7 (May 7, 2015) (comparing Regulation A to other methods of raising capital); see also David Katz, JOBS Act Rules Could Spawn Headaches as Well as Capital, CFO (Nov. 2, 2015), http://ww2.cfo.com/capital-markets/2015/11/jobs-act-rules-spawn-headaches-well-capital/ (“Crowdfunding, which for the first time allows internet issuers to offer equity to investors, ‘isn’t for everybody,’ says Alex Castelli, a partner and co-leader of the national liquidity and capital formation advisory group at CohnReznick, an accounting firm”); Rory Eakin, The JOBS Act Is Progress But Much Remains To Be Done, TECH CRUNCH (Mar. 29, 2015), http://techcrunch.com/2015/03/29/the-jobs-act-is-progress-but-much-remains-to-be-done/ (stating that “[a]s the rules are currently written, the hoops that companies will have to jump through will be far too burdensome”).


19. “Angel investors invest in early stage or start-up companies in exchange for an equity ownership interest.” Richard Harroch, 20 Things All Entrepreneurs Should Know About Angel Investors, FORBES (Feb. 5, 2015, 12:22 PM), http://www.forbes.com/sites/allbusiness/2015/02/05/20-things-all-entrepreneurs-should-know-about-angel-investors/#6a855354483a. One need only be considered an accredited investor to participate in angel investing, but one prominent New York angel investor recommends that an angel “need[s] at least $500,000 to invest a minimum of $25,000 across 20 deals.” Paul Sullivan, Billions Not Required for Angel Investing, N.Y. TIMES: YOUR MONEY (May 2, 2014), http://www.nytimes.com/2014/05/03/your-money/angel-investors-need-a-high-risk-tolerance-not-billions.html?r=0.


21. See infra Part II.
rules have altered the market thus far. Part IV critiques the new rules provided by Title III. Part V offers suggestions on how to amend the JOBS Act in order to make the existing exemptions more appealing to potential issuers and increase the availability of investment opportunities to the average, non-accredited American investor and concludes that these rules have failed to accomplish the goal of the JOBS Act.

II. AN OVERVIEW OF THE TRADITIONAL ROLE OF REGULATION D EXEMPTIONS FOR PRIVATE SECURITIES OFFERINGS

Under the Securities Act of 1933, any sale or offering of securities must be registered with the SEC or must qualify for an exemption from registration. Regulation D provides such an exemption for the sale of private securities to raise capital for businesses. Although companies relying on Regulation D need not register their offering of securities with the SEC, they must file a “Form D,” which identifies the issuer of the securities, the issuer’s address, the issuer’s industry, and other simple information. Rules 504, 505, and 506 of Regulation D provide the categories for exemption from the registration requirements. This Note will focus on Rule 506, as it was utilized by ninety-four percent of all securities offerings through Regulation D between 2009 and 2013.

There are two core facets of Rule 506 that make its safe harbor

22. See infra Part III.
23. See infra Part IV.
24. See infra Part V.
25. Jumpstart Our Business Startups Act (“Jobs Act”) § 301, 15 U.S.C. § 77d (2012). The Securities Act of 1933 requires that companies disclose important financial information to the SEC in an effort to protect investors, mainly from deceit, misrepresentation, and fraud. Fast Answers: Registration Under the Securities Act of 1933, U.S. SEC. & EXCH. COMM’N, https://www.sec.gov/answers/regis33.htm (last modified Sept. 2, 2011). In general, the information that must be provided includes: (1) a description of the company’s properties and business, (2) a description of the security to be offered for sale, (3) information about the management of the company, and (4) financial statements certified by independent accountants. Id.
29. § 230.506.
provision for the private offering exemption under Section 4(a)(2) of the Securities Act especially attractive to issuers. First, Rule 506 allows an issuer to raise an unlimited amount of funds through the sale of securities. Second, Rule 506 offerings are exempt from state “Blue Sky” registration laws, unlike offerings made under Rules 504 and 505. These unique characteristics allow issuers to raise the largest amount of capital with the least amount of regulatory oversight. The value attributed to the preemption of state laws and regulations is evidenced by the fact that while nearly two-thirds of Regulation D issuers could have extended offerings under Rule 504 or Rule 505, the vast majority instead chose to utilize Rule 506. The amount of capital raised under Regulation D offerings continues to be large and is steadily increasing—$863 billion in 2011, $903 billion in 2012, $1.029 trillion in 2013, and $1.332 trillion in 2014—and of this amount, ninety-nine percent has been raised under 506 since 2009.

