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## GOING PUBLIC SECRETLY: THE SEC'S UNAVAILING EFFORT TO INCREASE INITIAL PUBLIC OFFERINGS THROUGH CONFIDENTIAL REGISTRATION

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*In an effort to reverse the declining number of IPOs seen over the past two decades, newly-appointed SEC Chairman Jay Clayton announced in mid-2017 that any company seeking to go public could now initially file its registration statement confidentially rather than publicly. This announcement effectively extended a policy that had originally only applied to emerging growth companies—firms with less than \$1.07 billion in revenue during their last fiscal year—to larger companies. Because there are advantages to confidentially filing a registration statement, this new policy was meant to encourage more large firms to go public and, as a result, increase the overall number of IPOs.*

*This Note empirically examines the effect of this policy change over the course of its first year to analyze whether it has succeeded in effectuating more IPOs in the marketplace. The data suggest that this new policy has failed. And because it affects a relatively small number of firms, it will likely continue to fail to meaningfully increase the number of IPOs. This Note argues that in order to encourage more companies to go public, the SEC and Congress must stop focusing on changes to the process of going public and instead make being a public company more attractive to both smaller firms, which*

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have the potential to increase the number of IPOs, and larger firms, which can drastically increase the amount of overall public capital raised—another necessary metric in evaluating the success of the IPO market.

*In recent years, benefits granted to private capital markets have enabled them to flourish as viable alternatives to the public markets. This has led to greater societal inequality since average investors are often shut out from private investments, such as venture capital and private equity. Therefore, this Note argues that in order to save the public markets, benefits awarded to private capital must be reduced. In addition, this Note presents new proposals to further mitigate the structural realities that incentivize companies to remain private and, instead, encourage them to go public: (1) award firms that go public temporary exemptions from burdensome regulations that apply to public companies, such as the Sarbanes-Oxley Act; and (2) offer tax credits to companies that conduct IPOs. Enacting such policies would help ensure more of today's companies see the public markets as attractive sources of capital once again.*

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## I. INTRODUCTION

In late December 2016, then-President-elect Donald J. Trump met with Wall Street lawyer Jay Clayton at Trump's Mar-a-Lago resort in Palm Beach, Florida.<sup>1</sup> Following his

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<sup>1</sup> Robert Schmidt & Benjamin Bain, *Trump Wants a Pro-Business SEC. That Has Some Investors Worried*, BLOOMBERG (Feb. 23, 2017),

victory in the 2016 U.S. presidential election, Trump was searching for his nominee to head the Securities and Exchange Commission (“SEC”). During his meeting with Clayton, Trump “was fixated on the steep decline”<sup>2</sup> of U.S. initial public offerings (“IPOs”) and was “going on and on about the . . . dearth of U.S. IPOs and how we need to change that.”<sup>3</sup> A few months later, Clayton became SEC Chairman and began working to achieve the President’s goal of increasing the number of IPOs in the United States.<sup>4</sup> In his first public address on July 12, 2017, Chairman Clayton spoke to the Economic Club of New York about the “need to increase the attractiveness of our public capital markets”<sup>5</sup> and announced that the SEC’s confidential review of IPO registration statements—previously only available to “emerging growth companies”—was, as of two days earlier, open to all companies.<sup>6</sup> Clayton elaborated that he hoped this change would encourage larger companies to “find the prospect of selling their shares in the U.S. public markets more attractive[.]”<sup>7</sup>

This Note argues that the new SEC policy that allows large companies with annual revenues of \$1.07 billion or more to confidentially file registration statements before publicly announcing their intentions to go public has not—and will not—achieve the Trump administration’s goal of increasing the number of U.S. IPOs. The policy should, therefore, be

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<https://www.bloomberg.com/news/articles/2017-02-23/trump-wants-a-pro-business-sec-that-has-some-investors-worried> [https://perma.cc/FN79-S92E].

<sup>2</sup> *Id.*

<sup>3</sup> Bloomberg, *Trump Wants a Pro-Business SEC to Boost IPOs*, YOUTUBE (Feb. 23, 2017), <https://www.youtube.com/watch?v=gLHRS2O6W9g> (on file with the *Columbia Business Law Review*).

<sup>4</sup> See *infra* Section II.E.

<sup>5</sup> Jay Clayton, SEC Chairman, Remarks at the Economic Club of New York, at II.B. (July 12, 2017) (transcript available at <https://www.sec.gov/news/speech/remarks-economic-club-new-york> [https://perma.cc/QLP8-2RUG]).

<sup>6</sup> See *id.* For a discussion of emerging growth companies, see *infra* Section II.D.

<sup>7</sup> Clayton, *supra* note 5.

abandoned in favor of others that can better succeed in this endeavor. Part II of this Note provides background information on capital formation, the securities laws that regulate issuer registration, and the confidential draft registration process, which was first established by the Jumpstart Our Business Startups Act (the “JOBS Act”) in 2012 and was expanded by the SEC change in July 2017. Part III first surveys existing scholarship that suggests it is inconclusive whether the JOBS Act has succeeded in increasing the number of IPOs. Part III then discusses the results of the empirical study, conducted specifically for this Note by the author, which suggest that the new SEC policy announced in July 2017 has not had a noticeable effect on IPO activity. Part IV explains why the new SEC policy has failed to increase the number of IPOs, but argues that IPOs of larger companies are nonetheless essential to a healthy economy because they raise much more capital, despite having a marginal effect on the overall number of IPOs. Part IV then discusses the threat public markets face from private capital and argues that IPOs must prevail over such alternative financing options in order to promote distributional equality in the markets. Part V proposes new solutions that should be adopted to properly stimulate the U.S. public markets. These include eliminating benefits awarded to private capital, temporarily exempting new public companies from burdensome regulations required by the Sarbanes-Oxley Act and other public company compliance statutes, and offering tax credits to companies that conduct IPOs. Part V then calls for abandoning the confidential review process, since it has yet to conclusively show that it increases IPOs, in favor of greater disclosure. Part VI concludes.

## II. BACKGROUND ON INITIAL PUBLIC OFFERINGS AND SECURITIES REGULATION

### A. The Genesis of a Company: Financing Options for Entrepreneurs

The paramount concern for an entrepreneur starting a new business venture is financing. Without access to cash, a

startup will almost certainly fail.<sup>8</sup> First, entrepreneurs typically use personal finances and borrow money from family and friends to fund their businesses.<sup>9</sup> Beyond this initial “seed round”<sup>10</sup> of financing, entrepreneurs must consider more sophisticated sources of capital, such as debt financing—borrowing money with an obligation to repay the debt—and equity financing—selling investors an ownership interest in the company.<sup>11</sup>

Because debt financing is often only available to companies with earnings and assets, equity financing is one of the most popular options for new companies.<sup>12</sup> There are three major sources that provide such financing: (1) “angels”—successful businesspeople with high net worth; (2) venture capital firms; and (3) private equity firms.<sup>13</sup> However, because these individuals and entities take on high levels of risk in financing new businesses, they typically will only invest if the company’s predicted rates of return are high.<sup>14</sup> As a result,

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<sup>8</sup> See Richard A. Mann, Michael O’Sullivan, Larry Robbins & Barry S. Roberts, *Starting from Scratch: A Lawyer’s Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773, 817 (2004) (“Expenses quickly add up, and a business that cannot manage its cash flow will not survive.”).

<sup>9</sup> See *id.* at 821.

<sup>10</sup> *Id.* at 822.

<sup>11</sup> See *id.* at 817.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* at 823–25; see also Jesse Scott, Note, *The JOBS Act: Encouraging Capital Formation but Not IPOs*, 7 J. BUS., ENTREPRENEURSHIP & L. 367, 368 (2014). Although private equity and venture capital overlap somewhat, there are key differences between these two sources of funding. Traditionally, private equity firms invest in mature companies with established revenues and often seek a majority ownership stake. See Alejandro Cremades, *Venture Capital vs. Private Equity: Understanding the Difference*, FORBES (Feb. 14, 2019), <https://www.forbes.com/sites/alejandrocremades/2019/02/14/venture-capital-vs-private-equity-understanding-the-difference> [https://perma.cc/LN5R-DQV5]. On the contrary, venture capital firms invest at an earlier stage of the company’s growth and seek a smaller portion of the overall equity in order to spread the firm’s risk exposure. *Id.* Thus, venture capital is a more likely alternative for early-stage financing for entrepreneurs.

<sup>14</sup> See Dale A. Oesterle, *The High Cost of IPOs Depresses Venture Capital in the United States*, 1 ENTREPRENEURIAL BUS. L.J. 369, 369–70

entrepreneurs often plan exit strategies from these initial financing arrangements, the most common of which are a merger, an acquisition, or an IPO.<sup>15</sup> Such exit options—particularly an IPO—allow early investors a greater chance of earning a high return on their initial investment in the company.<sup>16</sup>

An IPO is defined as “[a] company’s first public sale of stock; the first offering of an issuer’s equity securities to the public through a registration statement.”<sup>17</sup> Through an IPO, a company moves from being privately owned<sup>18</sup> to being

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(2006) (“The willingness of venture capitalists, angels, and venture capital funds to place funds with portfolio companies depends on predictions of high rates of return for these high risk investments.”); Scott, *supra* note 13, at 368 (noting that angel investors, venture capitalists, and private equity firms “require high rates of return for the high risk of the investment.”).

<sup>15</sup> See Mann et al., *supra* note 8, at 839; Scott, *supra* note 13, at 368.

<sup>16</sup> See Oesterle, *supra* note 14, at 370. In many cases, a well-thought-out exit strategy will actually increase the likelihood of early-stage investment. See, e.g., J. William Callison, *Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business*, 26 J. CORP. L. 97, 109 (2000) (“[T]he existence of a clearly defined exit strategy is critical to the venture capitalist’s investment[.]”); see also Mann et al., *supra* note 8, at 839 (“Today’s investors, especially venture capitalists, place a premium on ventures with leaders who have planned for the future.”).

<sup>17</sup> *Initial Public Offering*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Initial Public Offering (IPO)*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/fast-answers/answersipohtm.html> [<https://perma.cc/QZ4D-JDVP>] (last modified May 31, 2013) (defining an IPO as “when a company first sells its shares to the public”).

<sup>18</sup> Private ownership is typically defined in the contrapositive—that is, any company that is not publicly traded. See, e.g., *Private Company*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/privatecompany.asp> [<https://perma.cc/L4JL-M6R8>] (last updated Mar. 28, 2018) (“Private companies may issue stock and have shareholders, but their shares do not trade on public exchanges and are not issued through an initial public offering[.]”). For an early definition of a private company, see Edward Manson, *The Evolution of the Private Company*, 26 L.Q. REV. 11, 13 (1910) (“A small company which does not go to the public for its capital, and keeps its shares in a few hands.”). Because of the variety of forms business entities take, the difference between private and public companies is better captured by the distinction between “closely held” businesses, such as the close corporation, and “publicly held” businesses. Two defining characteristics of

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owned, at least in part, by the public investment community.<sup>19</sup> As such, an IPO is commonly referred to as “going public” and usually means listing the company’s stock on the New York Stock Exchange (NYSE) or the Nasdaq—the two major stock markets in the United States—for the public to purchase.<sup>20</sup>

## B. Going Public: The Advantages and Disadvantages

### 1. The Advantages of an IPO

There are many advantages to executing an IPO that continue to make this option attractive to businesspeople today. An IPO provides a company with capital, which can be used for business expansion, operating expenses, and any other corporate purpose.<sup>21</sup> An IPO also provides costless liquidity because, unlike shareholders in a closely held corporation, public company investors have access to public markets through which they can sell their shares at any time, for any purpose.<sup>22</sup> Further, IPOs increase the valuation of a

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closely held businesses are: (1) they typically have few owners, most of whom are actively involved in managing the business; and (2) the owners have little or no liquidity options because there is no market for such shares. CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 451 (7th ed. 2014). Publicly held businesses have the opposite characteristics: (1) there are many shareholders, most of whom are not actively involved in the management of the firm but instead elect directors, who then delegate management authority to officers; and (2) shareholders have liquidity because they can easily sell their shares through the public markets. *See id.* at 219, 451. For further explanation of this distinction, see generally *id.* at 219–31, 451–54.

<sup>19</sup> Alan S. Gutterman, *Strategic Business Planning Analysis and Marketing the High Technology Initial Public Offering Candidate*, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 197, 199 (1991).

<sup>20</sup> O’KELLEY & THOMPSON, *supra* note 18, at 220. In fact, the NYSE and the Nasdaq are the first and second largest stock exchanges in the world, respectively. *See The World’s Biggest Stock Exchanges*, FORBES, <https://www.forbes.com/pictures/eddk45ighl/the-worlds-biggest-stock-exchanges> [<https://perma.cc/X8ZM-TJHD>].

<sup>21</sup> *See* DAVID A. WESTENBERG, INITIAL PUBLIC OFFERINGS: A PRACTICAL GUIDE TO GOING PUBLIC § 1:2.1 (2d ed. 2016).

<sup>22</sup> *See supra* note 18 for a discussion of how close corporations compare to public corporations.

company because illiquidity discounts are unnecessary and transaction costs associated with illiquidity are eliminated.<sup>23</sup> The elimination of transaction costs rests on the efficient market hypothesis.<sup>24</sup> Because all publicly traded common shares have identical legal characteristics,<sup>25</sup> ordinary investors need not incur costs to uncover the rights associated with particular shares. Thus, purchases and sales in the

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<sup>23</sup> See O'KELLEY & THOMPSON, *supra* note 18, at 219; WESTENBERG, *supra* note 21, § 1:2.1. Ronald Coase defined transaction costs as those accumulated “[i]n order to carry out a market transaction,” such as costs necessary “to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on.” R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960). However, economists debate over the precise definition of the term, leading to a range of definitions encompassing the spectrum from exhaustive to narrow. See, e.g., Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1672–76 (1989) (listing several definitions of transaction costs advanced by other economists).

<sup>24</sup> There are three versions of this hypothesis: (1) The weak form states that stock prices reflect past information; (2) the semi-strong form states that stock prices reflect all publicly available information; and (3) the strong form states that stock prices reflect all information, both public and private. See, e.g., RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, *PRINCIPLES OF CORPORATE FINANCE* 329–36 (12th ed. 2017); RONALD J. GILSON & BERNARD S. BLACK, (SOME OF) *THE ESSENTIALS OF FINANCE AND INVESTMENT* 136–38 (1993). *But see* Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980) (rejecting the efficient market hypothesis and claiming that if all parties held perfect information, rather than information asymmetries, markets would extinguish).

<sup>25</sup> This is a result of statutory requirements imposed on corporations. See, e.g., DEL. CODE ANN. tit. 8, § 151(f) (2017) (“[T]he rights and obligations of the holders of certificates representing stock of the same class and series shall be identical.”). The Model Business Corporation Act takes the same approach. MODEL BUS. CORP. ACT § 6.01(a) (AM. BAR ASS’N 2016) (“[A]ll shares of a class or series must have terms, including preferences, rights, and limitations, that are identical with those of other shares of the same class or series.”); see also O'KELLEY & THOMPSON, *supra* note 18, at 160 (“Corporate norms contemplate that all shares of a given class will be fungible[,] . . . [which] supports a uniform expectation that minimizes transaction costs for a purchaser and bolsters the functioning of a national market for shares.”).

securities markets stand in stark contrast with other transactions, such as mergers and acquisitions, which require substantial transaction costs before effectuating a deal.<sup>26</sup> Another benefit of going public is that it allows the company to offer public stock—which is generally more attractive than stock in a closely held corporation due to its liquidity—to employees as incentive compensation or to target companies as consideration in an acquisition.<sup>27</sup> Finally, an IPO may offer a company enhanced prestige and credibility among customers, vendors, and employees.<sup>28</sup> Recently, however, this appears to be less of a motivating factor; while companies of yesteryear viewed an IPO as the brass ring of success, some entrepreneurs today do not share that opinion.<sup>29</sup>

## 2. The Disadvantages of an IPO

Despite the aforementioned benefits a company may reap through an IPO, there are significant disadvantages as well. In fact, many commentators in recent years have stated that there are simply no advantages to going public in the current atmosphere.<sup>30</sup>

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<sup>26</sup> See David J. Roberts, Note, *Capitalizing the Target's Transaction Costs in Hostile Takeovers*, 73 WASH. L. REV. 489, 489 (1998) (“Even in smaller M&A deals, transaction fees can be substantial.”).

