

COMMENT

The JOBS Act and Middle-Income Investors: Why It Doesn't Go Far Enough

The 2008 recession sparked broad calls for tighter financial regulation.¹ Yet, at the same time, small businesses and entrepreneurs lobbied to loosen restrictions on the funding of start-ups.² Frustrated by stagnant credit markets and limited access to capital, advocates pushed for reforms that would ease restrictions on investment and thereby encourage economic growth and job creation.³ The result—the 2012 Jumpstart Our Business Startups (JOBS) Act—allows small businesses to raise capital through “crowdfunding,” the acquisition of small amounts of money from a large number of investors, for

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1. Efforts to reform the financial system resulted in a variety of new domestic and international legal constructs. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, pmbll., 124 Stat. 1376, 1376 (2010) (aiming to “improv[e] accountability and transparency in the financial system”); Basel Comm. on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems*, BANK FOR INT’L SETTLEMENTS 12-29 (2011), <http://www.bis.org/publ/bcbs189.pdf> (establishing more stringent capital requirements for banks).
 2. Michael Rapoport, *Tallying the Lobbying Behind the JOBS Act*, WALL ST. J.: WASH. WIRE (May 25, 2012, 9:31 AM), <http://blogs.wsj.com/washwire/2012/05/25/tallying-the-lobbying-behind-the-jobs-act> (“The companies and organizations who lobbied Congress to pass the bill outnumbered those against it by more than a 3-to-1 margin . . .”).
 3. Groups lobbying in favor of passage included the National Venture Capital Association, the Biotechnology Industry Organization, and the U.S. Chamber of Commerce. *Id.* The push to ease investment, as well as support for increasing funding for small and emerging businesses, is not new to the post-recession world. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-00-190, SMALL BUSINESS: EFFORTS TO FACILITATE EQUITY CAPITAL FORMATION 3 (2000) (“[V]enture capital investments tend to be concentrated[,] . . . raising questions about whether unmet needs . . . are being addressed.”).

the first time.⁴ One of the Act's key provisions, the so-called "crowdfunding exemption," will allow start-ups to obtain investment from a broad spectrum of investors without the cumbersome and expensive SEC registration requirements normally demanded of public equity issuers.⁵ Lawmakers and commentators alike have hailed the potential of the JOBS Act to increase the flow of funding to start-ups,⁶ while offering middle-class investors financial opportunities previously available only to the wealthy. But, unfortunately, the Act contains a critical shortcoming that will limit the ability of middle-income investors to take advantage of these new opportunities. Because most scholarly commentary on the JOBS Act has focused on the possibility of fraud under the crowdfunding exemption,⁷ it has largely overlooked the potential benefits available to investors and the harmful effects of a flaw in the Act that prevents diversification. This Comment addresses this omission.

4. Crowdfunding has been characterized as "a many-to-one relationship between funders and recipients" in "the presence of an intermediary, who serves as a matchmaker between promoters and funders." Edan Burkett, *A Crowdfunding Exemption? Online Investment Crowdfunding and U.S. Securities Regulation*, 13 *TRANSACTIONS: TENN. J. BUS. L.* 63, 66-68 (2011). For a brief overview of crowdfunding, see Stuart R. Cohn, *The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 *FLA. L. REV.* 1433, 1434 (2012), which notes that the term crowdfunding "has become synonymous with efforts to raise funds from numerous donors, usually in small amounts through internet sources."
5. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 302(a), 126 Stat. 306, 315 (2012).
6. See, e.g., Heather R. Huhman, *JOBS Act To Jumpstart the Job Marketplace*, *FORBES* (Apr. 5, 2012, 8:00 AM), <http://www.forbes.com/sites/work-in-progress/2012/04/05/jobs-act-to-jumpstart-the-job-market>; *Congressman Cantor Statement on House Vote To Send the JOBS Act to the President*, CONGRESSMAN ERIC CANTOR (Mar. 27, 2012, 2:30 PM), <http://cantor.house.gov/press-releases/congressman-cantor-statement-house-vote-send-jobs-act-president>.
7. See, e.g., Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 *TENN. L. REV.* 879, 931-37 (2011); Karina Sigar, *Fret No More: Inapplicability of Crowdfunding Concerns in the Internet Age and the JOBS Act's Safeguards*, 64 *ADMIN. L. REV.* 473, 480 (2012). The limited amount of scholarly commentary concerning investors has focused almost exclusively on the potential for fraud perpetrated on unsuspecting novices. See Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 *N.C. L. REV.* 1735, 1765-67 (2012); Jennifer J. Johnson, *Fleeing Grandma: A Regulatory Ponzi Scheme*, 16 *LEWIS & CLARK L. REV.* 993, 994-99 (2012). Similarly, practitioner blogs, even when discussing fundraising, do not mention the inability of investment companies to participate. See, e.g., David S. Rose, *Is It Legal To Solicit Investors for a Startup Since the JOBS Act Has Passed?*, *GUST* (Sept. 20, 2012), <http://gust.com/angel-investing/startup-blogs/2012/09/20/is-it-legal-to-solicit-investors-for-a-startup-since-the-jobs-act-has-passed>.

