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Late to the Crowd: How Ohio's Crowdfunding Bill Fails to Achieve Inclusiveness and Efficiency

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LATE TO THE CROWD: HOW OHIO'S CROWDFUNDING BILL FAILS TO ACHIEVE INCLUSIVENESS AND EFFICIENCY

NATHAN HILL*

ABSTRACT

Almost half of all small and medium sized businesses within the United States fail within the first five years. One of the main contributing factors to that failure is the inability to raise enough money to operate. While there are many ways for businesses to raise operating capital, the most accessible and sometimes the most efficient way is through a process called equity-based crowdfunding—the offering of shares in exchange for an investment raised through an online portal. In 2012, after seeing the success of equity-based crowdfunding in other countries, the United States passed the Jumpstart Our Business Startups Act (JOBS Act) to make crowdfunding safer and more accessible for both entrepreneurs and investors. Not surprisingly, the federal law did little to make crowdfunding more inclusive and efficient. Therefore, state legislatures and governors began passing and enacting what they called “intrastate crowdfunding laws”—laws that permit local businesses to use crowdfunding outside some of the requirements of Securities and Exchange Commission regulations—to find new avenues for raising money and to create competition in an effort to attract new business to their states.

In early 2021, after much delay, Ohio became the thirty-seventh state to pass intrastate crowdfunding. However, the Ohio law is almost an identical copy of the JOBS Act and was passed with a greater focus on large corporations than with small and medium sized entities (SMEs) in mind. Therefore, this Note recommends that Ohio amend House Bill 312 to create a more efficient way for SMEs to raise funds, while also creating more inclusivity than other money raising options. The Note accomplishes this by using successful intrastate crowdfunding laws in other states and

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equity-based funding programs in other countries to build upon what the Ohio legislature created in HB 312. In the end, this Note contends that a more efficient and inclusive intrastate crowdfunding bill could be a spark to the economy, the job market, and innovation in Ohio.

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I. INTRODUCTION

James Kindred and Rob Fink of the United Kingdom’s Big Drop Brewing Co. had big aspirations to see their low alcohol/alcohol free beer not only in Europe, but across Australia and the United States.¹ Unable to receive funding from a bank or venture capital firm in order to market their beers outside the United Kingdom, James and Rob looked to equity-based crowdfunding—the raising of capital through selling securities (or shares or stakes of ownership) to everyday people via an online portal—to raise the money needed to succeed.² In March of 2020, in the midst of a global pandemic, James and Rob launched their equity-based crowdfunding campaign on the European portal site, *Seedrs*.³ Their campaign offered investors from within the United Kingdom

¹ See *About Big Drop*, BIG DROP BREWING CO. LTD., <https://www.bigdropbrew.com/about-big-drop/> (last visited Oct. 7, 2020); Edith Hancock, *5 Successfully Crowdfunded Drinks Brands in 2020*, THE DRINKS BUS. (Oct. 5, 2020), <https://www.thedrinksbusiness.com/2020/10/5-successfully-crowdfunded-drinks-brands-in-2020/>.

² *Id.*

³ See *Big Drop Brewing*, SEEDRS, <https://www.seedrs.com/big-drop-brewing-co/sections/idea> (last visited Oct. 7, 2020); see also Hancock, *supra* note 1.

7.55% equity ownership in Big Drop Brewing.⁴ Nine months after their campaign launch, they exceeded their goal by 123% and raised approximately \$813,451.76.⁵ Now, thanks to efficient equity-based crowdfunding laws in the United Kingdom, Rob and James can scale their business without having to rely on a traditional bank loan or venture firm funding.

However, what occurred for Big Drop Brewing Co. was the exception, not the rule, especially in the United States. Countries around the world have been using equity-based crowdfunding to create a more efficient and inclusive way for businesses to raise capital.⁶ Places like the United Kingdom and New Zealand have been largely successful.⁷ These countries are seeing success rates of roughly 78%, with success measured by whether the business is still active at least two years after utilizing crowdfunding.⁸ While some of these programs are still in their infancy, the signs are encouraging. In New Zealand, the first year of equity-based crowdfunding saw twenty-one campaigns raise approximately 12 million NZD.⁹ Within the United States, the Federal Jumpstart Our Business Startups Act (JOBS Act) was passed in 2012 to introduce equity-based crowdfunding, while seeking to copy the success of crowdfunding from other markets.¹⁰ But, with strict Securities and Exchange Commission (SEC) restrictions and exorbitant SEC registration fees, small- and medium-sized entities (SMEs) in the United States have struggled to use equity-based crowdfunding to their advantage. One of the JOBS Act's main goals was to make crowdfunding safer and more accessible for both entrepreneurs and investors.¹¹ Armed with new laws and changing SEC regulations, businesses hoped they could use equity-based crowdfunding to help their ideas come to life. Unlike Big Drop Brewing Co., many businesses' dreams did not become a reality. Numerous obstacles and even more requirements halted equity-based crowdfunding from becoming what it truly could be: a spark for economies, job markets, and innovation.¹² With that knowledge,

⁴ See *Big Drop Brewing*, *supra* note 3.

⁵ See *id.* (converting from the British pound to U.S. dollars).

⁶ See Andrew A. Schwartz, *The Gatekeepers of Crowdfunding*, 75 WASH. & LEE L. REV. 885, 885–86 (2018).

⁷ See *id.* at 914; see also PAOLO BUTTURINI, CROWDFUNDING FOR SMEs: A EUROPEAN PERSPECTIVE 205 (Roberto Bottiglia & Flavio Pichler eds., 2016) (discussing how crowdfunding from within the United Kingdom grew more than 600% between 2012 and 2013 and is still considered a fast-growing sector).

⁸ Schwartz, *supra* note 6, at 927.

⁹ *Id.* (12M NZD is the equivalent of 10M USD).

¹⁰ See Off. of the Press Sec'y, *President Obama to Sign Jumpstart Our Business Startups (JOBS) Act*, THE WHITE HOUSE (Apr. 5, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/04/05/president-obama-sign-jumpstart-our-business-startups-jobs-act>.

¹¹ Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

¹² Jo Won, *Jumpstart Regulation Crowdfunding: What is Wrong and How to Fix It*, 22 LEWIS & CLARK L. REV. 1393, 1405–12 (2018).

states began passing their own intrastate crowdfunding legislation, in an attempt to offer more clarity and greater results than the federal law. Today, 36 states have some form of intrastate crowdfunding legislation.¹³ On December 17, 2020, the State of Ohio became number 37, with the passage of HB 312, which became effective in Ohio on March 31, 2021.¹⁴

Equity-based crowdfunding laws around the world are centered upon two functional goals: efficiency and inclusivity.¹⁵ This Note will consider efficiency in crowdfunding laws to mean removing or streamlining certain regulations and barriers to make it *easier* and *faster* for SMEs to raise capital than it would be through traditional methods.¹⁶ Inclusivity in its truest form, on the other hand, would be crowdfunding laws where any and all entrepreneurs are invited to pitch their company to “the crowd” through an internet portal.¹⁷ This idea comes from the fact that anyone with a good business idea should be able to become an entrepreneur.¹⁸ However, no one has ever advocated for a fully inclusive system, as regulations are necessary to protect investors, entities, and the market.¹⁹ Therefore, this Note’s use of inclusivity will consider laws that include measures to allow *more people* to use crowdfunding than would be allowed through traditional methods (such as bank loans, private equity financing, Regulation A+, etc.).

Effective intrastate and equity-based crowdfunding laws around the world tend to focus on either efficiency or inclusivity. New Zealand, for example, has equity-based crowdfunding laws that are more efficient, but at the cost of inclusivity.²⁰ Laws in the United States, like the JOBS Act, focus far more on inclusivity than efficiency.²¹ Ohio’s HB 312, however, attempts to juggle both, but by doing so, creates a bill that lacks effectiveness, while several states, like Michigan, have shown that these laws can work.²² Therefore, this Note proposes that Ohio change course and pass a new

¹³ *Interstate Crowdfunding Resources*, N. AM. SEC. ADM’RS ASS’N, <https://www.nasaa.org/industry-resources/securities-issuers/intrastate-crowdfunding-directory> (last visited Mar. 10, 2022).

¹⁴ See H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

¹⁵ Schwartz, *supra* note 6, at 885.

¹⁶ See C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 5 (2012); see also Christian W. Borek, Comment, *Regulation A+: Navigating Equity-Based Crowdfunding Under Title IV of the Jobs Act*, 47 CUMB. L. REV. 143, 147–50, 155–56 (2017) (showing that “traditional methods of” raising capital include bank lending, venture capital, retained earnings, Regulation D, Regulation A, Regulation A+).

¹⁷ Schwartz, *supra* note 6, at 905–06.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 886.

²¹ *Id.* at 910.

²² See *Michigan Invests Locally Exemption (M.I.L.E.) – Intrastate Crowdfunding*, DEP’T OF LICENSING AND REGUL. AFFS., <https://www.michigan.gov/lara/0,4601,7-154->

and improved intrastate crowdfunding bill that focuses on efficiency, with less focus on inclusivity, but while not entirely ignoring an inclusive approach. A new bill is required because intrastate crowdfunding presents advantages to entrepreneurs that other financing options do not, while also increasing the economic activities of states in a way that is more stable than traditional methods.²³

The rate at which state intrastate crowdfunding laws are being passed shows how a crowdfunding exemption to SEC registration exists more comfortably and more efficiently in a state regulatory market than in a federal regulatory structure.²⁴ Ohio needs an intrastate crowdfunding bill because SEC regulation is not a one-size-fits-all approach. By having its own legislation, Ohio can create an environment specific to Ohio SME needs that allows these entrepreneurs and small businesses to thrive, while innovating and regulating the law as it sees fit.²⁵ Ohio needs a *new* intrastate crowdfunding law because the impact on the economies and markets of states with successful laws are clear.²⁶ The issuer's campaign limits are higher under Ohio law (\$5 million raising limit) than under Federal Crowdfunding (FCF) Regulations (\$1.07 million raising limit), and Ohio has the ability to set its own investor limits that are different from SEC rules, where strict limits are placed on even accredited investors.²⁷ Therefore, Ohio can and must do more for the emerging SMEs in the state.

While HB 312 was a step in the right direction, it did too little for either efficiency or inclusivity. Efficiency is lacking because HB 312, with a few exceptions, is almost a carbon copy of the JOBS Act.²⁸ The JOBS Act, while incorporating both factors, had a much stronger focus on inclusivity than efficiency. So, by passing a similar bill, Ohio's intrastate crowdfunding bill is no more efficient than the SEC's other offerings, like Regulation D or A+.²⁹ Inclusivity is also lacking in HB 312. Mainly, HB 312 was

89334_61343_32915-514201--00.html (last visited Oct. 30, 2020); Schwartz, *supra* note 6, at 885.

²³ *Infra* Part III.A.

²⁴ See JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 304 (Rachel E. Barkow et al. eds., 8th ed. 2017).

²⁵ Brian, *Intrastate Crowdfunding and Blue Sky Laws*, CROWDWISE, <https://crowdwise.org/regulations-and-law/intrastate-crowdfunding-and-blue-sky-laws/#:~:text=Intrastate%20crowdfunding%20laws%20allow%20small,intended%20for%20more%20mature%20companies> (last updated Oct. 15, 2019).

²⁶ *Infra* Part III.A.

²⁷ *Infra* Part IV.

²⁸ Compare H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020), with Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

²⁹ Bradford, *supra* note 16, at 31; see also 17 C.F.R. § 230.502 (2021); 17 C.F.R. § 230.506 (2021) (describing the numerous different disclosure requirements that can change based on how much an entity is issuing, who they are issuing to, what kind of company they are, etc.). For a brief summary of Regulation D, see Will Kenton, *SEC Regulation D (Reg D)*, INVESTOPEDIA (July 29, 2020), <https://www.investopedia.com/terms/r/regulationd.asp>. For a brief summary of Regulation A+, see Max Crawford, *Regulation A+: What Entrepreneurs Need*

only passed after adding an amendment to assist large multi-million-dollar corporations secure financing for real estate projects,³⁰ which means that HB 312 was not passed with the main goal of opening more avenues for SMEs to raise capital. This, in general, creates an underinclusive bill.