31. See Yelena Barychev, The Alphabet Soup of Raising Capital: Regulation A or Regulation D – What Would You Prefer?, BLANK ROME, LLP: SECURITIES NEWS WATCH (Apr. 22, 2015), http://securitiesnewswatch.com/2015/04/22/the-alphabet-soup-of-raising-capital-regulation-a-or-regulation-d-what-would-you-prefer/ (“Rule 506 of Regulation D is one of the most widely used capital raising exemptions under the US securities laws. The main reason of its popularity is its flexibility. . . . Rule 506 does not have any caps on the dollar amount that can be raised. . . . The biggest downside of Regulation A+ structure is that blue sky registration requirements are not preempted for Tier 1 offerings . . . [s]uch preemption exists for Rule 506.”).
32. § 230.506.
33. See Fast Answers: Blue Sky Laws, U.S. SEC. & EXCH. COMM’N, https://www.sec.gov/answers/bluesky.htm (last modified Oct.14, 2014) (explaining that each state has their own set of securities laws and regulations—known as “Blue Sky Laws”—that are “designed to protect investors against fraudulent sales practices and activities” and typically require greater disclosure to investors and governmental agencies).
34. Rules 504 and 505 are subject to state registration laws, and are limited to $1 million and $5 million respectively. § § 230.504–06. Furthermore, Rule 504 (the issuance of restricted securities) allows for an unlimited amount of non-accredited investors, and Rule 505 allows for the participation of thirty-five non-accredited investors. Id.; § 230.144(a)(3); see Rule 144: Selling Restricted and Control Securities, U.S. SEC. & EXCH. COMM’N, https://www.sec.gov/investor/pubs/rule144.htm (last modified Jan. 16, 2013) (describing what constitutes a restricted security and the sales that produce restricted securities). An additional “sophistication requirement” is placed upon non-accredited investors partaking in private placements under Regulation D. They must “ha[ve] such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment” or be represented by a “purchaser representative” that fits this qualification. § 230.506.
35. IVANOV & BAUGUESS, supra note 16, at 7.
36. Id. at 2.
37. Id. at 3; see also Scott Bauguess, ET. AL., U.S. SEC. & EXCH. COMM’N, DIV. OF ECON. & RISK ANALYSIS, CAPITAL RAISING IN THE U.S.: AN ANALYSIS OF THE MARKET FOR UNREGISTERED SECURITIES OFFERINGS, 2009-2014, at 11–12 (2015) (discussing the
Despite the prevalence and ease of conducting Rule 506 offerings, a major downside exists from the perspective of the average investor, due to the barrier to entry for those without accreditation. Of the two available exemptions under Rule 506, 506(b) offerings are limited to only thirty-five non-accredited investors and 506(c) offerings are exclusively limited to accredited investors. These limitations prevent the average American from participating in the vast majority of such investment opportunities. As of 2013, only twelve million households qualified as accredited investors in the United States, and of these, only about 300,000 actively invest in small business start-ups, usually as angel investors. Form D filings report that in 2012, out of an estimated 234,000 investors who participated in Regulation D offerings, only ten percent of offerings included a non-accredited investor. In 2014, only eight percent of Regulation D offerings included non-accredited investors. The mean number of investors per offering between 2009 and 2014 was fourteen; however, the median number of investors per offering was only four, indicating that a small number of offerings involved a large number of investors. This goes to show that although there are millions of investors, few take part in private securities offerings. By passing the JOBS Act, Congress hoped to “reopen[] American capital markets to emerging growth companies.”

40. See IVANOV & BAUGUESS, supra note 16, at 3 (noting that “non-accredited investors were present in only 10% of Regulation D offerings” in 2012). It should be noted that the use of a “purchaser representative,” such as a financial advisor or broker, may only be used to satisfy the sophistication requirement imposed on non-accredited investors participating in Rule 506(b) offerings, and may not be used to circumvent the accreditation requirement for any other Regulation D offering. 17 C.F.R. § 230.501(h)(i); see Investor Bulletin: Private Placements Under Regulation D, U.S. SEC. & EXCH. COMM’N (Sept. 24, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_privateplacements.html.
43. IVANOV & BAUGUESS, supra note 16, at 3.
44. BAUGUESS, ET AL., supra note 37, at 34.
45. Id.
46. Id.
47. See Jumpstart Our Business Startups Act ("Jobs Act"), Pub. L. No. 112–106, § 2, 126...
Additionally, to raise awareness of investment opportunities, Congress instructed the SEC, via Title II of the JOBS Act, to revise the Regulation D rules to permit “general solicitation” or “general advertising” if the offering is solely extended to accredited investors.\(^{48}\) This alteration is reflected in the “new” Rule 506(c).\(^{49}\) The ability of issuers to advertise is unprecedented, and is very appealing to companies considering which avenue of investment to pursue.\(^{50}\) However, if issuers do opt to utilize the Rule 506(c) general advertising provision to recruit investors, the JOBS Act requires that the issuer take “reasonable steps to verify that purchasers of securities sold . . . are accredited investors.”\(^{51}\) The SEC determined that such reasonable steps include requesting proof of income, bank statements, and consumer reports, or other measures to verify investors’ statuses.\(^{52}\) The availability of general solicitation may facilitate increasing investors’ attention, but data has shown that companies are hesitant to utilize the tool and instead have continued to rely on the traditional method of raising capital via Rule 506(b) offerings.\(^{53}\) Since Rule 506(c) became effective on September 23, 2013, its offerings accounted for only 2% of capital ($33 billion) raised in all Regulation D offerings.\(^{54}\) Though new options are becoming available, the data collected by the SEC suggests that Regulation D, specifically Rule 506(b), will continue as the favored exemption of small businesses looking to raise capital.\(^{55}\)

Accordingly, although the general public may become more aware of investment opportunities, the ability to invest in such offerings is still restricted to the small number of Americans that are accredited investors under Rule 506(c). In this respect, the amendment to Rule 506...
did little to actually democratize access to capital, and instead merely allowed issuers to solely solicit accredited investors. Nevertheless, despite the allowance for non-accredited investors to participate in 506(b) offerings, the overwhelming majority of issuers decline to do so.

III. THE “NEW” REGULATION A+ IS A STEP IN THE RIGHT DIRECTION TOWARDS REACHING THE ENTIRE CROWD

Title IV of the JOBS Act contained a mandate to the SEC to expand Regulation A to promote “small company capital formation.” On March 25, 2015, the SEC adopted modifications to Regulation A, a current exemption from registration for smaller offerings of securities, now referred to as Regulation A+. The modifications went into effect on June 19, 2015, and, thus far, have garnered a fair amount of positive attention. The promulgation of the new modifications illustrates an attempt to revamp Regulation A, in light of the historical underutilization of these types of offerings since the introduction of the Regulation D exemption in 1982. The “old” Regulation A was often overlooked as a means of raising capital for two main reasons: (1) the prohibitively high cost of preparing documents for SEC review, and (2) the requirement to comply with state “Blue Sky” laws. Between 2012 and 2014, only

59. Amy Wan, An Analysis of the First Approved Real Estate Crowdfunding Regulation A+ Filing, CROWDFUND INSIDER (Sept. 11, 2015, 11:06 AM), http://www.crowdfundinsider.com/2015/09/74256-an-analysis-of-the-first-approved-real-estate-crowdfunding-regulation-a-filing/ (“Since the SEC announced the intent to implement the new Regulation A+ rules in March, there’s been a lot of hype around the potential for Regulation A+. . . . Since March, I’ve been hearing from crowdfunding attorneys that they’ve been getting calls on a daily basis from sponsors and companies eager to take advantage of the new offering mechanism allowed under Regulation A+.”).
61. Robbins & Modzelesky, supra note 17, at 1; see also Aguilar, supra note 60 (suggesting the reduction in Regulation A offerings may be attributed to the emergence of Regulation D as the preferred method for raising capital, as well as the monetary limitations and the burdens of blue sky law compliance imposed by Regulation A).
twenty-six Regulation A offerings were qualified. The amendments made to Regulation A were made with these concerns in mind.