<sup>27</sup> WESTENBERG, *supra* note 21, § 1:2.1.

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., Brian Hamilton, *Why Not Go Public? Here's Why*, CNBC (June 27, 2012), <https://www.cnbc.com/id/47979116> [<https://perma.cc/LZ7Y-F63F>] (“For a long time, one of the reasons for doing an IPO was that everybody else was doing it. It was a status symbol. . . . This generation seems to be more educated and thoughtful about options for accessing capital.”).

<sup>30</sup> E.g., Maureen Farrell, *America's Roster of Public Companies is Shrinking Before Our Eyes*, WALL ST. J. (Jan. 6, 2017), <https://www.wsj.com/articles/americas-roster-of-public-companies-is-shrinking-before-our-eyes-1483545879> (on file with the *Columbia Business Law Review*) (“There’s no great advantage of being public . . . . The dangers of being a public company are really evident.”) (quoting University of Michigan Ross School of Business professor Jerry Davis); Hamilton, *supra* note 29 (“For many private-company owners, the lure of ringing the bell on a stock exchange just isn’t there anymore. Why should it be? That bell is an

First, it is expensive.<sup>31</sup> A company generally incurs between \$2 million and \$4 million in expenses throughout the IPO process, whether or not the company actually completes it and goes public.<sup>32</sup> In addition to direct costs, companies that go public also incur additional expenses in the future as public companies, including those related to increased audit requirements, director and officer liability insurance, and securities counsel fees.<sup>33</sup>

A second disadvantage—directly connected to the first—is that public companies must comply with many regulations that largely do not apply to private businesses.<sup>34</sup> Most notably, the Securities Act of 1933 (the “1933 Act”),<sup>35</sup> the Securities Exchange Act of 1934 (the “1934 Act”),<sup>36</sup> the Foreign Corrupt Practices Act,<sup>37</sup> the Sarbanes-Oxley Act of 2002 (“SOX”),<sup>38</sup> and the Dodd-Frank Act of 2010 (“Dodd-Frank”)<sup>39</sup>—as well as additional rules and interpretations

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expensive one.”); Howard Tullman, *6 Reasons Companies Aren’t Going Public*, INC. (Apr. 18, 2017), <https://www.inc.com/howard-tullman/6-reasons-companies-arent-going-public.html> [<https://perma.cc/223L-YHWE>] (“For real companies, there’s no reason to [conduct an] IPO. A good, solid and growing company doesn’t need or want the help, the heartaches, or the hurrahs of being public.”).

<sup>31</sup> WESTENBERG, *supra* note 21, § 1:2.2.

<sup>32</sup> *Id.* For example, the median total expenses for all U.S. IPOs in the first half of 2016 was \$3.2 million. *Id.*

<sup>33</sup> *Id.* For example, a Financial Executives International survey found that publicly held companies paid an average of \$3.3 million on audit fees in 2010, while privately held companies spent an average of only \$222,300. Hamilton, *supra* note 29.

<sup>34</sup> WESTENBERG, *supra* note 21, § 1:2.2.

<sup>35</sup> Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended in scattered sections of 15 U.S.C.).

<sup>36</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended in scattered sections of 15 U.S.C.).

<sup>37</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.).

<sup>38</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C.).

<sup>39</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.).

promulgated by the SEC—impose enhanced regulatory requirements on public companies.<sup>40</sup> For example, under section 13 of the 1934 Act, a public company must file periodic reports with the SEC and comply with enhanced auditing of financial reports.<sup>41</sup> These additional requirements not only demand company time, resources, and expertise, but also result in substantial costs.<sup>42</sup>

A third disadvantage of an IPO is that, because regulatory filings are public, a company's competitors gain access to information that was previously confidential, such as financial statements.<sup>43</sup> Finally, increased potential liability for the company is a major disadvantage of going public.<sup>44</sup> This liability often stems from material misstatements or omissions in public disclosures and can lead to time-consuming, expensive class action and derivative lawsuits.<sup>45</sup> Because the stakes of shareholder litigation are high,<sup>46</sup> “an

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<sup>40</sup> See MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 149–50 (6th ed. 2014); WESTENBERG, *supra* note 21, § 1:2.2.

<sup>41</sup> O'KELLEY & THOMPSON, *supra* note 18, at 229. An exhaustive discussion of the various regulatory requirements to which public companies are subject is beyond the scope of this Note. It suffices here to say that the pecuniary and non-pecuniary costs of complying with such requirements is a disadvantage to going public for many companies. For more comprehensive looks at public company regulations, see ALLAN B. AFTERMAN, SEC REGULATION OF PUBLIC COMPANIES (1995); Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235 (1982); Brian Kim, Recent Development, *Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235 (2003); and David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 7, 2010), <https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/> [<https://perma.cc/93HC-C6XA>].

<sup>42</sup> STEINBERG, *supra* note 40, at 150 (“The expenses of complying with Exchange Act [of 1934] and SOX requirements will be substantial.”); see also *supra* note 33 and accompanying text.

<sup>43</sup> WESTENBERG, *supra* note 21, § 1:2.2.

<sup>44</sup> See CARL W. SCHNEIDER, JOSEPH M. MANKO & ROBERT S. KANT, GOING PUBLIC: PRACTICE, PROCEDURE AND CONSEQUENCES 5 (1999).

<sup>45</sup> *Id.* at 5; WESTENBERG, *supra* note 21, § 1:2.2.

<sup>46</sup> See e.g., Tom Hals, *Judge OKs Activision \$275 Million Shareholder Settlement, \$72 Million for Lawyers*, REUTERS (May 20, 2015), <https://www.reuters.com/article/us-activision-settlement/judge-oks->

entire industry of plaintiffs' lawyers lies in wait for public companies announcing disappointing results or experiencing declines in stock prices."<sup>47</sup> Similarly, once public, the company may also be plagued by time-consuming and expensive SEC enforcement actions.<sup>48</sup>

### 3. Alternatives to an IPO

If a company opts to forego an IPO, one alternative is to remain private.<sup>49</sup> "Remaining private is a perfectly rational and often satisfactory alternative . . . [because] private companies can operate with minimal oversight and maximum flexibility."<sup>50</sup> Companies choose to remain private in order to avoid many of the disadvantages of going public,<sup>51</sup> such as disclosure requirements, mandatory corporate governance practices and regulatory obligations, and the loss of control that accompanies an IPO.<sup>52</sup>

Private companies also may seek an acquisition as an alternative to an IPO. An acquisition provides investors with liquidity and the post-acquisition firm with additional capital resources and economies of scale.<sup>53</sup> This strategy has proven particularly lucrative for high-profile companies in recent years, such as Instagram and WhatsApp, both of which opted to be acquired by Facebook rather than go public.<sup>54</sup>

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activision-275-million-shareholder-settlement-72-million-for-lawyers-idUSKBN0052WI20150521 [<https://perma.cc/6HAF-5LNJ>].

<sup>47</sup> WESTENBERG, *supra* note 21, § 1:2.2.

<sup>48</sup> See generally David Marcus & Stephen Choi, *SEC Enforcement Actions Against Public Companies and Subsidiaries Keep Pace*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 24, 2017), <https://corpgov.law.harvard.edu/2017/05/24/sec-enforcement-actions-against-public-companies-and-subsidiaries-keep-pace/> [<https://perma.cc/TN V9-2FLM>].

<sup>49</sup> See WESTENBERG, *supra* note 21, § 1:7.

<sup>50</sup> *Id.* at § 1:7.1.

<sup>51</sup> See *supra* Section II.B.2.

<sup>52</sup> See WESTENBERG, *supra* note 21, § 1:2.2.

<sup>53</sup> *Id.* at § 1:7.2.

<sup>54</sup> Chelsey Dulaney, *Facebook Completes Acquisition of WhatsApp*, WALL ST. J. (Oct. 6, 2014), <https://www.wsj.com/articles/facebook-completes-acquisition-of-whatsapp-1412603898> (on file with the *Columbia Business*

### C. Beginning an IPO: The Registration Statement

For companies that decide to pursue an IPO, the starting point of the process is the 1933 Act.<sup>55</sup> Under section 5, a company making a public offering of securities must file a registration statement with the SEC.<sup>56</sup> The purpose of the 1933 Act's registration requirement is "to assure that the investor has adequate information upon which to base his or her investment decision."<sup>57</sup> Although there are other forms for specific types of companies or unique situations, the 1933 Act Form S-1 remains the "basic, long-form registration statement," which issuers use unless they qualify for another form.<sup>58</sup>

The Form S-1<sup>59</sup> consists of two main parts: the prospectus and additional information not set out in the prospectus.<sup>60</sup> The prospectus must contain all information required by applicable SEC regulations, the most important of which are Regulation S-K, which details comprehensive disclosure requirements, and Regulation S-X, which lists financial statement requirements.<sup>61</sup>

Material information that must be disclosed in the prospectus includes: (1) risk factors that make an investment in the company speculative; (2) a description of the principal

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*Law Review*) (discussing Facebook's purchase of WhatsApp for \$19 billion); Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES (Apr. 9, 2012), <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/> [<https://perma.cc/9D23-L6KR>].

<sup>55</sup> See Gutterman, *supra* note 19, at 201.

<sup>56</sup> Securities Act of 1933 § 5, 15 U.S.C. § 77e (2012); see also STEINBERG, *supra* note 40, at 125.

<sup>57</sup> THOMAS LEE HAZEN, PRINCIPLES OF SECURITIES REGULATION 52 (4th ed. 2017).

<sup>58</sup> *Id.* at 82. The specific requirements that must be met in order to file forms besides the Form S-1 are beyond the scope of this Note.

<sup>59</sup> For a copy of a blank Form S-1, see SEC, FORM S-1, <https://www.sec.gov/files/forms-1.pdf> [<https://perma.cc/DDR3-NHTE>].

<sup>60</sup> See WESTENBERG, *supra* note 21, § 13:2, at 13–3.

<sup>61</sup> HAZEN, *supra* note 57, at 81; WESTENBERG, *supra* note 21, § 13:2.1, at 13–3; see also 15 U.S.C. § 77j(a). See generally SEC, *supra* note 59 (directing issuers to Regulation S-K and Regulation S-X for more information on specific Form S-1 requirements).

purposes the issuer intends to use the net proceeds from the offering for; (3) financial data, including income statements and balance sheets from prior fiscal years; (4) management's discussion and analysis, known as the "MD&A," which includes the company's financial condition, liquidity, capital resources, and off-balance-sheet arrangements; (5) a business section, which details company strategy, intellectual property, applicable government regulations, and ongoing legal proceedings; and (6) executive compensation.<sup>62</sup> This sampling of information provides insight into the level of disclosure detail that an issuer must include in the Form S-1 prospectus section. Over the last few decades, the length of prospectuses has increased considerably due to expanded disclosure requirements, increased investor expectations, and sensitivity towards potential liability.<sup>63</sup> Part two of the Form S-1 includes additional information that is not included in the prospectus, such as the company's offering expenses, sales of unregistered securities over the past three years, exhibits required by Regulation S-K, and financial statement schedules required by Regulation S-X.<sup>64</sup>

Despite the SEC's insistence on disclosure within Form S-1 in order to protect potential investors, "[i]t is generally conceded to be a fiction that each investor or potential investor reads the prospectus from cover to cover."<sup>65</sup> Nonetheless, because market professionals—such as research analysts, brokers, and portfolio managers—as a group do read such publicly available information about a company,<sup>66</sup> stock prices quickly reflect this information due to the "critical volume of

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<sup>62</sup> See WESTENBERG, *supra* note 21, § 13:2.1. Although this list identifies six major components that must be disclosed in the prospectus, it is not exhaustive. For a fuller description of these components, additional information that must be disclosed, and optional information that is customary to include, see *id.*

<sup>63</sup> *Id.* § 13:2.2.

<sup>64</sup> *Id.* § 13:2.3.

<sup>65</sup> HAZEN, *supra* note 57, at 52.

<sup>66</sup> *Id.*

trading activity” that such groups control.<sup>67</sup> This, in turn, creates an efficient market through which all investors benefit because any relevant information disclosed in the Form S-1 is filtered into the market and reflected in the stock price.<sup>68</sup>

After a Form S-1 is filed, the SEC provides comments on it to the issuer.<sup>69</sup> The issuer must then respond to these comments and complete all other necessary steps of the IPO process, which are beyond the scope of this Note.<sup>70</sup> Thus, it typically takes a few months after publicly filing its Form S-1 before the firm officially becomes a public company.<sup>71</sup>

#### D. The 2012 Jumpstart Our Business Startups Act

On April 5, 2012, President Barack Obama signed the JOBS Act<sup>72</sup> into law, which amended sections of the 1933 Act and 1934 Act by implementing several initiatives designed to “facilitate access to the capital markets while lessening the regulatory burdens of traditional IPOs[.]”<sup>73</sup> The Act itself states its purpose is “[t]o increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”<sup>74</sup> The predicate of this Act was that smaller companies were deterred or precluded from going public because of massive regulatory burdens, particularly those imposed by SOX and Dodd-Frank.<sup>75</sup>

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<sup>67</sup> GILSON & BLACK, *supra* note 24, at 150. This idea rests of the semi-strong form of the efficient market hypothesis. *See id.* at 150–51.

<sup>68</sup> *See* HAZEN, *supra* note 57, at 52–53.

<sup>69</sup> *See* LATHAM & WATKINS LLP, US IPO GUIDE 4–8 (2018), <https://www.lw.com/thoughtLeadership/lw-us-ipo-guide> [<https://perma.cc/B93H-W9KY>].

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* at 4.

<sup>72</sup> Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in various sections of 15 U.S.C.).

<sup>73</sup> BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS HANDBOOK § 8.46, Westlaw (updated Oct. 2018).

<sup>74</sup> Jumpstart Our Business Startups Act, 126 Stat. at 306.

<sup>75</sup> JOHN C. COFFEE, JR., HILLARY A. SALE & M. TODD HENDERSON, SECURITIES REGULATION: CASES AND MATERIALS 146 (13th ed. 2015).

The new procedures codified by the JOBS Act are aimed at emerging growth companies (“EGCs”). An EGC is defined by the Act as “an issuer that had total annual gross revenues of less than \$1,000,000,000 . . . during its most recently completed fiscal year.”<sup>76</sup> This definition is adjusted for inflation every five years,<sup>77</sup> and, in 2017, the SEC increased the EGC revenue requirement to under \$1,070,000,000, which is where it remains today.<sup>78</sup> In most cases, an issuer remains an EGC until five years after its IPO.<sup>79</sup>

Qualifying as an EGC comes with several benefits throughout the registration process and beyond. First, and most importantly, an EGC may confidentially submit a draft registration statement (“DRS”), i.e. a draft Form S-1, to the SEC for non-public review.<sup>80</sup> Confidential review of the Form S-1 is a “substantial departure” from prior rules regulating this process, which had never before allowed confidential review, but instead mandated public filing.<sup>81</sup> Although the confidential filing is called a draft, it still must be substantially complete and include all required disclosures.<sup>82</sup> Further, while confidential filing is permitted initially, an issuer still must publicly file its registration statement no

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<sup>76</sup> 15 U.S.C. § 77b(a)(19).

