THE CROWDFUND ACT'S IMPACT ON WOMEN-OWNED BUSINESSES' ACCESS TO CAPITAL

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Women-owned businesses make up a significant portion of businesses in the United States and provide one of the most important growth opportunities for the United States' economy today. However, female entrepreneurs face on-going challenges in gaining access to capital through traditional capital-raising mechanisms such as venture capital or bank loans. The Obama administration heralded the CROWDFUND Act as a boon for women-owned businesses. Many believed that regulation crowdfunding, enabled through the Act, would democratize potential investors in small businesses, thereby increasing the number of investors willing to provide capital to female entrepreneurs and their businesses.

This Note provides the first quantified examination of the results of the first nearly eight months of regulation crowdfunding with respect to women-owned businesses. This Note additionally explores the results of regulation crowdfunding as reported by others.

Ultimately, this Note determines that, at least in the first months of regulation crowdfunding, women-owned businesses did not take advantage of regulation crowdfunding in any meaningfully increased way compared to traditional capital-raising mechanisms. This Note proposes several ways in which the government could further support women-owned businesses, such as implementing a simple reporting mechanism to better track the capital-raising efforts of

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women-owned businesses and developing a pilot program of financial advisors available to founders and management of women-owned businesses seeking capital.

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I. INTRODUCTION

Title III of the Jumpstart Our Business Startups Act ("JOBS" Act), also known as the "CROWDFUND" (Capital Raising Online While Deterring Fraud and Unethical Non-

Disclosure) Act, took effect on May 16, 2016.[1] This regulation provides the first opportunity for small businesses to crowdfund—essentially, to raise capital from a large and disparate group of investors—equity or debt offerings without submitting to the onerous rules of federal securities laws such as the Securities Act of 1933 and the Securities Exchange Act of 1934.[2]

The White House's fact sheet about the potential impact of the JOBS Act on women and the economy includes a segment explaining the increased access to capital that women-owned businesses (referred to as "WOBs" throughout this Note) would receive under the proposed legislation through reduced regulatory burdens for small businesses.[3] Though the fact sheet covers the multi-bill legislation in whole, this particular section seems clearly aimed at what ultimately became Title III, or the CROWDFUND Act. Given the federal government's historical inability to adequately address the need for support of WOBs in the economy, particularly in securing adequate access to capital, this assertion deserves further inquiry.[4]

Using a compiled dataset of SEC disclosed CROWDFUND offerings, this Note explores for the first time whether, in the short time since crowdfunding has become available to businesses through the CROWDFUND Act, female entrepreneurs have taken advantage of improved access to capital. In short, thus far, they have not. Further, this Note offers suggestions that the Small Business Association ("SBA") and the federal government should consider

1 Ethan Silver & Anup Khatri, *Endowed by the Crowed? Insights into the New Wave of Crowdfunding and Its Viability*, 29 J. TAX'N & REG. FIN. INST. 33, 33 (2016). *See generally* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

2 Silver & Khatri, *supra* note 1, at 33; *see also infra* Section II.C.3.

3 THE AMERICAN JOBS ACT: IMPACT FOR WOMEN AND THE ECONOMY 2, https://obamawhitehouse.archives.gov/sites/default/files/women_factsheet_jobs.pdf [https://perma.cc/DRW2-KV3J] (last visited July 14, 2017) [hereinafter AMERICAN JOBS ACT: IMPACT FOR WOMEN].

4 For a brief history of the government's attempts to support women in the workforce and women-owned businesses since the Progressive Era, see *infra* Section II.A.

implementing to better provide access to capital for female entrepreneurs in the future, starting with promulgating better reporting mechanisms that will allow researchers to more accurately track the government's progress in its efforts to improve access to capital for female entrepreneurs.

In Part II, this Note explores the historical position of women in the workforce, how the government has interacted with and tried to support WOBs in the past, and the particular struggle of female entrepreneurs in gaining access to capital. Part II further provides a baseline for understanding the governmental infrastructure currently in place for WOBs and introduces the difficulties faced by WOBs in acquiring capital to grow their businesses. The meteoric rise of crowdfunding in the United States is also discussed. Furthermore, Part II examines details of the regulatory environment for securities offerings prior to the CROWDFUND Act. Finally, Part II concludes by examining the adoption of the JOBS Act, including the CROWDFUND Act, as well as the changes this legislation and the Security and Exchange Commission's ("SEC") adoption of final rules made to the existing regulatory field.

Part III uses the author's collected data of all applications for crowdfunding under the CROWDFUND Act, from its implementation in May 2016 through mid-January 2017, to analyze the offerings and determine if WOBs have availed themselves of this new opportunity for fundraising capital. This is the first published study that seeks to quantify the number of WOBs that have utilized regulation crowdfunding. No WOBs closed equity rounds during the first quarter. Additionally, in reviewing the data for the first approximately eight months of regulation crowdfunding, WOBs were no more likely to avail themselves of the new option than more traditional fundraising pathways, such as angel investments.[5] These findings raise the question of whether the CROWDFUND Act's touted increase in capital for WOBs may be unfounded or whether WOBs are simply

5 *See infra* Section III.B.2.

less likely to avail themselves of the opportunity to raise capital under the CROWDFUND Act.[6]

Finally, in Part IV, this Note provides several suggestions for ways the SBA, and the government generally, can better support female entrepreneurs. Specifically, this Note argues that the first step in improving access to capital is ensuring that adequate reporting is performed on WOBs. This Note suggests that the SEC update Form C to include a checkbox to indicate whether the issuer is a WOB and suggests that the government update other required disclosures to report on metrics regarding the participation, retention, and promotion rates of women in industries such as venture capital. Additionally, this Note suggests that the SBA undertake a pilot program within their Women's Business Centers to provide professional financial advisors for female entrepreneurs seeking advice on capital raising in order to encourage women to seek the appropriate level of funding for their businesses and to ensure that WOBs are aware of the various means of fundraising, including the new equity crowdfunding.

II. A BRIEF HISTORY OF WOMEN IN THE WORKFORCE, CROWDFUNDING, AND THE CROWDFUND ACT

Women in the American workforce have experienced a tumultuous journey since the government originally encouraged women to participate in formal roles during World War II.[7] Swift and often forceful resistance met nearly every step of progress.[8] The federal government was relatively late in formally recognizing the economic power of

6 The author collected data from the SEC's publicly available database, EDGAR, as well as various sources cited throughout this Note.

7 *See generally* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (2006). For a review of how the Pregnancy Discrimination Act of 1978 too narrowly supports working mothers in the workforce, see Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2156–57 (1994).

8 FALUDI, *supra* note 7, at 10–11.

women and even later in implementing federal incentives for female entrepreneurs. Heavily delayed promulgation, poor implementation, and overall ineffectiveness often plagued the incentive plans that Congress did pass.[9]

Federal contracting, the modern federal government's main source of outreach to WOBs, has arguably failed to meet its goals since implementation.[10] Various government actors undertook other pilot projects in an effort to improve access to capital for women business owners, but these projects failed to achieve long-term large-scale adoption or success.[11] This Section explores the government's historically oscillating attitude towards women in the workforce, then specifically women as entrepreneurs, to understand the various governmental efforts to reach out to WOBs, to examine the current accessibility of capital available to WOBs, and to inform our understanding of the federal government's ability to provide support to WOBs moving forward. This Section then turns to the rapid rise of crowdfunding, particularly over the Internet, the adoption of the CROWDFUND Act, and how that Act impacted securities regulations.

A. The Government's Vacillating Involvement with Women in the Workforce

Despite the lack of support, and occasional open hostility, the government has shown to women in the workforce, some government actors have long recognized the importance of women in the workforce and of WOBs to the development of

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9 See Section II.A. for a discussion of the government's struggle to provide WOBs five percent of federal contracting dollars.

10 Kaitlyn McAvoy, *Government Hits Goal of Spending 5% of Contracting Dollars with Women-Owned Businesses—or Did It?*, SPEND MATTERS NETWORK (Mar. 8, 2016 8:12 AM), http://spendmatters.com/2016/03/08/government-hits-goal-of-spending-5-of-contracting-dollars-with-women-owned-businesses-or-did-it/ [https://perma.cc/2NH2-V7JB].

11 For a discussion of the Women's Pre-Qualification Pilot Loan Program, see *infra* Section II.A.

the country's economy.[12] Women made up roughly twenty percent of the workforce even during the Progressive Era, roughly from the 1890s through the 1920s.[13] During World War II, the government formally recognized women as an integral segment of the workforce in the United States for perhaps the first time, and small businesses offered (white) women some of the first societally–accepted roles outside of the home.[14] Although the particular intersection of race, class, gender, and business are outside the scope of this Note, it should be noted that African American women and lower-class white women have served in the American workforce throughout history, most often in service and other low-wage positions. During World War II, the government made its first attempts at bringing women into the labor force with propaganda including not just the iconic Rosie the Riveter advertisements, but a full campaign of patriotic ads, movies, and posters comparing women entering the workforce to the military service their labor replaced, a program resulting in huge success.[15] Once the war ended, businesses systematically pushed women back out of the workforce through the reinvigoration of company policies against married women, accusations of poor work and social qualities, and orchestrated lay-offs—all government

12 *See* Lillian F. McManus, *The Anatomy of a Helping Hand: Women-Owned Small Businesses and Federal Contract Procurement*, 18 WM. & MARY J. WOMEN & L. 625, 639–40 (2012). *See generally* H.R. REP. No. 100-736 (1988).

13 Marcia L. McCormick, *Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 645, 649 (2011).

14 Mirit Eyal-Cohen, *Why is Small Business the Chief Business of Congress?*, 43 RUTGERS L.J. 1 (2011); Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 202 (2009).

15 Barnard & Rapp, *supra* note 14, at 202–03; Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 107–09 (2002).

sanctioned and encouraged.[16] In fact, the government often demanded businesses take such action with legislation such as the Selective Training and Service Act, which required businesses to restore returning veterans to their former employment, displacing the "temporary" female workers that had replaced them during their military service.[17]

In large part, businesses did not welcome women back into the workforce until the Civil Rights Era of the 1960s. Both Congress and President Kennedy attempted to stymie the discriminatory practices re-instated after World War II with the passage of the Equal Pay Act in 1963.[18] Congress quickly followed this bill with the passage of the Civil Rights Act in 1964, specifically Title VII's prohibition of discrimination based on sex. With these pieces of legislation, Congress again sought to improve opportunities and working conditions for women in the workforce.[19] However, according to some contested accounts, Congress only included "sex" in the prohibitions of employment discrimination as an attempt to undermine the overall legislation and never intended to provide actual assistance to women hoping to find employment opportunities.[20] Despite the contradictory accounts, history makes clear that the bill did not include sex as a protected class in its original form; Congress engaged in little legislative debate over the last-minute addition, and ultimately passed the bill with the inclusion of "sex" as a protected class.[21]

Whether the mid-1960s Congress intended to encourage women to enter the workforce or not, by the late 1970s, Congress took up the charge again.[22] The Pregnancy

16 Barnard & Rapp, *supra* note 14, at 204.

17 Murray, *supra* note 15, at 107.

18 *See* Morgan A. Tufarolo, *You Haven't Come a Long Way, Baby: The Courts' Inability to Eliminate the Gender Wage Gap Fifty-Two Years After the Passage of the Equal Pay Act*, 24 AM. U.J. GENDER SOC. POL'Y & L. 305, 306 (2016).