Prior to the announcement of the final rule, Regulation A provided an exemption from the registration requirements of Section 5 of the Securities Act for private offerings up to $5 million. Title IV of the JOBS Act drastically expanded this limit to $50 million. To comply with its mandate, the SEC established two tiers under Regulation A, each with their own respective limit and requirements.

In order to conduct a Regulation A+ offering, the issuer must be a U.S. or Canadian business and have its principal place of business within either of those countries. Tier 1 allows issuers to offer and sell up to $20 million in securities over a 12-month period in a public offering with not more than $6 million of securities to be purchased by affiliates of the issuer. Tier 2 allows issuers to offer and sell up to $50 million in securities over a 12-month period in a public offering with not more than $15 million of securities to be purchased by affiliates of the issuer. These offerings may be advertised freely and, in contrast to Regulation D, are not subject to limitations on the number of non-accredited investors that may participate. Tier 2, however, does impose a limit on the amount that non-accredited investors may invest; they may only invest up to ten percent of their annual income or net worth, whichever is greater.

The most substantial differences between Tiers 1 and 2 are the regulatory compliance and reporting requirements. Tier 1 is subject to state reporting and registration requirements, whereas Tier 2 is exempt from state “Blue Sky” laws. Tier 1 issuers do have one remarkably

62. Robbins & Modzelesky, supra note 17, at 1.
63. Id.
64. Id.
65. Id.
68. Id.
69. Id.; § 230.255 (permitting issuers to solicit interest and “test the waters” before qualification of the offering by the SEC).
70. § 230.251(d)(2)(i)(C).
71. See § 230.257 (outlining the regulatory requirements for the different tiers under Reg. A).
large advantage, though, as they are only required to submit an exit report, while Tier 2 issuers are required to provide audited financial statements, annual reports on Form 1-K, semi-annual reports on Form 1-SA, current event reports on Form 1-U, and exit reports on Form 1-K or 1-Z.\footnote{73}

There are various benefits associated with Regulation A+, particularly the availability of investment opportunities to the “entire crowd,” as opposed to only accredited investors. Regardless, this singular incentive is unlikely to usurp the role of Regulation D in private securities offerings, as the cost of regulatory compliance (state compliance for Tier 1 and regular, ongoing reporting for Tier 2) is prohibitively high for most start-ups and small businesses.\footnote{74} The SEC estimates that it will take approximately 750 hours to prepare the filings for SEC approval under Regulation A+,\footnote{75} making it unlikely that Regulation A+ will become the preferred method of raising capital instead of Regulation D. Therefore, the non-accredited, ordinary American investor is unlikely to see more investment opportunities in the private securities market through Regulation A+ offerings.\footnote{76}

Nevertheless, the Regulation A+ market still offers some promise for the ordinary U.S. investor. Regulation A+ has prompted many companies to “test the waters”\footnote{77} by utilizing online, intermediary platforms. For example, StartEngine.com provides an Internet platform service to gauge interest in various companies seeking to make a public offering under Tier 2 of Regulation A+.\footnote{78} On June 19, 2015, Elio Motors’ “test the waters” campaign went live; between their opening and November 3, 2015, Elio Motors received $43,636,350 from 11,326 “non-binding indications of interest,” $18,636,350 over its goal of $25,000,000.\footnote{79} On August 28, 2015, Elio Motors announced that it filed

\footnote{73. § 230.257.}
\footnote{74. Robbins & Modzelesky, supra note 17, at 7.}
\footnote{75. Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), 75 Fed. Reg. 21806, 21889 (Apr. 20, 2015).}
\footnote{76. See Robbins & Modzelesky, supra note 17, at 7 (“We believe that it is likely that Regulation A+ will be used not as a standard method of capital-raising, but as a special solution to particular situations.”).}
\footnote{77. § 230.255.}
its offering statement with the SEC seeking authorization to make a formal securities offering. On November 20, 2015, Elio Motors received qualification from the SEC to conduct a Regulation A+ offering of 2,090,000 shares.

Furthermore, XTI Aircraft company, another company listed on StartEngine.com, received $13,443,604 in indications of interest between August 25 and November 3, 2015. On January 21, 2016, XTI Aircraft opened a 30-day window for interested parties to purchase its shares following the SEC’s qualification of its offering. XTI hopes to sell $3 million worth of shares, at $10 per share, to meet its minimum offering amount. However, the realization rate of turning expressed interest into actual securities purchases has yet to be determined, and neither Elio Motors nor XTI has publicly released the amount of shares currently purchased. Elio Motors and XTI Aircraft Company’s activities illustrate a company’s ability to take a conceptually appealing product and utilize the functionality of Tier 2 of Regulation A+ to gauge investor interest, and ultimately fund that idea.