Because Ohio's HB 312 fails to provide for more inclusive or efficient crowdfunding efforts, the legislative and executive branches must work together to pass a new efficient intrastate crowdfunding bill to spur the economy, the job market, and innovation in Ohio. An initial goal of HB 312 was to make Ohio the most business friendly state in the country and assist SMEs in finding faster ways to raise capital. But the way the law stands now, businesses will neither seek Ohio out as a launching pad nor have more efficient financing options. Businesses across the country, from multi-million-dollar professional sports teams³¹ to the smaller, locally-owned coffee shops³² have used some version of crowdfunding to help them reach their goals. Ohio must act to create better crowdfunding opportunities for its residents, while also seeking to give the state a competitive advantage over others.³³

This Note recommends specific improvements that could be included in such a law and explains how they would help serve the legislature's goals. Part II of this Note will discuss the background of crowdfunding, the JOBS Act, intrastate crowdfunding in general, and the history of intrastate crowdfunding legislation in Ohio. Part III will analyze the failures of the JOBS Act with respect to SMEs and why Ohio sought to supplement it. Further, Part III will discuss how intrastate crowdfunding provides a better alternative to more traditional methods, while also looking to examine the positive impact intrastate crowdfunding has on jobs, the economy, and innovation. Part III lastly considers the criticisms of intrastate crowdfunding, such as fraud, investor risk, and small business failure. In the end, Part III will establish that the benefits of a properly-designed crowdfunding program far outweigh the costs. As Part IV then explains, HB 312 has many shortcomings in the areas of entry requirements, portal operations, investor limits, and disclosures. Specifically, HB 312 fails to be either efficient or inclusive, and thus falls well short of its goal to make Ohio "the most business-friendly state in the country".³⁴ Finally, Part V will use the history of

to Know, START ENGINE (Apr. 9, 2021), <https://www.startengine.com/blog/regulation-a-what-entrepreneurs-need-to-know/>.

³⁰ See *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, 133d Sess. (Ohio 2020) (statement of Josh Glessing, Haslam Sports Group, H.B. 312); see also *id.* (statement of Thomas Niehaus, The Sherwin Williams Company, H.B. 312).

³¹ See Edward A. Fallone, *Crowdfunding and Sport: How Soon Until the Fans Own the Franchise?*, 25 MARQ. SPORTS L. REV. 7 (2014) (referring to the public ownership of the National Football League team the Green Bay Packers).

³² Albert J. Masco, *Turn on the Lights at *Coffee Bar*, KICKSTARTER (Aug. 23, 2019), <https://www.kickstarter.com/projects/asteriskcoffebar/turn-on-the-lights-at-coffee-bar>.

³³ See Kelly Mathews, Comment, *Crowdfunding, Everyone's Doing It: Why and How North Carolina Should Too*, 94 N.C. L. REV. 276, 298 (2015).

³⁴ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Rep. Jena Powell, Sponsor, H.B. 10).

legislation in Ohio and more successful intrastate crowdfunding programs to examine how Ohio should place an emphasis on efficiency, while not totally counting out inclusivity, through a blueprint for a new and improved program.

Big Drop Brewing Co. is just one example of how, at the tipping point of economic decline, efficient and inclusive equity-based crowdfunding laws are a viable, successful option.³⁵ Ohio attempted to do this with HB 312, but after leaving the bill in committee for over a year, the legislature did not do enough to assist Ohio's SMEs.³⁶ With too much dependence on the JOBS Act and a focus on assisting only large corporations, HB 312 will be ineffective from the start.³⁷ Therefore, Ohio should do everything possible to further assist in the growth of innovation and ideas, which is why it is imperative for the state to amend HB 312.

II. BACKGROUND: CROWDFUNDING, ITS MANY FORMS, AND ITS EVOLUTION IN OHIO

Much like the many different entities that use it, there are multiple different forms of crowdfunding available to entrepreneurs in the United States. The most popular forms include donation-based,³⁸ rewards-based,³⁹ peer-to-peer lending,⁴⁰ and equity-based crowdfunding. While each variation has its benefits, this Note seeks to understand the nuances of equity-based crowdfunding and its importance to Ohio. The focus on equity-based crowdfunding in general is due to its relative novelty. It is a new way for SMEs to obtain funding in the United States, an important tool that allows entrepreneurs to raise capital, and a way to seek financing that does not pull attention

³⁵ See *About Big Drop*, *supra* note 1; Hancock, *supra* note 1.

³⁶ *Status Reports*, THE OHIO LEG., <https://www.legislature.ohio.gov/legislation/status-reports> (last updated Jan. 2021); see H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

³⁷ See JD Davidson, *Ohio Senate Passes 4 Bills Aimed at Helping Small Businesses*, MAHONING MATTERS (Dec. 11, 2020), <https://www.mahoningmatters.com/local-news/ohio-senate-passes-4-bills-aimed-at-helping-small-businesses-3172976> [<https://web.archive.org/web/20210218015024/https://www.mahoningmatters.com/local-news/ohio-senate-passes-4-bills-aimed-at-helping-small-businesses-3172976>] (discussing HB 312 in one sentence at the bottom of the article); see also Mary Vanac, *Cleveland's Skyline Could Dramatically Change Under Legislation Signed by DeWine*, CLEVELAND BUS. J. (Dec. 29, 2020), <https://www.bizjournals.com/cleveland/news/2020/12/29/dewine-signs-commercial-real-estate-legislation.html> (proving that HB 312 was only passed with the intention of helping Sherwin Williams, the Columbus Crew, and Origin Malt in ranges from \$10 million to \$35 million).

³⁸ Bradford, *supra* note 16, at 31 (“Donation-model crowdfunding sites are not offering securities to investors. Contributors receive absolutely nothing in return for their contributions, so they clearly have no expectation of profits . . .”).

³⁹ *Id.* at 32 (“The reward . . . models . . . do not involve securities under federal law, as long as the reward or the pre-purchased product is all the investor is promised in return for her contribution.”).

⁴⁰ FLAVIO PICHLER & ILARIA TEZZA, CROWDFUNDING FOR SMEs: A EUROPEAN PERSPECTIVE 11 (Roberto Bottiglia & Flavio Pichler eds., 2016) (“Peer-to-peer (P2P) lending . . . resembles bank loans . . . [where] investors finance a project or an idea and obtain a financial return in the forms of periodic interest and principal at the end of lending period.”).

away from the core activities of the SMEs' business model.⁴¹ Further, there is relatively little research on equity-based crowdfunding in the United States, but many in Europe have found it to be the best opportunity to remove the gap to equity that many SMEs face.⁴²

While crowdfunding is at its infancy within the United States, it is nothing new. Composers Beethoven and Mozart are said to have used "crowdfunding" to raise money for concerts and the publication of manuscripts.⁴³ But crowdfunding did not become prominent in the United States until after the 2008 recession. During this time, businesses and entrepreneurs were unable to receive funding from traditional sources.⁴⁴ From 2008 to 2012, legislators and entrepreneurs struggled to come to a consensus on how best to balance the consumer protection values and other goals of SEC regulations against the need to encourage economic activity, including, for example, innovation.⁴⁵ Then, in 2012, the JOBS Act was passed in an attempt to open the doors of equity-based crowdfunding to more people.⁴⁶

A. *Generally, What Is Crowdfunding?*

Crowdfunding can be defined in numerous ways. Most famously and most succinctly, crowdfunding is defined as "rais[ing] money through relatively small contributions from a large number of people."⁴⁷ Crowdfunding asks the "crowd" to provide a solution, raising capital, to a financial problem.⁴⁸ Before the passage of the JOBS Act, 57% of small businesses could not find additional funding within four years of looking.⁴⁹ Therefore, SMEs required other avenues to receive the financial support that was essential to expanding or starting their business. Enter equity-based crowdfunding. In the United States, crowdfunding is facilitated through internet

⁴¹ ANJA HAGEDORN & ANDREAS PINKWART, CROWDFUNDING IN EUROPE: THE FINANCING PROCESS OF EQUITY-BASED CROWDFUNDING: AN EMPIRICAL ANALYSIS 71 (Dennis Bruntje & Oliver Gajda eds. 2016).

⁴² Andreas Wald et al., *It is Not All About Money: Obtaining Additional Benefits through Equity Crowdfunding*, 28 THE J. OF ENTREPRENEURSHIP 270, 273 (2019).

⁴³ PICHLER & TEZZA, *supra* note 40, at 6.

⁴⁴ *Id.* at 7 (discussing how the role of the financial crisis was important to the spike in crowdfunding because from 2007–2008, bank credit ceased to exist in the United States).

⁴⁵ See Mathews, *supra* note 33, at 280.

⁴⁶ Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012); see also Borek, *supra* note 16, at 147.

⁴⁷ Bradford, *supra* note 16, at 10.

⁴⁸ PICHLER & TEZZA, *supra* note 40, at 9.

⁴⁹ NAT'L SMALL BUS. ASS'N, SMALL BUSINESS ACCESS TO CAPITAL SURVEY 4, <http://www.nsba.biz/wp-content/uploads/2012/07/Access-to-Capital-Survey.pdf> (last updated Dec. 2012).

platforms called portals, such as Kickstarter, Indiegogo, and, in Ohio, Wunderfund.⁵⁰ These sites distributed more than \$8.3 billion between 2008 and 2017.⁵¹

While these portals have distributed billions of dollars over their lifetimes, many of them do not deal in equity-based crowdfunding. Because there are already billions of dollars for SMEs through these other methods, why does the United States, and specifically Ohio, need equity-based crowdfunding? Equity-based crowdfunding is independently important because, according to entrepreneurs throughout Israel and Norway, equity-based crowdfunding is uniquely situated to provide entrepreneurs and SMEs both inward and outward benefits.⁵² Outward benefits are aimed at “increasing public exposure and advancing the project’s success by recruiting additional investors.”⁵³ On the other hand, inward benefits are implemented through investors’ contributions of personal experience and expertise.⁵⁴ Based on the data, these benefits that derive from using equity-based crowdfunding can become resources that advance future success of the SMEs.⁵⁵ But, even if it provides these benefits that other crowdfunding options may not provide, what is equity-based crowdfunding?

In short, equity-based crowdfunding is the option that is the most like traditional investing in a company.⁵⁶ Here, an entity asks for support of its project by offering an ownership stake in its company.⁵⁷ This stock includes possible voting rights and an expectation to receive profits in the form of dividends, as well as capital appreciation.⁵⁸ The Supreme Court has held that stock purchased through crowdfunding is a “security” within the meaning of federal securities laws.⁵⁹ Traditionally, that would trigger the requirement that the entity must register with the SEC, but securities covered by Title III of the JOBS Act are exempt from registration.⁶⁰ Because equity-based crowdfunding is the newest form of crowdfunding, it has received the least amount of discussion and its implications are

⁵⁰ See KICKSTARTER, <https://www.kickstarter.com/> (last visited Nov. 30, 2020); INDIEGOGO, <https://www.indiegogo.com/> (last visited Nov. 30, 2020); WUNDERFUND, <https://www.wunderfund.co/> (last visited Nov. 30, 2020).

⁵¹ See Evan Glustrom, Note, *Intrastate Crowdfunding in Alaska: Is There Security in Following the Crowd?*, 34 ALASKA L. REV. 293, 300 (2017).

⁵² Wald et al., *supra* note 42, at 278–79.

⁵³ *Id.* at 270.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Borek, *supra* note 16, at 148; *see also* Bradford *supra* note 16, at 10.