Part I describes the landscape of early-stage investing and SEC regulations limiting this practice to wealthy investors. It also discusses how the JOBS Act loosens those restrictions. Part II considers the failures of the JOBS Act and argues that its bar on investment funds will prevent diversification and keep middle-class investors from taking advantage of the benefits of the Act. Finally, Part III explores the legislative history of the JOBS Act and shows that the provisions excluding investment funds cannot be justified by legislative purpose or existing policy rationales. Overall, this Comment argues that because of these defects, the individuals who are supposed to be among the intended beneficiaries of the Act will be blocked from realizing its benefits.

I. EARLY-STAGE INVESTING AND THE JOBS ACT

The JOBS Act was designed to allow a wider class of Americans to invest in start-ups. Start-up investing, referred to as “venture capital,” offers the potential for exceptional returns, as investors provide risky early financing to young businesses that appear ripe to grow quickly.⁸ Some venture capitalists focus on the most turbulent and potentially most profitable part of the market by investing in extremely young companies, a practice typically referred to as “angel funding,” and its providers as “angels.”⁹

The Securities Act of 1933 severely restricted how all companies, including these early-stage ventures, could raise funds. The 1933 Act prohibited any offering or public sale of a security unless it was registered with the SEC or satisfied one of the statutory exemptions to the registration requirements.¹⁰ Registration is expensive and time-consuming, thus effectively requiring smaller, growing firms to rely on an exemption in order to raise capital.¹¹

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8. The National Venture Capital Association has defined venture financing as an “equity investment in a company whose stock is essentially illiquid and worthless until a company matures five to eight years down the road.” Global Insight, *Venture Impact: The Economic Importance of Venture Capital Backed Companies to the U.S. Economy*, NAT’L VENTURE CAPITAL ASS’N 8-9 (2007), http://www.nvca.org/index.php?option=com_docman&task=doc_download&gid=359&Itemid=93.
 9. There are a variety of approaches to angel investing. Many angels will only invest in certain industries or geographies and have varied screening techniques. For one angel’s discussion of his approach, and how he developed it, see Fabrice Grinda, *Change in Angel Investment Strategy*, FABRICE GRINDA: MUSINGS OF AN ENTREPRENEUR (Nov. 24, 2008), <http://www.fabricegrinda.com/business-musings/change-in-angel-investment-strategy>.
 10. Securities Act of 1933, Pub. L. No. 73-22, § 77(e)(a)(1), 48 Stat. 74, 77 (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)).
 11. See Rutheford B Campbell, Jr., *Regulation A: Small Businesses’ Search for “A Moderate Capital,”* 31 DEL. J. CORP. L. 77, 91-92 (2006) (“Registration has never been a viable way for