<sup>77</sup> *Id.*

<sup>78</sup> See Inflation Adjustments and Other Technical Amendments Under Titles I and III of the JOBS Act, Exchange Act Release Nos. 33-10332, 34-80355, 116 SEC Docket 1819 (Mar. 31, 2017); see also *JOBS Act EGC Revenue Cap Raised to \$1.07 Billion to Adjust for Inflation*, DAVIS POLK & WARDWELL LLP (Apr. 3, 2017), [https://www.davispolk.com/files/2017-04-03\\_jobs\\_act\\_egc\\_revenue\\_cap\\_raised\\_1.07\\_billion\\_adjust\\_inflation.pdf](https://www.davispolk.com/files/2017-04-03_jobs_act_egc_revenue_cap_raised_1.07_billion_adjust_inflation.pdf) [<https://perma.cc/5H4S-GPRR>]. This figure will likely continue to increase. See COFFEE ET AL., *supra* note 75, at 146 n.39.

<sup>79</sup> COFFEE ET AL., *supra* note 75, at 146. In addition to the five-year expiration, the Act also provides three other ways in which an issuer can lose EGC status. See 15 U.S.C. § 77b(a)(19).

<sup>80</sup> 15 U.S.C. § 77f(e)(1).

<sup>81</sup> WESTENBERG, *supra* note 21, § 16:5.4[A]; see also *infra* notes 136–38 and accompanying text.

<sup>82</sup> WESTENBERG, *supra* note 21, § 16:5.4[A]; see also *supra* notes 59–64 and accompanying text for a discussion of mandatory disclosures.

later than fifteen days before the beginning of a road show.<sup>83</sup> A road show is a presentation of the issuer's securities to prospective investors in order to ascertain interest in purchasing such securities.<sup>84</sup>

The main advantage of confidential submission is "it enables an EGC to maintain its IPO plans in secrecy and delay disclosure of sensitive information to competitors, employees, and others until much later in the IPO process."<sup>85</sup> This also allows an EGC to confidentially withdraw a submitted Form S-1 without the public knowing, if, for example, the SEC raises disclosure issues that the company prefers not to address or market conditions take a turn for the worse.<sup>86</sup> By leveraging confidential submission, an EGC thus avoids the public embarrassment that may result from SEC challenges or comments to the company's registration statement as well as the stigma that is often associated with withdrawing a publicly filed Form S-1.<sup>87</sup> The main disadvantage of confidential review is that it delays any potential benefits of publicly filing, such as favorable publicity or the attraction of potential acquirers.<sup>88</sup> In addition, institutional investors may

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<sup>83</sup> See 15 U.S.C. § 77f(e)(1). When the JOBS Act was initially passed in 2012, issuers were required to publicly release the registration statement twenty-one days before a road show. See COFFEE ET AL., *supra* note 75, at 146. However, this was reduced to fifteen days in late 2015 by the Highway Transportation Bill, also known as the FAST Act. See *Changes to the JOBS Act and SEC Disclosure Requirements*, SHEARMAN & STERLING LLP (Dec. 7, 2015), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/12/Changes-to-the-JOBS-Act-and-SEC-Disclosure-Requirements-CM-120715.pdf> [<https://perma.cc/TNT5-MNSA>].

<sup>84</sup> See STEINBERG, *supra* note 40, at 142.

<sup>85</sup> WESTENBERG, *supra* note 21, § 16:5.4[C].

<sup>86</sup> See *id.*

<sup>87</sup> See COFFEE ET AL., *supra* note 75, at 146; WESTENBERG, *supra* note 21, at § 16:5.4[C].

<sup>88</sup> WESTENBERG, *supra* note 21, § 16:5.4[C].

be unwilling to partake in “test-the-waters” meetings<sup>89</sup> until the Form S-1 is publicly filed.<sup>90</sup>

In addition to the confidential filing of the Form S-1, the JOBS Act also grants several additional benefits to EGCs. These include, *inter alia*,<sup>91</sup> allowing EGCs to partake in “test-the-waters” communications with certain potential investors earlier than usually allowed,<sup>92</sup> requiring only two years of audited financial statements rather than three,<sup>93</sup> and exempting EGCs from various corporate governance provisions that apply to other public companies, such as “Say-on-Pay” votes by shareholders required by Dodd-Frank.<sup>94</sup> However, many of these other benefits have not been widely utilized by eligible companies, either because the financial benefit is *de minimis* or because the market demands greater disclosure.<sup>95</sup> However, “[t]he one provision in the JOBS Act that has been widely adopted is confidential review.”<sup>96</sup> Nonetheless, although eligible companies have taken advantage of the confidential filing benefit, it is uncertain whether the JOBS Act has actually achieved its stated goal of increasing access to the capital markets and, in turn, increasing the number of IPOs.<sup>97</sup>

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<sup>89</sup> A “test-the-waters” meeting allows an EGC to meet with institutional investors and other accredited investors before or after confidentially filing or publicly filing its registration statement in order to gauge interest in its upcoming offering. *See* LATHAM & WATKINS LLP, *supra* note 69, at 12; *see also infra* note 92 and accompanying text.

<sup>90</sup> WESTENBERG, *supra* note 21, § 16:5.4[C].

<sup>91</sup> For a more comprehensive discussion of the additional benefits EGCs receive under the JOBS Act, *see* COFFEE ET AL., *supra* note 75, at 146–50.

<sup>92</sup> Jumpstart Our Business Startups Act § 105(d), 15 U.S.C. § 77e(d) (2012).

<sup>93</sup> 15 U.S.C. § 77g(a)(2).

<sup>94</sup> Securities Exchange Act of 1934 § 14A(e)(2), 15 U.S.C. § 78n-1(e)(2) (2012); *see also* COFFEE ET AL., *supra* note 75, at 147.

<sup>95</sup> *See* COFFEE ET AL., *supra* note 75, at 148–49. For example, many EGCs include three years of financial statements, despite the JOBS Act only requiring them to provide two, because the market demands this additional information. *See id.*

<sup>96</sup> *Id.* at 149.

<sup>97</sup> Several empirical studies have been conducted to determine the effect of the JOBS Act on IPO activity. *See* discussion *infra* Section III.A.

### E. The SEC's July 2017 Change

On May 2, 2017, the Senate voted to confirm President Trump's nominee for SEC Chairman, Jay Clayton, by a vote of sixty-one to thirty-seven.<sup>98</sup> Clayton was officially sworn into his new position two days later on May 4, 2017.<sup>99</sup>

Clayton's first major policy move as Chairman came eight weeks later.<sup>100</sup> On June 29, 2017, the SEC announced that it would begin allowing "all companies to submit draft registration statements relating to initial public offerings for review on a non-public basis."<sup>101</sup> Because EGCs had already been allowed to confidentially submit a registration statement under the JOBS Act,<sup>102</sup> this policy change effectively extended this same privilege to non-EGCs—companies that do not qualify as EGCs because they had \$1.07 billion or more in revenue during their latest fiscal year.<sup>103</sup> Similar to the JOBS Act provisions, any company choosing to confidentially file its registration statement must still publicly file it at least fifteen days before a road show.<sup>104</sup>

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<sup>98</sup> Geoffrey Gardner, Development Article, *Expected Changes in SEC Regulatory Policy Under President Trump's Administration*, 36 REV. BANKING & FIN. L. 580, 586–87 (2017).

<sup>99</sup> *Id.* at 587.

<sup>100</sup> See Chad Bray & Matthew Goldstein, *S.E.C. Lets All Firms Keep Parts of I.P.O. Filings Secret*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/business/dealbook/sec-to-let-all-companies-file-ipo-documents-secretly.html?mcubz=0> [https://perma.cc/4B7C-A3HJ].

<sup>101</sup> Press Release, SEC, SEC's Division of Corporation Finance Expands Popular JOBS Act Benefit to All Companies (June 29, 2017), <https://www.sec.gov/news/press-release/2017-121> [https://perma.cc/DYS5-HJ5W].

<sup>102</sup> See *supra* notes 72–81 and accompanying text.

<sup>103</sup> See *supra* notes 76–78 and accompanying text.

<sup>104</sup> *Draft Registration Statement Processing Procedures Expanded*, U.S. SEC. & EXCHANGE COMMISSION (June 29, 2017) [hereinafter *DRS Explained*], <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded> [https://perma.cc/RQV3-64EX].

Clayton noted that his first act as Chairman was aimed at reversing the steep decline in the number of IPOs.<sup>105</sup> The year 2016 saw the fewest number of IPOs since 2009, a year undoubtedly reeling from the effects of the 2008 financial crisis.<sup>106</sup> This change was therefore intended to make it easier for companies that wanted to go public to be able to do so.<sup>107</sup> In its press release, the SEC noted that non-public review would allow all companies “more flexibility to plan their offering[s].”<sup>108</sup> Furthermore, Clayton argued that confidential filings would reduce a company’s exposure to market fluctuations that may harm its offering.<sup>109</sup> This change (hereinafter, the “July 2017 Change” or the “Change”) took effect on July 10, 2017.<sup>110</sup>

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<sup>105</sup> See SEC, *supra* 101 (quoting Clayton as saying, “We are striving for efficiency in our processes to encourage more companies to consider going public, which can result in more choices for investors, job creation, and a stronger U.S. economy.”); see also *Update 2-SEC to Allow All Companies to File Secretly for IPOs*, REUTERS (June 29, 2017) [hereinafter *SEC to Allow*], <https://www.reuters.com/article/usa-sec-ipo/update-2-sec-to-allow-all-companies-to-file-secretly-for-ipos-idUSL3N1JR1JA> [<https://perma.cc/8WP E-ZQEA>] (“It is the first major policy announcement by new Chairman Jay Clayton, who has said he aimed to reverse the steep decline in IPOs and give individual investors more access to smaller, successful companies.”).

<sup>106</sup> See Roger Yu, *SEC to Allow Confidential IPO Registration Filings for All Companies*, USA TODAY (June 30, 2017), <https://www.usatoday.com/story/money/2017/06/30/sec-allow-confidential-ipo-registration-filings/442539001/> [<https://perma.cc/52HZ-ULVA>]. Prior to the financial collapse of 2008, the most recent year that saw an equally low number of IPOs was 2003, a year in which one study found there were seventy IPOs. See Lia Der Marderosian, *2017 IPO Report*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 25, 2017), <https://corpgov.law.harvard.edu/2017/05/25/2017-ipo-report/> [<https://perma.cc/2SEX-HU6F>]. Note that this report shows that the year 2011 had one fewer IPO than 2016, which differs from the Yu article’s claim that 2016 saw the fewest IPOs since 2009. See Yu, *supra*. However, this is likely due to differing methodologies. See *infra* notes 141 and 147 for a full discussion of this phenomenon.

<sup>107</sup> See Bray & Goldstein, *supra* note 100.

<sup>108</sup> SEC, *supra* note 101.

<sup>109</sup> See Yu, *supra* note 106.

<sup>110</sup> *DRS Explained*, *supra* note 104; see also Jeff John Roberts, *Today Is the First Day of New Stealth IPO Rules*, FORTUNE (July 10, 2017),

### III. THE EFFECT OF THE CONFIDENTIAL DRAFT REGISTRATION PROCESS ON IPO ACTIVITY

The July 2017 Change extended a portion of the JOBS Act—the ability to file a confidential DRS—to all issuers.<sup>111</sup> Benefits beyond the confidential review process afforded to EGCs under the JOBS Act were not extended to all companies by the Change.<sup>112</sup>

Because the July 2017 Change is grounded in the confidential review provision of the JOBS Act,<sup>113</sup> it is first best to assess the success of this Act. Simply put, it is not certain that the JOBS Act achieved its stated goal of increasing EGC access to the capital markets through confidential registration.<sup>114</sup> Instead, scholars recognize that the results of early studies regarding the success of the JOBS Act’s “goal of facilitating small firms’ ability to raise capital” are “mixed.”<sup>115</sup>

Analyzing the success of the JOBS Act will place the confidential DRS review process into context at the time of the July 2017 Change and will demonstrate that the SEC under Chairman Clayton chose to expand a policy that had, at best, inconclusive results. This Part begins in Section III.A by assessing previous scholarship on the JOBS Act and the dispute over whether it succeeded in increasing access to the capital markets. Section III.B then analyzes the July 2017

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<http://fortune.com/2017/07/10/confidential-ipo-rules/> [<https://perma.cc/AU7G-YLT9>].

<sup>111</sup> See *supra* Section II.E.

<sup>112</sup> *SEC Staff Expands Ability to File Registration Statements on a Nonpublic Basis*, DAVIS POLK & WARDWELL LLP (July 5, 2017) [hereinafter *SEC Staff Expands*], [https://www.davispolk.com/files/2017-07-05\\_sec\\_staff\\_expands\\_ability\\_file\\_registration\\_statements\\_on\\_nonpublic\\_basis.pdf](https://www.davispolk.com/files/2017-07-05_sec_staff_expands_ability_file_registration_statements_on_nonpublic_basis.pdf) [<https://perma.cc/83PY-ME3R>].

<sup>113</sup> See *supra* notes 101–03 and accompanying text.

<sup>114</sup> See *infra* Section III.A.

<sup>115</sup> Colleen Honigsberg, Robert J. Jackson, Jr. & Yu-Ting Forester Wong, *Mandatory Disclosure and Individual Investors: Evidence from the JOBS Act*, 93 WASH. U. L. REV. 293, 307 (2015). In addition to the confidential DRS process, this study also examined other disclosure related aspects of the JOBS Act. See *id.* at 313; see also *infra* note 242.

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Change through the lens of the empirical study the author of this Note conducted.

A. Previous Scholarship Analyzing the Effect of the JOBS Act on EGC IPO Activity

One of the earliest studies of the JOBS Act found that “the JOBS Act has affected IPO volume” and in the two years following the enactment of the JOBS Act, IPO volume in the United States was fifty percent higher than the previous two years.<sup>116</sup> After accounting for market conditions, this study found that the JOBS Act was responsible for an additional twenty-one IPOs per year since its passage.<sup>117</sup> However, three-quarters of this increase was attributed to the biotechnology or pharmaceutical industries.<sup>118</sup> The study acknowledges this might be a result of the JOBS Act, since the confidential review process is of particular benefit to industries that have high proprietary costs, which include the biotechnology and pharmaceutical industries.<sup>119</sup> However, because there was a lack of IPO growth in other industries with presumably high proprietary costs, such as the technological industry, the authors admitted they “might not have fully accounted for the recent increase in biotech/pharma valuations.”<sup>120</sup>

Around the same time, another study came to the opposite conclusion. In a 2015 article, Professor Carlos Berdejó examined IPO activity before and after the enactment of the JOBS Act.<sup>121</sup> Although this study found that “there has been a slight increase in the number of IPOs by smaller issuers in the post-JOBS [Act] period,” Berdejó was hesitant to attribute this solely to the success of the Act because the number of

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<sup>116</sup> Michael Dambra, Laura Casares Field & Matthew T. Gustafson, *The JOBS Act and IPO Volume: Evidence that Disclosure Costs Affect the IPO Decision*, 116 J. FIN. ECON. 121, 122 (2015).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 123.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Carlos Berdejó, *Going Public After the JOBS Act*, 76 OHIO ST. L.J. 1 (2015).