Tier 1 of Regulation A+ is also being used, but with little success. On August 31, 2015, GroundFloor, a peer-to-peer microlending real estate company, was the first company to qualify for a Regulation A+ platform offering. After originally being warned by its attorneys that

84. XTI Aircraft, Offering Circular (Jan. 21, 2016), https://startenginebetadev.s3.amazonaws.com/form_1_a/55d2bf2773652d59247e0000/XTI_Form_1-A-_1-20-16_AW-SPH.pdf.
85. E-mail from Rich Jones, Senior Account Executive, Forty-Seven Communications, to Max Isaacson (Jan. 8, 2016; 01:30 PM) (on file with author).
86. Wan, supra note 59.
the approval process would be quite long and costly, and that it still may not be approved by state regulators, GroundFloor proceeded with a Regulation A+ offering. 87 150 pages of attorney-drafted disclosures were needed for SEC approval of Form 1-A. 88 Nick Bhargava, co-founder of GroundFloor, originally estimated that the total cost of going through the North American Securities Administrators Association (“NASAA”) review and SEC review of the filings would be close to $200,000. 90 It took GroundFloor about five months from the date of its first filing to receive approval from the SEC under Tier 1. 91 In reality, the process was even longer as GroundFloor was likely compiling its offering documents since roughly April 2014. 92 Even more astounding, the initial public offering was limited to a mere $545,000 worth of securities, the proceeds of which were used to finance seven loans to property developers. 93 According to GroundFloor’s disclosures, it spent $30,000 on auditing fees, $458,000 in legal fees, and $6,000 in state regulatory compliance fees or “Blue Sky” fees. 94 Thus, GroundFloor spent nearly the amount they were seeking in capital on the initial offering itself. This illustrates the severe downside of Tier 1 offerings and casts significant doubt on the advantage and practicality of a Tier 1, Regulation A+ public offering.

Notably, in regard to mandatory disclosures, Congress requires that issuers utilizing Regulation A+ file annual audited financial statements, leaving the SEC without any regulatory leeway. 95 However, Congress gave the SEC the authority to include whatever other rules they found necessary to promote the “public interest and [] the protection of investors.” 96 To this end, Congress ensured certain restrictions would be

88. Id.
90. Buhl, supra note 87.
91. Id., supra note 59.
92. Id.
93. Id.
94. Id.
96. Id.
placed upon offerings, while granting the SEC greater discretion to implement its own restrictions. In light of these initial Regulation A+ offerings, Congress should revisit Regulation A and relax the onerous, demanding regulations that deter potential issuers from choosing Regulation A as their preferred method of private securities offerings.

IV. TITLE III OF THE JOBS ACT: AN ATTEMPT TO LET ORDINARY AMERICANS GET A BITE AT THE APPLE

Unlike Regulation D and Regulation A+, Title III of the JOBS Act is specifically designed to provide a modus to “crowdfund,”—that is, provide an avenue by which small businesses can raise a relatively small amount of money through the online sale of securities to a large number of investors without excessive costs. The SEC announced a set of proposed rules on December 18, 2013, which were met with great excitement by the public. Almost two years later, the SEC adopted the final rule on October 30, 2015. Notwithstanding the SEC’s delay in finalizing the rules under Title III of the JOBS Act, many states took the initiative to pass intrastate crowdfunding bills in the meantime. There

97. See JOBS Act §§ 301–305 (allowing private businesses to raise funds from non-accredited investors, with limitations, online).


100. Although this note focuses on interstate, federal crowdfunding, the intrastate crowdfunding exemption movement should not be overlooked. As of September 23, 2015, sixteen states and the District of Columbia have fully enacted some form of intrastate crowdfunding; nine states have passed legislation but have yet to finalize intrastate crowdfunding rules; twelve states have crowdfunding legislation pending, and three states are considering whether to adopt intrastate crowdfunding measures. Sec. Exch. Comm’n Comm. Small & Emerging Cos., Recommendation to Modernize Rule 147 under the Securities Act of 1933, Sec. Exh. Comm’n 1 (Sept. 17, 2015), http://www.sec.gov/info/smallbus/acsec/acsec-rule-147-recommendation-draft.pdf; Anya Coverman, State Crowdfunding Update, Nat’l Conference State Legislatures (2015), http://nlasa.cdn.s3.amazonaws.com/wp-content/uploads/2014/12/Intrastate-Crowdfunding-Overview-2015.pdf. The typical “intrastate exemption” provided by states allows a company to sell securities to all investors, not only accredited investors, within that particular state’s boundaries. David M. Freedman, Everything You Need to Know About Securities Crowdfunding, AIMkts (July 1, 2015), http://www.accreditedinvestormarkets.com/article/everything-you-need-to-know-about-securities-crowdfunding/. Many of these state exemptions include limits on investments made by non-accredited investors. Id. Furthermore, intrastate issuers are severely restricted, in that the current SEC Rules require a business to only conduct business in that particular state to qualify for the safe harbor exemption under Rule 147. 17 C.F.R. § 230.147 (2015).
has also been ongoing Congressional discussion about a new proposal to fix past issues with the JOBS Act, which may ultimately alter Title III once more.\(^\text{101}\)

A. \textit{Title III Extends Investment Opportunities to the Ordinary, Non-Accredited American Investor}

For the first time in over eighty years (since the passage of the Securities Act of 1933), ordinary Americans will be able to passively invest in private business via securities.\(^\text{102}\) The final rule pursuant to Title III will allow any investor, accredited and non-accredited alike, to purchase unregistered securities from issuers utilizing Internet-based platforms, commonly referred to as funding portals.\(^\text{103}\) As noted, prior to these rules, those wishing to invest in private securities had to be a qualified institutional buyer or an accredited investor.\(^\text{104}\) If not, the offering had to be limited to thirty-five total non-accredited investors per offering, or had to be within the boundaries of a single state.\(^\text{105}\) Once the final rule becomes actionable, private companies may seek financing from ordinary Americans without registering the offering, so long as