Several important exemptions allow “private sales”¹² to wealthy “accredited investors” without registration.¹³ An individual can qualify for accredited investor status by acquiring a net worth of \$1 million or earning an annual salary over \$200,000.¹⁴ This exemption allows wealthy venture capitalists to angel invest, while also barring middle-class investors. Thus, before the JOBS Act, small companies seeking to avoid expensive SEC registration could generally seek funding only from wealthy investors who learned of the start-up in a private sale, that is, through a close-knit network.¹⁵

To broaden their funding base beyond the traditional angel network, some start-up companies began to seek ways to skirt the regulations of the 1933 Act.

small businesses to raise capital. High transaction costs associated with registered offerings inevitably put registration out of the range of small businesses in search of capital.” (footnotes omitted)); *see also* Rutheford B Campbell, Jr., *The Overwhelming Case for Elimination of the Integration Doctrine Under the Securities Act of 1933*, 89 KY. L.J. 289, 294 (2001) (noting that securities laws prevent splitting an offering between private and public sales, creating a “doctrine [that] is expensive for society and furthers no valid policy” objective of the 1933 Act).

12. Although the term “private sale” is not clearly defined, courts have held that it refers to transactions in which a limited number of securities are made available to a small number of accredited investors and without widespread public advertisement. *See, e.g.,* *W. Fed. Corp. v. Erickson*, 739 F.2d 1439, 1442-43 (9th Cir. 1984); *SEC v. Murphy*, 626 F.2d 633, 644-47 (9th Cir. 1980); *Cook v. Avien, Inc.*, 573 F.2d 685, 691 (1st Cir. 1978); *Doran v. Petrol. Mgmt. Corp.*, 545 F.2d 893, 900 (5th Cir. 1977).
13. 15 U.S.C. § 77d(a)(5) (allowing unregistered “transactions involving offers or sales by an issuer solely to one or more accredited investors . . . if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer’s behalf”). Accredited investors are the wealthy, sophisticated individuals who presumably do not “need[] the protection of the [1933] Act.” *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953). The rationale behind exempting accredited investors is that sophisticated clients “wanted greater freedom in their investment decisions, and they wanted to be free of restrictive regulations that had been adopted to protect unsophisticated investors such as those who had been so badly damaged by the Stock Market Crash of 1929.” Jerry W. Markham, *Protecting the Institutional Investor—Jungle Predator or Shorn Lamb?*, 12 YALE J. ON REG. 345, 353-54 (1995).
14. 17 C.F.R. § 230.501(a)(5)-(6) (2012).
15. Other exemptions to the registration requirements exist but are less helpful for early-stage start-ups. Companies can issue securities under Regulation A, but the amount that can be sold is limited and the company is still required to file a registration statement with the SEC. *Id.* § 230.251. Regulation D allows additional sales to accredited investors and a small number of non-accredited investors. *Id.* §§ 230.500-508. Under this rule, however, investors are prohibited from reselling these securities, issuers are not allowed to advertise sales, and they must still comply with state law requirements. In view of these limitations, the standard exemption in the 1933 Act for private sales to accredited investors remains critical. For background on Regulation D, *see* Manning Gilbert Warren III, *A Review of Regulation D: The Present Exemption Regimen for Limited Offerings Under the Securities Act of 1933*, 33 AM. U. L. REV. 355 (1984).

Companies explored various methods for crowdsourcing capital online without violating SEC rules. The two most common avenues were to seek advance product sales, as with the online portal Kickstarter,¹⁶ or to use certain types of debt.¹⁷ Both strategies, however, proved to be unworkable for most companies. Advanced sales platforms are used to sell products, not to fund abstract research or development,¹⁸ and debt often requires scheduled interest payments, which are difficult for a cash-poor start-up to make.¹⁹ Although some entrepreneurs did attempt to use online crowdsourcing tools to raise equity,²⁰ the SEC's definition of security was so broad as to implicate virtually any mechanism where a purchaser shares in the profitability of the enterprise, thus triggering the registration requirements.²¹ True equity investments would