⁵⁷ See PICHLER & TEZZA, *supra* note 40, at 11.

⁵⁸ *Id.*

⁵⁹ Bradford, *supra* note 16, at 33 (citing *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 848 (1975)).

⁶⁰ Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 306, 126 Stat. 306, 315 (2012); Borek, *supra* note 16, at 144.

relatively unknown.⁶¹ However, equity-based crowdfunding presents a more attractive avenue for SMEs to raise capital.⁶² The JOBS Act was essential to making this happen. Its addition of investor protections and safeguards against fraud allowed equity-based crowdfunding to exist in the United States.⁶³ However, after a delay in regulations from the SEC, many states found the JOBS Act too restrictive and too convoluted, so they began passing intrastate crowdfunding laws to loosen certain restrictions in the areas of offering limits, investor requirements, portal operations, advertising regulation, and disclosure requirements.⁶⁴ But the true benefits of equity-based crowdfunding are relatively unknown in Ohio, and HB 312 is more similar to the JOBS Act than to other states' equity-based intrastate legislation.⁶⁵ This could create an underutilized option for SMEs based on the JOBS Act's restrictions and convolution, which could impact Ohio at a time when it is trying to increase its economic activity.⁶⁶ More can be done to have a positive effect on the economy, the job market, and innovation in Ohio, as other intrastate crowdfunding programs have shown.⁶⁷

B. *The JOBS Act of 2012*

Crowdfunding exists in the United States as a product of the JOBS Act, which President Obama signed in April of 2012.⁶⁸ The Act was passed with the intention of spurring small businesses and entrepreneurs by removing costly regulations and making it easier for them to access capital through new registration exemptions.⁶⁹ The JOBS Act brought equity-based crowdfunding to the United States by creating a “new

⁶¹ Mathews, *supra* note 33, at 303.

⁶² *See id.* at 299–01.

⁶³ Borek, *supra* note 16, at 148–50 (explaining that the goal of the Securities Act of 1933 of providing investor and market protections exists today in the JOBS Act of 2012).

⁶⁴ *See* Mathews, *supra* note 33, at 280.

⁶⁵ Compare H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020), with Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

⁶⁶ *See Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Rep. Jena Powell, Sponsor, H.B. 10); *see, e.g.*, Andrew J. Tobias, *New Ohio Ad Campaign Aimed at Attracting Businesses Touts State's Low Taxes . . .*, CLEVELAND.COM (Feb. 11, 2021), <https://www.cleveland.com/open/2021/02/new-ohio-ad-campaign-aimed-at-attracting-businesses-touts-states-low-taxes-sparks-online-debate.html> (discussing one of Ohio's most recent attempts to increase its economic activity by trying to attract more talent to the state).

⁶⁷ *See, e.g., Michigan Invests Locally Exemption (M.I.L.E.) – Intrastate Crowdfunding*, *supra* note 22; Andrew A. Schwartz, *supra* note 6 (discussing New Zealand's approach to its creation of crowdfunding legislation to stimulate economic growth and its comparison to U.S. legislation).

⁶⁸ Off. of the Press Sec'y, *supra* note 10.

⁶⁹ 158 Cong. Rec. 38, H1275 (daily ed. Mar. 8, 2012) (statement of Rep. Cantor).

exemption from registration” under the SEC regulations for small investors.⁷⁰ The Act amended section four of the Securities Act of 1933 (“the Securities Act”) by providing an exemption from registration for small startups where, for any twelve-month period,

the company sells no more than \$1,000,000 of shares in the aggregate to investors.⁷¹ In addition, no single investor can purchase more than \$2,000 of shares or 5% of the investor’s annual income or net worth, whichever is larger (10% for investors with annual income or net worth exceeding \$100,000).⁷²

Importantly, both the offering and investor limits appear in sections of the Act that can be altered by state legislation. Lastly, crowdfunding transactions must occur through a funding portal that complies with any current and future SEC regulations.⁷³

However, one important requirement remained that hindered the JOBS Act’s effectiveness. SMEs could still only receive investments from “accredited investors.”⁷⁴ In other words, if an individual does not have a net worth greater than \$1,000,000, they will be unable to invest through crowdfunding.⁷⁵ This, in turn, significantly limited the number of people who could invest in equity-based crowdfunding and certainly did not make it any easier for SMEs to find and raise capital. While the JOBS Act had good intentions, efforts are still needed from state governments to make equity-based crowdfunding what it truly is: a chance to spark to innovation through more inclusive and efficient efforts. With a better understanding of the JOBS Act in place, it is appropriate to take a deeper look at intrastate crowdfunding in general.

C. *Intrastate Crowdfunding*

The JOBS Act falls short in many regards.⁷⁶ Luckily, there are processes available that allow an SME to avoid registering with the SEC. To avoid registration, the entrepreneur must ensure that the issuances they offer fully comply with either the Federal Crowdfunding exemption or their state intrastate exception. However, all state laws, like HB 312, that are passed as a state intrastate crowdfunding exception fall

⁷⁰ Jumpstart Our Business Startups (JOBS) Act, § 302(a); Peter C. Sumners, Note, *IV. Crowdfunding America’s Small Businesses After the Jobs Act of 2012*, 32 REV. BANKING & FIN. L. 38, 43 (2012).

⁷¹ Jumpstart Our Business Startups (JOBS) Act, § 302(a).

⁷² *Id.*

⁷³ *Id.* at § 302(b).

⁷⁴ *Id.* See generally *SEC Modernizes the Accredited Investor Definition*, U.S. SEC. EXCH. COMM’N, <https://www.sec.gov/news/press-release/2020-191> (last visited Nov. 20, 2020) (explaining the new and updated definitions of “accredited investors”). While this new rule expands the number of people who can invest in businesses, it still does not allow everyday citizens to invest in companies, hindering an SMEs use of equity-based crowdfunding.

⁷⁵ U.S. Sec. Exch. Comm’n, *Accredited Investors – Updated Investor Bulletin*, INVESTOR.GOV (Apr. 14, 2021), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-3>.

⁷⁶ *Infra* Part III.B.

under some sort of SEC regulation based on section 3(a) of the 1933 Securities Act.⁷⁷ In short, “all intrastate crowdfunding laws must comply with the federal securities exemption but [can] vary in regards to investment limitations and portal restrictions.”⁷⁸ The SEC rules and regulations allow intrastate securities to be sold and the state intrastate crowdfunding laws allow them to be sold through the act of crowdfunding. Therefore, if the SME complies with either its state or the federal exception, it can be exempt from registration under section 3(a)(11) of the Securities Act of 1933 and the SEC rules interpreting it.⁷⁹ As mentioned above, because the most flexibility is provided to the states in the areas of offerings, investments, and portals, which are the areas having the biggest effect on both issuers and investors, 37 states, including Ohio, have passed equity-based crowdfunding legislation that provides an exception/safe harbor to the federal law for purely intrastate crowdfunding endeavors.⁸⁰ So, what does this intrastate crowdfunding entail?

Crowdfunding of this type “completely exempt[s] intrastate crowdfunding from SEC regulation so long as the issuer is organized in the state and all investors reside in the [same] state.”⁸¹ For example, an Ohio incorporated business can advertise, market, and sell a security through a crowdfunding internet platform within Ohio to an Ohio resident and not have to register with the SEC.⁸² This is different from financing under the JOBS Act, Regulation D, and regular intrastate offerings (not involving crowdfunding) because, under the regulations and federal offerings, advertisement and general solicitation of the issuance of securities is prohibited and violations will bar the entity from being able to use Regulation D or intrastate offerings in the future.⁸³ Through these methods, using an internet portal would be seen as general solicitation/advertisement and would violate Regulation D and SEC exemptions to registration.⁸⁴ Local intrastate crowdfunding laws provide a more

⁷⁷ Securities Act of 1933 § 3(a), 15 U.S.C. § 77c(a).

⁷⁸ 15 U.S.C. § 77c(a)(11); Michael Vignone, *Inside Equity-Based Crowdfunding: Online Financing Alternatives for Small Businesses*, 91 CHL-KENT L. REV. 803, 811 (2016).

⁷⁹ Dana Shilling & Christine Vincent, *The '33 Act and its Registration Process*, in *LAWYER'S DESK BOOK* § 5.03 (2022).

⁸⁰ *Interstate Crowdfunding Resources*, *supra* note 13; *see also* Mathews, *supra* note 33, at 280 (“While the SEC drags its feet, failing to promulgate rules to implement the equity crowdfunding exemption, several pioneering states have passed their own intrastate crowdfunding exemptions.”).

⁸¹ Glustrom, *supra* note 51, at 308.

⁸² Vignone, *supra* note 78, at 811 (discussing the same example, but for the State of Wisconsin).

⁸³ *See* Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, § 201(a)(1), 126 Stat. 306 (2012) (discussing the general ban on solicitation and advertisement under the JOBS Act, which was later allowed under amendments to SEC Rules 144 and 506(a)); The Securities Act § 4(a)(1) (stating the ban that can occur using general solicitation under Regulation D).

⁸⁴ *See, e.g., In re Kenman Corp.*, SEC Rel. No. 34-21962 [1985-1986 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 83,767 (Apr. 19, 1985).

efficient and cheaper alternative for local businesses to raise capital, as long as their investors are state residents and the funding portal restricted access to those residents, which could possibly lead to the success of more SMEs.⁸⁵

All states tie their intrastate crowdfunding laws to one of the SEC's rules and regulations regarding the JOBS Act to exempt their local SMEs from having to register. Even though the states can pass an intrastate crowdfunding law, parts of the laws must still comply with SEC rules and regulations.⁸⁶ Passing state laws in connection with SEC rules and regulations allows the SME to utilize crowdfunding in an efficient manner because the SEC will defer to the state security regulators in the state.⁸⁷ Otherwise, by just utilizing Regulation D or Rule 147A, the SMEs can raise intrastate funds, but would be unable to do so through the act of crowdfunding.⁸⁸

Some states enact intrastate crowdfunding laws that tie in under Rule 147.⁸⁹ This rule was one of the first rules enacted by the SEC when the JOBS Act was passed. Offerings and state legislation under Rule 147 were prohibited from having businesses offer their shares to out-of-state residents.⁹⁰ Therefore, SMEs were prohibited from posting about their campaigns on social media or websites, which severely limited the number of investors an SME could reach. Other states have enacted laws that are tied to the newer Rule 147A, which was created to alter Rule 147 and create new avenues for SME viability.⁹¹ The requirements included that

the issuer . . . be . . . doing business in the state, the issuer must reasonably believe all purchasers are residents of the state, the purchaser may not resell the security to an out-of-state resident within six months, and there must be a . . . legend stating that . . . the security is not registered.⁹²

⁸⁵ See *Securities Act Rules: Questions and Answers of General Applicability*, U.S. SECS. AND EXCH. COMM'N, <http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#141-03> (last updated Aug. 6, 2015) (answer to Questions 141.03, 141.04, and 141.05).

⁸⁶ 15 U.S.C. § 77(c)(a)(11).

⁸⁷ *Intrastate Crowdfunding and Blue Sky Laws*, CROWDWISE, <https://crowdwise.org/regulations-and-law/intrastate-crowdfunding-and-blue-sky-laws/#:~:text=Intrastate%20crowdfunding%20laws%20allow%20small,intended%20for%20more%20mature%20companies> (last updated Oct. 15, 2019).

⁸⁸ The Securities Act § 3(a)(11).

⁸⁹ See Exemptions to Facilitate Intrastate and Regional Securities Offerings, 80 Fed. Reg. 69,787 (Oct. 26, 2016).

⁹⁰ *Compliance and Disclosure Interpretation Question 141.04*, U.S. SECS. AND EXCH. COMM'N, <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> (last updated Sept. 20, 2017).

