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Supporting the Innovation Economy: Ways to Facilitate Capital Formation and Investment Opportunities for Main Street Investors

Over the last several years, policymakers in Washington, D.C. have taken actions designed to help businesses raise capital at every stage of their lifecycle. Whether for an early-stage startup venture or a business looking to file for an initial public offering (IPO), access to capital is critical for entrepreneurs to turn their ideas into businesses, and those businesses into job-creating, innovative enterprises that are hallmarks of the free enterprise system.

America's "innovation economy" is the envy of the world. It has been the primary source of net new job creation for the last three decades and has made our nation a leader in critical industries including manufacturing, biotechnology, and the emerging fields of artificial intelligence and blockchain technology. At the core of every successful business is an entrepreneur who took a risk, and in doing so created jobs and improved the quality of life for themselves, their employees, customers, and the communities in which they operate.

Regrettably, the pace of business creation and entrepreneurship in America is lower today than it was a generation ago, threatening the future prospects of our economy and America's ability to remain competitive during an era of disruption and globalization. The number of businesses less than a year old has declined by nearly 50% over the last forty years[1], and new business creation – particularly for companies that plan to hire employees - has been suppressed in the wake of the 2008 financial crisis. Even more concerning, the businesses that are being formed are largely concentrated in a small number of metropolitan areas, leaving broad swaths of the country particularly vulnerable to a decline in entrepreneurship.[2]

This is all occurring at a time when artificial intelligence, automation, machine learning, and other technologies are taking hold at a rapid pace. Up to one-quarter of current jobs in the United States are at risk of being replaced by automation or other technologies.[3] Millions of workers may find themselves in the position of having to learn entirely new skills in the middle of their careers in order to remain employed. The innovation economy must be able to produce the new ideas and startups that will ultimately create the necessary jobs and help the American workforce adapt to the impact of new technologies.

While no single cause can be attributed to the decline in business formations, entrepreneurs often report that access to capital is a major challenge to starting a business and growing it from small to large. A recent report from the Kauffman Foundation found that 83% of new businesses that hire employees do not access bank financing or venture capital, in part because the structure of our capital markets is not particularly efficient at connecting startups with investors.[4]

Both Congress and the Securities and Exchange Commission (SEC) have recognized that outdated regulations are contributing to some of the challenges that businesses face when raising capital. While technological advances continue to disrupt industries, the rules governing our capital markets remain largely stuck in a 1930s-era mindset. Accordingly, over the last decade Congress and the SEC have advanced a number of reforms to modernize our regulatory system in order to meet the needs of the 21st Century economy.

[1] U.S. Census Bureau Business Dynamic Statistics (August 2019).
[2] Economic Innovation Group – "The New Map of Economic Growth and Recovery" (May 2016). From 2010 through 2014 – the years immediately following the last recession – 50% of all new businesses created in the United States were created across only twenty counties.
[3] Brookings Institute – "Automation and Artificial Intelligence: How Machines are Affecting People and Places." (January 2019).
[4] Kauffman Foundation – "Access to Capital for Entrepreneurs: Removing Barriers" (April 2019).

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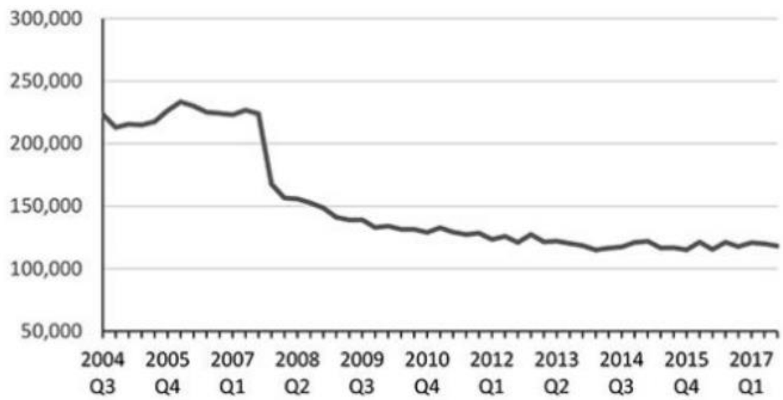
Business Applications with Planned Wages (WBA), seasonally adjusted



(Source: Census Bureau)

The most significant of these initiatives was the 2012 Jumpstart our Business Startups (JOBS) Act, a bipartisan success that helped transform the conversation around capital formation in Washington, D.C. The JOBS Act created the legal framework for equity crowdfunding, allowed companies conducting certain private offerings to use general solicitation for the first time, and established an initial public offering (IPO) “on-ramp” to tailor regulatory requirements for businesses looking to go public. Congress has since passed several additional reforms that build upon the framework of the JOBS Act.