19 Barnard & Rapp, *supra* note 14, at 200.

20 *Id*. at 206.

21 *Id*. at 205–06.

22 *Id*. at 206–07.

Discrimination Act of 1978 aimed to bolster women's place in the workforce by ensuring that pregnancy-related discrimination was considered sex discrimination under Title VII after the Supreme Court held in *Gilbert* that pregnancy-related discrimination did not qualify as sex discrimination under Title VII of the Civil Rights Act of 1964.[23] This development was also met with resistance and criticism.[24] In the early- and mid-1980s, several commentators, notably those leading the far-right political movements of the Reagan era, decried lowered birth rates among white women and suggested that anti-discrimination legislation such as the Equal Pay Act be repealed.[25] Congress took no such action, and these anti-discrimination laws remain in effect today.[26]

In 1988, the United States House of Representatives Committee on Small Business referred to women as a "gold mine of human capital" and recognized the "vital import[ance of] assist[ing] this economic revolution."[27] That year, Congress added section (h) to the Small Business Act of 1953, specifically finding that WOBs are a "major contributor to the American economy."[28] Section (h) recognizes the existence of "overt and subtle" forms of discrimination that negatively impact women's ability to raise capital.[29] It further states that its purpose is to "remove . . . discriminatory barriers . . . [for] women in accessing capital."[30] Despite this recognition and newfound purpose, Congress did not target WOBs through regulation again for several years.

The passage of the Federal Acquisition Streamlining Act in 1994 marked the first time in which the government

23 *Id*. at 200; General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

24 FALUDI, *supra* note 7, at 104.

25 *Id*. at 47–50.

26 *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

27 H.R. REP. No. 100-736, at 2 (1988).

28 Small Business Act of 1953, Pub. L. No. 85-536, § 2(2), 72 Stat. 384 (codified as amended at 15 U.S.C. § 631(h) (1982)).

29 *Id*.

30 *Id*.

specifically reached out to WOBs through procurement programs.[31] Congress set the modest goal of channeling five percent of federal contracting spending through WOBs, but failed to achieve that goal until fiscal year 2015, over twenty years later.[32] Despite the SBA's contention that it finally hit its goal, many women's advocacy groups are doubtful of the SBA's claims of success.[33] In fact, the United States Government Accountability Office released a report in 2014 that found the "SBA . . . lacks reasonable assurance that only eligible businesses receive WOSB [women-owned small business] set-aside contracts."[34] The report goes on to conclude, "[s]et-asides under the WOSB program to date have had a minimal effect on overall contracting obligations to WOSBs and attainment of WOSB contracting goals."[35] The government's failure to meet even a modest goal for set-aside contracts in federal procurement suggests the complicated nature of supporting WOBs despite their "gold mine" potential for the economy.

The SBA suffered from administrative delays related to other legislation as well. For instance, in 2000, Congress passed the Equity in Contracting for Women Act to improve WOBs' access to federal contracts.[36] This legislation provided contracting officials with the authority to set aside certain kinds of contracts for WOBs that met specific restrictions.[37] Despite the legislation's mandate for the SBA to identify underrepresented industries in which to contract with WOBs, the SBA neglected to issue a final rule until 2010 and

31 Kathleen Mee, *Improving Opportunities for Women-Owned Small Businesses in Federal Contracting: Current Efforts, Remaining Challenges, and Proposals for the Future*, 41 PUB. CONT. L.J. 721, 729 (2012).

32 *Id.*; McAvoy, *supra* note 10.

33 McAvoy, *supra* note 10.

34 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-54, WOMEN-OWNED SMALL BUSINESS PROGRAM: CERTIFIER OVERSIGHT AND ADDITIONAL ELIGIBILITY CONTROLS ARE NEEDED 9 (2014).

35 *Id.* at 18.

36 Mee, *supra* note 31, at 729.

37 *Id.* at 729–30.

then only after a lawsuit in which a court found an unreasonable delay.[38]

While the federal government and academic scholarship tend to focus on federal contracting and set-asides when discussing the government's support of WOBs,[39] the government has taken some halting steps towards increasing pathways for women to access debt capital. The first such legislation came in 1988 with the passage of the Women's Business Ownership Act, which prohibited discrimination against women in commercial lending and created the SBA's Office of Women's Business Ownership and the Women's Business Center program.[40] After realizing that only ten to twelve percent of SBA loans were granted to WOBs despite the fact that WOBs comprised roughly a third of all small businesses in the country, Congress decided in 1994 to institute the Women's Pre-Qualification Pilot Loan Program.[41]

Some commentators consider the Women's Pre-Qualification Pilot Loan Program a misnomer because the program does not directly provide loans to WOBs, but offers a pre-qualification letter for loans that female entrepreneurs can present to a lender as evidence of an SBA guaranty.[42] By 1997, the pilot program had expanded to fifty-five sites

38 *Id.* at 730–32.

39 For academic scholarship focused on women-owned businesses in federal contracting, see generally: McManus, *supra* note 12; Rachel N. Herrington, *Five Years In: A Review of the Women-Owned Small Business Federal Contract Program*, 45 PUB. CONT. L.J. 359 (2016); Anna S. Molina, *The Sisyphean Course of Combating Gender Discrimination in the Federal Marketplace for Prime Contracts: Rolling the Boulder of Small Business Size*, 22 CARDOZO J.L. & GENDER 109 (2015); Denise Benjamin Sirmons, *Federal Contracting with Women-Owned Businesses: An Analysis of Existing Challenges and Potential Opportunities*, 33 PUB. CONT. L.J. 725 (2004); Mee, *supra* note 31; *Social Policy Considerations, Classified Contracts, and Access to Contractor Records*, *in* 2-10 FEDERAL CONTRACT MANAGEMENT ¶10.02 (2015).

40 Patricia A. Seith, *Congressional Power to Effect Sex Equality*, 36 HARV. J.L. & GENDER 1, 47 (2013).

41 *Oversight—SBA 7(A) Lending Program: Hearing Before the Comm. on Small Business H.R.*, 104th Cong. 54 (1995).

42 *Id.* at 54–55.

around the country and approved 747 loans worth $76.9 million.[43] Despite the apparent success and numerous mentions of the program in subsequent hearings of the Committee on Small Business in the House of Representatives, the program last received serious attention in 2003, when the founder of The Women's Business Development Center, the largest intermediary for the program, issued a grave warning about the sustainability of such initiatives without further attention and investment from Congress.[44] While the SBA website still advertises various loan programs for underserved communities, there is no mention of the Women's Pre-Qualification Pilot Loan Program or any other women-specific loans.[45] The program appears to have folded into the broader category of SBA loans, which are open to small businesses regardless of the gender composition of their ownership.[46]

Beyond providing basic guidance and knowledge on its website, the SBA does not appear to have ever attempted to directly intervene in the process of equity financing for WOBs.[47] Today, governmental attention towards WOBs primarily remains targeted on federal contracting.[48] A slew of scholarly research explores ways to increase contracting opportunities and their effectiveness for WOBs, but relatively little scholarship is devoted to female

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43 *Women Business Enterprises: Hearing Before the Subcomm. on Government Programs and Oversight of the Comm. on Small Business H.R.*, 105th Cong. 71 (1997).

44 *Revitalizing America's Manufacturers: SBA Business and Enterprise Development Program: Hearing Before the Comm. on Small Business H.R.*, 108th Cong. 102 (2003); 140 CONG. REC. S12,237 (1994).

45 *SBA Loans*, SMALL BUSINESS ASSOCIATION, https://www.sba.gov/starting-business/finance-your-business/loans/sba-loans [https://perma.cc/WX5K-5Y62] (last visited June 20, 2017).

46 *Id.*

47 *Acquiring Financing*, SMALL BUSINESS ASSOCIATION, https://www.sba.gov/starting-business/finance-your-business/loans/acquiring-financing [https://perma.cc/V5MK-UUL4] (last visited June 20, 2017).

48 *See generally* Sirmons, *supra* note 39; Mee, *supra* note 31; Molina, *supra* note 39.

entrepreneurs' access to capital.[49] While there are several local and state initiatives aimed at WOBs and their access to capital, the scope of this Note focuses on the federal government's role in assisting WOBs in accessing the capital markets.

The winding road of the progression and regression of women's status in the workforce sustains ongoing tension in American society.[50] Some commentators contend that for every advancement women make in the workplace, backlash quickly follows.[51] Thus far, the majority of government outreach to WOBs has come in the form of set-asides and preferential treatment in government contracts.[52] Although federal contracting is important, this particular type of outreach affects only those WOBs that are in a position to take advantage of government contracts, has proven largely ineffective, and does little to address the government's conceded concern over female entrepreneurs' access to capital to start or grow their businesses.[53] Further, this focus on federal contracting largely ignores the broader purpose set out by the amended Small Business Act of 1953 that calls for the removal of barriers to capital for WOBs.[54]

49 *See generally* Sirmons, *supra* note 39; Mee, *supra* note 31; Molina, *supra* note 39.

50 *See generally* FALUDI, *supra* note 7.

51 *Id*. at 61. For an example of this idea of backlash in litigation, see Coral Construction, Inc. v. City & County of San Francisco, in which contractors challenged a California law prohibiting discrimination on the basis of race or gender in public contracting. 235 P.3d 947, 956 (Cal. 2010).

52 *See generally* Sirmons, *supra* note 39; Mee, *supra* note 31; Molina, *supra* note 39.

53 *See generally* McAvoy, *supra* note 10; Sirmons, *supra* note 39, at 736–37.

54 Small Business Act § 2, 15 U.S.C. § 631 (2012).

B. The Challenge of Raising Capital as a Female Founder

Common start-up lore indicates that 90% of start-ups fail in their first year.[55] In 2012, the SBA claimed that 50% of start-ups survive their first five years.[56] The Bureau of Labor Statistics provides a similar, if slightly less optimistic, outlook as the SBA.[57] Whatever the actual number, many new businesses do not last. While there are numerous reasons a company might fail, financing is a key ingredient, particularly at the early stage of a company.[58] One study has gone so far as to declare that "outside equity investments [are] essential."[59]

Every new business requires capital to fund operations, inventory, wages, and other expenses of starting and running a company.[60] Businesses have a choice of several

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55 *See* Erin Griffith, *Why Startups Fail, According to Their Founders*, FORTUNE (Sept. 25, 2014), http://fortune.com/2014/09/25/why-startups-fail-according-to-their-founders/ [https://perma.cc/26DS-QVB3]; *see also* Neil Patel, *90% of Startups Fail: Here's What You Need to Know About the 10%*, FORBES (Jan. 16, 2015, 10:00 AM), http://www.forbes.com/sites/neilpatel/2015/01/16/90-of-startups-will-fail-heres-what-you-need-to-know-about-the-10/#3a755fee55e1[https://perma.cc/2PPP-6KE2].