⁹¹ Glustrom, *supra* note 51, at 308–11 (discussing how the SEC updated Rule 147A in an attempt to promulgate regulations that made it unnecessary for individual states to pass their own legislation).

⁹² 17 C.F.R. § 230.147(A)(c)(e)(f) (2017).

If the businesses met the requirements under Rule 147A, they were provided a safe harbor to the registration requirements of section 3(a)(11).⁹³ Rule 147A provides new flexibility for SMEs attempting to utilize intrastate crowdfunding from Rule 147 by allowing an SME to offer a share to an out-of-state resident, but still prohibits selling a share through intrastate crowdfunding to an out-of-state resident.⁹⁴

Some states have tied their crowdfunding laws to Regulation A+. States that pass their intrastate crowdfunding laws under Regulation A+ open their SMEs up to costly disclosure requirements on both the federal and state level.⁹⁵ The regulation requires the filing of Form 1-A with the SEC prior to being permitted to crowdfund.⁹⁶ While the offering limit can be up to \$20 million, these state laws are only effective for larger-sized entities or entities seeking to enter an exchange or IPO in the future.⁹⁷ Lastly, the disclosure costs could range from \$200,000 to \$400,000.⁹⁸ While Regulation A+ seems like a stronger alternative to intrastate crowdfunding laws due to its high offering limit, very few states enact intrastate legislation that is tied to Regulation A+ because it is not as effective as it appears on its face.⁹⁹

Because of the limitations that Regulation A+ and Rule 147/147A pose, most states, including Ohio's HB 312, tie their laws to Regulation D. Regulation D is a combination of two SEC exceptions from registration, which exempt offerings of up to \$10 million in a 12-month period and exempt offerings sold to accredited investors.¹⁰⁰ State intrastate laws tied to Regulation D provide a safe harbor from registration, because Regulation D at a purely federal level is extremely vulnerable to violation.¹⁰¹ A violation would then prevent an SME using Regulation D from being able to raise funds in the future under the Regulation.¹⁰² For example, general solicitation or general offerings to unaccredited investors are not permitted.¹⁰³ And, it is on the issuer to ensure that the purchaser of the offering does not resell the security

⁹³ Glustrom, *supra* note 51, at 310.

⁹⁴ *Id.* at 310.

⁹⁵ Amendments for Small and Additional Issues Exemptions Under the Securities Act ("Regulation A+"), 80 Fed. Reg. at 21,807.

⁹⁶ *See* 17 C.F.R. § 230.251.

⁹⁷ Vignone, *supra* note 78, at 824.

⁹⁸ Amendments for Small and Additional Issues Exemptions Under the Securities Act ("Regulation A+"), 80 Fed. Reg. at 21,883.

⁹⁹ *Infra* Part III.A.1.

¹⁰⁰ 17 C.F.R. § 230.504 (2017); *Id.* § 230.506.

¹⁰¹ The Securities Act § 18(b)(4)(D); *see* MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 62 (7th ed. 2018) ("States . . . may set forth filing requirements and collect fees with respect to . . . offerings.").

¹⁰² 17 C.F.R. § 230.508 (2017).

¹⁰³ *See id.* § 230.506(c).

within a specified period of time.¹⁰⁴ A violation of either the solicitation or resale requirement can result in fines and might destroy the exemption.¹⁰⁵ However, with a state intrastate crowdfunding law, the SME is able to solicit investors through an online portal and through its website/social media, and it is not limited to only solicit accredited investors.¹⁰⁶

While entrepreneurs have numerous options when it comes to raising capital in order to operate, state intrastate crowdfunding laws are generally seen as more efficient and/or inclusive than federal regulations and are required in order to protect an entity from defeating the federal exemption.¹⁰⁷ However, for entrepreneurs in Ohio, intrastate laws regarding crowdfunding are extremely new.

D. *Equity Based Crowdfunding in Ohio*

The Ohio Legislature has attempted on three occasions to permit intrastate equity-based crowdfunding in Ohio. The 131st, 132nd, and 133rd General Assemblies all attempted to adopt a crowdfunding bill.¹⁰⁸ Each bill contained similar provisions, made minor changes from the previous bill, and reached different points of the legislative process. To understand what a perfect intrastate bill would look like, and why HB 312 is not it, each attempt must be discussed.

House Bill 593 was introduced in the 131st General Assembly in 2016.¹⁰⁹ It was Ohio's first attempt at permitting intrastate crowdfunding and was the shortest of the three bills. The bill died in committee, never receiving a single vote.¹¹⁰ It is unclear why this bill did not gain any traction, as the two hearings on the bill only had proponents speaking on its possible positive impacts.¹¹¹ Further, because the Bill was never voted on, it is near impossible to see from where the opposition for this bill came. However, even though the bill did not pass, certain parts of HB 593 laid the groundwork for the next two versions of intrastate crowdfunding bills in Ohio. The bill coined the name "OhioInvests," which was retained in the program finally adopted

¹⁰⁴ *See id.* § 230.506(4)(a)(1).

¹⁰⁵ *See id.* § 230.508.

¹⁰⁶ *See* H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2020) (limiting Ohio securities sellers to engage with accredited investors only).

¹⁰⁷ Schwartz, *supra* note 6, at 885.

¹⁰⁸ *See* H.B. 593, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016); H.B. 10, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018); H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

¹⁰⁹ *House Bill 593 – Status*, THE OHIO LEG., <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA131-HB-593> (last updated Nov. 10, 2016).

¹¹⁰ *Id.*

¹¹¹ *House Bill 593 – Committee Activity*, THE OHIO LEG., <https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA131-HB-593> (last updated Nov. 29, 2016).

under HB 312.¹¹² The original HB 593 limited unaccredited investors to purchasing no more than \$10,000 in a single offering, which is still the limit today.¹¹³ House Bill 593 also introduced main concepts, including the general requirements for issuers of securities, the requirement that all investors affirmatively acknowledge that they are investing in a risky enterprise, and the requirements that an unaccredited investor must qualify under before investing.¹¹⁴ However, this bill left open too many questions and had a few faults. House Bill 593 left unclear who could be an issuer, who assumes liability in the case of fraud, and how issuers receive their funds.¹¹⁵ Further, this bill had a high filing fee of \$300 for an SME seeking to use OhioInvests, which could have been seen as a barrier to entry for some entities in the state. Lastly, as there was no explicit opposition to the bill in the legislative history, one reason for its death in committee appears to be that the legislature saw it more as an opportunity to increase the budget of the Ohio Division of Securities through fees and not as an opportunity to increase economic activity in the state through innovation and assisting SMEs.¹¹⁶ Because of this, HB 593 was probably doomed from the start, as evidenced by its death in committee.¹¹⁷

The legislature's second attempt, HB 10, was much more successful, though it was not ultimately enacted. It took what its predecessor started and increased it by 150 pages, and it ended up looking fairly similar to the JOBS Act and the enacted HB 312.¹¹⁸ House Bill 10 was introduced in the 132nd General Assembly in 2017 and passed in both chambers of the legislature.¹¹⁹ However, the bill was passed too late in the session and never made it to the Governor's desk, resulting in its ultimate

¹¹² H.B. 593, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016); H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

¹¹³ Ohio H.B. 593, § 1707.051(F).

¹¹⁴ See *id.* at §§ 1707.05, 1707.051, 1707.052, 1707.053; see H.B. 10, 132d Gen. Assemb., Reg. Sess. §§ 1707.052, 1707.053, 1707.054, 1707.056 (Ohio 2017–2018).

¹¹⁵ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 593 Before the H. Comm. on Fin. Insts., Hous., and Hum. Dev.*, 131st Sess. (Ohio 2016) (statement of Jamie N. Beier Grant, Director, Ottawa County Improvement Corporation, H.B. 593).

¹¹⁶ H.B. 593 §§ 1707.03(Q)(5), 1707.03(Y)(10), 1707.051(J)(3), 1707.054(A)(3) 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (stating cost totaling almost \$900 per entity to utilize OhioInvests all going into the Ohio Division of Securities Budgetary Account) (showing that no local impact statement was created, which is something that the other two bills have received).

¹¹⁷ *House Bill 593 – Status*, THE OHIO LEG., <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA131-HB-593> (last updated Nov. 10, 2016).

¹¹⁸ *Compare* H.B. 10, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018), *with* H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

¹¹⁹ *House Bill 312 – Status*, THE OHIO LEG., <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HB-312> (last updated Dec. 17, 2020).

failure.¹²⁰ House Bill 10's first big step was lowering the registration fee to use intrastate crowdfunding from \$300 to \$50.¹²¹ This fee was more reasonable and many SMEs likely could have afforded it without crowdfunding. While \$300 may not seem like a lot to an entity raising \$30,000, these registration fees are paid before the crowdfunding campaign is launched and could pile up with other fees like attorney fees; therefore, a lower registration fee around \$50 could create both a more efficient and inclusive bill. However, with regard to inclusivity specifically, HB 10 imposed stronger regulations on portal operators and created an exception that provides for certain government entities to run crowdfunding portals as they saw fit, which was a stipulation that did not exist in HB 593.¹²² These stronger regulations and government portal operators might force the portals to be extremely selective in what entities they choose to be posted on their website for fear that they might be held responsible for a faulty campaign. Therefore, the strong regulations, while likely an effective use against fraud, would have highly limited the inclusivity of the bill and the efficiency of an SME seeking to get onto a portal.

Next, HB 10 set the groundwork for affirmative acknowledgement in Ohio, which required investors to affirmatively acknowledge that they were investing in an unregistered risky entity, that it was an intrastate offering, that the purchaser was an Ohio resident, and that the offering could not be sold for a period of nine months after purchase. Lastly, HB 10 created an enforcement power—to fine both entities and portals—to the Division of Securities.¹²³ In the end, HB 10 appears to be modeled on acts that exist in Michigan and North Carolina, which both limit investors to \$10,000 per transaction, require quarterly disclosures, and have an entity offering limit of \$2,000,000.¹²⁴ In the end, poor time management by the Ohio Legislature resulted in a failed attempt to get equity-based crowdfunding passed.

Ohio finally adopted an intrastate crowdfunding program in HB 312, introduced in 2019.¹²⁵ The bill passed in 2020 is a revival of the original HB 312 from 2019.¹²⁶ The original HB 312 (2019) had an interesting path, being passed in both the House and the Senate, but for unexplained reasons, being sent back to a Senate committee where it allegedly died until it was revived twelve months later and passed rather

¹²⁰ *Id.*

¹²¹ Ohio H.B. 10; see Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1470 (2013) (showing that crowdfunding securities should have lower registration fees than more traditional financing methods).

¹²² Ohio H.B. 10; see also Jennifer A. Parker, Ohio Legis. Serv. Comm'n, Bill Analysis, Sub. H.B. 10, 132d Gen. Assemb., at 2 (2018).

¹²³ Ohio H.B. 10.

¹²⁴ *Interstate Crowdfunding Resources*, *supra* note 13; Anthony J. Ceoli & Georgia P. Quinn, *Summary of Enacted Intrastate Crowdfunding Exemption*, CROWDCHECK, <https://perma.cc/5UNS-QRM7> (last updated Dec. 2016).

¹²⁵ H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

¹²⁶ *House Bill 312 – Status*, *supra* note 119.

quickly.¹²⁷ The original HB 312 (2019) was likely just another victim of pure politicking. Its death in the legislature is speculated to have come from additional amendments being added after passage in both houses, but with limited time left in the legislative session before a concurrence vote could be held.¹²⁸ What those amendments consisted of is unclear.