The SEC has also recently undertaken a robust capital formation agenda of its own. Under the leadership of Chairman Jay Clayton, the Commission has implemented or proposed rule changes that will mitigate regulatory burdens companies face when seeking capital. The SEC also recently issued a concept release (“Concept Release”) that examines the gamut of exemptions for private offerings and how they can be reformed to meet the needs of businesses and investors.[5] For an agency that has historically demonstrated a benign neglect towards its statutory duty to facilitate capital formation, these proactive steps by the SEC are a welcome development.

As the SEC and Congress consider changes to private offering exemptions and other rules, balancing the need to promote capital formation with robust investor protections must be paramount. SEC enforcement actions consistently remind us the extent to which bad actors take advantage of investors and cause financial harm to families. At the same time, the JOBS Act demonstrated that regulations can be modernized without compromising investor protections. Notwithstanding the many predictions that the JOBS Act would leave investors vulnerable, even the SEC has acknowledged there has been no meaningful increase in fraud since the JOBS Act was passed.

Creating Opportunities for Main Street Investors

Much of the capital formation agenda in Washington is rightfully focused on reviving the public company model in the United States. An IPO was once the ultimate goal of entrepreneurs, but in recent years going public has fallen out of favor with many businesses. Our economy is now home to roughly half the number of public companies than existed in the mid-1990s, while the overall number of public companies is little changed from 1982.[6] This is of particular concern given that job creation tends to increase significantly once a company goes public. As pointed

[5] Concept Release on Harmonization of Securities Offering Exemptions (June 18, 2019).
[6] Wall Street Journal – “America’s Roster of Public Companies is Shrinking Before our Eyes” (January 6, 2017).

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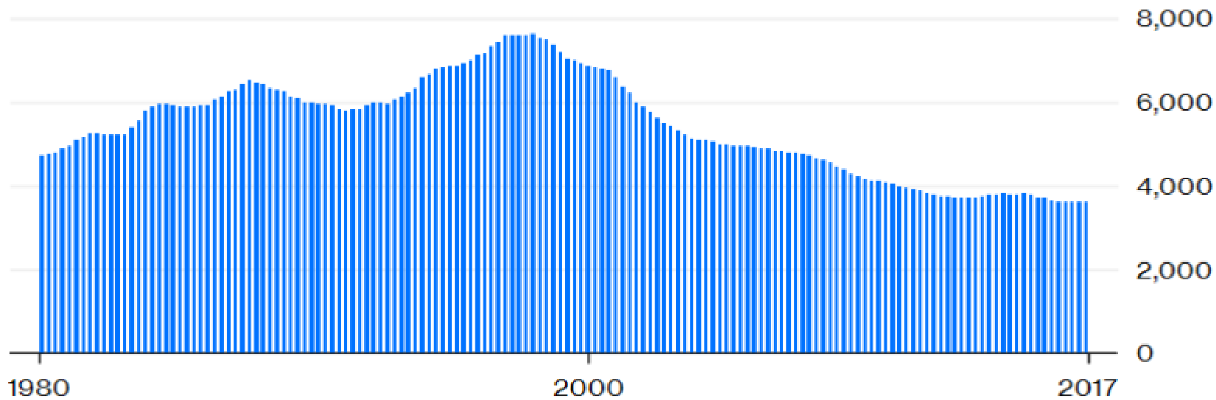
out by the 2011 IPO Task Force Report – which greatly influenced passage of the JOBS Act – 92% of job creation occurs after a company's IPO.[7]

Number of domestic companies listed on U.S. Stock Exchanges



Sources: Jay R. Ritter, Washington College of Business Administration, University of Florida; University of Chicago Center for Research in Security Prices

Not only are fewer companies completing an IPO, but the companies that are going public today tend to be significantly older and larger than IPOs from the 1980s or 1990s. The result is that investors have fewer chances to invest in the stocks of young public companies that go on to outperform over a long period of time. To put this into perspective, from 1975 through 1991, half of all publicly listed firms had a market capitalization below $100 million, compared to 22% of companies today. And the average age of public companies has increased from 12 years old in the late 1990s to roughly 20 years today.[8]

While the idea of *being* a public company and having to deal with the pressures of the SEC reporting regime and activist investors is burdensome, the IPO process itself remains a major hurdle. The focus of a business is diverted from executing long-term strategy to dealing with the complex legal, auditing, and other work that is part of the IPO process. Management must work around the clock in order to oversee and approve much of this work, taking time and resources away from actually managing the operation.