Therefore, in order for a business to utilize intrastate crowdfunding, they must pass a strict percentage threshold test, that mandates a business: (1) derive at least 80 percent of their revenues in the given state; (2) maintain at least 80 percent of their assets in that state; and, (3) use at least 80 percent of the offering’s gross proceeds in that state. \textit{Id.; see also} Tony Zerucha, \textit{Exclusive: Title III on its way?}, BANKLESS TIMES (Sept. 24, 2015, 9:45 AM), http://www.banklesteimes.com/2015/09/24/exclusive-title-iii-on-its-way/ (discussing intrastate crowdfunding “tests” and requirements). The SEC Advisory Committee noted, “These tests are difficult to satisfy and render many contemporary small businesses seeking local financing ineligible to rely upon the rule.” Sec. Exch. Comm’n Comm. Small & Emerging Cos., \textit{Recommendation to Modernize Rule 147 under the Securities Act of 1933}, Sec. Exch. Comm’n 1 (Sept. 17, 2015), http://www.sec.gov/info/smallbus/acsec/acsec-rule-147-recommendation-draft.pdf. Hence, amongst other recommendations, the Advisory Committee encouraged the SEC to eliminate these limits to allow more small businesses and investors to participate in in-state crowdfunding. \textit{Id.} Furthermore, the SEC proposed rules to ease intrastate and regional securities offerings on October 30, 2015. Crowdfunding, 78 Fed. Reg. 66428 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249).


104. Quinn, \textit{supra} note 102.

105. \textit{Id.}
certain disclosures and procedures are followed. Nevertheless, although the option is there, it remains unlikely that Title III will become a preferred capital raising method amongst most private companies.

B. The $1 Million Limitation on Title III Offerings Severely Restricts its Practicality

The new rules will allow an issuer to offer up to $1 million in unregistered securities within a 12-month period. Congress placed limitations on the aggregate amount that potential non-accredited investors may purchase; investors with an annual income or net worth less than $100,000 are permitted to invest $2,000 or the lesser of five percent of their annual income or net worth. Investors with an income or net worth of greater than $100,000 are permitted to invest the lesser of ten percent of their income or net worth. Moreover, there is a cap on all investors, limiting their total investments to $100,000 over a 12-month period.

The $1 million limit is relatively low considering the amount of capital sought by most start-up companies. In the fourth quarter of 2014, the average and median seed deal sizes were $1.9 million and $1.7 million, respectively. This goes to show that many companies, specifically those within the software and biotechnology industries, need substantially more capital than $1 million. Thus, companies may be

106. Id.
107. See Tanya Prive, Why Title III of the JOBS Act May Be a Flop, FORBES (Nov. 3, 2015, 8:00 AM), http://www.forbes.com/sites/tanyaprive/2015/11/03/why-title-iii-of-the-jobs-act-may-be-a-flop/ (discussing the various reasons why Title III may not emerge as useful for raising capital as hoped by Congress).
109. Id.
110. Id.
111. Id.
forced to resort to parallel or multiple offerings in order to meet their capital needs through Title III; however, this strategy will likely be cost prohibitive. The capital limitation placed on Title III crowdfunding has been described as “an unnecessary restriction on a company’s ability to grow.” On the other hand, others have argued that small businesses and seed-stage firms will not be hindered by the monetary limitation, as Title III provides an investment gap-filler for many smaller entities in need of only a couple hundred thousand dollars. Still, the limitation impairs the utility of Title III more than all of the prior discussed capital raising methods, such as Regulation D, which has no limitation, and Tier 2 of Regulation A+, in which a company may raise $50 million from non-accredited investors in a “mini-IPO.”

C. Title III Imposes a Complex Regulatory Scheme that Constrains its Viability as an Attractive Means to Raise Capital

Despite Congressional efforts to revolutionize the securities market, the regulatory scheme surrounding Title III is expansive and challenging. Importantly, Title III preempts state registration and “Blue Sky” laws, which will result in meaningful cost savings, but nevertheless, companies wishing to utilize Title III will still be subject to significant disclosure under federal law which is will be quite expensive. The rules require an issuer to disclose a substantial amount of information to the SEC through Form C. This includes: information about officers, directors, and owners of twenty percent or more of the issuing entity; a description of the issuer’s business and how the proceeds of the offering are to be used; the price of the offered securities and how that price was calculated; the target offering amount, the deadline for the

114. See Prive, supra note 107 (noting that multiple offerings may be cost prohibitive whereas other offering methods could raise a larger amount of capital in a single offering).
115. Vinluan, supra note 113.
116. Id. (“But Bill Warner, an angel investor and co-founder of EntreDot, a Research Triangle Park, NC-based organization that supports entrepreneurs, says crowdfunding is intended for small businesses and seed-stage firms, which have the hardest time securing financing.”).
117. See id. (discussing the caps placed on offering methods, with one angel investor describing them as “an unnecessary restriction on a company’s ability to grow”).
target, and whether or not funds will be accepted in excess of the target; certain related-party transactions; a discussion of the issuer’s financial condition; and, most importantly for considering the cost of an offering, the financial statements of the issuer. The proposed rules differ from the final rule in that the final rule will allow the issuer to complete Form C through an optional, user-friendly “Q&A” format, which is intended to help reduce the amount of time and expertise needed to complete the document.

Depending on the offering, different standards apply to the financial statements that must be disclosed. For issuers offering $100,000 or less in securities, a disclosure of the issuer’s total income, taxable income and total tax, as reflected in its federal income tax returns certified by its principal executive officer must be filed. If the offering is greater than $100,000 but not more than $500,000, the issuer must provide financial statements that have been reviewed by an independent, certified public accountant. For first time crowdfunding issuers making an offer between $500,000 and $1 million, financial statements reviewed by a public accountant will also suffice. However, if the issuer has previously sold securities via regulation crowdfunding, it must provide audited financial statements from an independent certified public accountant.

The alteration between the proposed rules and the final rule that relaxes the examination requirement of financial statements is somewhat significant for potential issuers, but not enough to incentivize the use of Title III over Regulation D, or even Regulation A+. By allowing issuers to more easily fill out Form C, they will save some money and time, but hardly enough to make a Title III offering the most attractive.