Further, both the original and enacted HB 312, along with many sections of HB 10, are almost identical. Why was the enacted HB 312 (2020) passed but the other two were not? While the answer is not clear, four possibilities arise based on a comparison of the bills. First, the enacted HB 312 (2020) raised the offering limit for which entities could ask to \$5 million, the highest limit in the United States.¹²⁹ Second, the original HB 312 (2019) makes the eligibility requirements for entities/issuers easier to understand and easier to meet. Instead of having to meet a laundry list of requirements, now entities must meet only one condition from three required sections.¹³⁰ Third, the enacted HB 312 (2020) not only gave enforcement rights to the Division of Securities, but opened up the opportunity for investors to sue entities and portals, and for entities to sue portals, providing for more accountability and possibly resulting in more efficiency within the program.¹³¹ House Bill 312 (2020) clearly provides the most protection against fraud, as well as providing consumer protection. Lastly, the enacted HB 312 (2020) had amendments placed at the end that provided funding for real estate development to move forward to the Ohio Controlling Board in the amounts of \$35 million, \$25 million, and \$10 million to Sherwin Williams, the Haslam Sports Group, and Origin Malt, respectively.¹³² If true, the enacted HB 312 (2020) was never passed with the intention of assisting SMEs and instead was a façade to getting already existing companies money they needed to grow. As evidence of this, Sherwin Williams and the Haslam Sports Group spoke in front of the Senate Committee on Finance as proponents for the passage of HB 312.¹³³

An implication that arises is that HB 312's permittance of intrastate crowdfunding was passed by both Chambers as a byproduct of getting these three Ohio companies funding they needed to develop real estate in Ohio not through crowdfunding, but rather through increases in state appropriations. In the end, the enacted HB 312 (2020)

¹²⁷ *Id.*

¹²⁸ JD Alois, *Update: Ohio Passes an Intrastate Crowdfunding Law that Dies in the Senate Before a Final Vote Can be Held*, CROWDFUNDINSIDER (Jan. 7, 2019), <https://www.crowdfundinsider.com/2019/01/143020-ohio-passes-intrastate-crowdfunding-law/>.

¹²⁹ *Compare* H.B. 10, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018), *with* Ohio H.B. 312.

¹³⁰ Carla Napolitano, Ohio Legis. Serv. Comm'n, Bill Analysis, H.B. 312, 133d Gen. Assemb., at 3–4 (2020).

¹³¹ *Id.* at 13–15.

¹³² Vanac, *supra* note 37.

¹³³ *See Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Josh Glessing, Haslam Sports Group) (statement of Thomas Niehaus, The Sherwin Williams Company).

appears to be the best of all three bills; however, based on the amendments in HB 312 and other substantive loopholes, there are areas of OhioInvests that could be improved upon to give Ohio the most effective intrastate crowdfunding bill in the country.

III. DISCUSSION

As technological innovation increases and Ohio becomes more eager to attract new talent and companies, the Legislature should create a new efficient, inclusive, and effective law that allows SMEs to raise capital.¹³⁴ That was one of the stated goals in the passage of HB 312, but under current law, both regarding the JOBS Act and the specific law in Ohio, businesses face too many obstacles to utilize equity-based crowdfunding in a way that is advantageous.¹³⁵ If more businesses utilize intrastate crowdfunding, it presents immense benefits to both the state of Ohio and the entrepreneurs that seek to use it. While different sources of fundraising all have their own benefits, intrastate crowdfunding laws create a guard to the State's economy and create the most balance for SMEs in the areas of attempting to raise funds and running their new entity.¹³⁶ With federal legislation falling short and a state law that is too similar to its federal counterpart in opening up new crowdfunding opportunities, Ohio legislation must be re-addressed.

Clearly, Ohio realizes the importance of this topic given the passage of HB 312.¹³⁷ As will be seen below, HB 312 has too many substantive shortcomings that make it ineffective at achieving its dual goal of providing SMEs with more opportunity to raise capital, while also making Ohio the most business-friendly state in the country.¹³⁸ The Ohio Legislature passed HB 312 with these dual goals in mind; however, the way HB 312 stands as enacted, a law to "Permit Certain Intrastate Crowdfunding" will neither create more opportunities for SMEs nor help Ohio stand out as a business-friendly state. While the Ohio Legislature has all the time in the world to pass this boilerplate legislation that will have extraordinarily little impact on business within the state,¹³⁹

¹³⁴ See Andrew J. Tobias, *New Ohio Ad Campaign Aimed at Attracting Businesses Touts State's Low Taxes, Sparks Online Debate*, CLEVELAND.COM (Feb. 11, 2021), <https://www.cleveland.com/open/2021/02/new-ohio-ad-campaign-aimed-at-attracting-businesses-touts-states-low-taxes-sparks-online-debate.html> (discussing one of Ohio's attempts in 2021 to get businesses to operate in Ohio).

¹³⁵ If H.B. 312 does not present SMEs with an attractive option, they will just use other financing options like bank loans and Regulation A+, which presents fewer benefits to both the entrepreneurs and the state. See *infra* Part III.A.1, III.A.2.

¹³⁶ *Infra* Part III.A.2.

¹³⁷ Status Reports, THE OHIO LEG., <https://www.legislature.ohio.gov/Assets/CurrentStatusReports/133/FormattedStatusReport.pdf> (last updated Nov. 2020); see The Ohio Legislature, *House Bill 312 – Status*, *supra* note 119.

¹³⁸ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Rep. Jena Powell, Sponsor, H.B. 10).

¹³⁹ *Infra* Part II.D; see Stephanie Black & Lynda de la Vina, *Intrastate Crowdfunding: A Best Practices Implementation Model for Evidence Based Measurement of State Impacts by Oversight Agencies*, 3 ACAD. OF BUS. RSCH. J. 55, 58–60 (2018) (discussing how most state laws are identical to the JOBS Act).

the SMEs of Ohio have little time to waste. Therefore, to achieve these goals and provide more positive impacts to Ohio, a new bill that accounts for federal regulations, fraud, and investor protections, while also adding more efficient procedures to assist SMEs in raising the capital they need, must be re-introduced and passed. This discussion will occur over numerous parts.

First, in Part A, this Note will look to answer the question, “does Ohio really even need its own intrastate crowdfunding bill?” This analysis will consider why equity-based crowdfunding is better than other alternatives. Then, this Note will examine how equity-based crowdfunding assists states in having a positive increase in the job market, the economy, and the increase of innovation. Second, under Part B of this Note, it will be important to return to the JOBS Act and discuss its failures, which required the states to act on their own accord. Lastly, under Part C, the counterarguments will be discussed, specifically regarding fraud, investor protections, and the high rate at which small businesses fail. In the end, this analysis will show that the benefits of legislation to the entrepreneurs and the state outweigh the costs and any counterarguments. Then, in Part IV, an analysis of HB 312 and its weaknesses will be examined to show that as the law stands now, it will neither assist SMEs nor have a positive impact on the state. Lastly, in Part V, a blueprint—using Ohio’s three previous attempts, the newly-minted HB 312, and procedures that work in other countries and states—will show how Ohio can create far better results for the SMEs and citizens of Ohio and possibly lead Ohio to actually become “the most business-friendly state in the country.”¹⁴⁰

A. *Does Ohio Really Need to Pass Its Own Crowdfunding Legislation?*

When crowdfunding is mentioned to people in the start-up industry, the question, “does Ohio really need its own crowdfunding legislation?” is always asked. Many people have gone as far to say that an intrastate crowdfunding law will never be successful enough to be effective in Ohio.¹⁴¹ And the passage of HB 312 will likely confirm their suspicions. Therefore, before this analysis can move forward, the question must be asked: Does Ohio even need its own crowdfunding legislation? The resounding answer is yes, for three reasons. First, intrastate crowdfunding presents additional benefits for Ohio SMEs as compared to other funding alternatives. Second, intrastate crowdfunding can have a positive impact on jobs, the economy, and innovation within the state.¹⁴² Finally, as will be seen through Part A.1 and Part A.2, the benefits of an intrastate crowdfunding law outweigh the costs.¹⁴³ The aforementioned critics are not without merit, however, and their arguments against Ohio passing its own crowdfunding bill will be analyzed. In the end, a new intrastate equity-based crowdfunding bill in Ohio is what is best for the state and its citizens.

¹⁴⁰ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Rep. Jena Powell, Sponsor, H.B. 10).

¹⁴¹ Telephone Interview with Entrepreneurs from Bounce Innovation Hub (Sept. 12, 2020).

¹⁴² *See generally* Glustrom, *supra* note 51 (explaining that intrastate crowdfunding is known for having a positive impact on jobs, the economy, and innovation in the state).

¹⁴³ *Infra* Part III.A.1, III.A.2.

1. Intrastate Equity-Based Crowdfunding Presents a Better Alternative for SMEs of Ohio

Ohio SMEs, and particularly start-ups, face a large unmet need for capital, sometimes called the “capital gap.”¹⁴⁴ In fact, most SMEs fail because they lack access to adequate capital.¹⁴⁵ Overall, SMEs have many options when it comes to seeking out finance. The most popular options include asking family and friends for money, bank loans, venture capitalist firms, and Regulation A+ funding through the SEC.¹⁴⁶ In general, businesses who have utilized crowdfunding are seen to have saved at least \$5,000 in attorney fees and anywhere from \$10,000 to \$50,000 in compliance costs.¹⁴⁷ These savings could be greater when compared to the more traditional sources of funding, but overall, due to intrastate crowdfunding’s focus on efficiency, the ability of SMEs to use intrastate equity-based crowdfunding will likely save them money in the long run.¹⁴⁸ One reason for this could be because fewer or easier disclosure requirements mean fewer attorney hours being billed on such forms. An intrastate crowdfunding law could then assist in closing the capital gap by allowing SMEs to save money in traditionally costly areas, while also providing them with new methods of raising capital. This, in turn, makes it easier to obtain funding, creating more efficiency than traditional methods.

Additionally, SMEs that use intrastate crowdfunding receive greater marketing opportunities than through the use of family and friend loans, bank loans, venture capitalists, or Regulation A+ funding.¹⁴⁹ Unlike the JOBS Act, issuers of intrastate offerings may advertise their offerings on state restricted websites and connect with investors across the entire state.¹⁵⁰ This can help businesses obtain cheaper advertising alternatives, expand their customer base, and increase the number of investors they could reach.¹⁵¹ Therefore, yet another opportunity that intrastate crowdfunding presents which allows an SME to cut costs, while raising capital. This cost cutting could open up funding to more people, showing how crowdfunding can be more inclusive than traditional methods. But how does intrastate crowdfunding compare to these alternatives specifically?

A majority of SMEs, including start-ups, receive a majority of their initial financing by just asking their friends and family for loans and using their personal

¹⁴⁴ See Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. SMALL & EMERGING BUS. L. 57, 59–60 (1998).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 59–64; see Borek, *supra* note 16, at 167–69.

¹⁴⁷ Vignone, *supra* note 78, at 813–14.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 814.

¹⁵⁰ See JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012); *Infra* Part V.

¹⁵¹ Vignone, *supra* note 78, at 814.

resources (savings, credit cards, etc.).¹⁵² Some SMEs are able to raise anywhere from \$100,000 to \$500,000 through these methods.¹⁵³ However, for entrepreneurs who are not in the upper middle class, these options might not be available to them, making this a less inclusive option.¹⁵⁴ Further, for the entrepreneurs that have access to this funding, once they exhaust the funds, more financing is extremely difficult to find.¹⁵⁵ This is where intrastate crowdfunding can present a better alternative. Instead of just being able to ask family and friends for financing, intrastate crowdfunding opens the door for issuers to be able to ask a whole statewide population for financing. Then, when it comes to exhausting the financing options, intrastate crowdfunding is credited with having more consistent cash flow investment for SMEs than through these personal methods.¹⁵⁶ Meaning, an entity who uses crowdfunding has it easier when finding more funding than an entity who uses family and friends. An intrastate law is seen as giving the SMEs more flexibility in how they operate through their initial investment. More flexibility could lead to more efficiency as it becomes easier and faster to obtain funding. When it comes to intrastate crowdfunding versus personal financing options, intrastate crowdfunding gives more accessibility to more investors while limiting the risk of exhausting all funding and not being able to find any more.