Larger companies with significant compliance operations may be able to absorb some of these requirements without much interruption to the business, but smaller issuers find the process to be incredibly disruptive. Business can come to a grinding halt in order to check all of the regulatory boxes necessary for going public. This is a primary reason for the collapse in the IPO market for companies below a $50 million market capitalization that would otherwise have significant potential for growth.

The IPO Task Force estimated that the average regulatory compliance cost per company to complete an IPO is $2.5 million, with ongoing annual costs of $1.5 million once public. This is not an insignificant amount for a company that has low revenue but tremendous growth prospects. The costs and requirements of the IPO process are nothing short of disruptive and have eviscerated the "small" IPO market.

[7] IPO Task Force – "Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth" (October 20, 2011). (Citing data from IHS Global Insight)
[8] National Bureau of Economic Research Working Paper – "Eclipse of the Public Corporation or Eclipse of the Markets?" (January 2018).

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Decline in IPOs and Impact Upon Wealth and Income Inequalities

As companies wait longer to go public, the impact is disproportionately felt by millions of Main Street investors. Because most households are limited by the SEC's accredited investor rules from investing in early-stage private offerings, the largest investment returns in many companies have already been earned by wealthy individuals and institutions by the time a company goes public. As Chairman Clayton said in his first speech as SEC Chair, "To the extent companies are eschewing our public markets, the vast majority of Main Street investors will be unable to participate in their growth. The potential lasting effects of such an outcome to the economy and society are, in two words, not good."[9]

The increase in passive investing through index funds also has produced unintended consequences for the average investor. When high growth companies choose not to go public or go public after much of their growth has been realized, the index funds that only own public companies miss out on significant wealth creation. There was a time when high growth companies went public earlier (think Microsoft or Apple) and investors had the opportunity to invest early, either directly in the stock or through growth funds. The result was that the middle class was able to participate in that economic growth and the investment returns associated with it. But the burden of the IPO process, the rise of private markets, and a shift of trillions of dollars towards passive investment all necessitate the need for Congress and the SEC to draft regulatory fixes to make it easier for companies to go public.

Put simply, the lack of investment opportunity in the public markets – coupled with restrictions on non-wealthy households from investing in private offerings – ultimately contributes to the wealth and income inequalities that plague our economy. While the economic recovery of the last decade has benefited wealthier households that own significant financial assets, too many Americans find themselves living paycheck to paycheck and unable to cover emergency expenses, let alone being able to save for a down payment on a home or higher education expenses.

According to recent data from the Federal Reserve, half of all U.S. households have only recently regained what they lost during the 2007-2009 recession, and still have one-third less wealth then they had in 2003. By comparison, the top 1% of households – where holdings of financial assets are concentrated – have seen their wealth double over the last fifteen years.[10]

This type of wealth inequality is not sustainable for an economy that has been built upon the existence of a strong and mobile middle class. The teachers, firefighters, nurses, and blue-collar workers that keep our economy thriving have found it difficult to keep up with education, housing, and other costs. It is these workers that elected officials and regulators must keep in mind when considering new policy initiatives.

Ensuring the Success of the JOBS Act

As the SEC considers changes to its rulebook pursuant to the Concept Release and other initiatives, it is imperative that the Commission first take steps to ensure that the JOBS Act reaches its full potential. The promise of the JOBS Act was that it was designed to assist businesses of all sizes in accessing the capital markets – whether a startup looking to complete a small crowdfunding offering or a company seeking to enter the public markets. The JOBS Act also did not consider capital formation to be a "zero-sum game" whereby capital raised in the private markets is capital permanently taken away from the public markets. The greater ability a company has to attract private investors early in its lifecycle, the better chance of its success and its ability to complete an IPO one day.