121. Id. at 71398 (“We believe that this optional [Q&A] format should help reduce the burden on crowdfunding issuers of preparing disclosures.”).
122. If financial statements of the issuer are available that have been reviewed or audited by an independent public accountant, those financial statements must be filed. Id. at 71412.
123. But, if the issuer has financial statements available that have been audited by an independent public accountant, those statements must be provided. Id.
124. Id.
125. Id.
126. See Prive, supra note 107 (discussing four hurdles that Title III imposes, including: (1) the $1 million limitation, (2) the cost of regulation compliance, (3) the creation of messy, extensive capitalization tables, and (4) the other more cost-effective means to raise capital).
127. Id.
Filing Form C with the SEC still may be costly and time consuming—the SEC estimates that the average cost of the preparation and filing of Form C is $6,000, which some say is an underestimation—a burden that many small businesses may not be able to handle. The elimination of the audited financial statements requirement for first-time issuers is undoubtedly the most noteworthy, as it will save an estimated $10,000 to $40,000 for these issuers. The SEC has estimated that ongoing disclosure costs will range between $1,667 for offerings of $100,000 or less, to $13,333 for offerings nearing $1 million. However, others have dismissed the SEC’s estimations as egregiously low, suggesting that actual ongoing annual report costs will range from $7,000 to $25,000 per year, which can be offset through other means of raising capital, such as Regulation D. Moreover, a significant cost—ranging from several hundred to several thousands of dollars per issuer—is imposed to conduct investigations on issuers’ directors and officers to ensure that no “bad actors” are involved in the business. Lastly, the online “funding portal” or broker-dealer will take a fee in accordance with the funds raised, which might range between ten and twenty percent. Adding all these costs, an issuer seeking to raise $100,000 in securities will likely pay at least $17,967. The costs associated with a Title III offering add up quickly, and when compared to those required by a Rule 506 offering, they are dauntingly large. In the words of a New York Times writer, “a company hoping to raise $100,000 could end up paying more for the capital than it

131. See Prive, supra note 107 (examining the costs imposed on businesses by Title III reporting requirements).
133. Id.
134. Taking into consideration the lowest estimates of each cost results in $17,967 for a $100,000 offering: $6,000 for filing Form C; $1,667 for ongoing disclosure; several hundred dollars ($300 here, hypothetically) for “bad actor” certifications, and varying a ten percent fee for an offering. See Crowdfunding, 80 Fed. Reg. at 71499-500 (estimating the offering costs for issuers).
would by borrowing the money with a credit card."135

Moreover, Title III imposes an enormous burden on online funding portals and intermediary broker-dealers as is required under Section 4A of the Securities Act of 1933.136 The SEC estimates that the initial cost for an entity to register as a broker and become a member of a national securities association, in order to engage in crowdfunding activities, will be roughly $275,000, with an annual cost of $50,000 required to maintain the registration and membership.137 Additionally, the SEC estimates the cost of meeting the various requirements that apply to registered brokers will be $245,000 initially, and $180,000 annually.138 If an entity registers solely as a funding portal and registers with a member of a national securities association the estimated cost is $100,000 initially, with an annual cost of $10,000.139 Notably, these costs are merely for registration and membership and do not account for development and implementation of the platform.140 In total, the SEC estimates that the initial cost to become an intermediary broker will be $945,000, with an ongoing annual cost of $315,000.141 For an intermediary registering as a funding portal, the initial cost is estimated to be $592,000, with an ongoing annual cost of $135,000.142 In addition, the cost of conducting background checks on issuers is estimated to result in approximately $13,818 to $34,546 per intermediary per year.143 Intermediaries are also required to produce a series of educational videos to be shown on their portals, which is estimated to cost $10,000 per intermediary per year, with an initial cost between $10,000 and $30,000.144 Ultimately, even more money will be spent complying with disclosure and ongoing reporting requirements, as other regulatory

138. Id.
139. Id.
140. The SEC estimates that the cost to develop a platform, for an “average intermediary” will cost approximately $425,000 initially with an ongoing annual maintenance cost of roughly $85,000 per year. Id.
141. Id.
142. Id. at 71510.
143. Id. at 71513.
144. Id. at 71529.
authorities begin to implement their own rules.\textsuperscript{145}

\textbf{D. The Prohibition on Advertising and General Solicitation Dramatically Reduces the Attractiveness of Title III Offerings}

Lastly, the advertising restrictions required by Title III are a serious impediment to notifying the average American that such investment opportunities exist. Interestingly, solicitation and advertising are very restricted in comparison to Regulation D and Regulation A+ offerings.\textsuperscript{146} Direct communication between the issuer and the potential investor is extremely limited.\textsuperscript{147} An issuer may only post notices similar to “tombstone ads,” which may only direct a potential investor to the funding portal on which the offering is listed and provide basic, factual information about the business and offering, including the amount of securities offered, the nature of the securities, the price of the securities, and the closing date of the offering period.\textsuperscript{148} Furthermore, the funding portals will not be able to market specific offerings, but rather only their own services.\textsuperscript{149} Thus, as one expert acknowledges:

\begin{quote}
\textsuperscript{145} The Financial Industry Regulatory Authority (“FINRA”) proposed a rule to adopt its own Funding Portal Rules, in addition to those of the SEC, on October 9, 2015. 80 Fed. Reg. 66368 (Oct. 28, 2015) (“All funding portal members of FINRA will be subject to these [SEC] rules if they are adopted by the SEC. Further, as discussed earlier, FINRA is proposing specified conduct and compliance rules, also aimed at investor protection.”). FINRA has included in its rule change a streamlined process for entities to exist solely as funding portals, rather than also functioning at registered brokers. \textit{Id.} at 66369. FINRA estimates that abiding by FINRA rules alone, and not registering as a broker-dealer with the SEC will still cost between $100,000 and $150,000 annually, in compliance costs alone. \textit{Id.} at 66366 (acknowledging that firms that offer full private placement platform brokerage services for accredited investors may have multiple full-time compliance officers and spend $100,000 to $150,000 annually on ensuring regulation compliance). \textit{See also} Almerico, \textit{supra} note 132 (estimating the costs associated with complying with regulations promulgated by the SEC and FINRA).