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16. Kickstarter and Indiegogo are examples of online portals that provide crowdsourced advanced sales financing. These sites allow individuals to pledge funds to various projects or start-ups in exchange for their products when they are produced. Since Kickstarter launched in April 2009, "over \$450 million has been pledged by more than 3 million people, funding more than 35,000 creative projects." *Kickstarter Basics: Kickstarter 101*, KICKSTARTER, <http://www.kickstarter.com/help/faq/kickstarter%20basics#Kick> (last visited Jan. 31, 2013).
 17. Sites such as Prosper and Lending Tree allow people to finance small expenditures for themselves or for a business with crowdsourced debt. See Peter Renton, *Peer to Peer Lending Crosses \$1 Billion in Loans Issued*, TECHCRUNCH (May 29, 2012), <http://techcrunch.com/2012/05/29/peer-to-peer-lending-crosses-1-billion-in-loans-issued>.
 18. Advanced sales are also cumbersome to use when the product is simply poorly defined. Kickstarter could not have funded Facebook, for example, because there was no defined product to sell. Financing through advanced sales also results in less efficient capital acquisition when the start-up must fundraise for large investments. See Paul Belleflame, Thomas Lambert & Armin Schwienbacher, *Crowdfunding: Tapping the Right Crowd* 25-26 (CORE Discussion Paper No. 2011/32, 2012), <http://ssrn.com/abstract=1578175>.
 19. Even if cash were available, entrepreneurs would likely prefer to reinvest the funds in the high-growth start-up rather than return it to lenders. Recently, some entrepreneurs have been structuring initial capital infusions as convertible debt to simplify fundraising. See Dan Primack, *Start-up Savior? Killing Convertible Debt*, CNNMONEY (Aug. 31, 2012, 1:00 PM), <http://finance.fortune.cnn.com/2012/08/31/killing-convertible-debt> (noting that "almost 50% of angel deals were convertible debt" in 2011). These investments, however, often operate as equity due to the limited collateral and close relationships between founders and investors. David Gass, *Convertible Debt: Should Entrepreneurs Consider This Option with Angel Investors?*, FAST CO. (July 7, 2011), <http://www.fastcompany.com/1759856/convertible-debt-should-entrepreneurs-consider-option-angel-investors>.
 20. See Cohn, *supra* note 4, at 1435 (discussing the website SellaBand, which helps musicians seek tour funding and offers their backers a share of revenue); Daniel M. Satorius & Stu Pollard, *Crowd Funding: What Independent Producers Should Know About the Legal Pitfalls*, 28 ENT. & SPORTS L. 15, 16-17 (2010); Ray Ring, *Saving Journalism by 'Crowdfunding.'* HIGH COUNTRY NEWS, Mar. 16, 2009, http://www.hcn.org/issues/41.5/innovate-part-ii/article_view?b_start:int=2&-C=.
 21. SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (defining a security as an "investment of money in a common enterprise with profits to come solely from the efforts of others

allow small businesses the chance to achieve a broader funding base, but they remained blocked by the 1933 Act's restrictions.

In 2012, the JOBS Act amended the Securities Act of 1933 to finally allow for crowdfunded equity. Specifically, the JOBS Act created a new class of "emerging" companies²² that could engage in crowdfunding while remaining exempt from registration requirements. This crowdfunding exemption—section 302 of the JOBS Act—allows emerging companies to raise up to a total of \$1 million annually from individuals who do not meet the "accredited investor" threshold.²³ As a check on fraud, the amount that companies can raise is limited by the quality of their financial controls. For example, the full \$1 million is available to companies only if their financial statements are audited by an independent public accountant,²⁴ whereas a company may raise under \$100,000 by providing little more than an income tax statement and unaudited financials.²⁵ Similarly, the Act established limits for investors as well. Investors may devote only up to five or ten percent of their income, depending on whether they earned more than \$100,000 in the previous year.²⁶ Furthermore, all investments must take place under the aegis of an approved broker or online portal.²⁷ Within these guidelines, anyone—not just wealthy, accredited individuals—can invest in the equity of start-ups.