IPOs by larger issuers (to whom JOBS Act benefits, such as confidential filing, did not apply at the time) also increased.<sup>122</sup> As a result, Professor Berdejó acknowledged, “the number of IPOs by smaller issuers could be the result of more robust overall IPO and economic activity or be driven by other extra-legal factors.”<sup>123</sup>

In addition to analyzing the sheer volume of IPOs, Berdejó also examined the proportion of IPOs that came from EGCs and found that “there has not been a noticeable increase in the proportion of IPOs conducted by issuers that qualify as EGCs” despite the fact that EGCs were taking advantage of the new options granted to them by the JOBS Act, such as filing a confidential DRS.<sup>124</sup> Instead, the study found that the proportion of IPOs from EGCs actually decreased from 87.6% in the pre-JOBS Act period to 84.8% in the post-JOBS Act period.<sup>125</sup> This was contrary to the expected result; because of the benefits granted to EGCs through the JOBS Act, one would expect that EGCs would become a greater portion of overall IPO activity. From this data, the study concluded “the JOBS Act has not had a substantial effect in increasing the number of smaller issuers accessing the public capital markets via an IPO.”<sup>126</sup>

A third study examined IPO activity in the year 2013, the first full calendar year the JOBS Act was in effect.<sup>127</sup> This study found that of the 183 IPOs in 2013, 146 (79.8%) were conducted by EGCs.<sup>128</sup> Nonetheless, the author concluded that, although 2013 saw an increase in the number of IPOs as

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<sup>122</sup> *Id.* at 35.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 4–5.

<sup>125</sup> *Id.* at 36–37. Of the 178 IPOs in the pre-JOBS Act period (January 1, 2010—March 31, 2012), 156 (87.6%) were issuers that would have qualified as EGCs had the JOBS Act been in place. *Id.* at 36 tbl.1. Of the 270 IPOs in the post-JOB Act period under study (April 1, 2012—June 30, 2014), 229 (84.8%) qualified as EGCs under the JOBS Act. *Id.*

<sup>126</sup> *Id.* at 37.

<sup>127</sup> Todd Blakeley Skelton, Note, *2013 JOBS Act Review & Analysis of Emerging Growth Company IPOs*, 15 *TRANSACTIONS: TENN. J. BUS. L.* 455, 490 (2014).

<sup>128</sup> *Id.* at 491.

compared to previous years, the data did not indicate whether this increase was due to the JOBS Act.<sup>129</sup> Instead, the study found that several other factors could have played a significant role in this increase, including market factors such as “record high levels for the S&P 500 and Dow Jones Industrial Average indexes, quantitative easing and monetary policy decisions by the Federal Reserve and other central banks, investor appetite for new debt and equity issues,” and several other macroeconomic factors.<sup>130</sup>

Finally, the 2017 IPO Report, published by the Harvard Law School Forum on Corporate Governance and Financial Regulation, further discusses the relationship of the JOBS Act to IPO activity.<sup>131</sup> This report states that eighty-five percent of all IPOs since the enactment of the JOBS Act were conducted by EGCs.<sup>132</sup> However, it also states that “[a]lthough it was intended to encourage EGCs to go public, the JOBS Act—combined with other regulatory and market changes—has made it easier for EGCs to stay private longer and has provided them with greater flexibility in timing their IPOs.”<sup>133</sup> In other words, this suggests that the JOBS Act has arguably had the opposite effect of its stated goal because allowing EGCs to confidentially file DRSs encourages them to remain private for longer than they would have in the absence of this privilege.<sup>134</sup>

This sampling of the literature shows that it is inconclusive whether the JOBS Act has succeeded in increasing access to the capital markets and, in turn, EGC IPOs. While some studies show the JOBS Act resulted in modest increases in

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<sup>129</sup> *Id.* at 495.

<sup>130</sup> *Id.*

<sup>131</sup> *See* Marderosian, *supra* note 106.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See* Joseph H. Kaufman, Partner, Simpson Thacher & Bartlett LLP, *Deregulating the Markets: The Jobs Act*, Panel at the 2012 National Lawyers Convention, *in* 38 DEL. J. CORP L. 476, 494 (2013) (discussing how the JOBS Act confidential registration provision allows companies to “get ready to [conduct an IPO] but not make a decision to come out into the light until it looks like market conditions will be strong[.]”); *see also infra* notes 168–70 and accompanying text.

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IPO activity, others find it did not affect IPO activity at all. Still other reports argue that, contrary to its stated goal, the JOBS Act has had a negative effect on IPO activity.

## B. Empirical Study Analyzing the July 2017 Change

Despite the uncertainty over whether the JOBS Act has succeeded,<sup>135</sup> the July 2017 Change expanded the confidential DRS policy to all companies in an effort to do the very thing the JOBS Act had not conclusively done: increase IPO activity and access to the capital markets.

The filing of a public registration document has been a foundational prerequisite for going public since the passing of the 1933 Act.<sup>136</sup> Indeed, “[t]he Securities Act of 1933 was primarily designed to provide disclosure for the investing public in connection with new issues of securities.”<sup>137</sup> Now, as a result of the July 2017 Change, public disclosure—a bedrock principle of securities regulation—must occur only fifteen days before an issuer’s road show.<sup>138</sup> Such a drastic change to disclosure warrants analysis to understand if it justified.

### 1. Methodology

The author of this Note conducted an empirical study in order to evaluate the success of the July 2017 Change and to determine the effect, if any, it has had on the capital markets and IPO activity. The study examines IPO activity in the United States from January 1, 2015 through July 9, 2018. This results in a data set that captures roughly two-and-one-half years prior to the Change (January 1, 2015–July 9, 2017), as well as the first year after the Change (July 10, 2017–July 9, 2018).

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<sup>135</sup> See *supra* Section III.A.

<sup>136</sup> See Securities Act of 1933 §5, 15 U.S.C. § 77e (2012) (requiring a registration statement be filed with the SEC before any offers to sell or buy a given security).

<sup>137</sup> Philip A. Loomis, *The Federal Securities Laws*, 7 GA. ST. B.J. 353, 354 (1971).

<sup>138</sup> See *supra* notes 83–84 and accompanying text.

The Thomson Reuters Securities Data Company Platinum New Issues database (“SDC Platinum”) was used to identify all of the IPOs in the United States that occurred during this time period.<sup>139</sup> Three phases of filtering were then deployed to ascertain the final set of IPOs that was analyzed. First, filtering options within SDC Platinum excluded limited partnerships, blank check companies,<sup>140</sup> investment funds, real estate investment trusts (REITs), foreign issuers, rights issues, and unit issues.<sup>141</sup> Second, the author manually

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<sup>139</sup> *Securities Data Company (SDC) Platinum New Issues*, THOMSON REUTERS, <https://www.refinitiv.com/en/products/sdc-platinum-financial-securities> [<https://perma.cc/US9R-63HW>] (last visited Oct. 27, 2018).

<sup>140</sup> A blank check company is a company that either “has no specific business plan or purpose or has indicated its business plan is to engage in a merger or acquisition with an unidentified company or companies, other entity, or person.” *Blank Check Company*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/fast-answers/answers-blankcheckhtml> [<https://perma.cc/G5ZN-2J5Y>] (last modified Oct. 28, 2014). Generally, such companies are formed for the sole purpose of effectuating a merger or acquisition between two firms. *See id.*

<sup>141</sup> The author made these filtering choices in order use a methodology that conforms closely with other studies in the literature. For example, Professor Jay Ritter keeps one of the most comprehensive studies of IPO activity. *See* Jay R. Ritter, *Initial Public Offerings: Updated Statistics*, U. FLA. (July 11, 2018), [https://site.warrington.ufl.edu/ritter/files/2018/09/IPOs2017Statistics\\_July11\\_2018.pdf](https://site.warrington.ufl.edu/ritter/files/2018/09/IPOs2017Statistics_July11_2018.pdf) [<https://perma.cc/UF2T-952A>]. In Table 15, Professor Ritter records the number of IPOs per year, excluding special purpose acquisition companies (SPACs), closed-end funds, REITs, unit offers, IPOs with an offer price of less than \$5.00, commercial banks and savings and loans, companies not promptly listed on the Amex, NYSE, or Nasdaq, master limited partnerships, small best efforts offers, and foreign companies issuing American depositary receipts. *Id.* at 39. Other studies use similar filters. *See, e.g.,* Dambra, et al., *supra* note 116, at 125 (“[W]e impose filters to exclude unit offerings, IPOs in the financial industries (including real estate investment trusts), IPOs with proceeds below \$5 million, best efforts offerings, rights offerings, shell companies, limited partnerships, foreign offerings, and non-original IPOs (issuers already listed in public markets, either overseas or on US OTC exchanges, at the time of the IPO), and we check for mistakes in the SDC data reported on Jay Ritter’s website.”). Therefore, the author of this Note chose to also exclude certain categories of IPOs in order to ascertain a data set that focuses on the significant IPOs that policies—such as the JOBS Act and the July 2017 Change—are targeted toward. Specifically, limited partnerships,

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filtered out any of the aforementioned categories that were not properly removed by SDC Platinum. The author also eliminated offerings that were not made to the U.S. public,<sup>142</sup> offerings by issuers that primarily trade on an exchange other than the NYSE or Nasdaq—such as over-the-counter (OTC) offerings or IPOs listed on smaller exchanges, such as the NYSE American<sup>143</sup>—and offerings of penny stocks, defined as IPOs with an offer price under five dollars per share.<sup>144</sup> Third, while manually examining the registration documents for each IPO,<sup>145</sup> the author removed any IPOs that fell into one of the aforementioned categories (but had not been properly

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blank check companies, investment funds, and REITs were excluded because these are not true corporations. Foreign issuers were excluded because this study only looks at American companies going public on American exchanges. Rights issues and units issues are not offerings of common stock and thus were also excluded.

<sup>142</sup> Offerings not made to the U.S. public were excluded because such offerings are beyond the reach of the JOBS Act and the July 2017 Change.

<sup>143</sup> Offerings on exchanges other than the NYSE or Nasdaq were excluded because such offerings make up a marginal portion of the American IPO market and, therefore, the focus of any action taken to increase IPO activity is on the NYSE and Nasdaq. Together, these two exchanges make up nearly 100% of the market. *See Market Performance*, NASDAQ, [https://www.nasdaq.com/about/market\\_performance.pdf](https://www.nasdaq.com/about/market_performance.pdf) (on file with the *Columbia Business Law Review*). In addition, because the July 2017 Change was aimed at large companies, it is highly unlikely that firms of this size would trade OTC or on a smaller exchange, such as the NYSE American. *See generally NYSE American*, NYSE, <https://www.nyse.com/markets/nyse-american> [<https://perma.cc/SMZ9-3FCS>].

<sup>144</sup> *See Penny Stock Rules*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/fast-answers/answerspennyhtm.html> [<https://perma.cc/4K4V-CFLQ>]. Penny stocks were excluded because they are not the focus of policy changes, such as the JOBS Act or the July 2017 Change, and their inclusion can disrupt proper comparisons of the data year over year. For example, one year may have many more penny stock IPOs than another year. However, a year with many penny stock IPOs and few non-penny stock IPOs would not be seen as a success due to the low amount of capital that penny stocks raise and the general volatility that they historically have offered investors. *See, e.g.,* Barbara Aarsteinsen, *High-Risk 'Pennies' for the Bold*, N.Y. TIMES (Nov. 17, 1985), <https://www.nytimes.com/1985/11/17/business/high-risk-pennies-for-the-bold.html> [<https://perma.cc/LC8V-XHEH>] (discussing volatility of penny stocks).

<sup>145</sup> *See infra* text accompanying notes 148–49.

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removed during the first two phases of filtering) or that did not file a Form S-1 with the SEC.<sup>146</sup> Finally, the author also used SDC Platinum to pull a non-filtered set of IPOs that was then completely manually filtered. This served as a check on the SDC Platinum filtering process and resulted in the addition of one IPO to the data set (which had been erroneously excluded by SDC Platinum). This methodology resulted in a final data set of 364 IPOs.<sup>147</sup>

Next, the author of this Note used the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) database<sup>148</sup> to examine the registration documents for each company that went public. The author searched for each issuer using either the issuer's full company name or its stock ticker symbol. The company's Form S-1 was located by matching the filing date provided by SDC Platinum.<sup>149</sup> The author then manually examined each Form S-1 to determine if the company registered as an EGC. Companies declare EGC

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<sup>146</sup> This can happen for several reasons. Information for a few companies simply could not be located on EDGAR. In other cases, companies are able to file alternative registration documents—such as a Form 1-A—rather than a Form S-1. The reasons for these alternative processes are beyond the scope of this Note. Therefore, it suffices to say here that only companies that had an accessible Form S-1 filed with the SEC were included in the data set.

<sup>147</sup> Because of filtering choices, other IPO studies may result in slightly different numbers of IPOs for a given time period. For example, Professor Ritter reports 115 IPOs in 2015, seventy-four IPOs in 2016, and 108 IPOs in 2017. Ritter, *supra* note 141, at 40 tbl.15. However, another report states there were 151 IPOs in 2015, ninety-four IPOs in 2016, and 151 IPOs in 2017. John E. Fitzgibbon Jr., *The IPO Buzz: Recovery Year in Rearview Mirror*, IPOSCOOP.COM (Jan. 1, 2018), <https://www.iposcoop.com/the-ipo-buzz-recovery-year-in-rearview-mirror/> [https://perma.cc/NPH4-HTM2]. This also explains why the studies cited *supra* Section III.A may report slightly different numbers of IPOs in a given time period.

<sup>148</sup> EDGAR, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/edgar/searchedgar/companysearch.html> [https://perma.cc/P6ZU-D2AG] (last visited Oct. 27, 2018).

<sup>149</sup> In some instances, the filing date provided by SDC Platinum was incorrect. However, this did not pose a problem because in the vast majority of cases, a company only files one Form S-1 and, therefore, the correct document was easily located within EDGAR.

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status by noting it within their prospectus and by checking the relevant box on the first page of the Form S-1.<sup>150</sup>

For EGCs, EDGAR was then further used to determine if the company opted to first confidentially file a DRS prior to its public filing of the Form S-1. Although a DRS is initially confidential, it—along with any correspondence between the issuer’s law firm and the SEC—becomes public after a company publicly files a Form S-1.<sup>151</sup> Issuers that had filed a DRS were coded as “Yes,” meaning they utilized the confidential filing option granted to them by the JOBS Act. EGCs that filed a Form S-1 without filing a DRS at an earlier date were coded as “No,” meaning they did not use the confidential submission process.

For any company that did not claim EGC status on its Form S-1, the author confirmed it was a non-EGC by examining the company’s financial statements within its prospectus and verifying the company earned revenue of \$1.07 billion or more in its most recently completed fiscal year.<sup>152</sup> For non-EGCs that filed their Form S-1s prior to the July 2017 Change, this was the end of the inquiry since no confidential DRS process was available to these issuers. For companies that filed a Form S-1 after the July 2017 Change, EDGAR was then used to repeat the process conducted for EGCs to determine if these companies had filed a confidential DRS before filing their Form S-1.

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<sup>150</sup> For many Form S-1s, particularly older ones, there is no box to check stating that a company is an EGC. For these companies, the author of this Note relied solely on the language of the prospectus.

<sup>151</sup> See Telis Demos, *Companies Find a Faster IPO Turnaround Doesn’t Hurt*, WALL ST. J. (Sept. 29, 2013), <https://www.wsj.com/articles/companies-find-a-faster-ipo-turnaround-doesn8217t-hurt-1380492164?mg=prod/accounts-wsj> (on file with the *Columbia Business Law Review*) (“Eventually, all drafts of the prospectus are revealed when the documents are publicly filed; correspondence with the SEC is published weeks after the offering, as it is with nonconfidentially filed offerings.”).

<sup>152</sup> A company that went public prior to April 2017 qualified as a non-EGC if it earned revenue of \$1.0 billion or more in its most recently completed fiscal year. For the definition of an EGC, see *supra* notes 76–78 and accompanying text. A non-EGC is defined as a company that does not fit the definition of an EGC.

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This methodology produced the final data set analyzed throughout the remainder of this Note.<sup>153</sup>

## 2. Results and Analysis

After deploying the methodology described in Section III.B.1, the author of this Note then analyzed the resulting data set to evaluate whether the July 2017 Change is a worthwhile or effective SEC policy. This entailed the use of three distinct frameworks. Framework A, discussed in Section III.B.2.i, examines total IPO activity by year. Framework B, discussed in Section III.B.2.ii, looks at whether non-EGCs have used the privilege of confidential filing granted to them by the July 2017 Change at the same rate as EGCs. Framework C, discussed in Section III.B.2.iii, directly compares IPO activity before and after the July 2017 Change.