\textsuperscript{147} Section 302(b) of the JOBS Act adds a “new” Section 4A to the Securities Act of 1933, “Requirements with Respect to Certain Small Transactions,” which provides, amongst other requirements, that an issuer shall “not advertise the terms of the offering, except for notices which direct investors to the funding portal or broker.” 15 U.S.C. § 77d-1(b)(2) (2012). \textit{See also} Crowdfunding, 80 Fed. Reg. 71387, 71425, 71542 (Nov. 16, 2015) (to be codified at 17 C.F.R. § 227.204) (limiting communication between issuers and potential investors to channels provided by the intermediary on the intermediary’s platform).


In practice, this means that only truly interested parties, acting of their own volition and not at the urging of paid salespeople, who are prepared to take time to register with the funding portal, share personal information, and undergo investor education, will ever have access to, and the opportunity to, actually make a crowdfunding investment.  

However, it should be noted that the SEC has interpreted the statutory language quite broadly, suggesting that the “tombstone ads” can be placed not only in the newspaper, but on social media as well. Nevertheless, issuers are only permitted to communicate with potential investors through the channels provided by the intermediary or the intermediary’s platform, which severely inhibits the ability of an issuer to sell his or her business offering.

In this way, Congress has effectively placed a variety of barriers between the issuer and the purchaser, purportedly to protect the consumer from potential fraud. However, these same barriers that are described as consumer protection components also restrict the ability of prospective issuers to market their businesses, and ultimately disincentivizes the issuer to utilize Title III as their capital raising mechanism. Rule 506(c), which allows a general solicitation of accredited investors, may emerge as the preferred method of companies seeking to raise capital, as solicitation remains an important component of seeking outside investment. Notwithstanding the incentives to use Rule 506(c), experts have predicted that Rule 506(b) offerings will likely continue to dominate the private securities offerings realm because of the economic incentives

150. Ellenoff, supra note 146, at 25–26 (discussing the requirements of JOBS Act § 302(b), 15 U.S.C. § 77d-1(a)).
151. Crowdfunding, 80 Fed. Reg. 71537, 71425 (Nov. 16, 2015) (“[The SEC] believe[s] the final rules will allow issuers to leverage social media to attract investors, while at the same time protecting investors by limiting the ability of issuers to advertise the terms of the offering without directing them to the required disclosure.”).
152. Id.
153. See Ellenoff, supra note 146, at 25–26 (suggesting that disclosure requirements and the statutorily-imposed so-called distance between a potential investor and an issuer seeking investment will help deter crowdfunding fraud).
154. Eakin, supra note 17.
155. Robbins, supra note 118.
associated with the lack of ongoing disclosure and filing requirements in addition to industry attorneys’ familiarity with rule’s requirements.\textsuperscript{156} Despite Congress’ admirable attempt to expand capital markets to the ordinary American investor, the burdens accompanying a Title III offering effectively void the advantage of reaching the entire crowd.\textsuperscript{157}

V. CONSIDERATIONS FOR AMENDMENTS TO THE JOBS ACT TO INCREASE INVESTORS’ ACCESS TO CAPITAL MARKETS IN FULFILLMENT OF THE JOBS ACT’S INTENDED PURPOSE

Private issuers need some incentive to deviate from the traditional method of raising capital—Regulation D, Rule 506(b) and Rule 506(c). The burden on issuers is heavier for Title III than for Regulation D offerings. The SEC has frustrated the purpose of the nine pages of Title III within the JOBS Act by promulgating complex, complicated rules with many economic roadblocks.\textsuperscript{158} These roadblocks created by Title III drastically reduce the economic efficiency, and thus, the appeal of crowdfunding.\textsuperscript{159} Rather than helping everyday investors by protecting them from fraudulent offerings, or educating them about the value of private securities, the final rule will ultimately cost ordinary Americans the opportunity to participate in private placements due to the numerous, daunting hurdles that will prevent issuers from raising capital through Title III crowdfunding and intermediaries from facilitating such investment.\textsuperscript{160} The cost of conducting a “mini-IPO” through an online funding portal is much more expensive than utilizing any of the alternatives, particularly Regulation D.\textsuperscript{161}

\textsuperscript{156} See \textit{Bauguess, et al.}, \textit{supra} note 37, at 15 (noting the dominance of Rule 506 can be attributed to the preemption of state securities laws and the SEC’s lesser qualification requirements than other rules).

\textsuperscript{157} \textit{Id.; see also} Robbins, \textit{supra} note 118, at 4–5 (suggesting six reasons why crowdfunding “is limited in ways that make it far less attractive than Rule 506(c)”).

\textsuperscript{158} See \textit{Almerico, supra} note 132 (“Then, we read the 585 pages of rules and comments. . . . but surely the SEC would understand that a startup company would need an economical way to crowdfund under the JOBS Act. Apparently, the SEC did not get this memo.”).

\textsuperscript{159} See \textit{Eakin, supra} note 17 (“Simply put, if Title III is more expensive and time consuming than alternative paths to funding, promising entrepreneurs will, and should, avoid it, except as an option of last resort.”).