56 *Frequently Asked Questions,* SMALL BUSINESS ASSOCIATION, https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf [https://perma.cc/RFZ4-TTY5] (last visited June 20, 2017).

57 U.S. BUREAU OF LABOR STATISTICS, BUSINESS EMPLOYMENT DYNAMICS: ENTREPRENEURSHIP AND THE U.S. ECONOMY, http://www.bls.gov/bdm/entrepreneurship/bdm_chart3.htm [https://perma.cc/92UM-ATEB] (last modified Apr. 28, 2016).

58 *See* SUSAN COLEMAN & ALICIA ROBB, ACCESS TO CAPITAL BY HIGH-GROWTH WOMEN-OWNED BUSINESSES 2 (2014), https://www.nwbc.gov/sites/default/files/Access%20to%20Capital%20by%20High%20Growth%20Women-Owned%20Businesses%20(Robb)%20-%20Final%20Draft.pdf [https://perma.cc/RW4K-JZE9].

59 CANDIDA G. BRUSH ET AL., GATEKEEPERS OF VENTURE GROWTH: A DIANA PROJECT REPORT ON THE ROLE AND PARTICIPATION OF WOMEN IN THE VENTURE CAPITAL INDUSTRY 2 (2004).

60 *See* Christopher W. Cole, *Financing an Entrepreneurial Venture: Navigating the Maze of Corporate, Securities, and Tax Law*, 78 U.M.K.C. L. REV. 473, 476 (2009).

avenues in order to secure such capital, including internal and external funding sources.[61] WOBs, while comprising a sizeable portion of businesses, have historically struggled more than their male-owned counterparts to secure funding from the capital markets.[62] In 2012, women owned 36% of nonfarm, privately held businesses,[63] a remarkable increase from the less than 5% of businesses that women owned in 1972[64] and even from the 29% of businesses that women owned in 2007.[65] Despite the prevalence of WOBs, access to capital remains many female entrepreneurs' main concern.[66] Though scholars seem conflicted as to why female entrepreneurs lag behind their male counterparts in accessing capital, most agree that WOBs do not raise enough capital.[67] In short, WOBs are significantly less likely to attract investors than firms owned by men.[68]

Many commentators see the amount of capital raised by a small company as a significant predictor of growth.[69] Though WOBs have been growing in overall numbers, their performance in terms of job creation and revenue have often stalled or even backslid in comparison to their male-owned peers.[70] Production from the "gold mine" that the U.S. House of Representatives Committee on Small Business envisioned

61 *See* Susan Coleman & Alicia Robb, *Sources of Funding for New Women-Owned Firms*, 32 W. NEW ENG. L. REV. 497, 497 (2010); *see also* Cole, *supra*, note 60, at 476–77.

62 *See* Alicia M. Robb & Susan Coleman, *Financing Strategies of New Technology-Based Firms: A Comparison of Women- and Men-Owned Firms*, 5 J. TECHNOL. MANAG. INNOV. 30, 30–32 (2010).

63 NAT'L WOMEN'S BUS. COUNCIL, WOMEN-OWNED BUSINESSES (WOBS): NWBC ANALYSIS OF 2012 SURVEY OF BUSINESS OWNERS, https://www.nwbc.gov/sites/default/files/FS_Women-Owned_Businesses.pdf [https://perma.cc/5VJK-HR6K] (last visited June 20, 2017) [hereinafter NWBC FACT SHEET].

64 Sirmons, *supra* note 39, at 728.

65 NWBC FACT SHEET, *supra* note 63.

66 Coleman & Robb, *supra* note 61, at 500.

67 *Id.* at 505.

68 *Id.* at 510.

69 COLEMAN & ROBB, *supra* note 58, at 2.

70 *See id.* at 26.

in 1988 is stymied by a general lack of investment in WOBs, which prevents their growth. Congress went so far as to pass legislation explicitly recognizing that women suffer from discrimination that specifically impacts their ability to secure financing.[71] However, there has been little governmental assistance directed towards increasing WOBs' access to equity markets.[72]

Female entrepreneurs are three times less likely to secure funding through angel investors or venture capitalists than their male counterparts.[73] Less than 5% of venture capital investments made in the last forty years of the Twentieth Century were to women-led[74] businesses.[75] Similarly, only 10% of venture capital dollars between 2010 and 2015 went to a start-up with at least one female founder.[76] Other

71 15 U.S.C. § 631 (2012).

72 For an overview of the Small Business Investment Company program that the government does offer, see *SBIC Program*, SMALL BUSINESS ASSOCIATION, https://www.sba.gov/sbic [https://perma.cc/3SC9-QFTP] (last visited June 20, 2017).

73 COLEMAN & ROBB, *supra* note 58, at 8.

74 Readers may notice that some of the statistics in this Note mention women-led businesses or even companies with at least one female founder in addition to "WOBs." These terms are not interchangeable with one another. Unfortunately, founder gender has not been rigorously studied or reported throughout most of the entrepreneurial community until relatively recently. In instances when terms other than "WOBs" are used, data specifically for WOBs is unavailable, unreliable, or went unfound. For more information, see Gené Teare & Ned Desmond, *Female Founders on an Upward Trend, According to CrunchBase*, TECHCRUNCH (May 26, 2015), https://techcrunch.com/2015/05/26/female-founders-on-an-upward-trend-according-to-crunchbase/ [https://perma.cc/AZ4F-5VZN]. *See also* Tracy Chou, *Where Are the Numbers?*, MEDIUM (Oct. 11, 2013), https://medium.com/@triketora/where-are-the-numbers-cb997a57252#.no6m1z3sm [https://perma.cc/3QAV-2HKX].

75 As noted, women-led businesses and women-owned businesses are not identical. However, these numbers indicate similar funding challenges of companies with female leadership. Additionally, women-founded firms are more likely to have female leadership than their male-counterparts. Barbara J. Orser et al., *Women Entrepreneurs and Financial Capital*, 30 ENTREPRENEURSHIP THEORY & PRAC. 643, 647 (2006).

76 Again, even many of these companies likely do not qualify as women-owned businesses because such a designation requires women to

studies have found even smaller numbers, reporting that only between 1% and 6% of venture-backed companies have any female founders.[77] Despite some commentators' contentions that these differences are due to inherent gender differences such as choice in industry, WOBs received less venture capital funding even after controlling for factors such as high-growth potential and industry.[78] TechCrunch reported that companies with at least one female founder performed slightly better with angel investors than with venture capitalists, capturing 17% of angel investors' dollars between 2010 and 2015.[79] There is wide agreement in the current literature that women are largely excluded from the venture capital and angel investing networks.[80]

One important aspect to consider regarding venture capital funding is that while the actual capital is an incredibly important injection into the company, venture capitalists provide an unparalleled level of resources beyond funding as well.[81] In addition to funding, highly sought venture capitalists are typically experienced business managers and/or former entrepreneurs themselves.[82] Given

own at least 51% of the company, a different metric than having at least one female founder. Gené Teare & Ned Desmond, *The First Comprehensive Study on Women in Venture Capital and Their Impact on Female Founders*, TECHCRUNCH (Apr. 19, 2016), https://techcrunch.com/2016/04/19/the-first-comprehensive-study-on-women-in-venture-capital/ [https://perma.cc/RV5U-DPU4].

77 Jason Greenberg & Ethan R. Mollick, *Activist Choice Homophily and the Crowdfunding of Female Founders*, ADMIN. SCI. Q. (forthcoming) (manuscript at 7), https://poseidon01.ssrn.com/delivery.php?ID=996103073088119030122084087065091068004022029078044001090111002011096102014088075124043107058100031035112102066115101119113088049051007062072118125105088088096083074009061004009075079096124088123076103000124008073113118098108109024088082126104077081121&EXT=pdf [https://perma.cc/KV9T-5WLL] (last visited July, 12, 2017).

78 Orser et al., *supra* note 75, at 648, 659.

79 Teare & Desmond, *supra* note 76.

80 *See* COLEMAN & ROBB, *supra* note 58, at 8; *see also* BRUSH ET AL., *supra* note 59, at 4; Greenberg & Mollick, *supra* note 77, at 5.

81 BRUSH ET AL., *supra* note 59, at 3.

82 *Id.*

their experience, networks, and resources, they often provide an invaluable amount of data, connections, and recruiting pipelines that might prove themselves even more valuable to upstart entrepreneurs than the underlying funding injected into a company.[83]

One study concluded that personal networking is an essential element in securing venture capital financing.[84] That same study went on to find that women are often left out of venture capital communities because of the low participation rate and high attrition rate of women in the overall venture capital industry.[85] Female entrepreneurs rely more often on personal sources of both debt and equity to start and continue their businesses rather than outside sources such as venture capital and angel investments.[86] However, studies have shown that businesses with both personal and external sources of capital are more likely to grow.[87]

The vast majority of venture capital is directed through personal relationships between an entrepreneur and a venture capitalist.[88] While women tend to describe their networks as a mixture of men and women, men tend to view their networks as male-dominated.[89] One commentator noted that top venture capitalists tend to use close business colleagues as "gatekeepers for high-potential deals, and women have rarely been networked into this small inner circle."[90] This lack of network connection with those in the venture capital industry is therefore likely one of the main

83 *Id.*

84 *Id.* at 3–4.

85 *Id.* at 6–7, 9.

86 COLEMAN & ROBB, *supra* note 58, at 2.

87 *Id.* at 2, 7.

88 BRUSH ET AL., *supra* note 59, at 2.

89 *Id.*

90 *Id.* at 3 (quoting Trish Costello, CEO of the Center for Venture Education).

reasons women receive less funding from these types of external sources.[91]

One explanation for the inability of women to break into the inner circles of venture capitalists is that relatively few women serve as venture capitalists themselves.[92] Women represented roughly 10% of management-track venture capitalists in 1995, a percentage that actually decreased to 9% by 2000 despite rapid growth in the overall industry.[93] Additionally, the women who did enter into the elite ranks of venture capital firms represented primarily entry- and mid-level roles rather than partnership or decision-making roles within those firms.[94] TechCrunch found in mid-2016 that women comprised only 7% of full-time investing venture capital partners while comprising roughly 22% of entry- and mid-level roles.[95] While TechCrunch's numbers seem to be positive news for those hoping for an increase in the overall number of women in venture capital, their estimates may be higher than the actual figures as other academic studies have found that women comprise only 14% of venture capitalists (regardless of rank within the firm) as recently as 2010.[96] Finally, the select few women with roles in venture capital firms were more than twice as likely as their male peers to leave the industry.[97] Several studies have suggested that an increase in the number of women in decision-making roles within the venture capital industry would improve outcomes for WOBs because of the key role social networking plays in securing venture capital funding.[98]

This dearth of women in the industry mimics the shortage of women in science, technology, engineering, and mathematics ("STEM") fields, an issue targeted during the

91 COLEMAN & ROBB, *supra* note 58, at 7; BRUSH ET AL., *supra* note 59, at 2–3.

92 Teare & Desmond, *supra* note 76.

93 BRUSH ET AL., *supra* note 59, at 1, 6.

94 *Id.* at 7.