[9] Remarks at the Economic Club of New York – Chairman Jay Clayton (July 12, 2017).
[10] "Historic Asset Boom Passes by Half of Families" - Wall Street Journal (August 30, 2019).

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Policymakers should reject arguments that expanding private offerings – as considered under the Concept Release – will always come at the long-term expense of the public capital markets.

Due in large part to the way the law was implemented by the SEC, certain provisions of the JOBS Act have not had a significant impact in practice. For example, while Title II of the JOBS Act allows privately held businesses to solicit certain offerings to the public, the SEC unnecessarily overcomplicated the steps a company must take to ensure that its actual investors are "accredited" under SEC rules. The crowdfunding provisions under Title III have also proven to be unworkable in many cases as businesses have found that legal and auditing costs outweigh the benefits of completing an offering. The SEC should revisit its implementation of the JOBS Act to ensure that Congress' clear intentions are carried out.

Recommendations

Reinvigorating the innovation economy by encouraging and supporting entrepreneurship would go a long way towards helping businesses thrive and addressing the wealth and income inequalities that exist in our society. While there are many important policy areas – taxes, minimum wage standards, occupational licensing requirements, and others that play a role – this paper focuses specifically on capital markets issues and actions that the SEC and Congress can take to help working Americans own a share of the next generation of American innovation.

As policymakers move forward with this agenda they should consider the following recommendations:

1) **Amend the general solicitation rules under Title II of the JOBS Act to allow investors to self-certify as accredited investors under SEC rules;**

2) **Tailor regulations to encourage more companies to enter the public markets;**

3) **Amend the definition of an "accredited investor" to expand eligibility beyond just income and net worth thresholds. Allow those who can demonstrate a sophisticated knowledge of financial markets to become accredited;**

4) **Fix the rules governing crowdfunding offerings under Title III by raising the amount that companies can raise every year, and allow the use of special purpose vehicles (SPVs) to pool investment;**

These recommendations are discussed in greater detail below.

Recommendation 1: Amend the general solicitation rules under Title II of the JOBS Act to allow investors to self-certify as accredited investors under SEC rules

Title II of the JOBS Act directed the SEC to allow companies that pursue a private offering under Regulation D of the Securities Act of 1933 to advertise their offering to the general public. Prior to this, companies conducting private offerings under Regulation D – primarily under longstanding Rule 506(b) - were prohibited from engaging in any type of general solicitation. While issuers are now allowed to solicit an investment to the general public, any individual that ultimately invests in such an offering must still meet the definition of an accredited investor.[11] In

[11] An individual is accredited if their income exceeds $200,000 ($300,000 in joint income with a spouse), or if their net worth exceeds $1 million, excluding their primary residence.

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July 2013, the SEC adopted new Rule 506(c) under Regulation D to implement rules governing general solicitation.[12]

Section 201(a)(1) of the JOBS Act states that issuers must take "reasonable steps to verify" that an investor is accredited before being allowed to invest in an offering. Unfortunately, when the SEC adopted Rule 506(c) the steps it required for investor certification were anything but reasonable. Rather than allowing investors to self-certify – as had long been the practice for 506(b) offerings – the SEC instead adopted new subjective and burdensome requirements for companies to obtain verification.

These requirements would generally rely on a third-party to certify that a potential investor is accredited. Under the new rules, there was an assumption that a third-party verification regime would be created through accountants, broker-dealers, investment advisers, and others who would be in a position to attest to an individual's income or net worth. Not surprisingly, this regime has not taken hold, and onerous restrictions have discouraged third parties from verifying accredited status of investors.

The result has been predictable: offerings using general solicitation make up only a fraction of the entire Regulation D market. According to SEC data, issuers raised roughly $71 billion over the first three years Rule 506(c) was in effect – compared to nearly $2.2 trillion raised under Rule 506(b).[13] In 2018, $211 billion was raised under Rule 506(c), compared to $1.5 trillion under 506(b).[14]It has become clear that the additional burdens the SEC placed upon 506(c) issuers have effectively put a ceiling on the market, and disincentivized general solicitation as a means of communicating with investors.