### i. Framework A: Total IPO Activity

As a first method of analysis, it is helpful to compare the number of IPOs in 2015, 2016, 2017, and the first half of 2018. Although the July 2017 Change became effective on July 10, 2017, there were no 2017 IPOs from July 1, 2017 through July 9, 2017.<sup>154</sup> Similarly, there were no 2018 IPOs from July 1, 2018 through July 9, 2018. Therefore, for simplicity's sake, the "pre-Change" period includes Q1 2015–Q2 2017. The "post-Change" period includes Q3 2017–Q2 2018 even though the actual one-year "post-Change" period is July 10, 2017–July 9, 2018.

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<sup>153</sup> Much of the discussion *supra* Section III.B.2 and Part IV is substantially based on the data set created by the author—Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*). The full data set relies solely on publicly available information and is on file with the *Columbia Business Law Review*. Others should be able to recreate it using the methodology detailed in Section III.B.1. In an effort to ensure readability and avoid excessive use of citations, the *Columbia Business Law Review* has opted not to cite to the data set each time the author refers to it, but only when particularly relevant.

<sup>154</sup> The first Q3 2017 IPO occurred on July 12, 2017, after the July 2017 Change took effect. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*).

The study revealed a high of 115 IPOs in 2015, a dip to just seventy-three IPOs in 2016, and a slight boost to 101 IPOs in 2017. The first half of 2018 was strong, with 75 IPOs. Table 1 summarizes these results.

**Table 1: EGC, Non-EGC, and Total IPOs (Q1 2015–Q2 2018)**<sup>155</sup>

Quarter	EGC IPOs	% EGC IPOs	Non-EGC IPOs	% Non-EGC IPOs	Total IPOs
Q1 2015	21	95%	1	5%	22
Q2 2015	42	89%	5	11%	47
Q3 2015	26	100%	0	0%	26
Q4 2015	18	90%	2	10%	20
<b>Total 2015</b>	<b>107</b>	<b>93%</b>	<b>8</b>	<b>7%</b>	<b>115</b>
Q1 2016	5	100%	0	0%	5
Q2 2016	18	78%	5	22%	23
Q3 2016	24	96%	1	4%	25
Q4 2016	17	85%	3	15%	20
<b>Total 2016</b>	<b>64</b>	<b>88%</b>	<b>9</b>	<b>12%</b>	<b>73</b>
Q1 2017	13	76%	4	24%	17
Q2 2017	29	88%	4	12%	33
Q3 2017	14	93%	1	7%	15
Q4 2017	34	94%	2	6%	36
<b>Total 2017</b>	<b>90</b>	<b>89%</b>	<b>11</b>	<b>11%</b>	<b>101</b>
Q1 2018	26	93%	2	7%	28
Q2 2018	43	91%	4	9%	47
<b>Total 2018</b>	<b>69</b>	<b>92%</b>	<b>6</b>	<b>8%</b>	<b>75</b>

The true question to answer, however, is whether the July 2017 Change affected IPO activity in any way. The July 2017 Change only affected non-EGCs, since EGCs were already afforded the confidential DRS process under the JOBS Act. Therefore, an increase in non-EGC IPOs following the enactment of the Change would provide evidence that the July 2017 Change possibly affected IPO activity. Whether such an increase occurred can be evaluated in two ways: first, by analyzing the number of non-EGC IPOs (the volume method), and second, by analyzing the proportion of overall IPOs that come from non-EGCs (the proportion method). These two methods of analysis are established practices in the literature.<sup>156</sup>

<sup>155</sup> This table summarizes information included in the data set created by the author. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*).

<sup>156</sup> See, e.g., Berdejó, *supra* note 121, at 33–37.

The volume method rests on the presumption that if the July 2017 Change succeeds in expanding access to the capital markets, there will be an increase in IPOs from non-EGCs. At first glance, the data suggest that this may have occurred. As Table 1 demonstrates, the year 2017 in total saw more non-EGC IPOs than the previous two years—there were eleven<sup>157</sup> non-EGC IPOs in 2017, whereas there were only nine and eight non-EGC IPOs in 2016 and 2015, respectively. However, a closer look reveals that the majority of 2017 non-EGC IPOs came in Q1 and Q2—both of which saw four non-EGC IPOs. Therefore, these offerings came before the July 2017 Change was announced or enacted.

There have been nine non-EGC IPOs following the July 2017 Change (i.e., from Q3 2017 through Q2 2018), but only those IPOs in Q4 2017 or later could have been motivated by the Change.<sup>158</sup> This suggests that the new SEC policy has not

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<sup>157</sup> It appears that two of these companies filed as non-EGCs but may have been able to file as EGCs due to the new inflation-adjusted definition of EGC announced in April 2017. *See supra* notes 76–78 and accompanying text. Floor & Decor Holdings, Inc.’s (NYSE ticker symbol: FND) final amended Form S-1 reports \$1,050,759,000 in revenue for fiscal year 2016, which is under the \$1.07 billion maximum fiscal revenue required for EGC status. Floor & Decor Holdings, Inc., Registration Statement (Form S-1/A) 54 (Apr. 24, 2017). However, Floor & Decor likely did not avail itself of EGC status because its original Form S-1 was filed in February 2017, prior to the EGC definition change. *See* FDO Holdings, Inc., Registration Statement (Form S-1) (Feb. 10, 2017). Similarly, PQ Group Holdings Inc.’s (NYSE ticker symbol: PQG) initial Form S-1 reports \$1,064,177,000 in revenue for fiscal year 2016, also under the EGC maximum revenue requirement. PQ Group Holdings Inc., Registration Statement (Form S-1) 65 (June 9, 2017). It is a bit more uncertain why PQ Group did not avail itself of EGC status since its initial registration statement came after the April 2017 definition change announcement. Nonetheless, for purposes of this Note, the author has chosen to include both Floor & Decor and PQ Group as non-EGCs in order to be as over-inclusive as possible. Neither company identified as an EGC although both may have technically qualified as such given the April 2017 EGC definition change.

<sup>158</sup> The issuer of the Q3 2017 non-EGC IPO first filed its Form S-1 on June 9, 2017. PQ Group Holdings Inc., Registration Statement (Form S-1) (June 9, 2017). This was twenty days before the SEC’s announcement of the July 2017 Change. As a result, this issuer could not have been motivated by the new SEC policy, but instead had already planned to go public. As such,

been successful in increasing the volume of IPOs. Instead, three non-EGC IPOs during the second half<sup>159</sup> of 2017 is fairly consistent with non-EGC IPO volume during the two prior years; there were four non-EGC IPOs during the second half of 2016, and two non-EGC IPOs during the second half of 2015. Similarly, six non-EGC IPOs during the first half of 2018 is consistent with non-EGC IPO volume during the three prior years; there were eight non-EGC IPOs during the first half of 2017, five during the first half of 2016, and six during the first half of 2015.<sup>160</sup>

Furthermore, in general, it would be highly speculative to conclude that there is a causal link between the non-EGC IPOs themselves and the July 2017 Change. Indeed, two pieces of evidence suggest that these IPOs may have occurred regardless of the Change.

First, on a micro level, the timing of the filings of the initial confidential DRS documents suggests that the two Q4 2017 issuers—National Vision Holdings, Inc. (Nasdaq ticker symbol: EYE) and EWT Holdings I Corp. (NYSE ticker symbol: AQUA)—had been considering going public for quite

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only eight non-EGCs have filed registration documents and completed IPOs since the announcement and/or enactment of the July 2017 Change.

<sup>159</sup> Although Table 1 is organized by quarter, the first half of any given year includes the sum of the data for Q1 and Q2. The second half, in turn, encompasses Q3 and Q4.

<sup>160</sup> Analyzing the data on a quarterly level reveals a similar trend. There were two non-EGC IPOs in Q4 2017, which is in line with Q4 in the two prior years; Q4 2016 had three, and Q4 2015 had two. There were two non-EGC IPOs in Q1 2018, which is also in line with Q1 for the three prior years; Q1 2017 had four, Q1 2016 had zero, and Q1 2015 had one. Similarly, Q2 2018 had four non-EGC IPOs, and Q2 in each of the three years prior saw either four or five non-EGC IPOs. Using historical data as a predictive indicator, one would likely conclude that two non-EGC IPOs in Q4 2017 and four non-EGC IPOs in Q2 2018 are consistent with the number of non-EGCs that should have gone public during this time period, regardless of the July 2017 Change. Q1 2018 is inconclusive since the three prior years are more erratic than other quarters. Nonetheless, the fact that this quarter saw two non-EGC IPOs is far from significant since the prior year's Q1, before the Change, saw double this amount. This more detailed analysis of the data further suggests that the July 2017 Change has not yet influenced post-Change non-EGC IPO activity.

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some time. National Vision filed a confidential DRS on the first day the Change became effective—July 10, 2017—and EWT Holdings filed its confidential DRS one week later, on July 17, 2017.<sup>161</sup> While it is possible that one or both of these companies were motivated by the SEC announcement of the July 2017 Change on June 29, 2017, it is unlikely that these large private companies would decide to go public and file their DRSs in such a short amount of time. Instead, it is more likely that these companies had planned to go public prior to the SEC announcement and slightly delayed their filings in order to take advantage of the new confidential filing process.

Therefore, it is likely that only six issuers—all of whom filed their DRSs in September 2017 or later and went public in 2018—could have been motivated by the Change. However, as discussed, this level of non-EGC IPO activity is largely consistent with non-EGC IPO activity in the years prior to the Change.<sup>162</sup> Nonetheless, a strong counter argument to this analysis is that going public takes time and, therefore, the first year after the Change does not capture the majority of companies motivated by the Change who will eventually go public. Instead, their IPOs may occur long after the Change has been in effect for only one year. As such, additional studies should be conducted in the future to further assess the Change's effect.

Turning to the proportion method of analysis, the data show similar dismal results. This method is predicated on the fact that if the July 2017 Change made going public more appealing to non-EGCs, these firms should begin to make up a larger proportion of overall IPO activity. This increase has not happened either.

Non-EGCs in 2017 and the first half of 2018 made up a slightly lower percentage of total IPOs than in 2016 and a higher percentage than in 2015. However, focusing on Q4 2017—the first quarter with IPOs from non-EGCs that first

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<sup>161</sup> After filing these confidential DRSs, both companies continued the IPO process and filed public Form S-1s; National Vision filed its on September 29, 2017 and EWT Holdings filed its on October 3, 2017. About one month after filing the Form S-1s, both companies officially went public.

<sup>162</sup> See *supra* notes 158–60 and accompanying text.

filed their registration documents after the July 2017 Change<sup>163</sup>—through Q2 2018, the percentage of non-EGCs is much lower than most quarters from prior years. Non-EGCs made up single digit percentages (ranging from 6%–9%) for each of the relevant quarters since the Change (Q4 2017–Q2 2018), whereas such issuers made up double-digit percentages (ranging from 10%–24%) for six of the ten quarters before the Change.

Comparing quarters individually reveals a similar trend. Non-EGCs made up only 6% of overall IPO activity in Q4 2017, whereas such issuers made up 15% in Q4 2016 and 10% in Q4 2015. Q1 2018 non-EGC activity (7% of overall IPOs) greatly underperformed as compared to Q1 2017 (24%), but outperformed Q1 2016 (0%) and Q1 2015 (5%). Nonetheless, Q2 2018 saw non-EGCs make up a lower percentage of quarterly IPOs (9%) than each of the three previous Q2s (12% in 2017, 22% in 2016, and 11% in 2015). Therefore, although Q4 2017–Q2 2018 saw more total IPOs than most quarters from years past, this is likely attributable to macroeconomic trends since the majority of these IPOs came from EGCs, which were unaffected by the July 2017 Change.

Following from these findings, using the total IPO activity framework as a metric of success, the July 2017 Change has failed to increase IPO activity. Neither the volume nor proportion method shows any meaningful increase in non-EGC IPOs since the enactment of the Change.

#### ii. Framework B: Non-EGC Use of Confidential Filing

Another valuable metric to analyze the success of the July 2017 Change is non-EGC use of the confidential filing process. This framework compares EGC issuer filings of confidential DRs—an option granted to them by the JOBS Act—to non-EGC issuer filings of confidential DRs, an option granted to them by the July 2017 Change. Tables 2 and 3 summarize these findings.

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<sup>163</sup> See *supra* note 158 and accompanying text.

**Table 2: EGC IPO Use of Confidential Filing Process (Q1 2015–Q2 2018)**<sup>164</sup>

Quarter	EGC IPOs– Used Confidential Filing	% EGC IPOs– Used Confidential Filing	EGC IPOs– Did Not Use Confidential Filing	% EGC IPOs– Did Not Use Confidential Filing	Total EGC IPOs
Q1 2015	18	86%	3	14%	21
Q2 2015	42	100%	0	0%	42
Q3 2015	25	96%	1	4%	26
Q4 2015	17	94%	1	6%	18
<b>Total 2015</b>	<b>102</b>	<b>95%</b>	<b>5</b>	<b>5%</b>	<b>107</b>
Q1 2016	5	100%	0	0%	5
Q2 2016	17	94%	1	6%	18
Q3 2016	24	100%	0	0%	24
Q4 2016	15	88%	2	12%	17
<b>Total 2016</b>	<b>61</b>	<b>95%</b>	<b>3</b>	<b>5%</b>	<b>64</b>
Q1 2017	12	92%	1	8%	13
Q2 2017	29	100%	0	0%	29
Q3 2017	14	100%	0	0%	14
Q4 2017	34	100%	0	0%	34
<b>Total 2017</b>	<b>89</b>	<b>99%</b>	<b>1</b>	<b>1%</b>	<b>90</b>
Q1 2018	25	96%	1	4%	26
Q2 2018	43	100%	0	0%	43
<b>Total 2018</b>	<b>68</b>	<b>99%</b>	<b>1</b>	<b>1%</b>	<b>69</b>

As Table 2 demonstrates, the overwhelming majority of EGCs (ninety-five percent or more in 2015, 2016, 2017, and the first half of 2018) utilize the confidential DRS process prior to filing a Form S-1. Looking at total EGC IPOs between Q1 2015 and Q2 2018, only ten EGC issuers elected not to first file a confidential DRS (which amounts to three percent of all EGC IPOs during this time period) before filing their Form S-1s. The near universal use of the confidential DRS process by EGCs during the years following the enactment of the JOBS Act suggests that it offers tremendous benefits to issuers, such as the ability to iron out registration statement problems with the SEC in private and the opportunity to not disclose information to competitors.<sup>165</sup>

<sup>164</sup> This table summarizes information included in the data set created by the author. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*).