95 Teare & Desmond, *supra* note 76.

96 Greenberg & Mollick, *supra* note 77, at 7.

97 BRUSH ET AL., *supra* note 59, at 9.

98 *Id.* at 2, 13–15; *see also* COLEMAN & ROBB, *supra* note 58, at 28–29.

Obama administration.[99] Though there is less demand to fill open positions in venture capital than in STEM fields because of the ultra-competitive nature of the venture capital industry, supporting and encouraging women to find an interest in finance and venture capital should be included in the government's efforts to encourage diversity in the STEM fields.

Society's gendered view of innovation and entrepreneurship is another challenge women must overcome in obtaining equity funding.[100] In a report to the National Women's Business Counsel, Coleman and Robb reported that "[i]n reviewing a sample of 81 research articles, [researchers] . . . found 'a tendency to recreate the idea of women as being secondary to men and of women's businesses being of less significance.'"[101] These findings suggest that female entrepreneurs must overcome an inherent bias in the predominantly male venture capital field that their business is somehow less compelling than that of their male entrepreneur peers.[102]

Finally, a recent study suggests that simply increasing the number of women in venture capital will not increase the amount of funding female entrepreneurs ultimately receive; rather, only certain types of women are more likely to engage in "activism" to help female entrepreneurs whom they perceive as similarly disadvantaged in their field because of their gender.[103] Therefore, efforts must be made not only to ensure that female representation is sufficient in venture capital and other financing-related avenues, but that the female representation is comprised of women who are

99 *Women in STEM*, OFFICE OF SCIENCE AND TECHNOLOGY POLICY, https://obamawhitehouse.archives.gov/administration/eop/ostp/women [https://perma.cc/A9JR-DFNU] (last visited July 12, 2017).

100 COLEMAN & ROBB, *supra* note 58, at 6–7.

101 *Id.* at 7 (quoting Helene Ahl, *Why Research on Women Entrepreneurs Needs New Directions*, 30 ENTREPRENEURSHIP THEORY & PRAC. 595, 595 (2006)).

102 See *supra* text accompanying notes 92–97 for gender statistics in the venture capital industry.

103 *See* Greenberg & Mollick, *supra* note 77, at 38.

sympathetic to the difficult financial circumstances that WOBs face.

Several of these factors may contribute to findings that women seek equity financing significantly less often than their male counterparts.[104] Even when considering debt rather than equity, studies show that women are less likely to apply for loans, less likely to anticipate loan grants, and more likely to apply for smaller amounts of loans than their male counterparts.[105] Women are more likely to apply for fewer loans or to forego applying for loans at all because of a fear of denial of the loan application.[106] Though this funding might be indispensible for their business, women lag in asking for and receiving each potential source of capital.

In short, WOBs are significantly less likely than their male-owned counterparts to access either debt or equity capital, and when they do, they access either option to a much lesser extent than do male founders. This lack of capital can prematurely limit an enterprise's growth, or even its overall ability to successfully continue as a going concern.[107] This disparate access to capital could explain the recent plateau in creation of WOBs and their ongoing struggle to reach high-growth phases.[108] To re-tap the "gold mine" of women as drivers of the workforce and the economy, the federal government must engage in more effective methods of providing access to capital for female entrepreneurs.[109]

C. Crowdfunding and the CROWDFUND Act

Crowdfunding is a relatively new term and was first used to facilitate donations or product pre-purchases rather than

104 Orser, *supra* note 75, at 655.

105 Robb & Coleman, *supra* note 62, at 37.

106 COLEMAN & ROBB, *supra* note 58, at 15–16.

107 BRUSH ET AL., *supra* note 59, at 3–4.

108 *See* Section II.A.

109 *See* H.R. REP NO. 100-736, at 15–16 (1988).

to issue equity securities.[110] The idea of crowdfunding grew out of the combination of "crowdsourcing," which applies the theory that a group of individuals can, on average, find better solutions to problems than any one individual, and microfinance.[111] Crowdfunding simply accesses the power of the public, usually through the Internet, to raise money.[112] This sub-section first discusses the history of crowdfunding and its rapid adoption within the United States, then discusses the regulatory environment that prohibited equity crowdfunding before the promulgation of the CROWDFUND Act, and finally explains how specifically the CROWDFUND Act changed securities regulations in order to allow for equity crowdfunding while still attempting to prevent fraudulent activities.

1. The Meteoric Rise of Crowdfunding

While there are several models of crowdfunding, including the donation model (or reward model), the pre-purchase model, and the lending model, this Note focuses on the equity model, sometimes called "equity crowdfunding" or "regulation crowdfunding," with examples taken from the reward model.[113] This Note uses equity crowdfunding and regulation crowdfunding interchangeably to refer to the CROWDFUND Act's newly allowable investment opportunities.[114]

110 C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 10–11 (2012).

111 *Id.* at 29; John S. Wroldsen, *The Crowdfund Act's Strange Bedfellows: Democracy and Start-Up Company Investing*, 62 KAN. L. REV. 357, 359–60 (2013).

112 Bradford, *supra* note 110, at 10.

113 *Id.* at 14–15; David Mashburn, *The Anti-Crowd Pleaser: Fixing the Crowdfund Act's Hidden Risks and Inadequate Remedies*, 63 EMORY L.J. 127, 136 (2013).

114 While this Note refers to "equity crowdfunding," it should be noted that the CROWDFUND Act allows for offerings of both debt and equity, and no distinction was made between the two during data collection.

While crowdfunding is a relatively new term, the concept and its precursors have existed for quite some time.[115] One of the oft-cited first examples of crowdfunding occurred after France's donation of the Statute of Liberty to the United States.[116] The granite pedestal upon which the statue sits was partially funded with donations, many of which were under one dollar, from 125,000 people.[117] With the advent of the Internet, crowdfunding platforms developed that could reach a far broader base than ever before.[118] ArtistShare, an early crowdfunding platform, launched in 2003 and connected artists with a fan base willing to invest upfront for the promise of produced music.[119] ArtistShare considered itself a "fan-funding platform" as crowdfunding had yet to become the common vernacular for such platforms.[120] IndieGoGo, which was founded in 2008, and Kickstarter, which was founded in 2009, are the leading reward-based crowdfunding platforms today.[121]

To participate in modern Internet-based crowdfunding, a potential "investor" may log on to a "funding platform" (a crowdfunding website such as Kickstarter, IndieGoGo, or Kiva), learn about an idea they would like to see come to life,

115 *See generally* Bradford, *supra* note 110.

116 *See* Kelly Mathews, *Crowdfunding, Everyone's Doing It: Why and How North Carolina Should Too*, 94 N.C. L. REV. 276, 287–88 (2015); Alma Pekmezovic & Gordon Walker, *The Global Significance of Crowdfunding: Solving the SME Funding Problem and Democratizing Access to Capital*, 7 WM. & MARY BUS. L. REV. 347, 364–65 (2016).

117 DAVID M. FREEDMAN & MATTHEW R. NUTTING, EQUITY CROWDFUNDING FOR INVESTORS: A GUIDE TO RISK, RETURNS, REGULATIONS, FUNDING PORTALS, DUE DILIGENCE, AND DEAL TERMS 2 (2015).

118 Bradford, *supra* note 110, at 5.

119 Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F. L. REV. 307, 309 (2015).

120 *Id*. at 310.

121 Bradford, *supra* note 110, at 16; *see also About Us*, INDIEGOGO, https://www.indiegogo.com/about/our-story [https://perma.cc/M4ZW-8L5L] (last visited June 20, 2017); *Pressroom*, KICKSTARTER, https://www.kickstarter.com/press?ref=hello [https://perma.cc/C2SD-57Y7] (last visited June 20, 2017).

and pledge money to the cause.[122] Depending on the platform and assuming the project meets its funding goal, the many investors who pledge money are eventually charged the amount that they pledged and the project creator receives the funds they sought in order to execute their idea.[123] The funding platform will take a cut of the funds extended to the creator of the project.[124] Under the reward and pre-purchase models, currently utilized on platforms such as Kickstarter and IndieGoGo, investors in the project often receive a copy of what was created, an experience related to the project, or some other "reward" for helping to fund the project.[125] For example, one of the most successful crowdfunding projects to date is the Pebble smart watch.[126] Pebble Technology's original goal was to raise $100,000 through Kickstarter in order to manufacture and distribute its smart watch product (also named Pebble), but nearly 70,000 people pledged almost $10.3 million in order to bring the underdog's invention, which competes with Apple and Google products, to market.[127] Rewards for pledging to the campaign varied depending on amount "donated" from receiving the smart watch itself to a customized watch face to simply receiving 'exclusive' updates from the company.[128] Other projects have featured more outlandish rewards, such as the opportunity to "take shrooms" with former Nine Inch Nails drummer, Josh Freese, in return for $75,000 to fund an album.[129]

122 *See, e.g.*, *Pressroom*, *supra* note 121.

123 *Id.*

124 Bradford, *supra* note 110, at 19.

125 *Id.* at 16–17.

126 Rachel Metz, *How Pebble is Killing It on Kickstarter*, MIT TECHNOLOGY REV. (June 2, 2016), https://www.technologyreview.com/s/601602/how-pebble-is-killing-it-on-kickstarter/ [https://perma.cc/C7BC-5AVW].

127 *Id.*; *Pebble: E-Paper Watch for iPhone and Android*, KICKSTARTER, https://www.kickstarter.com/projects/getpebble/pebble-e-paper-watch-for-iphone-and-android [https://perma.cc/5S2Z-W4T8] (last visited June 20, 2017).

128 *Pebble: E-Paper Watch for iPhone and Android*, *supra* note 127.

129 Bradford, *supra* note 110, at 18.

The vast amount of success enjoyed by crowdfunding portals such as Kickstarter and IndieGoGo quickly made "crowdfunding" a household term.[130] In a little under two decades, crowdfunding developed from an obscure concept without a name to catching the interest of the White House as an object for de-regulation.[131]

Equity crowdfunding has emerged as a potential solution for reducing the need for female entrepreneurs to break through the traditional social network barriers described in Section II.B. and giving female entrepreneurs direct access to funders that are more apt to contribute to their projects.[132] Some studies have shown that the simple act of providing access to more female potential investors can have positive effects on the outcomes of WOBs seeking funding, as a 2014 Diana Project study noted that "venture capital firms with women partners are twice as likely to invest in companies with a woman on the management team" and "three times more likely to invest in companies with women CEOs."[133]

A recent study suggests that women are more likely to successfully raise capital through crowdfunding than through traditional means such as venture capital because of improved access to the type of people willing to help female entrepreneurs in disadvantaged fields.[134] Therefore, the White House touted the CROWDFUND Act as a way of improving access to capital for WOBs.[135]

Despite crowdfunding's youth, it has quickly proven to be a helpful tool for connecting businesses with their potential customer bases, raising money through donations, and

130 *See* Mashburn, *supra* note 113, at 137.