By increasing access to venture capital investing, the JOBS Act appears to offer significant benefits to middle-class investors. The vast majority of Americans, who do not qualify as "accredited investors,"²⁸ will now be able to make their own investments in emerging companies. Although this investing is

[regardless of] whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value"). Registrants also have to comply with state law restrictions. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 28.

22. Emerging companies must have under \$1 billion in revenue and under \$1 billion in nonconvertible debt. They also cannot be registered with the SEC as a large accelerated filer. JOBS Act, Pub. L. No. 112-106, § 101(a), 126 Stat. 306, 308 (2012).
23. *Id.* § 302(a).
24. *Id.* § 302(b). Full audited financials are required for any fundraising above \$500,000. *Id.*
25. *Id.* In addition, a company may raise between \$100,000 and \$500,000 by providing "financial statements reviewed by a public accountant who is independent of the issuer, using professional standards and procedures for such review or standards and procedures established by the Commission, by rule, for such purpose." *Id.* For a more thorough review of these tiers of fundraising and auditing requirements, see Cohn, *supra* note 4, at 1441-42.
26. JOBS Act § 302(a). The JOBS Act allows investors with incomes below \$40,000 per year to invest up to \$2,000. *Id.*
27. *Id.* §§ 302(a), 304(b).
28. For the income demographic breakdown of the U.S. population, see *Statistical Abstract of the United States: 2012*, U.S. CENSUS BUREAU 455 (2012), <http://www.census.gov/prod/2011pubs/12statab/income.pdf>.

risky, it offers the potential for exceptionally high returns. Early-stage venture funds have outperformed the benchmark Dow Jones Small Cap Index and the S&P 500 over the past 5-year, 15-year, and 20-year periods.²⁹ More importantly, this new asset class can provide enhanced portfolio diversification. With venture capital, investors can diversify away from publicly traded stocks and savings accounts, and protect a portion of their savings from a market downturn and low interest rates.³⁰ A key failing in the Act, however, will effectively prevent middle-class investors from reaping these benefits.

II. THE FAILURE OF THE JOBS ACT TO ALLOW DIVERSIFICATION

When the JOBS Act was passed, the final version included a little-discussed provision that will limit the ability of middle-class investors to participate in venture investing.³¹ Section 302(b) prohibits “investment companies” from operating under the Act, preventing companies that make investments for others from offering mutual fund-type products. This exclusion will make it very difficult, if not impossible, for middle-income investors to diversify their holdings.

Diversification is critically important to investors in general, and potentially even more so in the context of angel investing. Modern finance theory clearly articulates that portfolio diversification, the inclusion of assets with uncorrelated returns, will lower overall risk.³² This suggests that diversification

29. *U.S. Venture Capital Index and Selected Benchmark Statistics*, CAMBRIDGE ASSOCS. (Sept. 30, 2012), <http://www.cambridgeassociates.com/pdf/Venture%20Capital%20Index.pdf>. The report also notes, however, that venture capital has underperformed in the short term (less than three years) and on the ten-year horizon. Other commentators have also called into question whether venture capital, excepting the late-1990s Internet boom, offers sustainable long-term returns. See Diane Mulcahy, Bill Weeks & Harold S. Bradley, “*We Have Met the Enemy . . . and He Is Us*”: *Lessons from Twenty Years of the Kauffman Foundation’s Investments in Venture Capital Funds and the Triumph of Hope over Experience*, EWING MARION KAUFFMAN FOUND. (May 2012), <http://www.kauffman.org/uploadedfiles/vc-enemy-is-us-report.pdf>.

30. Regardless of total return, however, venture capital investments can still offer benefits provided they are not perfectly correlated with the remainder of the portfolio. For a broader discussion on the impact of diversification, see *infra* Part II. Note that the benefits of diversifying among different types of investments (e.g., holding venture capital as well as stocks and bonds) can be just as important as holding multiple instruments in one investment class, so the logic described below applies equally in this case.