<sup>165</sup> See *supra* notes 85–87 and accompanying text; see also James Surowiecki, *The Virtues of Twitter’s Confidential I.P.O. Filing*, *NEW YORKER* (Sept. 13, 2013), <https://www.newyorker.com/business/currency/the-virtues-of-twitthers-confidential-i-p-o-filing> [<https://perma.cc/X4FQ-MZHC>]

**Table 3: Non-EGC IPO Use of Confidential Filing Process (Q1 2015–Q2 2018)<sup>166</sup>**

Quarter	Non-EGC IPOs– Used Confidential Filing	% Non-EGC IPOs– Used Confidential Filing	Non-EGC IPOs– Did Not Use Confidential Filing	% Non-EGC IPOs– Did Not Use Confidential Filing	Total Non-EGC IPOs
Q1 2015	N/A	N/A	1	100%	1
Q2 2015	N/A	N/A	5	100%	5
Q3 2015	N/A	N/A	0	N/A	0
Q4 2015	N/A	N/A	2	100%	2
<b>Total 2015</b>	<b>N/A</b>	<b>N/A</b>	<b>8</b>	<b>100%</b>	<b>8</b>
Q1 2016	N/A	N/A	0	N/A	0
Q2 2016	N/A	N/A	5	100%	5
Q3 2016	N/A	N/A	1	100%	1
Q4 2016	N/A	N/A	3	100%	3
<b>Total 2016</b>	<b>N/A</b>	<b>N/A</b>	<b>9</b>	<b>100%</b>	<b>9</b>
Q1 2017	N/A	N/A	4	100%	4
Q2 2017	N/A	N/A	4	100%	4
Q3 2017	0	0%	1	100%	1
Q4 2017	2	100%	0	0%	2
<b>Total 2017</b>	<b>2</b>	<b>18%</b>	<b>9</b>	<b>82%</b>	<b>11</b>
Q1 2018	2	100%	0	0%	2
Q2 2018	3	75%	1	25%	4
<b>Total 2018</b>	<b>5</b>	<b>83%</b>	<b>1</b>	<b>17%</b>	<b>6</b>

As seen in Table 3, non-EGCs have responded similarly to EGCs in the wake of the July 2017 Change. There have been eight non-EGCs that filed registration documents and went public after July 10, 2017.<sup>167</sup> All but one issuer—AXA

(detailing the benefits of the confidential DRS process in the context of Twitter’s 2013 IPO).

<sup>166</sup> This table summarizes information included in the data set created by the author. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*).

<sup>167</sup> See *supra* note 158 and accompanying text. The Q3 non-EGC IPO issuer, PQ Group Holdings Inc. (NYSE ticker symbol: PQG), initially filed its Form S-1 on June 9, 2017 and, therefore, could not have participated in the confidential review process as the July 2017 Change had not been announced or enacted yet. Nonetheless, because the company did not go public until after the July 2017 Change took effect (the issue date was September 28, 2017), the company technically could have withdrawn its June 9, 2017 Form S-1 and elected to confidentially file a DRS on July 10, 2017 or after. However, this likely did not make much strategic business sense since—by filing the June 9, 2017 Form S-1—the information that would have been included in the confidential DRS was already, and would remain, public.

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Equitable Holdings (NYSE ticker symbol: EQH)—have elected to file a confidential DRS. This suggests that the confidential submission process offers similar benefits to non-EGCs and these firms will continue to use this privilege, in line with their EGC counterparts.

Furthermore, the data may underestimate the number of non-EGCs who have confidentially filed. A major benefit of the confidential submission process is the fact that it allows an issuer to have more control over the timing of its IPO announcement, which scholars note is a crucial component of IPO success.<sup>168</sup> Therefore, the use of this process does not necessarily equate with an immediate increase in capital markets activity. Instead, it may encourage companies to remain private for longer than they would have in a world without the confidential DRS option.<sup>169</sup> Although some companies file a Form S-1 quickly after first filing a confidential DRS, others wait years. For example, Axsome Therapeutics (Nasdaq ticker symbol: AXSM) filed its confidential DRS on August 25, 2015 and its public Form S-1 less than two months later, on October 13, 2015. On the other hand, Rhythm Pharmaceuticals, Inc. (Nasdaq ticker symbol: RYTM) filed its confidential DRS on October 13, 2015 and its public Form S-1 nearly two *years* later on September 5, 2017. Such flexibility in timing has been echoed by practitioners as a potential result of the July 2017 Change.<sup>170</sup>

This reveals one of the major problems in assessing the success of the July 2017 Change. If the Change eventually leads to more IPOs—which is doubtful given the lack of consensus around the success of the JOBS Act in increasing

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<sup>168</sup> See Honigsberg et al., *supra* note 115, at 306.

<sup>169</sup> See *supra* notes 131–34 and accompanying text.

<sup>170</sup> *SEC to Allow*, *supra* note 105 (quoting Michael Zeidel, a partner in the corporate finance department at Skadden, Arps, Slate, Meagher & Flom LLP, saying “If you are a billion dollar company and may go public, I don’t think the confidential filing is going to change your ultimate decision as to whether to go public or not, but it can encourage companies to move more quickly to start the process of filing so they are ready to access the capital markets at the most opportune time.”).

the number of IPOs—the markets may not see such an increase for years to come.

In an attempt to determine if non-EGCs are, in fact, filing confidential DRSs but not yet filing Form S-1s, the author of this Note filed a Freedom of Information Act (FOIA) request with the SEC. This was necessary because a DRS filed by an issuer who has not yet filed a Form S-1 is, due to its confidential nature, not public. The author requested all DRSs filed by non-EGCs from July 10, 2017 through October 27, 2018 and argued that, unlike the JOBS Act, the July 2017 Change was not grounded in statute and, therefore, is subject to discovery under FOIA.<sup>171</sup>

However, the SEC denied this FOIA request. In a letter to the author of this Note, the SEC stated it could “neither confirm nor deny the existence of any records responsive to [this] request.”<sup>172</sup> It explained that, “[i]f such records were to exist they would be exempt from disclosure pursuant to [FOIA Exemption 4,] 5 U.S.C. § 552(b)(4) . . . [which] protects confidential commercial or financial information, the release of which could cause substantial competitive harm to the submitter.”<sup>173</sup> While it is disappointing that this FOIA request did not reveal the number of confidential DRSs that have been filed by non-EGCs since the Change, ultimately such information would not affect the overall conclusion of this study. Even if many non-EGCs have filed DRSs, this would not mean that the July 2017 Change is successful because such companies would have not yet conducted IPOs. The Change is meant to increase IPOs, and simply filing a confidential DRS does not achieve this. Instead, as previously

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<sup>171</sup> This argument was based on information found in *SEC Staff Expands*, *supra* note 112 (“[B]ecause the [SEC’s] willingness to accept this new set of draft registration statements on a nonpublic basis is not grounded in statute, these draft registration statements are subject to discovery under the Freedom of Information Act by the press, competitors and others.”).

<sup>172</sup> Letter from Mark P. Siford, Counsel to the Dir./Chief FOIA Officer, Office of Support Operations, to Patrick Gallagher, Columbia Law Sch. 1 (Nov. 2, 2018) (on file with the *Columbia Business Law Review*).

<sup>173</sup> *Id.*

noted, it could actually mean that such companies remain private for much longer.<sup>174</sup>

### iii. Framework C: IPO Activity Before and After the July 2017 Change

A final method of evaluation calls for a narrowing of the focus in order to compare equivalent time periods before and after the July 2017 Change. By isolating two time periods of equal length, the pre-Change period can serve as a control group for the post-Change period. This framework examines the one year (365 days) prior to the enactment of the Change and the one year (365 days) after the enactment of the Change.<sup>175</sup> Tables 4, 5, and 6 summarize the data previously analyzed in Section III.B.2.i and Section III.B.2.ii for these new time periods.

**Table 4: EGC, Non-EGC, and Total IPOs Before and After the Change**<sup>176</sup>

Time Period	EGC IPOs	% EGC IPOs	Non-EGC IPOs	% Non-EGC IPOs	Total IPOs
1 Year Before Change	83	87%	12	13%	95
1 Year After Change	117	93%	9	7%	126

**Table 5: EGC IPO Use of Confidential Filing Process Before and After the Change**<sup>177</sup>

Time Period	EGC IPOs– Used Confidential Filing	% EGC IPOs– Used Confidential Filing	EGC IPOs– Did Not Use Confidential Filing	% EGC IPOs– Did Not Use Confidential Filing	Total EGC IPOs
1 Year Before Change	80	96%	3	4%	83
1 Year After Change	116	99%	1	1%	117

<sup>174</sup> See *supra* notes 168–70 and accompanying text.

<sup>175</sup> The 365 days prior to the Change runs from July 10, 2016 through July 9, 2017. The 365 days after the Change runs from July 10, 2017 through July 9, 2018. These time periods inevitably include weekends and holidays when the markets are closed.

<sup>176</sup> This table summarizes information included in the data set created by the author. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*).

<sup>177</sup> This table summarizes information included in the data set created by the author. See *id.*

**Table 6: Non-EGC IPO Use of Confidential Filing Process Before and After the Change**<sup>178</sup>

Time Period	Non-EGC IPOs— Used Confidential Filing	% Non-EGC IPOs— Used Confidential Filing	Non-EGC IPOs— Did Not Use Confidential Filing	% Non-EGC IPOs— Did Not Use Confidential Filing	Total Non-EGC IPOs
1 Year Before Change	N/A	N/A	12	100%	12
1 Year After Change	7	78%	2	22%	9

Table 4 shows the starkest evidence that the July 2017 Change has yet to achieve its goal of increasing the number of IPOs. Although the one year after the Change saw more IPOs (126) than the one year prior to the Change (ninety-five), this was a result of an increase in EGC IPOs, which were not affected by the Change. More surprising is the fact that non-EGC IPOs actually *decreased* in the one year following the Change; there were twelve non-EGC IPOs in the one year before the Change and only nine non-EGC IPOs in the one year after the Change. This suggests that, even if more non-EGCs are exploring the possibility of an IPO by filing a confidential DRS, any benefit to the public markets will not be enjoyed anytime soon.

Table 5 shows that the vast majority of EGCs continue to use the confidential filing process as only a handful of EGCs in each time period chose not to do so. Similarly, Table 6 shows that non-EGCs are adopting this behavior as well. It is important to note that one of the non-EGCs that did not file a confidential DRS filed its Form S-1 prior to the Change taking effect and, therefore, could only have taken advantage of this process if it chose to withdraw its Form S-1 and file a confidential DRS after July 10, 2017.<sup>179</sup> As a result, all but one non-EGC that first filed its registration document after the Change took effect used the confidential process.

<sup>178</sup> This table summarizes information included in the data set created by the author. *See id.*

<sup>179</sup> *See supra* note 167 and accompanying text.

### 3. Summary of Findings

In its first year, the July 2017 Change failed to increase IPO activity. The data show that, since its enactment, there has not been an increase in the number of non-EGC IPOs or in the proportion of non-EGCs in the overall IPO market. Instead, although non-EGCs have begun to use the confidential DRS process, the volume and proportion of non-EGC IPOs have decreased as compared to time periods prior to the Change.

This study is the first attempt to analyze the effect of the July 2017 Change, and, therefore, only assesses the first year of IPO activity following its enactment. Therefore, as time passes and more data become available, additional studies should be conducted in order to analyze whether the Change has increased IPO activity. Nonetheless, the findings of this empirical study suggest that the first major policy change under the Trump administration's SEC has failed and will not generate the increase in IPOs or access to capital markets that it promised.

#### IV. THE INHERENT FLAWS OF THE SEC'S APPROACH TO INCREASING IPOs

The discussion in Part III demonstrates that the July 2017 Change has not succeeded in increasing the number of IPOs. This Part now analyzes why this is the case. First, Section IV.A explores why the Change is at odds with the SEC's stated goal of increasing the number of IPOs, but nonetheless defends the need to encourage non-EGC IPOs due to the large amount of capital these IPOs raise. Section IV.B then discusses how the IPO process has been largely substituted by private capital, and examines why the SEC must combat this shift in order to promote distributional equality throughout society via the public markets.

##### A. Capital Raised as a Complementary Metric of IPO Success

The inherent problem with the SEC's July 2017 Change is that the agency appears to be focused primarily on increasing

the number of IPOs in order to revitalize the public markets. For example, President Trump's first meeting with Chairman Clayton stressed concern over the declining number of IPOs.<sup>180</sup> Further, in announcing the Change, Chairman Clayton highlighted that "the reduction in the number of U.S.-listed public companies is a serious issue for our markets and the country more generally."<sup>181</sup> His rationale for the Change emphasized that it would "encourage more companies to consider going public, which can result in more choices for investors, job creation, and a stronger U.S. economy."<sup>182</sup>

However, the July 2017 Change only affects large firms, and there simply are not enough that could go public to have a significant effect on the overall number of IPOs. It is not surprising that EGCs have typically accounted for eighty percent or more of the total IPOs in a given year.<sup>183</sup> The vast majority of private companies in the United States will not earn \$1.07 billion or more—the threshold that makes a company a non-EGC—in revenue in one fiscal year.<sup>184</sup> However, the SEC must not only focus on the volume of IPOs in order to assess the health of the public markets. Instead,

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<sup>180</sup> See *supra* notes 1–3 and accompanying text.

<sup>181</sup> Clayton, *supra* note 5.

<sup>182</sup> SEC, *supra* note 101; see also SEC to Allow, *supra* note 105 ("Chairman Jay Clayton . . . has said he aimed to reverse the steep decline in IPOs and give individual investors more access to smaller, successful companies.").

<sup>183</sup> See Berdejó, *supra* note 121, at 36 tbl.1.

<sup>184</sup> Given the nature of private companies, access to financial data is inherently difficult. However, because a company that generates \$1.07 billion or more in revenue is a major entity, it is a safe assumption that the vast majority of private companies in the United States do not reach this threshold. Further, according to data from the United States Census Bureau, the overwhelming majority of American small businesses—73.3%—had revenues of less than \$1 million in 2016. See United State Census Bureau, *Statistics for U.S. Employer Firms by Sector, Gender, Ethnicity, Race, Veteran Status, and Receipts Size of Firm for the U.S., States, and Top 50 MSAs: 2016 Annual Survey of Entrepreneurs*, AM. FACT FINDER (Aug. 10, 2018), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ASE\\_2016\\_00CSA03&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ASE_2016_00CSA03&prodType=table) (on file with the *Columbia Business Law Review*); see also *infra* note 188.

the amount of capital raised by IPOs offers another valuable metric to examine.

An individual non-EGC typically raises much more capital in its IPO than an individual EGC. Thus, non-EGCs offer a valuable compliment to the public markets, even if more non-EGC IPOs are unlikely to move the needle in terms of overall IPO volume, given that there are so few. Table 7 summarizes these data.

**Table 7: Capital Raised by EGC and Non-EGC IPOs (Q1 2015–Q2 2018)**<sup>185</sup>

Year	Issuer Type	Total Capital Raised (\$ in millions)	Number of IPOs	Average Capital Raised Per IPO (\$ in millions)	Percentage of Total Capital Raised
2015	EGC	14,162	107	132	71%
	Non-EGC	5,829	8	729	29%
	Total	19,991	115	174	100%
2016	EGC	6,649	64	104	66%
	Non-EGC	3,418	9	380	34%
	Total	10,067	73	138	100%
2017	EGC	14,594	90	162	75%
	Non-EGC	4,800	11	436	25%
	Total	19,394	101	192	100%
Q1-Q2 2018	EGC	10,980	69	159	63%
	Non-EGC	6,342	6	1,057	37%
	Total	17,322	75	231	100%

Although 2015 saw only eight non-EGC IPOs, these issuers accounted for twenty-nine percent of the overall capital raised in 2015—\$5.8 billion of the nearly \$20 billion. This trend followed in 2016 and 2017. In 2016, the nine non-EGCs that went public accounted for thirty-four percent of the overall capital raised; in 2017, the eleven non-EGCs accounted for a quarter of all raised capital. The first half of 2018 is even more significant—thirty-seven percent of all capital raised during this time period comes from the six non-EGC IPOs.