Moreover, the SEC itself has acknowledged that the predictions of widespread fraud as a result of general solicitation have not come into fruition. A 2016 report from the SEC's Division of Economic and Risk Analysis stated that there had been "no measured increase in the incidence of fraud in the new Rule 506(c) market."[15]

Companies that opt to raise capital via general solicitation tend to be younger, smaller, and are seeking to raise higher levels of capital than other offerings. In other words, these are exactly the type of companies that that SEC should want to help connect with potential investors. The SEC should amend Rule 506(c) and allow investors to self-certify that they are accredited.

Recommendation 2: Tailor regulations to encourage more companies to enter the public markets

As noted above, the overall decline in public companies – and the tendency of companies today to go public much later in their lifecycle - has implications for long-term job creation and the ability of retail investors to generate wealth. Individuals are missing out on chances to invest in young public companies and earn significant returns.

In 2018, several organizations released a report that included 22 recommendations for how policymakers can encourage more IPOs. That report – *Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public* – represented the viewpoints of a broad cross-section of industry participants, and helped reinvigorate a conversation about how Congress and the SEC can build upon the JOBS Act.

The SEC deserves credit for acting upon its own accord over the last two years to tailor regulations for IPOs. The Commission has expanded the confidential filing submission provisions of the IPO on-ramp to all issuers and

[12] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings 78 FR 44771 (July 10, 2013).
[13] Division of Economic and Risk Analysis - "Report to Congress: Access to Capital and Market Liquidity" (August 2017).
[14] Concept Release at 19.
[15] Division of Economic and Risk Analysis - "Private Securities Offerings post-JOBS Act" (February 2016).

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subsequently proposed expanding the "testing the waters" provisions,[16]and has also proposed exempting more companies from the onerous auditor attestation requirements of the 2002 Sarbanes-Oxley Act.[17] The SEC should take further action in this area, including disclosure requirements around short-selling, as well as market structure reforms that enhance the secondary market trading of small public companies.

Importantly, the question of private vs. public markets should not be viewed at as a zero-sum game. Some have argued that the aversion of companies to going or staying public is largely due to the expansion of private offering exemptions under the JOBS Act and previous regulatory actions. However, these arguments ignore the fact that private markets were already outpacing public markets well before the JOBS Act, and that many of the exemptions that are supposedly taking away from public listings also existed during periods when the IPO market was much stronger than it is today. Helping more businesses raise capital when they are young and growing will ultimately increase their likelihood of success and contribute to a more robust IPO pipeline down the road.

Recommendation 3: Amend the definition of an "accredited investor" to expand eligibility beyond just income and net worth thresholds. Allow those who can demonstrate a sophisticated knowledge of financial markets to become accredited.

In 1982, the SEC adopted a definition of an "accredited investor" under Regulation D to determine the individuals eligible to invest in certain private offerings. As the SEC has explained, "the accredited investor definition attempts to identify those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary."[18]

Since adoption of the definition, an investor has been able to be deemed accredited based solely upon a set of income and net worth thresholds. An individual is accredited if their income exceeds $200,000 ($300,000 in joint income with a spouse), or if their net worth exceeds $1 million, excluding their primary residence. Unless a person meets one of those two thresholds, there is no additional path for them to achieve accredited status.

Based upon the Federal Reserve's Survey of Consumer Finances, the SEC recently estimated that as of 2013, 8.07 million households, or 6.6% of all households, met the $200,000 individual income threshold. And 9.22 million households, or 7.5% of all households, met the $1,000,000 net worth threshold.[19] (These thresholds became more restrictive after passage of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which mandated that an individual's primary residence be excluded from the net worth calculation.)

Thus, over 90% of U.S. households are prohibited from investing in many private offerings. While the amount raised under Regulation D relative to public markets has increased significantly over the last decade, companies historically have raised money through private channels prior to going public. This allowed early investors to reap substantial economic gains prior to an IPO – a privilege that is increasingly reserved only for the ultra-wealthy and institutional investors.

Moreover, notwithstanding concerns raised by investor "advocates," an investment portfolio that contains both public and private investments can actually have the effect of *reducing* overall market risk to an investor. Former SEC Commissioner Piwowar made this point aptly in 2016 when he stated that "by holding a diversified portfolio of assets, investors reap the benefits of diversification…when adding higher-risk, higher-return securities to an

[16] Draft Registration Statement Processing Procedures Expanded – Division of Corporation Finance (June 29, 2017); Solicitation of Interest Prior to a Registered Public Offering – Proposed Rule (February 19, 2019).
[17] Amendments to the Accelerated Filer and Large Accelerated Filer Definitions – Proposed Rule (May 9, 2019).
[18] SEC Staff Report – "Report on the Review of the Definition of Accredited Investor" (December 18, 2015).
[19] *Id.* at 48.