131 Mathews, *supra* note 116, at 288–89.

132 Greenberg & Mollick, *supra* note 77, at 7.

133 CANDIDA G. BRUSH ET AL., DIANA REPORT WOMEN ENTREPRENEURS 2014: BRIDGING THE GENDER GAP IN VENTURE CAPITAL 11 (2014). *But see* Greenberg & Mollick, *supra* note 77, at 37–38 (explaining recent findings that increasing the number of women investing in companies does not necessarily increase the amount of money invested in WOBs).

134 Greenberg & Mollick, *supra* note 77, at 37–38.

135 AMERICAN JOBS ACT: IMPACT FOR WOMEN, *supra* note 3, at 1.

generating conversations between founders and funders.[136] The broad reach of crowdfunding platforms into the "crowd" diversifies the audience with which founders can engage.[137] While anti-fraud and other protective measures are certainly needed to some degree, equity crowdfunding offers a chance for entrepreneurs, particularly women, to solve one of their foremost problems—access to capital—more cheaply and efficiently.[138]

2. Regulatory Environment Prior to the CROWDFUND Act

Prior to the CROWDFUND Act, equity crowdfunding (and some crowdfunding involving debt) violated federal securities laws—namely, the Securities Act of 1933, which was originally enacted in the wake of the Great Depression to stymie securities fraud through disclosure and registration with the SEC.[139] Before the CROWDFUND Act, the Securities Act of 1933 prevented the application of crowdfunding to equity offerings both on the offeror and offeree sides.[140] Firms could not offer securities online because of SEC registration requirements and offerees could not participate in such offerings because of the requirements in place for accredited investors.[141] Finally, the regulations restricted intermediaries from selling securities with requirements for registration.[142] The Securities Act of 1933 lists several financial instruments that qualify as "securities," including notes, stock, and investment

136 *See* Mathews, *supra* note 116, at 299–300.

137 *Id.*

138 *Id.*; Bradford, *supra* note 110, at 5; Greenberg & Mollick, *supra* note 77, at 4.

139 Bradford, *supra* note 110, at 6; Matthew O'Brien, *Choice of Forum in Securities Class Actions: Confronting "Reform" of the Securities Act of 1933*, 28 REV. LITIG. 845, 846 (2009).

140 Bradford, *supra* note 110, at 30. *See generally* Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012).

141 *See* Mashburn, *supra* note 113, at 132.

142 *See* Bradford, *supra* note 110, at 24.

contracts.[143] For purposes of this Note, a securities offering, or "offering," refers to any exchange of money for stock or debt in the offeror entity. Registration for a full-blown securities offering under these regulations is typically prohibitively expensive and time-consuming for early-stage startups.[144] Congress developed these restrictive regulations in order to prevent potential securities fraud and to increase investor confidence in public offering markets.[145]

In an attempt to improve investor confidence in the companies' financial statement disclosures, Congress enacted the 2002 Sarbanes-Oxley Act, which further strengthened the reporting requirements for businesses seeking to raise capital.[146] Congress enacted Sarbanes-Oxley in the wake of accounting scandals at several large companies, such as Enron and WorldCom, which lost investors billions of dollars and reduced investor confidence in the markets.[147] Section 404 of Sarbanes-Oxley requires an independent audit of internal controls on financial reporting and has proven particularly costly and time-consuming, especially for smaller companies.[148] While Congress directed Sarbanes-Oxley at public companies, provisions such as Section 404 and its expensive compliance costs are concerning for any company considering an Initial Public Offering ("IPO").[149] Some commentators even blamed Sarbanes-Oxley for the IPO slow-down in the early 2000s.[150]

143 15 U.S.C. § 77b(a)(1) (2012); *see also* Mashburn, *supra* note 113, at 138.

144 Bradford, *supra* note 110, at 42–43.

145 *See* Mashburn, *supra* note 113, at 146–47.

146 Sarah Y. Rifaat, *It's Payback Time, or Is It?: An Argument to Apply Universal Heightened Standards to All Employee Stock-Based Individual Account Programs in the Post-Enron Era and Why Sarbanes-Oxley's Preventive Measures Do Not Adequately Protect Employee Investor Interests*, 32 PEPP. L. REV. 671, 709–710 (2005).

147 *Id.*

148 Carlos Berdejó, *Going Public After the JOBS Act*, 76 OHIO ST. L.J. 1, 15–16 (2015).

149 *Id.*

150 *America as Number Two: Hong Kong Again Beat the NYSE in New Stock Offerings in 2011*, WALL ST. J. (Jan. 4, 2012),

Under the Securities Act of 1933 and Sarbanes-Oxley, Congress required companies to register with the SEC and engage in costly disclosures in order to offer securities, go public, and stay public.[151] Sarbanes-Oxley increased the cost of these disclosures further by creating stringent requirements for the disclosures and personal liability for officers of offending companies.[152] Congress developed these strict disclosure requirements to increase investors' ability to conduct appropriate due diligence on potential investments, to increase investor confidence in public capital markets, and to reduce fraud.[153] While these rationales are unquestionably important considerations in securities law, other scholarly literature covers them extensively and they are largely outside the scope of this particular Note.[154]

Sarbanes-Oxley had a more pronounced impact on small issuers of equity, namely, small businesses.[155] With the passage of the JOBS Act in 2012, Congress sought to rectify that situation.[156] The JOBS Act specifically created a new category of company called "emerging growth companies" which have annual gross revenue of less than $1 billion.[157] Prior to the JOBS Act, the SEC promulgated some exemptions for small companies in order to reduce disclosure

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http://www.wsj.com/articles/SB10001424052970204720204577129052317747614 [https://perma.cc/754B-2QN2]; Berdejó, *supra* note 148, at 3.

151 Berdejó*, supra* note 148, at 3.

152 Tara L. Dunn, *The Developing Theory of Good Faith in Director Conduct: Are Delaware Courts Ready to Force Corporate Directors to Go Out-of-Pocket After* Disney IV*?,* 83 DENV. U.L. REV. 531, 533 (2005).

153 Sarah O'Rourke Schrup, *Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 1512(C)(1)*, 102 J. CRIM. L. & CRIMINOLOGY 25, 41–42 (2012).

154 *See generally* WILLIAM E. KNEPPER ET AL., LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 13.09; Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007); Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149 (2004).

155 Berdejó, *supra* note 148, at 3.

156 *Id*.

157 Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 § 101(b)(2) (2012).

and compliance costs, the most recent of which were in 2008.[158] These exemptions included more relaxed disclosure requirements for firms with an equity float (shares available for public trading) of less than $75 million or less than $50 million of annual revenue if they could not calculate the equity float.[159] These relaxed requirements allowed such firms to include two years of audited financial statements rather than three, eliminated the requirement to disclose selected financial data for the last five years, and reduced the executive compensation requirements, among other provisions.[160]

Under the securities regulations in existence prior to the CROWDFUND Act, emerging growth companies primarily relied on Rule 506 of Regulation D, which allowed only accredited investors to participate in the securities offering.[161] Title III further democratizes securities offerings by including the general public, or the "crowd," in these types of securities offerings, subject to some restrictions discussed in the following section.[162]

Prior to Title III, equity and some debt crowdfunding violated securities regulations on the part of offerors, offerees, and any unregistered intermediaries such as funding portals.[163] The CROWDFUND Act provided entrepreneurs hoping to take advantage of equity crowdfunding some relief from these restrictions.[164] Specifically, Title III provided a new exemption under the Securities Act of 1933.[165]

The SEC has historically recognized that costly disclosure requirements and other compliance costs disproportionately impact small businesses, so they have routinely promulgated

158 Berdejó*, supra* note 148, at 20.

159 *Id*. at 20–21.

160 *Id*. at 21.

161 Wroldsen, *supra* note 111, at 362.

162 *Id*. at 363.

163 *See supra* Section II.C.2.

164 Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, 15 U.S.C. § 302 (2012).

165 *Id*.

exemptions to securities regulations for such companies.[166] However, the combined requirements of the Securities Act of 1933 and its many amendments, as well as Sarbanes-Oxley in 2002 in the wake of various financial crises and scandals, ratcheted up the compliance expenses for many companies, including small businesses.[167] Obama's JOBS Act arose out of a desire to respond to the economic turndown in 2008, the reduction in activity in the IPO markets, and a perception that the regulatory burdens were too great for small businesses, in particular, to bear.[168] However, the administration still gave significant weight to the countervailing concerns of the continued need for regulatory oversight in the capital markets.[169]

3. The Adoption of the CROWDFUND Act and the Resulting Regulatory Changes

President Obama and his administration urged the passage of the American Jobs Act in 2011 in order to boost the economy.[170] Congress passed a portion of that act, the JOBS Act, on March 27, 2012, and President Obama signed it into law on April 5, 2012.[171] Title III of the JOBS Act is known as the CROWDFUND Act.[172] The White House promoted the overall legislation as providing a multitude of benefits for WOBs and specifically referenced helping WOBs

166 Berdejó, *supra* note 148, at 20.

167 *See* Berdejó, *supra* note 148, at 3.

168 Stacie K. Townsend, *The Jumpstart Our Business Startups Act Takes the Bite Out of Sarbanes-Oxley: Adding Corporate Governance to the Discussion*, 99 IOWA L. REV. 893, 899 (2014).

169 *Id.* at 902.

170 *Obama Calls on Congress to Quickly Pass His 'American Jobs Act'*, CNN (Sept. 9, 2011, 3:00 PM), http://www.cnn.com/2011/POLITICS/09/08/obama.jobs.plan/ [https://perma.cc/53GV-HYN2].

171 *Jumpstart Our Business Startups (JOBS) Act*, SEC, https://www.sec.gov/spotlight/jobs-act.shtml [https://perma.cc/UZW2-3564] (last visited June 20, 2017).

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

access capital to start and grow their businesses as motivation for the legislation.[173] The SEC adopted the final rules for the CROWDFUND Act over three years later, on October 30, 2015, and those rules ultimately took effect on May 16, 2016.[174] Therefore, these new regulations have been in effect for approximately eight months at the time this Note was written. While this is an insufficient time in which to conclusively determine whether the CROWDFUND Act is a boon to WOBs and female entrepreneurs in general, the research suggesting that equity crowdfunding may offer WOBs improved access to capital deserves scrutiny early and often in the legislation's lifetime in order to track WOBs' success in accessing such capital. This Note specifically seeks to determine whether WOBs were particularly motivated to take advantage of this new opportunity for securing financing within the first eight months of the changes to the regulation. Conclusively determining whether the CROWDFUND Act has improved women's access to capital requires additional and on-going review.