Although collectively EGCs raise more capital than non-EGCs, non-EGCs on average raise much more in their individual IPOs. For example, in 2015, the eight non-EGC

<sup>185</sup> This table summarizes information included in the data set created by the author. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*).

issuers raised an average of \$729 million, whereas the average EGC IPO only raised \$132 million. This means that the average non-EGC IPO in 2015 raised 5.5 times the amount of capital as an EGC IPO. Once again, this pattern continued in the next two years. In 2016, the average non-EGC IPO raised 3.7 times the amount of capital as the average EGC IPO. Interestingly—despite the July 2017 Change—the year 2017 saw this proportion decrease as compared to 2015 and 2016; the average 2017 non-EGC IPO raised \$436 million, 2.7 times the average EGC IPO of \$162 million. However, this decrease is largely due to Snap Inc.’s March 2017 IPO, which serves as an outlier for this year. Although Snap is an EGC, it raised more capital than any other 2017 IPO.<sup>186</sup> The first half of 2018 shows an even starker contrast. The six non-EGC IPOs raised an average of \$1.06 billion, 6.6 times the average EGC IPO of \$159 million.<sup>187</sup>

Table 7 demonstrates the fact that the SEC’s apparent goal and policy choice are ultimately at odds. If the SEC wishes to increase the number of IPOs per year, it would be best to focus efforts on EGCs, as IPOs from these issuers far outnumber non-EGC issuers. However, if the SEC hopes to increase the amount of capital raised per year, it should focus on non-EGCs. Because the July 2017 Change applies only to non-EGCs, it will never cause a meaningful increase in the number of IPOs in a given year. There simply are not enough private

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<sup>186</sup> In fact, Snap Inc. (NYSE ticker symbol: SNAP) raised the largest amount of capital out of all of the companies in the data set—\$3.4 billion. See Patrick J. Gallagher, IPO Data Set (on file with the *Columbia Business Law Review*). Removing Snap from this calculation, the average 2017 EGC amount raised becomes \$123 million. This results in the average non-EGC IPO being 3.5 times greater than the average EGC IPO (excluding Snap), which is in line with this metric from 2016.

<sup>187</sup> The IPO of AXA Equitable Holdings (NYSE ticker symbol: EQH) in May 2018 serves as a bit of an outlier. It alone raised \$2.75 billion, almost double the next highest 2018 IPO, which raised \$1.47 billion. Still, even without AXA, the average non-EGC IPO in the first half of 2018 raised \$957 million, which is more than six times the average EGC IPO.

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companies with \$1.07 billion or more in revenue that are likely to go public.<sup>188</sup>

This is not to say that the SEC should not focus on policies that encourage non-EGCs to go public. Instead, the SEC's capital markets policy should embody twin aims: 1) boost EGC IPOs in order to increase the number of public companies, and 2) incentivize non-EGC IPOs in order to inject a higher amount of capital into the public markets. Because these two metrics measure different aspects of the capital markets, both can and should be used to stimulate complimentary facets of the economy and increase overall activity in the public markets.

But, the ability to confidentially file a DRS is simply not enough of a carrot to make non-EGCs walk where the SEC wants them to. It may not even have been enough to make EGCs walk anywhere.<sup>189</sup> Because the confidential DRS process has failed to conclusively generate an increase in IPOs, the SEC must shift its focus away from such efforts. To effect real change, the SEC must stop focusing on attempts to make the process of *becoming* a public company more appealing—which is what the confidential DRS process does

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<sup>188</sup> The largest 225 private companies in the United States have revenues that range from \$2 billion to \$109.7 billion, though it is unclear whether this metric is based off of the company's latest fiscal year or not. *America's Largest Private Companies*, FORBES, <https://www.forbes.com/largest-private-companies/list/> [<https://perma.cc/P4N6-GFDP>]. However, many of these are entities—such as law firms—that are unlikely to go public anytime soon. Although there are other private companies that qualify as non-EGCs besides these 225, in total non-EGCs likely make up a very small portion of the millions of private companies. In a similar vein, *The Wall Street Journal* estimates that there are only 153 venture-backed American private companies valued at \$1 billion or more. Scott Austin, Chris Canipe & Sarah Slobin, *The Billion Dollar Startup Club*, WALL ST. J. (Feb. 18, 2015), <https://www.wsj.com/graphics/billion-dollar-club/> (on file with the *Columbia Business Law Review*) (last updated Jan. 2019). Nonetheless, valuation is not solely based on past revenues, and, in fact, many of these entities would qualify as EGCs because their latest annual revenues were below \$1.07 billion. *See id.*

<sup>189</sup> See the inconclusive results of the JOBS Act discussed *supra* Section III.A.

for EGCs and non-EGCs—and instead implement policies that make *being* a public company more attractive.

## B. Promoting Equality Via the Public Markets

Before delving into proposals aimed at effectuating more IPOs,<sup>190</sup> it is necessary to first understand why such a goal is important. Why does the economy need public companies? Why should economic policy seek to encourage firms to enter the public markets? In short, who cares?

The IPO market has steadily dried up over the past two decades. Where, according to one study, there was an annual average of 310 IPOs from 1980–2000, this drastically decreased to an average of ninety-nine IPOs from 2001–2012.<sup>191</sup> One leading cause of this is that alternative sources of financing to the public markets have ballooned in recent years. In discussing the IPO decrease, a member of the SEC Small and Emerging Companies Advisory Committee highlighted the “large amounts of private capital” as a cause.<sup>192</sup> Private assets under management totaled less than \$1 trillion in 2000, but surpassed \$5 trillion in 2017.<sup>193</sup> As such, “many companies no longer need an IPO to raise capital” because there is “plenty of private cash to go around.”<sup>194</sup> Given this reality, revitalizing the IPO market requires policies that make the public markets more attractive than easily-accessible, abundant private capital.

When companies look to raise capital through private investors, the majority of Americans are cut out of the

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<sup>190</sup> See *infra* Part V.

<sup>191</sup> Xiaohui Gao, Jay R. Ritter & Zhongyan Zhu, *Where Have All the IPOs Gone?*, 48 J. FIN. & QUANTITATIVE ANALYSIS 1663, 1663 (2013).

<sup>192</sup> James A. Hutchinson, SEC Small and Emerging Companies Advisory Committee Meeting 122 (Feb. 15, 2017) (transcript available at <https://www.sec.gov/info/smallbus/acsec/acsec-transcript-021517.pdf> [<https://perma.cc/6Y8J-6GXD>]).

<sup>193</sup> Frank Partnoy, *The Death of the IPO*, ATLANTIC (Nov. 2018), <https://www.theatlantic.com/magazine/archive/2018/11/private-inequity/570808/> [<https://perma.cc/NC5X-UEYA>].

<sup>194</sup> *Id.*

equation.<sup>195</sup> Unlike public stock markets, private funds typically require exceedingly high minimum investments. Therefore, “[o]nly the very wealthiest can afford the big sums demanded for direct access to private equity funds run by famous names such as Blackstone, Apollo and Carlyle, which may require a minimum investment of \$1 [million], \$5 [million] or more[.]”<sup>196</sup> In addition to private restrictions, some SEC rules also aim to protect individual investors from risky private deals, and therefore, many times “[o]nly those who meet certain wealth or income standards—such as household income of \$300,000—can participate.”<sup>197</sup>

Nonetheless, in recent years, some changes have been made to make private capital more accessible to a wider range of investors. In changing long-standing securities laws, the JOBS Act created a way for individuals to invest in private companies through equity crowdfunding,<sup>198</sup> a method by which companies can raise capital from average investors online, functioning in a similar way to Kickstarter campaigns.<sup>199</sup> Despite this, many companies see equity crowdfunding as a “last resort,”<sup>200</sup> allowing traditional private

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<sup>195</sup> *See id.*

<sup>196</sup> Stephen Foley, *Private Equity Begins to Entice Ordinary Investors*, FIN. TIMES (May 26, 2015), <https://www.ft.com/content/e85240c4-b150-11e4-831b-00144feab7de> [<https://perma.cc/GNJ5-UH38>].

<sup>197</sup> *See* Dave Michaels, *SEC Chairman Wants to Let More Main Street Investors in on Private Deals*, WALL ST. J. (Aug. 30, 2018), <https://www.wsj.com/articles/sec-chairman-wants-to-let-more-main-street-investors-in-on-private-deals-1535648208> (on file with the *Columbia Business Law Review*).

<sup>198</sup> *See* Michael B. Dorff, *The Siren Call of Equity Crowdfunding*, 39 J. CORP. L. 493, 503 (2014). Prior to the JOBS Act, it was illegal for a new business to sell equity over the Internet without registering the sale pursuant to the 1933 Act. *See id.* at 501.

<sup>199</sup> Howard Marks, *What is Equity Crowdfunding?*, FORBES (Dec. 19, 2018), <https://www.forbes.com/sites/howardmarks/2018/12/19/what-is-equity-crowdfunding/#1e5809553b5d> [<https://perma.cc/R8H9-CZ5D>]. For details on the crowdfunding provisions of the JOBS Act, see Erica Wu, Note, *Biotech Crowdfunding: How the JOBS Act Alone Cannot Save Investors*, 2018 COLUM. BUS. L. REV. 1060, 1071–73 (2018).

<sup>200</sup> Dinah Wisenberg Brin, *Equity Crowdfunding May Be a Last Resort for Some Startups, Study Suggests*, FORBES (June 27, 2018),

capital, such as private equity and venture capital—typically available only to the wealthy—to remain supreme. Furthermore, Blackstone has begun targeting investors with \$1 million to \$5 million in assets, necessarily allowing investments of less than \$1 million.<sup>201</sup> Of course, such investments are still out of reach for the majority of Americans. Finally, the SEC is considering revising rules that foreclose many individual investors that do not meet income or wealth requirements from investing in private deals.<sup>202</sup>

Nonetheless, in general, when the highest-growth companies seek private capital as an alternative to the public markets, it can result in “real distributive consequences” between wealthy and average investors.<sup>203</sup> Primarily because, “[i]f many of the economy’s greatest success stories aren’t included in the funds that ordinary Americans hold, only the wealthiest members of society will enjoy the gains, intensifying inequality.”<sup>204</sup> In other words, when a company is funded privately, any gains are received by the private investors, who are typically a small group made up of the wealthiest in society.<sup>205</sup> On the other hand, the public markets offer an opportunity for anyone to invest. Today, roughly half of all U.S. households own publicly-traded stock

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<https://www.forbes.com/sites/dinahwisenberg/2018/06/27/equity-crowdfunding-may-be-a-last-resort-for-some-startups-study-suggests/#702c63db73c1> [<https://perma.cc/A8PL-NAND>].

<sup>201</sup> See Miriam Gottfried, *Blackstone Targets Millionaire Next Door*, WALL ST. J. (Oct. 15, 2017), <https://www.wsj.com/articles/barbarians-open-their-gates-as-blackstone-others-seek-retail-cash-1508068802> (on file with the *Columbia Business Law Review*).

<sup>202</sup> See Michaels, *supra* note 197.

<sup>203</sup> Partnoy, *supra* note 193.

<sup>204</sup> *Id.*

<sup>205</sup> One caveat is that average investors may be invested indirectly in private equity funds through holdings in pension funds or mutual funds. See Mary Hall, *How to Invest in Private Equity*, INVESTOPEDIA (Mar. 22, 2018), [https://www.investopedia.com/articles/mutualfund/07/private\\_equity.asp](https://www.investopedia.com/articles/mutualfund/07/private_equity.asp) [<https://perma.cc/C6MJ-V6CW>]. Nonetheless, regulations typically limit the amount of such funds that can be invested in private equity and many may not be invested in private companies at all. See *id.*

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directly or indirectly via mutual funds.<sup>206</sup> Indeed, “the majority of the American middle class has invested its retirement savings, directly or indirectly, in the stock market.”<sup>207</sup>

This is why encouraging companies to go public is vital to the health of the American economy. When companies list on a public stock exchange, rather than finance through private capital, society as a whole benefits more. Gains are spread among investors across the socioeconomic class spectrum, rather than enjoyed just by the wealthy. And because public companies must comply with disclosure requirements, public stock is more accurately valued than private stock in which company information can more easily be kept behind a veil, despite investor demands.<sup>208</sup> If more companies remain private and therefore are not subject to public transparency rules, “a rising share of important American companies will operate in the relative comforts of opacity.”<sup>209</sup>

The SEC must address this shift to private capital head on if its goal of revitalizing the IPO market is to be achieved. Not only must the status of being a public company seem attractive, it also must be *more* attractive than remaining private and obtaining capital through private funding.

## V. PROPOSALS FOR INCREASING IPO ACTIVITY

As discussed in Parts III and IV, the July 2017 Change has failed—and will likely continue to fail—to generate an increase in the number of IPOs. However, better solutions exist and should be implemented in order to achieve this goal. In order to effectively reverse the decline in IPOs, the SEC

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<sup>206</sup> See COFFEE ET AL., *supra* note 75, at 5.

<sup>207</sup> *Id.*

<sup>208</sup> See James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 120 (2017) (“With truthful disclosure, investors will buy the stock at a valuation that reflects the risks associated with the investment[.]”).

<sup>209</sup> Gwynn Guilford, *US Startups Don’t Want to Go Public Anymore. That’s Bad News for Americans*, QUARTZ (Feb. 1, 2018), <https://qz.com/1192972/us-startups-are-shunning-ipos-thats-bad-news-for-americans/> [<https://perma.cc/HA3A-P8WT>].

must effectuate changes that accomplish two interconnected goals: 1) make private markets less viable for companies seeking capital; and 2) make the public markets—and being a public company—the most attractive option. This Part outlines three new proposals for increasing IPO activity. It then calls for the abolition of the confidential DRS process for both EGCs and non-EGCs and a return to the principle of disclosure that historically has served as the foundation of the public markets.

#### A. Eliminate Benefits Awarded to Private Capital

Many companies forego an IPO in order to avoid new regulations and accompanying costs,<sup>210</sup> instead tapping private capital reserves that do not trigger such regulations or costs. Therefore, in order to lead American companies to the public markets, the SEC and Congress must eliminate regulations that benefit private capital and cause the public markets—and the distributional equality they promote—to suffer.

Historically, section 12(g) of the 1934 Act required companies to become public reporting companies—and, as such, publicly file regular reports—once they obtained assets exceeding \$1 million and had 500 or more shareholders.<sup>211</sup> This meant that “[f]or decades . . . firms could raise only small amounts of money without triggering public-reporting requirements.”<sup>212</sup> However, in 2012, the JOBS Act increased the threshold to \$10 million and 2000 shareholders, or 500

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<sup>210</sup> See generally *supra* Sections II.B.2–3.

<sup>211</sup> See *U.S. Congress Enacts JOBS Act, Increasing 499 Investor Limit for Private Funds to 1,999 and Eliminating Prohibition Against General Solicitation in Connection with Certain Private Offerings*, SIDLEY AUSTIN LLP (Mar. 28, 2012), <https://www.sidley.com/en/insights/newsupdates/2012/03/us-congress-enacts-jobs-act-increasing-499-investor-limit-for-private-funds-to-1999-and-eliminating-prohibition-against-general-solicitation-in-connection-with-certain-private-offerings> (on file with the *Columbia Business Law Review*).

<sup>212</sup> Partnoy, *supra* note 193.

shareholders who are not accredited investors.<sup>213</sup> This was a grave mistake because it encourages companies to consider obtaining greater levels of private capital without having to worry about making public filings. Instead, if the SEC wishes to revitalize the IPO market, it should work with Congress to *reduce* the threshold for when companies must comply with disclosure requirements. One of the main reasons that companies seek private capital as opposed to public is the ability to avoid disclosure laws.<sup>214</sup> Therefore, the JOBS Act's quadrupling of the reporting threshold—in terms of number of shareholders—allows companies to continue to seek additional private funding and avoid public disclosure. Instead, the reporting threshold should be returned to 500 shareholders, or perhaps lowered even further. For example, if a company with 250 shareholders was required to comply with securities disclosure laws, such a company would likely consider an IPO earlier in its growth since one benefit of remaining private—avoiding disclosure laws—would cease to exist after only a few hundred investors became shareholders.

Perhaps due to its failure in bringing new companies into the public markets, the SEC has instead begun to consider the opposite: pushing more investors to the private markets.<sup>215</sup> This is well-intended. Struggling with how to revitalize the capital markets generally, Chairman Clayton is attempting to provide “main street investors” with an opportunity to invest in companies that are currently “out of their reach” since they are private.<sup>216</sup> However, this is the wrong approach and threatens the public markets and investors generally.