The next most popular option for entrepreneurs looking for financing is to get a traditional bank loan.¹⁵⁷ However, when it comes to obtaining bank loans, most SMEs do not have the cash flow, the collateral, or the operating history to qualify.¹⁵⁸ In short, the SMEs who would use intrastate crowdfunding are very unlikely to get a bank loan. Additionally, the amount of a loan that a bank gives out fluctuates with the economy.¹⁵⁹ Depending on the year, there might be very few bank loans available to SMEs. Intrastate crowdfunding does not present these same hurdles. Using intrastate crowdfunding, much like personal financing, allows the SMEs to have a long-term capital source that is compatible with the fluctuation of the environment.¹⁶⁰ This is not to say that intrastate crowdfunding will not be impacted by changes in the market, but it is less impacted than obtaining a bank loan. As Big Drop Brewing Co. has shown, intrastate crowdfunding can be resistant to recessions and the ebbs and flows of the economy, providing financial benefits to both the SMEs and the state.¹⁶¹ Alternatively, by using intrastate crowdfunding, entrepreneurs can avoid the high rates

¹⁵² Bradford, *supra* note 16, at 101.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 102.

¹⁵⁶ *E.g.*, Fisch, *supra* note 144, at 61.

¹⁵⁷ Bradford, *supra* note 16, at 102.

¹⁵⁸ *Id.*

¹⁵⁹ Fisch, *supra* note 144, at 60.

¹⁶⁰ *See id.* at 59–64.

¹⁶¹ *See About Big Drop, supra* note 1; Hancock, *supra* note 1.

of interest that come from using bank loans and feel less burdened when it comes to paying those loans back.¹⁶² Not having the stress of paying back a bank loan could open up the market to more people who fear the risk of default when starting their business. This would increase both inclusivity and efficiency in the capital-raising market. Therefore, while bank loans present certain benefits to some entities and are an important alternative, intrastate crowdfunding can present a better option for SMEs of Ohio seeking to start, expand, or improve their business.

Another possible source of fundraising is by seeking out a venture capitalist firm and using private equity financing.¹⁶³ However, SMEs that seek to use intrastate crowdfunding are either seeking to do so as initial financing or to assist the business in making repairs and improvements. Less than a quarter of venture capitalist funding is for early-stage financing.¹⁶⁴ Rapid growth is needed for a private equity firm to even be attracted to investing in a company, and most SMEs are lacking in that area.¹⁶⁵ Further, venture capitalist firms reject 99% of the business plans that are submitted to them.¹⁶⁶ So what are the plans outside that 1% acceptance rate supposed to do? Intrastate crowdfunding lowers the search costs that many businesses incur in order to find investors. This is because the cost to post to a portal is limited and there are not generally any strict advertising requirements.¹⁶⁷ Further, many angel investors and private equity firms only invest in companies that come from a geographic region they are familiar with.¹⁶⁸ With intrastate crowdfunding, investment opportunities are open to the entire state and can help communities who are traditionally ignored by private equity firms, specifically minority-owned businesses and businesses in rural areas, find the funding they need to succeed.¹⁶⁹

The last financing option to compare to intrastate crowdfunding is Regulation A+.¹⁷⁰ This SEC regulation was altered with the passage of the JOBS Act.¹⁷¹ It provides for issuers to raise anywhere from \$6 million to \$50 million depending on

¹⁶² Vignone, *supra* note 78, at 813–14.

¹⁶³ Bradford, *supra* note 16, at 102.

¹⁶⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO, GAO/GGD-00190, SMALL BUSINESS: EFFORTS TO FACILITATE EQUITY CAPITAL FORMATION 21 (2000).

¹⁶⁵ Fisch, *supra* note 144, at 62.

¹⁶⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO, GAO/GGD-00190, SMALL BUSINESS: EFFORTS TO FACILITATE EQUITY CAPITAL FORMATION 20 (2000).

¹⁶⁷ Fisch, *supra* note 144, at 66.

¹⁶⁸ *Id.* at 61–64.

¹⁶⁹ *See* Glustrom, *supra* note 51, at 294.

¹⁷⁰ 17 C.F.R. § 230.251 (2015); *see* Borek, *supra* note 16, at 186.

¹⁷¹ *See* ANZHELA KNYAZEVA, REGULATION A+: WHAT DO WE KNOW SO FAR, SEC WHITE PAPERS 1 (2016), https://www.sec.gov/files/Knyazeva_RegulationA%20.pdf; Borek, *supra* note 16, at 186.

the tier the entity is considered.¹⁷² This offering limit is exponentially higher than what can be allowed through intrastate crowdfunding. However, Regulation A+ is one of the most rule-heavy regulations regarding the JOBS Act and crowdfunding financing.¹⁷³ Further, it is seen more as an alternative to a small, registered IPO.¹⁷⁴ Therefore, for entities that are seeking to use crowdfunding to invest in improvements to their business or launch their company from the ground up, Regulation A+ is not a viable option. This is because the transaction costs for intrastate crowdfunding are significantly lower than through Regulation A+.¹⁷⁵ In addition, Regulation A+ has lengthy disclosure requirements that could end up making “a company hoping to raise \$100,000 . . . pay more for capital than it would by borrowing money with a credit card.”¹⁷⁶ In the end, intrastate crowdfunding has fewer disclosure requirements which could lessen the burden on numerous SMEs seeking funding and increase efficiency.¹⁷⁷ Lastly, intrastate crowdfunding can assist SMEs in reaching investors they would have not normally been able to reach.¹⁷⁸ This is a clear advantage to Regulation A+, as only 7.4% of Americans are eligible to be investors under the regulation.¹⁷⁹ By providing fewer disclosure requirements, costing less, and opening the door to more investors, intrastate crowdfunding has clear advantages.

Intrastate crowdfunding is not for every SME seeking financing. The states know that. For SMEs seeking to raise initial funding or seeking to use intrastate crowdfunding to expand or improve their business, like Big Drop Brewing Co, it provides the strongest option.¹⁸⁰ Its main purpose is to assist as many SMEs as possible in raising funds relatively efficiently and avoid all the red tape that exists through federal financing. After comparing intrastate crowdfunding with personal financing, bank loans, private equity financing, and Regulation A+, intrastate crowdfunding can present a better alternative for the SMEs of Ohio.

¹⁷² JOBS Act, Pub. L. No. 112-106, § 401, 126 Stat. 306, 323-26 (2012); 17 C.F.R. § 230.251(a)(1) (2021).

¹⁷³ See Borek, *supra* note 16, at 155–63.

¹⁷⁴ KNYAZEVA, *supra* note 171, at 2.

¹⁷⁵ Borek, *supra* note 16, at 186.

¹⁷⁶ Robb Mandelbaum, *What the Proposed Crowdfunding Rules Could Cost Business*, N.Y. TIMES BLOG (Nov. 14, 2013, 7:00 PM), http://boss.blogs.nytimes.com/2013/11/14/what-the-proposed-crowdfunding-rules-could-cost-businesses/?_r=0; see KNYAZEVA, *supra* note 171, at 30 (stating that the disclosure requirements for Regulation A+ are extensive).

¹⁷⁷ Borek, *supra* note 16, at 186.

¹⁷⁸ *Infra* Part III.A.1.

¹⁷⁹ Borek, *supra* note 16, at 170.

¹⁸⁰ See *About Big Drop*, *supra* note 1; Hancock, *supra* note 1.

2. Intrastate Crowdfunding and Its Impact on Jobs, the Economy, and Innovation

Now that the benefits of intrastate crowdfunding to entrepreneurs have been shown, it is important to understand the benefits that this crowdfunding alternative presents to Ohio. Intrastate crowdfunding can impact many areas within a state, but has the ability to have the greatest impact in the areas of jobs, the economy, and innovation.¹⁸¹ In fact, the JOBS Act was passed with the intent to increase innovation nationally, but when that failed, states were hoping to pick up on the stated benefits.¹⁸² States saw intrastate equity-based crowdfunding as an opportunity to attract more talent to their state, increase the number of jobs, have a positive impact on the state's economy, and increase the amount of innovation that comes out of their states.¹⁸³ After examining each of these impacts, this Note will show that there is a clear benefit to Ohio.

When it comes to intrastate crowdfunding, many states see it as an opportunity to attract new talent and companies to their state, while also creating new jobs.¹⁸⁴ In fact, during the early times of intrastate crowdfunding, Georgia used its new law to market and poach companies and talent from Ohio.¹⁸⁵ Whether Georgia was successful or not, companies launch their businesses in states in which they feel they can be successful. One indicator for some SMEs is how business friendly their intrastate crowdfunding laws are.¹⁸⁶ Therefore, there is a benefit to having a strong intrastate crowdfunding law, especially as they become more and more popular throughout the United States. States want to encourage SMEs to launch within their boundaries because throughout the country, SMEs comprise "99.7% of U.S. employer firms, 97.6% of firms exporting goods, and created 61.8% of net new private-sector jobs between 1993-2016."¹⁸⁷ Because SMEs are the main job creators in each state, giving them more opportunities to succeed, like through intrastate crowdfunding, provides a significant benefit to the state in increasing the number of jobs available.

Additionally, crowdfunding itself is seen as being a job creator.¹⁸⁸ Specifically, anywhere from 270,000 to 2 million jobs have been added through the launch of

¹⁸¹ See Won, *supra* note 12, at 1405–12.

¹⁸² *Id.* at 1395–96.

¹⁸³ La Croix, *Guest Post: Some States Have Sidestepped the JOBS Act's Burdensome Crowdfunding Rules*, THE D&O DIARY (May 15, 2014), <https://www.dandodiary.com/2014/05/articles/securities-litigation/some-states-have-sidestepped-the-jobs-acts-burdensome-crowdfunding-rules/>.

¹⁸⁴ *Id.*; Won, *supra* note 12, at 1404.

¹⁸⁵ La Croix, *supra* note 183.

¹⁸⁶ *What Is Intrastate Equity Crowdfunding?*, NAVIGANT L. GRP. (Sept. 3, 2015), <https://www.navigantlaw.com/what-is-intrastate-equity-crowdfunding/>.

¹⁸⁷ Won, *supra* note 12, at 1410.

¹⁸⁸ *Id.* at 1404–05.

equity-based crowdfunding.¹⁸⁹ In fact, many commentators believe that the United States should shift its focus from the 20th century emphasis on large corporations as job creators to a 21st century emphasis on SMEs, because SMEs are more likely to create jobs and keep them than large corporations.¹⁹⁰ Therefore, by having an effective intrastate crowdfunding law, states are able to create more jobs and keep them for a longer period of time. Most businesses are unable to succeed on self-financing or “bootstrapping it.” If the businesses are unable to succeed, they are not creating jobs. Therefore, the impact on the job market from self-financed entities is substantially less than the possible 270,000 jobs that intrastate crowdfunding has created. Ohio has long had a focus on job creation, including creating its own non-profit that is tasked with that goal.¹⁹¹ By having a clear example of the positive impact that crowdfunding could have on the job market, Ohio should have passed an efficient and effective bill, but the current HB 312 will not have such a positive impact on Ohio.¹⁹²

In addition to creating more jobs, intrastate crowdfunding laws have the ability to create a positive impact on the economy.¹⁹³ Big Drop Brewing Co. is one example that highlights how, even while the market is crashing, viable SMEs are able to meet their fundraising goals by utilizing intrastate crowdfunding.¹⁹⁴ Regulating SME financing at a local level through intrastate crowdfunding is likely to have a stronger effect on the state market, because local conditions affect SMEs independent of the national market.¹⁹⁵ This is because the small size of crowdfunded offerings have a more direct impact on the state, so they have a greater interest in regulating intrastate crowdfunding.¹⁹⁶

¹⁸⁹ *Economic Value of Crowdfunding*, FUNDABLE, <https://www.fundable.com/learn/resources/infographics/economic-value-crowdfunding> (last visited Apr. 7, 2021).