The CROWDFUND Act's main aim is to democratize the equity markets for small and emerging growth companies by easing the requirements of the existing securities regulations under the Securities Act of 1933.[175] The government and some commentators heralded this democratization of equity markets as a win for female entrepreneurs, minority-owned businesses, and other traditionally disenfranchised persons.[176] Recent empirical studies have shown that "women are more likely to succeed at crowdfunding than

173 AMERICAN JOBS ACT: IMPACT FOR WOMEN, *supra* note 3, at 1.

174 *SEC Adopts Rules to Permit Crowdfunding*, SEC (Oct. 30, 2015), https://www.sec.gov/news/pressrelease/2015-249.html [https://perma.cc/2CKZ-KU5F]; *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers*, SEC (May 13, 2016), https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm [https://perma.cc/46VK-M8C3].

175 Berdejó, *supra* note 148, at 1.

176 Andrew A. Schwartz, *The Digital Shareholder*, 100 MINN. L. REV. 609, 624 (2015); Greenberg & Mollick, *supra* note 77, at 34–35.

men."[177] Similarly, "female backers are comparatively more likely to support female founders than male founders."[178] Access to this new source of (female) funders, therefore, does logically seem like a potentially successful pathway for WOBs to increase their equity fundraising efforts and successes given their challenges with traditional financing sources.[179]

The JOBS Act preserved some of the SEC's relaxed disclosures under the 2008 exemptions.[180] These include the option to include only two years of audited financial statements and most of the executive compensation exemptions.[181] After the offering closes, Title III requires additional, though limited, annual disclosures that are reported back to the investors, or crowd, that funded the securities.[182] Additionally, the new regulations restrict securities offerings to registered funding portals, which must meet various regulatory hurdles themselves, including investor education, refraining from endorsing or marketing specific offerings, and disseminating the required public disclosures to potential investors.[183]

The most drastic change, and main thrust, of the CROWDFUND Act is Congress' allowance of equity crowdfunding.[184] The CROWDFUND Act reduces—although by how much remains controversial—the amount of money and time it takes in order for small businesses, now deemed "emerging growth companies," to raise capital online.[185]

177 Greenberg & Mollick, *supra* note 77, at 1.

178 *Id.* at 361.

179 *See supra* Section II.B.

180 Berdejó, *supra* note 148, at 22.

181 *Id.*

182 Wroldsen, *supra* note 111, at 372.

183 *Id.* at 367.

184 Patricio Robles, *The CROWDFUND Act: Everything You Need to Know*, ECONSULTANCY (Apr. 6, 2012), https://econsultancy.com/blog/9548-the-crowdfund-act-everything-you-need-to-know/ [https://perma.cc/7XWN-HEXT].

185 Christine Hurt, *Pricing Disintermediation: Crowdfunding and Online Auction IPOs*, 2015 U. ILL. L. REV. 217, 248 (2015).

Specifically, the Act creates a new exemption to the Securities Act of 1933's registration requirements discussed above.[186] The CROWDFUND Act allows a potential issuer to raise up to $1 million from investors in a twelve-month period.[187] Rather than the onerous disclosure requirements discussed above, the issuer must disclose basic information about the company, directors, and the offering itself.[188] The financial statements that an issuer must disclose depend upon the target offering amount, but no audited financial statements are required for offerings under $500,000.[189] However, issuer executives can be held liable for material misstatements and omissions under the Act.[190]

On the investor side, the CROWDFUND Act eased the requirements for issuing securities to investors who have not attained "accredited investor" status. The Act requires that contributors invest no more than "the greater of $2000 or five percent of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000" and no more than ten percent of the annual income or net worth of an investor if her annual income or net worth is at least $100,000, with no investor to exceed a maximum investment of $100,000.[191]

Finally, the CROWDFUND Act also created regulatory requirements for brokers or funding portals that wish to act as intermediaries in equity crowdfunding offerings.[192] These requirements include registering with the SEC, providing

186 Stuart Evan Smith, *The Securities and Exchange Commission's Proposed Regulations Under the Crowdfund Act Strike a Necessary Balance Between the Burden of Disclosure Placed on Issuers of Securities and Meaningful Protection for Unsophisticated Investors*, 44 U. BALT. L. REV. 127, 127 (2014).

187 Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, 15 U.S.C. § 302(a) (2012).

188 *Id*. at § 302(b).

189 *Id*.

190 *Id*.

191 *Id*. at § 302(a).

192 *Id*. at § 304.

potential investors with the required disclosures from the issuers, monitoring requirements, and prohibiting issuers from collecting any funds unless their target offering amount is met.[193] This last requirement codifies one of Kickstarter's rules, which forces issuers to engage in an all-or-nothing scenario in which issuers receive no money unless they are able to raise a pre-determined goal amount.[194]

Overall, the CROWDFUND Act reduced regulatory requirements for both investors and entrepreneurs.[195] This diversified the potential pool of investors that small growth companies can access and slightly reduced the costs to small companies of raising a round of financing.[196] Though critics on both sides condemn the legislation as still overly restrictive and expensive for small companies on the one hand, and as ineffective in preventing fraud on the other, the CROWDFUND Act did at least open the possibility of using equity crowdfunding to small businesses across the country, and it allowed for contributions from the public other than the wealthy elite defined as "accredited investors."[197]

193 Bradford, *supra* note 110, at 95, 98.

194 *Id.* at 19.

195 Jeremy Derman, *Does the SEC Rule the Job Creation Roost? Squaring the SEC Rulemaking with the JOBS Act's Relaxation of the Prohibition Against General Solicitation and Advertising*, 47 SUFFOLK U. L. REV. 139, 154 (2014).

196 Hurt, *supra* note 185, at 261. Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1467 (2013).

197 For criticism of the CROWDFUND Act, see Patrick Archambault, *How the SEC's Crowdfunding Rules for Funding Portals Save the Two-Headed Snake: Drawing the Proper Balance Between Integrity and Cost*, 49 SUFFOLK U. L. REV. 61, 67–68 (2016); Benjamin P. Seigel, *Title III of the JOBS Act: Using Unsophisticated Wealth to Crowdfund Small Business Capital of Fraudsters' Bank Accounts?*, 41 HOFSTRA L. REV. 777, 780 (2013); Mashburn, *supra* note 113, at 132–33. For praise of the CROWDFUND Act, or at least the theories behind it, see Wroldsen, *supra* note 111, at 357–58; Smith, *supra* note 186, at 132.

III. FIRST MONTHS OF THE CROWDFUND ACT

Equity crowdfunding officially became legal on May 16, 2016.[198] This Section will discuss popular commentators' reviews of the first few instances of regulation crowdfunding before turning to the author's own dataset of companies that filed to issue securities through regulation crowdfunding between May 2016 and January 2017. This Section additionally compares the instances of WOBs seeking funding through equity crowdfunding to the estimated percentages of WOBs receiving financing through venture capital and angel investments discussed in Section II.

A. Early Media Attention on the Results of Regulation Crowdfunding

In September 2016, Venture Beat, a popular blog devoted to venture capital news, reported on the first quarter of regulation crowdfunding.[199]According to that article, eleven companies closed offerings in the first quarter of available equity crowdfunding under the CROWDFUND Act.[200] Of those eleven companies, only five hit their funding targets and therefore received the collected funds.[201] Another blog reported in late August 2016 that the SEC received eighty-two filed campaigns since the opening on May 16 of that year.[202] According to that article, three companies had

198 Amy Wan, *Title III Crowdfunding Became Legal on May 16: What It Does & What's Still Lacking*, CROWDFUNDINSIDER (May 17, 2016, 9:24 AM), http://www.crowdfundinsider.com/2016/05/85696-title-iii-crowdfunding-became-legal-on-may-16-what-it-does-whats-still-lacking/ [https://perma.cc/663Q-ZTNX].

199 Sherwood Neiss, *Here's What the First Quarter of Regulation Crowdfunding Has Taught Us*, VENTURE BEAT (Sept. 3, 2016, 4:10 PM), http://venturebeat.com/2016/09/03/heres-what-the-first-quarter-of-regulation-crowdfunding-has-taught-us/ [https://perma.cc/C2TX-3KA7].

200 *Id.*

201 *Id.*

202 *Crowdfund Insights—Quarter 1 for Regulation Crowdfunding Results*, CROWDFUND CAPITAL ADVISORS (Aug. 20, 2016), http://crowdfundcapitaladvisors.com/crowdfund-insights-quarter-1-regulation-crowdfunding-results/ [https://perma.cc/FU3M-2Y8W].

already surpassed the $1 million regulated cap on capital and had to return a portion of the pledged capital to investors in order to comply with Title III's limits.[203] Many commentators considered these early signs for equity crowdfunding as generally positive overall.[204]

The current sample is still too limited to make conclusive predictions about the types of companies that will avail themselves of equity crowdfunding or which companies are likely to find the greatest success under Title III's new model of capital raising. However, the early results are an interesting glimpse into the types of companies that actively seek funding through Title III's new avenues, so this Note will briefly review the companies highlighted in the Venture Beat article before moving on to the author's collected dataset.

Venture Beat named the following companies as closing their equity crowdfunding in the first quarter of availability: Native Hostel Austin LLC; Brewer's Table – East Austin, LLC; Legion M Entertainment, Inc.; MF Fire; MobileSpike, Inc.; N1CE USA, LLC; Pipeline Sports Network, Inc.; GameTree PBC; NextRX Inc.; Allen Hydro Energy Corp; and Uncensored Freedom Inc.[205] Based on this author's review of regulatory filings in conjunction with each of the securities offerings for each entity, none of the eleven companies that closed in the first quarter in which Title III was available to entrepreneurs were WOBs.[206] Though this sample size is too small to make significant conclusions, several explanations could account for this phenomenon, which include the possibility that the new regulations were not adequately marketed to female entrepreneurs, WOBs are less likely to partake in new and untested potential avenues for capital, or that women remain less willing to ask for equity-based capital even when presented with a democratized platform of potential funders that increases their chances of actually

203 *Id.*

204 *Id.*; Neiss, *supra* note 199.

205 Neiss, *supra* note 199.

206 These filings were accessed by the author through the SEC's EDGAR database of publicly searchable filings.

receiving requested capital. Additionally, technology, a male-dominated industry, was the most likely sector to engage in an offering.[207] Perhaps equity crowdfunding, and the investors participating, lend themselves to male-dominated industries such as technology rather than industries that have higher incidences of female entrepreneurship. However, retail was the fifth top industry by offering, which has a high incidence of female entrepreneurs.[208]

B. Author-Collected Data from the First Eight Months of Regulation Crowdfunding

1. Methodology

The author collected data on the 185 companies that have filed a Form C, per the SEC's required registration process for regulation crowdfunding, in preparation for a securities offering through the CROWDFUND Act between May 16, 2016 and January 10, 2017.[209] This data is publicly available via the SEC's database, EDGAR.[210] The author then followed a methodology similar to the methodology CrunchBase utilized when the platform attempted to quantify the number of female founders for a given period of time.[211] Specifically, the author reviewed the SEC filings related to Form C. Most companies included a capitalization table detailing the ownership breakdown of the company in an offering memorandum or exhibit to Form C. Disclosure of this information is recommended via an "Optional Question & Answer Format" that the SEC provides along with Form

207 *See Crowdfund Insights—Quarter 1 for Regulation Crowdfunding Results, supra* note 202.