Since the Great Depression, the mandatory disclosure system imposed on public companies has focused on consumer protection by ensuring that as much information as possible

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<sup>213</sup> See *Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act*, SEC. & EXCHANGE COMMISSION (May 24, 2016), <https://www.sec.gov/info/smallbus/secg/jobs-act-section-12g-small-business-compliance-guide.htm> [<https://perma.cc/P2CW-8GZ2>].

<sup>214</sup> See Section II.B.2.

<sup>215</sup> See Michaels, *supra* note 197.

<sup>216</sup> *Id.*

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comes into the light so that investors are aware of the risks in purchasing a given stock.<sup>217</sup> Private securities, on the other hand, are “off the radar of federal regulators,” and, as such, “[t]here is typically less information available about the firms, increasing risks for investors.”<sup>218</sup> Therefore, not only would new rules allowing more investors into the private securities markets likely result in further declines in IPOs (since there would be an even greater abundance of private capital), but it would also subject investors to investments whose risks may remain undisclosed, thus making the investments themselves exponentially more risky.

In sum, rather than encouraging more private investment, the SEC and Congress should eliminate benefits that companies enjoy by remaining private and instead cultivate a system in which there is little benefit—such as from a disclosure standpoint—in seeking private capital rather than public. With little benefit to seeking private capital, companies would be more likely to consider an IPO.

#### B. Create Meaningful Benefits for Companies that Elect to Go Public

In addition to eliminating the privileged status that private capital holds over the public markets, the SEC and Congress must also effectuate policies in which companies are actively incentivized to go public despite benefits that private capital may offer. By actively eliminating deterrents that companies cite as reasons to not go public—namely regulatory compliance mandates and increased costs<sup>219</sup>—the public markets will become more attractive.

This Section advocates for the SEC to explore policies that significantly reduce regulatory compliance requirements and associated costs for companies that go public—especially in a new public company’s early years. Doing so would allow companies to begin to incur these increased costs in later years as a public company. In fact, companies could perhaps

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<sup>217</sup> See COFFEE ET AL., *supra* note 75, at 4–6.

<sup>218</sup> See Michaels, *supra* note 197.

<sup>219</sup> See *supra* Section II.B.2.

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even fund these additional costs through the very capital raised by the IPO. By eliminating major costs associated with going public, at least in the early years, going public can more effectively compete with the private capital markets, which do not impose such costs due to the lack of applicable regulations and compliance standards.

Specifically, there are two proposals the SEC, Congress, and other governmental actors should explore: (1) temporarily exempt companies from portions of SOX and other regulations applicable to public companies; and (2) offer tax credits to companies for going public. Each of these ideas is explored more below.

### 1. Temporarily Exempt Companies from Portions of SOX and Other Regulations Applicable to Public Companies

In an effort to increase IPOs, EGCs and non-EGCs should both be temporarily exempted from portions of SOX, Dodd-Frank, and other public company compliance statutes that are particularly onerous and likely serve as deterrents to going public. For example, section 404(b) of SOX requires auditors to evaluate public companies' internal controls, the policies and procedures intended to prevent errors or fraud with regard to financial statements.<sup>220</sup> Over the years, certain companies have been exempted from this requirement—Dodd-Frank exempted very small companies and then the JOBS Act exempted EGCs.<sup>221</sup> Non-EGCs who choose to go public should similarly be exempt from burdensome requirements like this for a limited period of time as well, such as five years.<sup>222</sup>

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<sup>220</sup> Sarbanes-Oxley Act of 2002 § 404(b), 15 U.S.C. § 7262(b) (2012); *see also* Michael Rapoport, *Why Stop at Dodd Frank? Some Want Trump's Regulatory Overhaul to Go Further*, WALL ST. J. (Feb. 14, 2017), <https://www.wsj.com/articles/trump-gives-impetus-to-push-to-revamp-sarbanes-oxley-auditor-rule-1487070001> (on file with the *Columbia Business Law Review*).

<sup>221</sup> *See* Rapoport, *supra* note 220.

<sup>222</sup> This proposed length mirrors the length of time that EGCs, once public, are able to continue to enjoy the benefits granted by EGC status. *See*

Increased regulations and the cost of such compliance are consistently cited as deterrents to going public.<sup>223</sup> Exempting new public companies from such requirements would likely make public company status much more appealing. Such a policy would remove substantial compliance costs from a firm's initial years as a public company and allow for an adjustment period before subjecting the company to new, stringent oversight requirements. Furthermore, rather than risk burdening a new public company with a massive amount of new expenses, such a policy would allow a company to use the capital raised by the IPO itself—and, hopefully, the growth that that capital provides—to fund these new compliance and regulatory expenses in the future.

Nonetheless, removing such regulations could cultivate fertile ground for corporate failures akin to those in the pre-SOX era, such as the Enron fraud.<sup>224</sup> In fact, this proposal may seem to contradict this Note's general call for greater disclosure.<sup>225</sup> However, this should be of little concern for two reasons. First, because the regulations would eventually apply to new public companies, it is unlikely that massive problems would occur during the brief exemption period. Second, because investors would be on notice of this policy change, it could actually lead to improved valuation of stock. Simply put, investors comfortable with the added risk of regulation exemptions could invest in such companies and hope to earn a high return, as often happens immediately

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*supra* note 79 and accompanying text. Alternatively, non-EGCs could even be exempted from section 404(b) and other burdensome compliance statutes for less time if the SEC determined that the cost savings from a shorter exemption period would still properly induce non-EGCs to go public.

<sup>223</sup> See *supra* Section II.B.2.

<sup>224</sup> See generally BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003).

<sup>225</sup> See *infra* Section V.C. In addition, at least one other study has found that the ability for EGC's to avoid the requirements of section 404 of SOX may negatively affect markets. See Honigsberg et al., *supra* note 115, at 309, 313.

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after an IPO.<sup>226</sup> Investors that do not want to take such a risk could instead decide to only invest in such companies after the regulatory exemption period ends. If the number of risk-averse investors is too significant, this could backfire by greatly reducing the demand for an issuer's stock, thus indirectly making the public markets less attractive. However, companies could always decide to not take advantage of such an exemption period and instead voluntarily subject themselves to such requirements. It is common for firms to forego benefits based on market demand. For example, although EGCs are only required by law to provide two years of audited financial statements in their Form S-1s, most provide more due to market demands.<sup>227</sup> Thus, the worst-case scenario may involve some companies returning to the current status quo.

This idea does not have to stop at SOX and Dodd-Frank. In order to be most effective, the SEC and Congress should identify the top regulations across all applicable statutes that deter companies from going public and grant a temporary exemption to any firm that opts to conduct an IPO.

## 2. Offer Tax Incentives to Companies for Going Public

Tax policy should also be used to catalyze IPOs. "Almost all taxes . . . change the incentives to engage in various activities[.]"<sup>228</sup> Consequently, Congress should enact tax legislation, such as an IPO tax credit, to encourage companies to go public. Tax credits are currently used for a wide range of activities, which are often motivated, in part, by incentivizing businesses to act in a certain way. For example, the solar

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<sup>226</sup> See *e.g.*, *infra* notes 239–46 and accompanying text (discussing the phenomenon of underpricing).

<sup>227</sup> See *supra* note 95 and accompanying text.

<sup>228</sup> MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 28 (7th ed. 2013).

investment tax credit incentivizes commercial installation of solar and other renewable energy systems.<sup>229</sup>

Similar tax credits could be offered to companies that commit to conducting an IPO. Although this would initially have a negative effect on the federal fisc—since the government’s tax revenue would presumably be less than it would be without the tax credit—such a policy can be justified for two reasons. First, encouraging more public companies may ultimately result in increased tax revenue in the long run. Any increased earnings a firm generates as a public entity would be taxed as additional corporate income.<sup>230</sup> Furthermore, investors in public common stock would ultimately be taxed on capital gains upon their sale of such stock.<sup>231</sup> Finally, public companies would have an increased demand for professional services, such as law and accounting, which would also lead to increased tax revenue as these firms earn additional income servicing new public companies. As such, tax credits offered to encourage companies to go public may ultimately pay off.

Second, even if such a tax policy did not pay for itself in the long run, the government should subsidize the costs of going public because of the equality ends it achieves.<sup>232</sup> A public company avails itself of a wide range of American investors, unlike private capital, which often only provides returns to the wealthy.<sup>233</sup> Increasing activity in the public markets is ultimately good for the public. However, because IPOs are costly endeavors, many companies are incentivized to remain

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<sup>229</sup> See Brad Plumer, *Tax Bill Largely Preserves Incentives for Wind and Solar Power*, N.Y. TIMES (Dec. 16, 2017), <https://www.nytimes.com/2017/12/16/climate/tax-bill-wind-solar.html> [<https://perma.cc/X5T6-SEDN>] (“For years, Congress has offered tax credits for wind and solar projects that can offset 30 percent or more of the total costs.”).

<sup>230</sup> This is based on the gross oversimplification that higher profits would yield higher taxable corporate income. *But see* Patricia Cohen, *Profitable Companies, No Taxes: Here’s How They Did It*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/business/economy/corporate-tax-report.html> [<https://perma.cc/X8QA-9TQ6>].

<sup>231</sup> See generally GRAETZ & SCHENK, *supra* note 228, at 497–504.

<sup>232</sup> See *supra* Section IV.B.

<sup>233</sup> See *supra* Section IV.B.

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private. Tax credits could be a viable solution to help subsidize the costs of going public. Economically rational companies will ultimately decide for or against an IPO based on its potential financial impact. Tax credits can serve as a meaningful way to effectively reduce the costs of going public and, therefore, encourage more companies to choose the public markets over private.

### C. Eliminate the Confidential DRS Process for EGCs and Non-EGCs

The confidential DRS process has yet to conclusively increase IPO activity. Companies themselves, not investors or the capital markets, are the only ones who benefit from the current policies enacted through the JOBS Act and the July 2017 Change. Instead, the confidential DRS process actively inhibits IPO growth and has other negative consequences. Therefore, it should be ended for EGCs and non-EGCs alike, and the IPO process must return to the principles of public disclosure as originally intended by the 1933 Act.

The first problem with the confidential DRS process is it inhibits companies from going public because they have “greater flexibility in timing their IPOs.”<sup>234</sup> For example, prior to 2000, it typically took between forty-five and sixty days for a company to complete an IPO after initially filing its registration statement.<sup>235</sup> However, from 2013–2016, it took EGCs a median of sixty-seven days from the initial confidential DRS filing to the filing of the Form S-1.<sup>236</sup> Such companies then take additional time between the filing of the Form S-1 and the actual IPO date.<sup>237</sup> Although this may suggest that the confidential DRS process merely adds an additional few months to the overall IPO timeline, in some cases, firms may wait years after filing a confidential DRS before going public.<sup>238</sup> Thus, the ability to confidentially file a

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<sup>234</sup> Marderosian, *supra* note 106.

<sup>235</sup> *See id.*

<sup>236</sup> *Id.*

<sup>237</sup> *See supra* notes 69–71 and accompanying text.

<sup>238</sup> *See supra* notes 169–70 and accompanying text.

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DRS allows companies to remain private for much longer than companies did before the creation of the confidential DRS review process.

A second problem with the confidential DRS process is that some evidence suggests it does not reduce costs associated with going public. For example, one study found that the JOBS Act did not reduce the direct costs of going public, and actually increased indirect costs—measured by underpricing<sup>239</sup>—by seventy-six percent.<sup>240</sup> The study notes that these findings “are consistent with a large body of literature that finds that investors value transparency and that, in its absence, issuers are penalized by a higher cost of capital.”<sup>241</sup>

Finally, the confidential DRS process has also resulted in unintended consequences that negatively affect individual investors. A study conducted by then-Professor Robert J. Jackson, Jr., a current SEC Commissioner, and others examined the confidential DRS process and several other aspects of the JOBS Act that reduce the level of required EGC disclosure.<sup>242</sup> This study found that reducing mandatory

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<sup>239</sup> Underpricing is “the fact that the price of the offered shares jumps substantially above the offering price during the first day of trading.” Berdejó, *supra* note 121, at 12. This is a problem for issuers because it means they leave “considerable amounts of money on the table” since the initial offer price was not set higher. *Id.*

<sup>240</sup> Susan Chaplinsky, Kathleen Weiss Hanley & S. Katie Moon, *The JOBS Act and the Costs of Going Public*, 55 J. ACCOUNTING RES. 795, 799 (2017).

<sup>241</sup> *Id.* at 828.

<sup>242</sup> Honigsberg et al., *supra* note 115, at 313. Although the confidential DRS process results in issuers “eventually disclos[ing] the same amount of information” as issuers who opt to not use the confidential process, the authors of this study examined the confidential DRS process along with other JOBS Act provisions that more directly reduce EGC disclosure requirements, including the ability for EGCs to provide fewer than three years of audited financial statements and the ability for EGCs to opt out of SOX section 404(b). *See id.* The authors concluded that the confidential DRS benefit does directly affect the disclosure in the market because “it may severely limit the amount of time investors have to process the filings in question” due to the fact that a registration statement only needs to be filed

disclosure through the confidential DRS process and other provisions of the JOBS Act “led to a reduction in trading by individual investors, suggesting that individuals prefer to receive more information under these disclosures rather than less.”<sup>243</sup> Within two weeks of a company’s IPO, however, these differences in individual investor activity had disappeared.<sup>244</sup> Nonetheless, the fact that the JOBS Act allows institutional investors to dominate the market for the first few weeks of an IPO is alarming, particularly because of the ability for early investors to capitalize on underpricing.<sup>245</sup> The high returns that often accompany the first day of an IPO “are favorable for the initial IPO investors—who are able to purchase the IPO shares at the offering price and immediately resell them in the secondary market at a higher price[.]”<sup>246</sup> The results of the Jackson et al. study suggest that individual investors are shut out from this opportunity, which is instead dominated by institutional investors, in part, because of the JOBS Act’s confidential DRS process.

“Mandatory disclosure is the cornerstone of federal securities laws.”<sup>247</sup> In general, disclosing issuer information is “socially desirable to the extent it bridges informational asymmetries between the issuer (and its insiders) and the market.”<sup>248</sup> However, the confidential DRS process—created first by the JOBS Act and extended by the July 2017 Change—delays disclosure requirements for issuers. Because this process does not bring about any meaningful net gain for society in terms of increased IPOs, but instead has produced several negative results, it should be abolished in favor of a return to complete investor transparency in accordance with the principals of the 1933 Act.

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fifteen days before the firm’s first road show. *Id.* at 313, 313 n.65; *see also supra* note 83 and accompanying text.

<sup>243</sup> Honigsberg et al., *supra* note 115, at 304.

<sup>244</sup> *See id.* at 304–05.

<sup>245</sup> *See supra* note 239.

<sup>246</sup> Berdejó, *supra* note 121, at 12.

<sup>247</sup> Honigsberg et al., *supra* note 115, at 295.

<sup>248</sup> Berdejó, *supra* note 121, at 17.

## VI. CONCLUSION

The SEC's expansion of the confidential DRS process to non-EGCs through the July 2017 Change intended to increase the number of IPOs in the marketplace. However, the results of the empirical study conducted by the author of this Note indicate that the Change has not yet had any noticeable effect on IPO activity. It likely never will. Although non-EGCs offer value to the public markets due to the large amount of capital their IPOs raise, there simply are not enough firms of this size to cause a meaningful increase in IPO volume. Moreover, minor changes to the process of going public will simply not effectuate the increase in public companies the SEC seeks. If the SEC is serious about revitalizing the capital markets, the answer is not to expand the private markets, which largely operate out of the reach of securities disclosure laws. Instead, the agency must work with Congress to ensure that being a public company is not a burden, but instead is the best option for an American company in need of capital.