31. JOBS Act § 302(b).

32. TIM KOLLER, MARC GOEDHART & DAVID WESSELS, *VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES* 33 (5th ed. 2010); BEVIS LONGSTRETH, *MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE* (1986).

can increase overall returns if the risk level is kept constant.³³ With early-stage companies, in particular, investments often assume a bifurcated return profile. Most companies fail, taking with them the cash contributed by investors; a few others achieve modest returns; and, occasionally, a company will be extremely successful and return multiples of the capital invested.³⁴ In early-stage investing, perhaps more than any other field, the prudent investor must have a well-diversified set of investments to ensure that the failures are balanced by the superstars.

The easiest way to diversify an investment portfolio is to participate in a pooled fund managed by a professional investor. By pooling capital, even an investor with limited resources can gain the benefits of diversification by spreading her capital among several different start-ups. Thus, even if several companies fail, investors may still be able to obtain an attractive return on average. The same principle has worked successfully in common stocks, with over thirteen trillion dollars invested by Americans in diversified mutual funds and similar vehicles.³⁵

Despite the obvious benefits of pooled funds, the JOBS Act specifically prevents investors from making investments through a professional fund by excluding “investment companies” from the new provisions.³⁶ This prevents the JOBS Act from being used to fund any entity which “is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities.”³⁷ Since investment companies cannot be considered emerging companies, no exemption from the SEC registration requirements applies. Middle-income investors thus cannot invest

33. Diversification reduces risk, and the investor can then increase returns by decreasing holdings in riskless assets or increasing the leverage on the portfolio, returning to the original level of risk. For more on the impact of diversification on a portfolio and modern portfolio theory, see DAVID F. SWENSEN, *PIONEERING PORTFOLIO MANAGEMENT: AN UNCONVENTIONAL APPROACH TO INSTITUTIONAL INVESTMENT* (2000).

34. According to the National Venture Capital Association, 49 venture-backed IPOs and 449 successful acquisitions were recorded in 2012. *Yearbook 2013*, NAT'L VENTURE CAPITAL ASS'N 49-50 (2013), http://www.nvca.org/index.php?option=com_content&view=article&id=257&Itemid=103. A total of 3,143 companies received investment in the same period. *Id.* at 27. Assuming a similar ratio over time, the implication holds that over 2,600 companies, or nearly 85%, fail even after reaching the venture capital stage.

35. *2011 Investment Company Fact Book*, INV. CO. INST. 8 (2011), http://www.ici.org/pdf/2011_factbook.pdf. This comprises twenty-three percent of all corporate ownership. *Id.* at 12 fig.1.5. For a discussion tracing the origins of mutual funds back to early Dutch investors' desires for diversification, see K. Geert Rouwenhorst, *The Origins of Mutual Funds* (Yale ICF Working Paper No. 04-48, 2004), <http://ssrn.com/abstract=636146>.

36. JOBS Act § 302(b).

37. 15 U.S.C. § 80a-3 (2006).

with them, even if only to create a pooled vehicle for investing in other start-ups. Furthermore, the Internet portals that will facilitate transactions under the Act cannot assist in pooling capital, as they must not specifically promote any individual start-ups and cannot hold investors' money to make investments themselves.³⁸ Thus, the easiest way for investors to gain diversification, an investment fund, is legally precluded by the text of the Act itself.³⁹

One might argue that investors can build their own diversified portfolio and would not need a pooled vehicle. There are practical concerns that make this unlikely, however. First, the JOBS Act primarily increases investment opportunities for middle-income Americans. Middle-class investors may not have the time or resources to research multiple illiquid start-ups. Second, many investors lack the skill to evaluate these companies—which may not yet have products, prototypes, or customers—and would rather defer to a professional with investment expertise or technical knowledge of the sector in which the start-up operates. Lastly, many start-ups may set minimums on the amount that investors can contribute to simplify bookkeeping. For example, even if the minimum is set at a modest \$500, an investor who is only able to dedicate \$2,000 per year to angel investing will be unable to achieve diversification within a reasonable time horizon. Offering pooled investment vehicles would not require investors to use them, of course. Those who prefer to invest directly could still do so. By excluding them, however, investors are deprived of their choice in the matter, and, most critically, many simply will not be able to invest in start-ups.