208 *See id.*

209 SEC, FORM C UNDER THE SECURITIES ACT OF 1933 (2016), https://www.sec.gov/about/forms/formc.pdf [https://perma.cc/2W6V-F5VK] [hereinafter FORM C].

210 *See EDGAR Company Filings*, SEC, https://www.sec.gov/edgar/searchedgar/companysearch.html [https://perma.cc/5DW5-36R5] (last visited June 20, 2017).

211 *See* Teare & Desmond, *supra* note 74.

C.[212] However, the SEC does not require this information and not all companies provided it in their disclosures. When companies did not provide this information, the author reviewed any disclosures relating to the directors, officers, and management of the company and recorded if at least one director or officer was female. The author determined whether a listed person was female after considering a combination of factors including the director's or officer's name; gender pronouns used in any biographical sections and throughout the disclosures; and external sources such as the company's website, media interviews, press releases, and social media.

Even when a capitalization table or other disclosure existed, the sex of the owners was not always clear. This was particularly true when ownership was divided amongst several LLCs or other entities with undisclosed ownership or when companies disclosed only owners with at least 20% equity ownership of the company and those owners did not hold at least 51% of the company. Therefore, the author followed a methodology similar to CrunchBase's and recorded when a company listed at least one female director or officer.[213] The author also recorded when a company's ownership made it conclusively a WOB or not. The author determined that a company was conclusively a WOB if at least 51% of a company was disclosed as owned by women. This definition of a WOB as 51% women-owned is consistent with the definition provided by the SBA and the Women's Business Enterprise National Council, which is the largest third-party certifier of women-owned businesses.[214] However,

212 FORM C, *supra* note 209, at 7.

213 As mentioned earlier in this Note, a company with one female co-founder is not necessarily women-owned. WOB status requires that women own at least 51% of the company. Any statements using this data are over-inclusive.

214 *Is There an SBA Contracting Program for Me?*, SMALL BUSINESS ASSOCIATION, https://certify.sba.gov/am-i-eligible [https://perma.cc/LZP4-ZNB2] (last visited June 20, 2017); *Introduction to Certification*, WBENC, http://www.wbenc.org/certification/ [https://perma.cc/MX6U-XEEL] (last visited June 20, 2017).

those organizations additionally require that 51% of the business be controlled or managed by women.[215] This second qualification is unfortunately impossible to determine based on Form C regulation crowdfunding disclosures.

2. Analysis of Author's Findings

Out of 185 companies, the author could not determine the sex of ownership for 2 companies, both of which filed the minimum required information for crowdfunding and both of which withdrew their crowdfunding offerings before the offerings closed. Similarly, 55 of the companies did not provide enough data in order to determine if they qualify as WOBs or not, but of these 55, 40 did not list a single female director, officer, or top investor, and, therefore, seem unlikely to qualify as WOBs. Of the 183 companies where ownership sex was identified, 40 companies, or 22%, had at least one female director, officer, or investor. This is slightly higher, but similar to, the 18% of companies CrunchBase found with at least one female founder in 2014.[216] However, only 15 of the companies were confirmed as WOBs, which represents just over 8% of the dataset. These numbers are roughly in line with the estimates of the percentage of venture capital and angel investments made in WOBs.[217]

The quantitative results of the author's findings are laid out below in Table 1:

215 *Is There an SBA Contracting Program for Me?, supra* note 214; *Introduction to Certification*, *supra* note 214.

216 Teare & Desmond, *supra* note 74.

217 *See supra* Section II.B.

TABLE 1: FINDINGS

Metric	Number of Filings	Percentage of Filings
Total Regulation Crowdfunding Filings	185	-
Filings with Inconclusive Ownership Sex	2	1.1%
Filings with Inconclusive WOB-Status	55	29.7%
Filings with at least One Female Director, Officer, or Investor	40	21.6%
Filings Confirmed as WOBs	15	8.1%

This early determination that WOBs seem to seek no more equity crowdfunding than they receive in other, more traditional forms of fundraising suggests that equity crowdfunding has not increased the number of WOBs seeking funding as some commentators hoped.[218] Although many of the offerings scrutinized had not yet closed, if the first quarter with 11 offerings and only 5 successful closings is any indication, a far smaller percentage of companies will close their offerings, possibly drastically changing the percentage of WOBs that receive funding.[219]

Although there is not yet sufficient data to conduct more significant analysis on the prevalence of WOBs availing themselves of the new equity crowdfunding rules under Title III, no WOBs closed offerings in the first quarter despite making up a significant portion of the new segment of "emerging growth companies" in the country.[220] Similarly, only about 8% of companies seeking equity through crowdfunding in the first roughly eight months of availability were WOBs.[221] These data points do not bode

218 *See supra* Part I.

219 *Crowdfund Insights—Quarter 1 for Regulation Crowdfunding Results, supra* note 202.

220 *See supra* Section III.A.

221 Data is the author's own.

well for the early suggestions and legislative hopes that equity crowdfunding would provide a more accessible route to capital for female entrepreneurs.[222] Additional monitoring and analysis is needed to estimate the incidence of female entrepreneurs availing themselves of equity crowdfunding in the coming years, and the government should ensure that WOBs are sufficiently aware of this new avenue for requesting capital from a more diversified group of investors. In sum, the first months of equity crowdfunding did not result in any significant increase in WOBs attempting to access capital.

3. Shortcomings

As previously mentioned, in order to qualify for government programming such as federal contracting set-asides, women-owned businesses must show that they are at least 51% owned and controlled by women.[223] However, Form C does not currently allow researchers to determine whether these metrics are both met. Therefore, some of the 15 companies confirmed as WOBs may not actually qualify under the SBA's definition if parties other than their equity owners control them. Similarly, it is not always possible to determine the sex of listed or unlisted owners of a company given that the SEC does not require companies to provide capitalization tables, list owners, or otherwise disclose owners' identities. Given the manual nature of researching the sex of company owners combined with the inconsistent disclosures provided by filing companies, it is possible that some of the author's findings are incorrect. Any such errors are the fault of the author alone.

222 *See* AMERICAN JOBS ACT: IMPACT FOR WOMEN, *supra* note 3, at 1, 2.

223 *See supra* text accompanying notes 214–15.

IV. HOW BETTER METRICS, PROFESSIONAL FINANCIAL ADVISORS, AND PUBLIC-PRIVATE PARTNERSHIPS CAN HELP WOMEN-OWNED BUSINESSES BETTER ACCESS CAPITAL

In its current iteration, the CROWDFUND Act neither mentions nor directly impacts WOBs.[224] However, the White House hoped the legislation would provide indirect assistance to female entrepreneurs by opening the markets to ordinary investors, thereby increasing the likelihood of women investors participating in early securities offerings.[225] While researchers need more data about the companies filing for securities offerings through funding portals, the early indications appear to show that WOBs are not utilizing equity crowdfunding in any greater percentage than they pursue more traditional financing options and, therefore, equity crowdfunding could have little actual impact on WOBs' ability to secure financing more easily than through those traditional fundraising pathways.[226] This Section details potential solutions to the problems that female entrepreneurs face in attempting to secure capital. Specifically, this Section first discusses the challenges in reporting how many companies seeking funding are WOBs and suggests ways to improve disclosure. This Section then suggests that the SBA invest in a pilot program to provide financial advisors to assist WOBs in securing financing, and finally discusses ways to improve reporting around female participation, retention, and promotion.

There are several things that could help improve access to capital for WOBs. First, as evidenced by the author's own dataset, there is no clear way to determine when a company attempting to secure financing is a WOB. Given the government's goal of assisting WOBs in accessing capital and the importance of WOBs to the economy, the SEC should add a checkbox to the required portion of Form C that identifies a

224 *See* Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, 15 U.S.C. (2012).

225 AMERICAN JOBS ACT: IMPACT FOR WOMEN, *supra* note 3, at 1, 2.

226 *See supra* Part III.

company as a WOB.[227] This would allow researchers and the government to track their efforts to increase WOBs' access to capital through measurement of how often WOBs seek capital, as well as how often their fundraising goals are ultimately successful. As Justice Brandeis said, "[s]unlight is said to be the best of disinfectants."[228] Given the government's long-standing challenges in meeting its goals with respect to WOBs, clear indicators and metrics should exist for tracking progress towards those goals and determining the success of certain initiatives.[229] Currently, accurately tracking how many WOBs are accessing capital is a relatively inaccurate art form. For instance, based on the author's dataset, over 30% of the companies that filed a Form C are neither conclusively WOBs nor conclusively not WOBs. Stated differently, a company was more than three and a half times as likely to have inconclusive ownership than to be conclusively a WOB. This lack of tracking inhibits research on whether and how the government's efforts to increase capital to WOBs are successful.

Form C is minimalist in its required disclosures in order to reduce the disclosure costs of participating in equity crowdfunding.[230] Critics may claim that any addition to the required disclosures increases reporting costs and, therefore, the cost of equity crowdfunding itself, working directly against the overall goals of the CROWDFUND Act itself.[231] However, a simple checkbox should not increase the cost or time required to fulfill the required disclosures, and equity issuers are in the best position to provide such information.

227 See *supra* Section II.A for a discussion of the government's goal of supporting WOBs and WOBs' importance to the economy.

228 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1932).

229 *See supra* Section II.A. For a discussion of the difference between metrics, indicators, and measures, as well as a discussion about the challenges of each, see Alexandra R. Leumer, *Climate Resilience Metrics—Putting Them to Work in California*, 9 GOLDEN GATE U. ENVTL. L.J. 195 (2016).

230 *See supra* test accompanying notes 158, 166–69.

231 *See* Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012, 15 U.S.C. (2012).

When a company or government wishes to improve some metric, the best first step is always to track that metric; if the government truly wishes to increase WOBs' access to capital, their first step should be at least allowing researchers to track their progress through a very simple and nearly costless disclosure mechanism.

Additionally, as discussed above, women are less likely to ask for capital and, when they do, are more likely to ask for less than they realistically need for their business.[232] This restricts the growth potential of WOBs and can reduce the chances of the business' continuation.[233] The SBA should create a pilot program to test the efficacy of providing professional financial advisors for WOBs through the existing network of over 100 Women's Business Centers.[234] The government should arm these financial advisors with guidelines for the capital needs of businesses in common industries as well as information regarding the dangers of under-capitalization for new firms.[235] Financial advisors should be available to assist in the loan process as well as provide information about raising capital through equity securities, regulation crowdfunding, and traditional angel investing or venture capital.