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existing portfolio, as long as the returns from the new securities are not perfectly positively correlated with the existing portfolio, investors can reap higher portfolio returns."[20]

The SEC should not look at the risks associated with private investment in isolation; rather they should consider that investors are likely to hold a diverse portfolio of assets that are not correlated with one another. Doing so can both reduce overall investment risk to households and increase their ability to earn consistent returns.

The SEC should also recognize that the world is much different today than it was in 1982. Advances in technology and the democratization of our capital markets have increased the flow of information to investors regarding potential investments and the risks associated with them. No longer are households entirely reliant on a class of financial professionals to steer their investments. People have become increasingly educated and empowered to take control of their finances – the SEC should update its rules to reflect this new reality.

A large bipartisan majority of Congress seems to agree. Twice the House of Representatives has passed – with wide bipartisan support - legislation to allow individuals to become accredited investors if they can demonstrate a sophisticated knowledge of financial markets, regardless of their income or net worth.[21]

But the SEC does not need to wait on Congress – it should amend the accredited investor definition to reflect the modern realities of today's markets and give Main Street investors more opportunities to invest early in growing American businesses. Coupled with a fix to the general solicitation rules, an expanded accredited investor definition has the potential to transform the way that young, growing businesses raise capital.

Recommendation 4: Fix the rules governing crowdfunding offerings under Title III by raising the amount that companies can raise in a given year, and allow the use of special purpose vehicles (SPVs) to pool investment

Title III of the JOBS Act established the legal framework for equity crowdfunding under the federal securities laws. While crowdfunding – the practice of raising small increments of money from a large pool of individuals – had existed in other areas (for example in the financing of independent movies), allowing investors to gain equity ownership via crowdfunding required action by Congress.

While early iterations of crowdfunding legislation held greater promise, the final language in the JOBS Act included a number of regulatory traps for crowdfunding issuers that has inhibited this market. For example, issuers were permitted to raise no more than $1 million during a 12-month period (adjusted for inflation), and in its implementing rules the SEC also limited the amount that any one individual may invest in a crowdfunding offering.

Additionally, Title III imposed significant liability on fundraising portals which has made market participants think twice about being involved with crowdfunding offerings. Expectedly, the crowdfunding rules have failed to take off, as the SEC reports that only about $100 million has been raised under the new crowdfunding rules since they went into effect in 2016.[22]

[20] Remarks at the Meeting of the SEC Advisory Committee on Small and Emerging Companies. Commissioner Michael S. Piwowar (May 18, 2016).
[21] H.R. 2187, 114th Congress (Passed House by a vote of 347-8 on February 1, 2016); H.R. 1585, 115th Congress (Passed House by a voice vote on November 1, 2017).
[22] Report to the Commission: Regulation Crowdfunding – SEC Staff Report (June 18, 2019). Total $108.2 million has been raised from May 2016 – December 2018.

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Congress must revisit Title III in order to make the equity crowdfunding rules workable for issuers and investors alike. A good start would be the Fix Crowdfunding Act, bipartisan legislation that passed the House of Representatives 394-4 in July 2016. This legislation also allowed the use of special purpose vehicles (SPVs) to invest in crowdfunding offerings. SPVs are mechanisms that pool money together and can act on behalf of a group of investors. This would significantly cut down on the complexities crowdfunding issuers face when they have to obtain equity holder consent or votes on certain matters from a large group of investors.

Conclusion

As we enter a period of unprecedented economic disruption, policymakers must take action to support the innovation economy and market-oriented solutions to the challenges facing America's middle class. Wealth and income inequalities, lack of opportunity, and other challenges currently facing our workforce can be alleviated by supporting the next generation of great American businesses. It is these businesses that will create the jobs and innovation necessary to help the American economy lead again in the 21st Century. The time to act is now – Congress and the SEC have an opportunity to ensure the JOBS Act reaches its full potential, our public equity markets remain strong, and that the innovation economy that has helped build and sustain our middle class flourishes in the future.