¹⁹⁰ See Won, *supra* note 12, at 1410.

¹⁹¹ *Putting JobsOhio to Work for Ohioans*, POL’Y MATTERS OHIO (May 6, 2020), <https://www.policymattersohio.org/research-policy/fair-economy/work-wages/putting-jobsOhio-to-work-for-ohioans>. The relative success or failure of this state created non-profit is beyond the scope of this Note.

¹⁹² *Infra* Part IV.

¹⁹³ See David M. Kirby, *Small Businesses Can Make a Big Impact on the Economy*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/david-m-kirby/small-businesses-can-make_b_13127000.html.

¹⁹⁴ See *About Big Drop*, *supra* note 1; Hancock, *supra* note 1.

¹⁹⁵ Mathews, *supra* note 33, at 305.

¹⁹⁶ *The JOBS Act at a Year and a Half: Assessing Progress and Unmet Opportunities: Hearing on S. 113-178 Before the S. Subcomm. on Sec., Ins. & Inv. of the S. Comm. on Banking, Hous. & Urban Affairs*, 113th Cong. 9–10 (2013) (statement of Rick Fleming, Deputy General Counsel, North American Securities Administrators Association).

Further, strong local business conditions have the ability to assist the state in avoiding economic recessions.¹⁹⁷ As of 2014, intrastate crowdfunding was thought to have injected upwards of \$65 billion into state economies.¹⁹⁸ As intrastate crowdfunding grows, it is estimated that intrastate crowdfunding will contribute \$500 billion in funding per year, which will generate approximately \$3.2 trillion dispersed throughout state economies.¹⁹⁹ Therefore, the positive impacts that crowdfunding could have on the economy are immense. If every resident of Ohio, for example, invested \$1 through intrastate crowdfunding, it could inject almost \$12 million into the state economy.²⁰⁰ These benefits to a state economy are better served through intrastate crowdfunding, because viable SMEs who fund through crowdfunding have higher success rates than businesses who receive funding from traditional methods.²⁰¹ By encouraging SMEs to remain in the state, the state can create strong local conditions that can help the state become more resistant to recessions and depressions, something that does not exist through federal funding alternatives.²⁰² In the end, the best way to describe the impact that intrastate crowdfunding could have on the state market is by saying that it could provide a “huge impact,” because “statistics from the Small Business Administration indicate . . . the general economy is substantially affected by small business economics.”²⁰³ Therefore, Ohio needs its own effective intrastate crowdfunding bill because it provides the most benefits to small businesses, which in turn will provide a substantial impact to the state.

Lastly, intrastate crowdfunding has the ability to increase innovation within the state.²⁰⁴ When intrastate crowdfunding laws are successful, meaning efficient and/or inclusive, they have the ability to expand the entrepreneurial base in the state.²⁰⁵ Intrastate crowdfunding is known for reducing capital risk and the reduction of that risk increases innovation.²⁰⁶ Crowdfunding specifically has this impact on both the

¹⁹⁷ See, e.g., Wendell Cox, *How Texas Avoided the Great Recession*, NEW GEOGRAPHY (July 19, 2010), <http://www.newgeography.com/content/001680-how-texas-avoided-great-recession>.

¹⁹⁸ *Economic Value of Crowdfunding*, *supra* note 189.

¹⁹⁹ *Id.*

²⁰⁰ Borek, *supra* note 16, at 170 (explaining the similar impact that would occur on the economy if every person in the US invested \$1).

²⁰¹ *Infra* Part II.C.

²⁰² See, e.g., Cox, *supra* note 197.

²⁰³ See Kirby, *supra* note 193; BUS. WIRE, INNOVATIVE DEVICE TECHNOLOGIES FIRST TO SEEK FUNDING ON CLINTON-BACKED SBA ‘ACE-NET’ INTERNET SERVICE (1997) (reporting that small businesses make up forty-seven percent of the U.S. Gross National Product).

²⁰⁴ See Won, *supra* note 12, at 1410.

²⁰⁵ Mathews, *supra* note 33, at 300.

²⁰⁶ See, e.g., NADINE SCHOLZ, THE RELEVANCE OF CROWDFUNDING: THE IMPACT ON THE INNOVATION PROCESS OF SMALL ENTREPRENEURIAL FIRMS 61 (2015) (“Crowdfunding reduces this risk . . .”).

investors and the businesses because it “is helpful in validating the market demand and idea concept,” which is something that that traditional sources of financing lack because it is hard for them to show the possibility of this demand.²⁰⁷ Alternatively, half of the top ten states for best start-up culture have intrastate crowdfunding laws.²⁰⁸ Three out of the other five states that do not currently have a law are in the process of passing their own intrastate laws.²⁰⁹ Therefore, while intrastate crowdfunding laws are not the only factor in creating a state with a strong start-up culture, they certainly assist in building a strong and favorable culture. Thus, strong intrastate crowdfunding laws are imperative in attracting talent and increasing innovation, which is one of the main goals of HB 312.²¹⁰ While there is not as much hard data on increasing innovation like there is on jobs and the economy, states that have an intrastate crowdfunding law generally have encouraged and increased innovation within their states.

B. The Failures of the JOBS Act and Forcing the Hands of the States

It is safe to say the JOBS Act did not meet its anticipated expectations. In fact, issues with its passage began immediately. When Title III of the JOBS Act passed, it delegated to the SEC the ability to create regulations that would oversee equity-based crowdfunding in the United States.²¹¹ However, after the SEC received approximately 480 comment letters during notice and comment rulemaking, the Commission delayed and did not release regulations until almost three years later.²¹² This delay is claimed to have put an undue burden on the states and is credited for having a severe impact on the effectiveness of crowdfunding.²¹³ While it is unclear what took the SEC so long to issue these regulations, one possibility could be that while attempting to issue regulations under the JOBS Act, the SEC was still working to issue a behemoth of regulations under the Dodd-Frank Act of 2010.²¹⁴ Because entities could not use FCF

²⁰⁷ *Id.*

²⁰⁸ La Croix, *supra* note 183.

²⁰⁹ *Id.*

²¹⁰ *Id.*; see *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30.

²¹¹ Title III of the JOBS Act is the specific provision of the Act that creates an equity-based crowdfunding exception in the United States; however, most of the crowdfunding oversight comes from SEC regulation. See JOBS Act, 126 Stat. 306, Title III (2012); Timothy M. Joyce, *1000 Days Late & \$1 Million Short: The Rise and Rise of Intrastate Equity Crowdfunding*, 18 MINN. J. L. SCI. & TECH. 343, 344–45.

²¹² Joyce, *supra* note 211, at 351; La Croix, *supra* note 183.

²¹³ Joyce, *supra* note 211, at 352; see Matthew A. Pei, *Intrastate Crowdfunding*, 2014 COLUM. BUS. L. REV. 854, 857; see also Andrew A. Schwartz, *Inclusive Crowdfunding*, 2016 UTAH L. REV. 661, 669 (“The primary impetus for intrastate crowdfunding appears to be the delay in finalizing regulations for retail crowdfunding under Title III of the JOBS Act.”).

²¹⁴ Charles A. De Monaco et al., *Order to Chaos: Dodd-Frank and the JOBS Act*, FOX ROTHSCHILD LLP: ATT’YS AT L. (Oct. 2012), <https://www.foxrothschild.com/publications/order-to-chaos-dodd-frank-and-the-jobs->

until the SEC published its regulations, entrepreneurs began pressuring their local and state governments to pass equity-based intrastate crowdfunding legislation, as they saw it as an opportunity to increase the success of SMEs and wanted to use its benefits sooner rather than later.²¹⁵ With that, the JOBS Act never fully recovered and failed to provide for the businesses and individuals who were anxiously awaiting its passage.

Despite the delay in creating regulations, once the regulations were effective, a new set of problems arose. These problems created issues in the areas of efficiency and inclusivity.²¹⁶ First, equity-based crowdfunding under the JOBS Act still has extremely high transactional costs, limiting the efficiency legislators sought in passing the legislation.²¹⁷ The main purpose for passing the JOBS Act was to make it easier for SMEs to raise capital than the regulations would require under Regulation D, Regulation A+, or other funding alternatives.²¹⁸ However, under the Act, more requirements exist than for those other alternatives, with the exception of Regulation D, upholding the traditional burden that existed in the first place.²¹⁹ The SEC predicted that campaign costs to utilize Title III of the JOBS Act could be in excess of \$100,000, and require an average of 100 hours of work to comply with the Act.²²⁰ However, some commentators claim that the work hour requirement is severely underestimated.²²¹ Whether or not these numbers are underestimated is irrelevant, as the cost in excess of \$100,000 presents too high of a burden for most entities to use equity-based crowdfunding under the JOBS Act. Further, most companies are seeking to use intrastate crowdfunding to make improvements or repairs for their business, so requiring over 100 hours of compliance work, if not more, does not make the JOBS Act more efficient than any other financing alternative, defeating the whole purpose.

The upfront cost and compliance time requirement presents a huge barrier to SMEs seeking to use Title III of the JOBS Act. In the United States, the average cost of starting a small business is around \$30,000.²²² If an entrepreneur decided to raise this money through equity-based crowdfunding, it would likely cost him/her \$5,000 and

act/#:~:text=In%20April%20of%202012%20the,objectives%20in%20enacting%20Dodd%20Frank.&text=To%20accomplish%20this%2C%20the%20JOBS,Emerging%20Growth%20Company%20(EGC).

²¹⁵ La Croix, *supra* note 183.

²¹⁶ Schwartz, *supra* note 6, at 907.

²¹⁷ See 158 Cong. Rec. H1236 (daily ed. Mar. 7, 2012) (statement of Rep. Bachus).

²¹⁸ Won, *supra* note 12, at 1400–01.

²¹⁹ Chance Barnett, *Why Title III of the JOBS Act Will Disappoint Entrepreneurs*, FORBES (May 13, 2016), <https://www.forbes.com/sites/chancebarnett/2016/05/13/why-title-iii-of-the-jobs-act-will-disappoint-entrepreneurs/?sh=43879f93c4be>.

²²⁰ *Id.*

²²¹ *Id.*

²²² *How to Estimate the Cost of Starting a Business from Scratch*, MINORITY BUS. DEV. AGENCY (Nov. 25, 2011), <https://www.mbda.gov/news/blog/>.

75–100 hours of document preparation.²²³ If the entrepreneur decides to use a third party, the cost would likely rise to around \$7,100.²²⁴ Then, in order to comply with the JOBS Act, each year, the business' compliance costs would be around \$3,000 a year for three years, not including time spent on preparation.²²⁵ Therefore, that total is a little over \$16,000 or half of what the SME raised, leaving little for the business to use for operations.

Now, let us compare that to the offering limit set forth in the JOBS Act. There, SMEs are capped at raising a maximum of \$1 million annually through crowdfunding.²²⁶ Comparatively, many SMEs require \$2 million to \$5 million to be considered viable or profitable by venture capitalist or banks.²²⁷ So, it is easy to see that the offering limit is set too low for entrepreneurs and SMEs to utilize crowdfunding as a viable financing option. While the offering limit is too low for SMEs to use federal crowdfunding as a viable option, it is also too low to raise enough funds to be considered viable by some banks and venture capitalists, which is another option as to why some SMEs seek to use equity-based crowdfunding.²²⁸ The failure of the Act was clear one year later. Under federal equity-based crowdfunding, offerings equaled around \$40 million, but offerings under the traditional SEC registration exemption, Regulation D, equaled over \$1.3 trillion.²²⁹

The impact of these high transaction costs and low offering limits are clear and common-sensical. They limit the inclusivity of crowdfunding and accomplish the polar opposite of what the JOBS Act was created for. Therefore, Ohio must pass a law that is more efficient to assist SMEs in the state to use equity-based crowdfunding, even for minor offerings.²³⁰

C. *Counterarguments Against Ohio Passing a New Intrastate Crowdfunding Law*

The push for intrastate crowdfunding legislation is not without critics. In order to see the benefits, it is important to understand the concerns. The biggest concerns come from the area of SEC oversight, fraud, investor protections, and the high percentage of small businesses that fail. The most obvious concern is that the SEC already

²²³ Won, *supra* note 12, at 1411 (citing Crowdfunding, 80 Fed. Reg. 71, 387, 497–71 (Nov. 16, 2015)).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Thomas Murphy, *Playing to a New Crowd: How Congress Could Break the Startup Status Quo by Raising the Cap on the Jobs Act's Crowdfunding Exemption*, 58 B.C. L. REV. 775, 795–96 (2017).