The government should ensure that these financial advisors are well versed in the CROWDFUND Act as well as other options that female entrepreneurs have for raising equity investments. Women's Business Centers should seek to create partnerships and connections with local venture capitalists and should seek to include those venture capitalists and angel investors as potential advisors and mentors for WOBs that come looking for advice on growing their businesses. Given the importance of networking, the Women's Business Centers should strive to develop themselves as communities of female entrepreneurs that

232 *See supra* text accompanying notes 104–07.

233 *Id.*

234 *Women's Business Center*, SMALL BUSINESS ASSOCIATION, https://www.sba.gov/tools/local-assistance/wbc [https://perma.cc/9EQ5-9WW7] (last visited June 20, 2017).

235 *See supra* Section II.B.

connect WOBs with local venture capitalists, angel investors, and other potential investors.[236]

While women currently have access to "business mentors" that provide financial packaging and lending assistance through the SBA, this service is currently provided through SCORE, a non-profit organization that connects volunteer business mentors with entrepreneurs.[237] Similarly, the current financial advising offered through SCORE comes from fellow entrepreneurs and executives based on their personal experiences in business.[238] The SBA should invest in professional business financial advisors that provide information from a broad range of experiences and data rather than individual experiences that may or may not have been optimized for company growth. This additional data is especially important given that the data indicates that current WOBs are largely undercapitalized as well as underperforming in growth and employment relative to their male-owned counterparts.[239]

Financial advisors are fairly well-paid with a median annual salary just under $90,000.[240] Therefore, hiring financial advisors would be a costly undertaking for the SBA. However, there are several ways the SBA can reduce the cost of such an initiative. For instance, the SBA could pilot the program by hiring a small team of financial advisors that work remotely with entrepreneurs around the country based on industry. Alternatively, the SBA could start with a pilot program in several active Women's Business Centers. In either scenario, the SBA should measure the economic

236 *See supra* Section II.B.

237 *Mission, Vision and Values*, SCORE, https://www.score.org/content/mission-vision-and-values [https://perma.cc/J8BL-63KU] (last visited June 20, 2017).

238 *Frequently Asked Questions About SCORE*, SCORE, https://www.score.org/frequently-asked-questions-about-score [https://perma.cc/YCU2-XJAU] (last visited June 20, 2017).

239 *See supra* Section II.A.

240 *Financial Advisor: Salary Details*, U.S. NEWS, http://money.usnews.com/careers/best-jobs/financial-advisor/salary [https://perma.cc/2S8U-BSZT] (last visited June 20, 2017).

impact of providing such services to small business owners. Finally, the SBA could offer the services at a flat reduced fee in order to reduce the cost of the initiative. In short, there are a multitude of ways to reduce the cost of providing professional financial services to WOBs and other entrepreneurs, which could improve both the efficacy of the government's existing initiatives and outcomes for WOBs that historically seek too little capital.[241]

Next, the Obama administration invested significant expenses in an attempt to increase women and girls' interest in entering STEM fields.[242] This support came in the forms of the establishment of the White House Council on Women and Girls in 2009, the appointment of the first Ambassador-At-Large for Global Women's Issues, the creation of the Race to the Top program, and the creation of the Women @ Energy series through Department of Energy partnerships.[243] The lack of women in venture capital mimics the shortage of women in STEM fields, and retention of women in both areas of the economy remains low.[244] Given the importance of WOBs—and their access to capital—to the economy, discussed throughout this Note, the government should take similar steps to increase women and girls' awareness of and interest in finance and venture capital.

While recent research has shown that a simple increase in women in the venture capital field may not improve outcomes for WOBs, it could improve networking opportunities for female entrepreneurs.[245] Research has consistently shown that networking opportunities are an

241 *See See supra* text accompanying notes 104–07.

242 *Women in STEM, supra* note 99.

243 Press Release, The White House, FACT SHEET: Obama Administration Record for Women and Girls (Aug. 26, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/26/fact-sheet-obama-administration-record-women-and-girls [https://perma.cc/N36S-3DFP].

244 Monica Leas & Julie Oberweis, *Venture Capital's Next Venture? Women*, TECHCRUNCH (June 3, 2015), https://techcrunch.com/2015/06/03/venture-capitals-next-venture/ [https://perma.cc/RGB4-GVYR].

245 *See supra* text accompanying notes 88–91, 103.

integral part of accessing capital from traditional angel investors and venture capitalists.[246] Increasing the number of women in venture capital may not coincide with an increase in activism in the industry that leads to an increase in positive outcomes for female entrepreneurs, so attention should be paid to further studies that specify the qualities that best predict activism.[247] Once those qualities are better understood, the government would be able to more effectively target people of both genders for inclusion in the industry and to better allocate government resources towards that goal. The SBA should target and incentivize such traits in its future and existing employees. Similar to the need to understand how many WOBs are seeking capital, a first necessary step towards improving female participation and retention in the venture capital industry is tracking those metrics publicly. CrunchBase did not begin to look into the number of female founders until 2015.[248] Other commentators have also decried the lack of reporting around female employees, retention, and promotion.[249] The government should encourage all companies, particularly those in industries such as venture capital with a dearth of women in leadership roles, to report on female participation, retention, and promotion rates. As with the WOB checklist on Form C, these disclosures can constitute short, quick indicators used on regular disclosure filings.

Assisting WOBs with accessing capital has proven to be a challenge for the government.[250] However, currently, the very entities that are creating rules around the new regulation crowdfunding and that are tasked with assisting female entrepreneurs grow and manage their businesses do not require disclosure or tracking of whether a company seeking funding is a WOB or not.[251] Like any goal, a true commitment to improved access to capital for WOBs

246 *Id.*

247 *See supra* text accompanying note 103.

248 Teare & Desmond, *supra* note 74.

249 Chou, *supra* note 74.

250 *See supra* Section II.A.

251 *See* FORM C, *supra* note 209.

demands that progress be tracked and reported publicly. Therefore, the government should improve the disclosure mechanisms for WOBs and seek female employment metrics for all companies, particularly those in industries that struggle to hire and retain women, such as venture capital.[252] Similarly, WOBs consistently under-estimate their fundraising needs and ask for too little capital for their businesses.[253] The SBA should engage in a pilot program of providing professional financial advisors by industry that can provide female entrepreneurs with financial modeling, loan application assistance, and information about the various pathways towards funding. While none of these solutions will entirely solve the complex problem of ensuring female founders have access to raise sufficient capital, they will show a commitment to solving the issue that Congress already identified as a pressing problem and will create a baseline from which lawmakers can measure their future endeavors against.

V. CONCLUSION

The government has a long history of both attempting (at least rhetorically) to promote and failing to adequately provide resources to WOBs.[254] The government has expanded SBA loans, which are more likely to go to minority- or women-owned businesses than traditional bank loans.[255] The government has long attempted to support WOBs through the creation of Women's Business Centers and various government-sponsored programs such as preferential treatment in federal contracting and the Women's Pre-Qualification Pilot Loan Program.[256] The government should strengthen this infrastructure through partnerships within the community, specifically with entities related to financial support such as banks, angel investors, and venture

[252] *See supra* Section II.B.

[253] *See supra* text accompanying notes 104–07.

[254] *See supra* Section II.A.

[255] *SBA Loans*, *supra* note 45.

[256] *See supra* text accompanying notes 27–29, 40–41.

capitalists, given that the top concern for female entrepreneurs remains accessing capital.[257]

WOBs appear to present the best opportunity for growth in the economy.[258] Yet, female entrepreneurs systematically struggle to raise capital through traditional means of angel investing and venture capital.[259] Several sometimes-conflicting theories exist as to why this access to capital appears lower for female entrepreneurs than their male counterparts, but many commentators have seized on the fact that there are few women in the venture capital market, the women who have entered the industry hold entry- or mid-level positions without significant decision-making power, and retention of women in the industry is exceptionally low.[260] The government needs to stimulate interest in and support for retention of women in the venture capital industry, similar to its work in supporting and encouraging women and girls to enter STEM fields. A good start to these efforts would include encouraging venture capital firms to report on their participation, retention, and promotion rates for women.

While semblances of crowdfunding existed earlier in history, modern crowdfunding, and the term used to describe it, quickly became popular through the connection provided by the Internet.[261] Online platforms quickly became household names and offered anyone with an Internet connection the ability to contribute to projects of interest through donations.[262] Many businesses are anxious to use this same method to access the capital markets.[263]

After major recessions in the United States, Congress grew concerned with the threat of securities fraud and, therefore, became interested in increasing investor

257 Coleman & Robb, *supra* note 61, at 500.

258 *See supra* text accompanying note 27.

259 *Id.*

260 *See supra* text accompanying notes 85–98, 100–02.

261 *See supra* Section II.C.1.

262 *See supra* Section II.C.

263 *See supra* text accompanying notes 132–138.

confidence in the markets.[264] Therefore, Congress promulgated strict regulations for both businesses seeking to offer securities and investors interested in providing capital in return for equity or debt.[265] Previous securities regulations prohibited equity crowdfunding through the Securities Act of 1933.[266] Many felt that Sarbanes-Oxley's passage in 2002 further choked securities regulations, especially for small companies or those seeking a pathway to their IPO.[267] With the passage of the JOBS Act, which included the CROWDFUND Act, the government sought to reduce restrictions on investors and small companies while maintaining enough regulation to stifle the threat of fraud.[268]

Some commentators proclaimed the CROWDFUND Act as the democratization of equity investments in emerging companies.[269] Many believed that this democratization would improve female entrepreneurs' access to capital because it diversified potential investors by reducing the regulations restricting non-accredited investors.[270] Since equity crowdfunding became available on funding portals in May 2016, nearly 200 companies have sought to take advantage of the new capital raising mechanism.[271] However, the first quarter did not result in any WOBs closing equity rounds through the new crowdfunding provisions.[272] Additionally, the early data shows that the rate of WOBs attempting to secure financing through crowdfunding appears no greater than the rate at which they successfully secure financing through more traditional means of fundraising, such as venture capital or angel investments.[273] Further research is needed to conclusively determine if equity crowdfunding has

264 *See supra* Section II.C.2.

265 *Id.*

266 *See supra* Section II.C.2.

267 *See supra* text accompanying note 150.

268 *Id.*

269 *See supra* text accompanying notes 175–76.

270 *Id.*

271 *See supra* text accompanying note 209.

272 *See supra* text accompanying note 206.

273 *See supra* text accompanying note 217.

resulted in the expected boon to female entrepreneurs seeking capital.

Thus far, the government has provided only wavering practical support to WOBs over the years, despite its long-standing recognition of the importance of WOBs to the economy.[274] The government needs to further strengthen and expand its commitment to WOBs through more and better resourcing of the SBA in order to more effectively serve female entrepreneurs, particularly by providing access to information about financial advising and planning. The government should begin by creating very simple updates to disclosures such as Form C in order to allow researchers and the SBA to report on the success of government initiatives aimed at improving capital to WOBs. Only with consistent reporting will the SBA be able to show conclusively that its efforts have resulted in improved outcomes for female entrepreneurs, who can help drive further economic growth for the country.[275]

274 *See supra* Section II.A.

275 *Id*.