III. AN UNSUPPORTED EXCLUSION

In light of the many advantages of pooled funds, it is difficult to understand why investment companies were excluded from the Act. When the JOBS Act passed the House, the bill had been viewed as an uncontroversial measure designed to increase funding flowing to small businesses⁴⁰ and did not

38. JOBS Act § 304.

39. Of course, there may be alternative ways for investors to attempt to gain diversification or expertise. But many solutions, such as hiring a private consultant, are likely to be so expensive as to make any investment unprofitable. Other options, such as relying on information from a professional manager or an informal network of friends, may present complicated incentive structures or conflicts of interest that may be unappealing or even harmful to the investor.

40. The JOBS Act passed the House overwhelmingly, with only twenty-three votes in opposition. *Final Vote Results for Roll Call 110*, CLERK OF THE U.S. HOUSE OF

include the language prohibiting the participation of investment companies.⁴¹ Indeed, the subject of middle-class investors' portfolio diversification seems not to have come up at all during the House floor debate.⁴²

The prohibition against investment funds appears to have been a late addition to the JOBS Act motivated by an interest in investor protection. Some Senators expressed concern that the House bill lacked sufficient protections against fraud. In response, Senator Merkley introduced Senate Amendment 1884, which included the prohibition against investment fund participation in the JOBS Act and was incorporated into the final version of the bill. The amendment was hurriedly considered and passed with limited debate. Although the investment company exclusion was added as part of the Merkley Amendment's package of consumer protection measures, there was no discussion in the record of how the specific provision banning investment funds would help protect either consumers or investors.⁴³ Many of the new provisions included in the Amendment—such as those requiring disclosure of company financials, establishing officer liability for the accuracy of such information, and mandating the use of approved online intermediaries to screen investments—had an obvious investor-protection rationale.⁴⁴ It is less clear, however, what purpose was served by excluding investment companies.⁴⁵

Given the limited congressional debate on the investment company exclusion, the policy rationale for this provision was left unstated. It is unlikely that this amendment was designed to prevent outright fraud on the part of investment companies—that is, to prevent a company from gathering a large pot of assets and then fleeing. This problem is not unique to investment

REPRESENTATIVES (Mar. 8, 2012), <http://clerk.house.gov/evs/2012/roll110.xml> (last visited Jan. 31, 2013). Bipartisan support extended to the Senate as well: “We are in the middle of March Madness here. To use a basketball metaphor: This is a layup. Let’s get it done.” 158 CONG. REC. S1876 (daily ed. Mar. 21, 2012) (statement of Sen. McConnell).

41. The House version required only that an intermediary “not offer investment advice.” H.R. 3606, 112th Cong. § 301(b) (2d Sess. 2012).
42. See, e.g., 158 CONG. REC. H1275 (daily ed. Mar. 8, 2012).
43. 158 CONG. REC. S1887 (daily ed. Mar. 21, 2012) (statement of Sen. Merkley).
44. *Id.*
45. This specific proposal received no mention in the Congressional Record. When the House received the revised bill, many representatives questioned whether the Senate amendments, including the prohibition on investment company activities, went too far, but did not alter the Senate text. 158 CONG. REC. H1590-92 (daily ed. Mar. 27, 2012). In all House commentary, as in the Senate, however, the entire discussion centered on balancing the concerns of fraud on investors with start-up access to capital; the impact of diversification was not discussed. See *id.* at H1586-93; *id.* at H1597-98.

companies.⁴⁶ Any scam can masquerade as a start-up; in fact, crowdfunding may be particularly susceptible to fraud, with the most promising and legitimate ideas expecting to receive funding through traditional channels. To protect against fraud, the JOBS Act and the Merkley Amendment already mandate certain safeguards. If those safeguards are insufficient, then this concern implicates the entire Act.⁴⁷ Making investment less attractive by prohibiting pooled funds will not solve this issue and may make it worse if sophisticated individuals who recognize the importance of diversification refuse to participate in the market.