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} See \textit{Mandelbaum, supra} note 135 (commenting on the costs of Title III, including intermediary fees, audit fees, annual reporting costs, and regulatory compliance costs).
In order to make Title III offerings more appealing, the cost of conducting such an offering must be reduced, particularly for the issuer. The requirement of reviewed financial statements for offerings greater than $100,000 should be eliminated to reduce the financial burden; rather, the submission of an income tax return should suffice for offerings of $1 million or less. This would save a significant amount of money for issuers, likely tens of thousands of dollars. Moreover, the $1 million offering limitation should be lifted to increase the number of businesses that might consider Title III as a reasonable means of raising capital. Also, the reporting requirements should be relaxed in order to decrease costs associated with qualified Title III offerings. Although the optional “Q&A” format for Form C is a step in the right direction, Form C should be further simplified such that an average business owner could complete the forms without the involvement of securities counsel, which will inevitably be expensive. If the cost of an offering under Title III were to drop significantly in order to compete with Regulation D, Title III would become a viable alternative to other options for raising capital.

In passing the JOBS Act, Congress was especially pressed with the challenge of balancing the promotion of business growth and consumer protection. Many have been fraught with concerns that crowdfunding will open the door to fraud, as unsophisticated, non-accredited investors—those with a net worth less than $1 million or an income less than $200,000 in the preceding two years—might be able to make a risky investment decision without adequate disclosure of all

162. See Robb Mandelbaum, Should You Crowdfund Your Next Business?, INC.COM (May 2014), http://www.inc.com/magazine/201405/robb-mandelbaum/jobs-act-crowdfunding-problems.html (“I just don’t see people raising more than half-a-million bucks through Title III as long as that audit requirement is there,” noted Scott Purcell, CEO of FundAmerica while discussing the disincentive of the audit requirement for offerings greater than $500,000).


164. Robbins, supra note 118.

165. Id.

166. See Mandelbaum, Should You Crowdfund Your Next Business?, supra note 162 (discussing the many hurdles presented by Title III crowdfunding including: finding the right portal with the right price, taking a bet on whether or not the crowd will invest in your business, and furthermore, the many costs associated with a Title III offering).

167. See Thomas Hazen, Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure, 90 N.C. L. Rev. 1735, 1738 (2011–2012) (“Policymakers continually face the challenge of effectively balancing the benefits of encouraging small business formation against the investor protection goals of the securities laws.”).
material information.\textsuperscript{168} Is it merely a person’s net worth that gauges their ability to make an investment decision? Regardless, proponents of the investment limitations imposed by Title III of the JOBS Act\textsuperscript{169} argue that such restrictions ensure adequate consumer protection.\textsuperscript{170} These limitations are reinforced by the disclosure requirements of the JOBS Act, particularly Form C, which is sufficiently detailed to allow potential investors to make an educated decision.\textsuperscript{171} Furthermore, the final rule for Title III incorporates sufficient measures to prevent fraud, including, but not limited to, the prerequisite that funding portals require investors to undergo a brief education program via the website.\textsuperscript{172} In the unfortunate circumstance that a fraudulent offering does occur, issuers are liable to purchasers under Section 4A(c) of the Securities Act, which triggers the identical liability as is created under Section 12(a)(2).\textsuperscript{173} Section 12(a)(2) permits the purchaser of a security the ability to sue the seller if the seller omits material facts or misleads the purchaser of a security.\textsuperscript{174} In this respect, the JOBS Act and Title III sacrifice the ability of the average American to invest in exchange for investor protection. Compared with each of the other methods of raising capital in the form of private securities offerings, Regulation D still continues to provide the most cost-effective means available. Because of this, the opportunities for the non-accredited, average American to invest are considerably limited. Although the adoption of the Regulation A+ and Title III rules is a step in the right direction toward allowing greater public participation in investment opportunities, the rules fail to fulfill the

\textsuperscript{168} See, e.g., Bryan Sullivan & Stephen Ma, \textit{Crowdfunding: Potential Legal Disaster Waiting to Happen}, \textit{Forbes} (Oct. 22, 2012, 7:00 AM), http://www.forbes.com/sites/eric savitz/2012/10/22/crowdfunding-potential-legal-disaster-waiting-to-happen/#58f84df33c9f (“The bottom line is that, while unintentional, crowdfunding is tailor made to assist fraudsters in duping unsophisticated ‘investors.’”).


\textsuperscript{170} See Hazen, \textit{supra} note 167, at 1765 (“It is naïve to assume that limiting offerings to small amounts per investor will deter scammers from taking advantage of investors via crowdfunding.”).

\textsuperscript{171} JOBS Act § 302(b)4A(b)(1) (providing for the “Requirements on Issuers” within the “new” Section 4A of the Securities Act of 1933); 15 U.S.C. § 77d–1(b)(1); Crowdfunding, 80 Fed. Reg. 71387, 71538 (Nov. 16, 2015) (to be codified at 17 C.F.R. § 227.201).

\textsuperscript{172} Crowdfunding, 80 Fed. Reg. 71387, 71543 (Nov. 16, 2015) (to be codified at 17 C.F.R. § 227.302(2)(b)).

\textsuperscript{173} JOBS Act § 302(b)4A(c) (providing for a cause of action, within the “new” Section 4A, against an issuer who “makes an untrue statement of a material fact or omits to state a material fact required to be stated”); 15 U.S.C. § 77d–1(c)(1)(B).

promise of crowdfunding. Congress should again revisit the JOBS Act to remove many of the restrictions imposed by Title III in order to make it an attractive capital raising method for small businesses.175 No longer should only the wealthy have access to a full range of investment opportunities; so too should the crowd.

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175. See Brian Korn, SEC Proposes Crowdfunding Rules, FORBES (Oct. 23, 2013, 2:41 PM), http://www.forbes.com/sites/deborahjacobs/2013/10/23/sec-proposes-crowdfunding-rules/ (“Compared to other forms of crowdfunding and capital raising, equity crowdfunding to the public has the worst ‘bang for your buck’ in all of corporate finance. . . . In order for equity crowdfunding to the public to serve as a useful tool, as intended, Congress needs to amend the JOBS Act to make it less onerous and costly. Unfortunately, the SEC’s hands are tied since the JOBS Act itself creates most of the restrictions in the proposed rule.”).