The prohibition on investment company activities may have also been motivated by an unstated concern about those firms' incentives and ability to exploit investors. Investment companies often charge a performance fee based on returns, as well as a flat management fee determined as a percentage of their total assets. They may be tempted to increase their assets to raise their flat management fee. An investor might therefore entrust funds to a manager with a primary incentive not to invest well, but to gather as many clients as possible.⁴⁸ This problem, however, is solvable. Investment companies targeting the crowdsourced space can simply be prevented from taking management fees and forced to rely instead on performance-based investment returns. In this way, the incentives of the retail investors and their hired guns would be better aligned.⁴⁹ Similarly, the funding portals could require a robust disclosure regime to allow customers to make informed choices between providers and help them select those that deliver the most value for their investors.⁵⁰

46. Nor is the danger of fraud unique to middle-class investors. The rich can be fleeced as well, as noted by Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 152 n.8, 191-92 (2010).

47. See *supra* note 7.

48. Finance literature frequently highlights the problems associated with the collection of management fees as a percentage of assets. See, e.g., André F. Pernold & Robert S. Solomon, Jr., *The Right Amount of Assets Under Management*, FIN. ANALYSTS J., May-June 1991, at 31.

49. Of course, an investment company could still make more money in absolute terms by having a greater pool of assets under management. But, under this scenario, at least the investment company would only earn money if investors did as well. Also, it is somewhat unlikely that conventional venture capital firms, which prefer to concentrate on larger investments, would participate in crowdfunded investments. It is more likely that the aggregators would be angel investors, seeking to attract additional publicity to some of their products, or other smaller entities.

50. Disclosure requirements are often discussed as a method of assisting even unknowledgeable investors. See, e.g., 17 C.F.R. § 240.15g-2 (2010) (requiring brokers to make disclosures to consumers in penny-stock transactions); see also Markham, *supra* note 13, at 378-81 (arguing that institutional investors should be required to sign risk disclosure statements).

Alternatively, this provision may be a result of historical reporting concerns. Investment companies have traditionally been subject to a wide variety of reporting rules that the JOBS Act does not waive, such as those in Dodd-Frank⁵¹ and the Investment Advisors Act of 1940.⁵² It is possible that investment companies were excluded from the JOBS Act for fear of lowering the disclosure threshold generally.⁵³ However, removing the investment company exclusion would allow firms to offer pooled vehicles in the crowdsourced space, without waiving the disclosure, governance, and reporting restrictions contained in other U.S. securities laws that would remain in force.

Ultimately, however, these concerns appear to fall short. None of them are of sufficient weight to override the significant financial benefits to middle-class investors, as well as to start-ups, from allowing the use of diversified, pooled investment vehicles. Without a clear policy justification, the prohibition on investment funds appears to be unfounded, failing to protect investors and undermining a basic purpose of the JOBS Act.

CONCLUSION

The JOBS Act was designed to energize the American economy. The legislation loosened restrictions on equity investing, allowing capital to flow to start-ups and making venture capital investing more egalitarian. In its rush to ensure that middle-class investors would be protected, however, Congress may have moved too far. The blanket prohibition on investment funds will not only fail to protect the middle class, but it will prevent average investors from taking advantage of the Act's benefits. Thus, one of the JOBS Act's greatest promises—enabling middle-class investors access to a new asset class—appears unrealized.

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51. 12 U.S.C. § 5301(12)(B)(ii) (Supp. V 2012).

52. 15 U.S.C. § 80b-2(a)(11) (2006).

53. *Generally Applicable Questions on Title I of the JOBS Act*, U.S. SEC. & EXCHANGE COMMISSION (May 3, 2012), <http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm>.

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