²²⁷ Won, *supra* note 12, at 1409.

²²⁸ Barnett, *supra* note 219.

²²⁹ Catherine Yushina, *Regulation Crowdfunding: One Year in Force*, CROWDFUND INSIDER (May 16, 2017), <https://www.crowdfundinsider.com/2017/05/100442-regulation-crowdfunding-one-year-force/>.

²³⁰ Schwartz, *supra* note 6, at 892.

regulates crowdfunding, so the states do not need to act.²³¹ While this is true, the entities who need crowdfunding the most are generally small, community businesses, so, because state economies are impacted first before the national economy, states have a stronger interest to regulating crowdfunding towards the specific needs of SMEs within their state.²³² These stronger interests come from SMEs seeking an overall less cumbersome way to raise capital, opening up the door to more entrepreneurs. An entity seeking to use intrastate crowdfunding through Regulation D and SEC oversight would have to comb through over 453 pages of regulations to comply, whereas, with intrastate crowdfunding laws the goal is to get SMEs funding through an easier, faster way. Thus, intrastate crowdfunding laws are needed, and each state has gone through the trouble to pass their own law.²³³

Next, the most fervent reason cited as to why states should not regulate crowdfunding independently is due to the perceived likelihood of fraud. In fact, studies have found that when corporate fraud takes place, the state's economy in which the corporation's headquarters is located sees a reduction in its stock market participation as a whole, having a negative effect on both the state and national markets.²³⁴ While there is some evidence of fraud in crowdfunding through lawsuits like *SEC v. Ascenergy LLC*, instances of fraud through intrastate crowdfunding are relatively rare.²³⁵ In *Ascenergy*, the SEC brought an enforcement action after learning that Ascenergy's CEO spent \$1.2 million in capital raised through crowdfunding as payments to himself and transferred the other \$3.8 million to a holding company that had nothing to do with Ascenergy's purpose.²³⁶ Therefore, this claim is not completely unfounded, but instances like *Ascenergy* rarely happen.²³⁷

Many critics were nervous that an increase in equity and intrastate crowdfunding would disproportionately increase the level of securities fraud.²³⁸ However, their theories did not come true.²³⁹ There is actually more evidence of fraud through IPOs.

²³¹ See Glustrom, *supra* note 51, at 303.

²³² *Infra* Part III.A.2; see Glustrom, *supra* note 51, at 303 (discussing that Alaska businesses need something different than a state in the southern continental United States); see, e.g., Cox, *supra* note 197.

²³³ Jenni Bergal, *States Try to Make It Easier to Raise Money with Crowdfunding*, GOVERNING (Aug. 21, 2014), <https://www.governing.com/news/headlines/states-try-to-make-it-easier-to-raise-money-with.html>.

²³⁴ Christa Hainz, *Fraudulent Behavior by Entrepreneurs and Borrowers*, in THE ECON. OF CROWDFUNDING: STARTUPS, PORTALS, AND INV. BEHAV. 79–80 (Douglas Cumming & Lars Hornuf eds., 2018).

²³⁵ See Glustrom, *supra* note 51, at 304; see also Complaint at ¶¶ 11, 46, *SEC v. Ascenergy, LLC*, 2015 WL 6513864 (D. Nev., Oct. 28, 2015).

²³⁶ See Glustrom, *supra* note 51, at 304.

²³⁷ *Id.*

²³⁸ See Anita Anand, *Is Crowdfunding Bad For Investors?*, 55 CAN. BUS. L.J. 215, 222 (2014).

²³⁹ Won, *supra* note 12, at 1418.

One study of over 3,000 IPOs found that 11.59% of the companies that went public “committed fraud at the IPO stage.”²⁴⁰ However, evidence of fraud through crowdfunding was found in only 14 out of 381 Kickstarter projects (3.7%).²⁴¹ These lower levels of fraud could be attributed to the crowd’s inquiry regarding the project in an open dialogue, and the crowd’s ability to find projects with signals of quality. Ethan Mollick, an Associate Professor of Management at The Wharton School of Business, asserts that the underwriting protection that exists in IPOs is adequately replaced by crowd due diligence in equity-based crowdfunding.²⁴² Now, states’ legislation, including HB 312 in Ohio, have grown to include strong fraud protections in their legislation, including the right to bring a private action against an issuer who tries to perpetrate fraud.²⁴³ However, protecting investors and entities from fraud is a large reason why states should proceed with caution when implementing their own crowdfunding legislation.

The next major concern that is raised is the sophistication of the investors and the high risk of loss.²⁴⁴ When intrastate legislation is passed, it permits almost anyone to invest, and many investors will have no relevant experience. Therefore, they may be unable to recognize that the risk of loss is extremely high.²⁴⁵ Requiring too much disclosure places an undue burden on the issuer, but not enough disclosure can undermine investor protections and intrastate crowdfunding as a whole.²⁴⁶ Unsophisticated investors are unlikely to know when an entity is committing fraud or have the skillset to judge the merit or riskiness of investing in a particular business.²⁴⁷ In order to make less sophisticated investors more aware, states like North Carolina and Michigan have investors affirmatively acknowledge that they are investing in an unregistered risky enterprise. In North Carolina, this affirmative acknowledgment has investors waive liability.²⁴⁸ This waiver of liability is not an actual protection to unsophisticated investors but is used as a warning tool to highlight to more unsophisticated investors that the risk is extremely high. However, things like affirmative acknowledgement and liability waivers must be used in conjunction with other investor protections, such as education and/or disclosures. But, without strong investor protections built into intrastate laws, investors will not be willing to use

²⁴⁰ Tracy Yue Wang et al., *Corporate Fraud and Business Conditions: Evidence from IPOs*, 65 J. FIN. 2255, 2270 (2010).

²⁴¹ Ethan Mollick, *The Promise and Perils of Equity Crowdfunding*, KNOWLEDGE@WHARTON (Nov. 7, 2013), <http://knowledge.wharton.upenn.edu/article/promise-perils-equity-crowdfunding/>.

²⁴² *Id.*

²⁴³ H.B. 312, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁴⁴ Mathews, *supra* note 33, at 310–11.

²⁴⁵ *Id.*

²⁴⁶ Won, *supra* note 12, at 1416.

²⁴⁷ Mathews, *supra* note 33, at 310–11.

²⁴⁸ *Id.*

intrastate crowdfunding. Luckily, there are some investor protections in the JOBS Act, but when it comes to intrastate laws, HB 312 should provide more investor protections, which could limit inclusivity but would ensure efficiency in protecting against fraud.

The last concern that is raised is the high rate at which small businesses fail and why making it easier for them to gain capital is a good thing. Asking investors, whether sophisticated in this area or not, to invest large sums of money in something that has a high risk of failure is extremely challenging, especially when most SMEs seeking to use intrastate crowdfunding do not have the high growth potential that sophisticated investors are looking for.²⁴⁹ Approximately twenty percent of small businesses fail within the first year, thirty percent of businesses will have failed by the end of their second year, by the end of the fifth year about half will have failed, and by the end of the decade only thirty percent of businesses will remain, which leaves about a seventy percent failure rate overall.²⁵⁰ While more capital in the hands of more SMEs is not always a good thing, equity-based crowdfunding and, more specifically, strong equity-based crowdfunding laws, have built in protections to protect against companies that are less desirable or likely to fail.²⁵¹ In fact, an increase in the success of a variety of implausible businesses shows that with more capital opportunities there is a greater chance for many SMEs to succeed.²⁵² Intrastate bills should strongly consider fraud and investor protections and, through that, investors should have their investment protected against loss when it comes to the high rate of business failure.²⁵³ Other countries have shown that while the risk of small business failure is always high, SMEs funded via equity-based crowdfunding see a lower rate of insolvency. In Germany, 70% of SMEs that had successful equity-based crowdfunding campaigns were still in operation approximately five years after their successful campaign.²⁵⁴ In the United Kingdom, 85% of SMEs were still in operation.²⁵⁵ Therefore, while there is not as much data on how intrastate crowdfunding impacts SMEs in the United States, examples from other countries show that the high rate of business failure is not as important of a concern as some critics might make it seem.

These criticisms are all important. However, when looking at the concerns in Part C of this Note and weighing them against the advantages to entrepreneurs and states discussed in Part B, the benefits to the states and their innovators likely outweigh the costs. Furthermore, each of these concerns can be addressed more easily through state

²⁴⁹ See *Microcap Stock: A Guide for Investors*, U.S. SEC. & EXCH. COMM'N (Sept. 18, 2013), <https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstockhtm.html> (discussing SMEs as one of the riskiest investment opportunities).

²⁵⁰ See *Survival of Private Sector Establishments by Opening Year*, BUREAU OF LAB. STAT., https://www.bls.gov/bdm/us_age_naics_48_table7.txt (last visited Apr. 9, 2021).

²⁵¹ HAGEDORN AND PINKWART, *supra* note 41, at 71.

²⁵² See *Financing Innovation: The Future of Capital Formation for Small and Emerging Businesses*, CONF. PROC., LEWIS & CLARK L. F., (Sept. 26, 1997).

²⁵³ *Id.*

²⁵⁴ Lars Hornuf & Matthias Schmitt, *Success and Failure in Equity Crowdfunding - CESifo DICE Report*, 14 LEIBNIZ INFO. CTR. FOR ECON. 2, 16–22 (2016).

²⁵⁵ *Id.*

regulation in the intrastate market.²⁵⁶ Therefore, Ohio must have an intrastate crowdfunding bill. But why will HB 312 not be as effective as legislators were hoping?

IV. HOUSE BILL 312, ITS FAULTS, AND PROVING THE CRITICS RIGHT

By an overwhelming majority of Ohio legislators, 117–2 to be exact, HB 312 appears to be the ideal Ohio intrastate crowdfunding bill for SMEs in Ohio.²⁵⁷ However, HB 312 fails to be either inclusive or efficient and is not likely to provide the benefits discussed in Part III.A. Equity-based crowdfunding in the United States has the dual goal of being both efficient and inclusive.²⁵⁸ Ohio's bill fails to accomplish either of these goals.²⁵⁹ With most state intrastate crowdfunding bills being carbon copies of the JOBS Act, it is easy to understand why the Ohio bill looks like it does.²⁶⁰ In order to understand what the perfect intrastate crowdfunding bill would look like in Ohio, it must first be examined how HB 312 is not one.

Intrastate crowdfunding bills seek to be a more efficient way for SMEs to raise capital. However, Ohio's HB 312, with the exception of the limit on the amount of money to be raised, looks extremely similar to the JOBS Act, meaning that it is no more efficient than its federal counterpart. While HB 312 prevents registration with the SEC, it buries the entry requirements to be able to use intrastate crowdfunding deep within the bill.²⁶¹ Intrastate crowdfunding is intended to make raising capital more efficient for the SMEs. If an SME struggling to gain capital cannot understand what is needed to be able to use intrastate crowdfunding, they are less likely to use it as an option, and, therefore, it clearly lacks the efficiency needed to make intrastate crowdfunding faster than federal regulations.

Second, HB 312 gives the Ohio Division of Securities the power to hand out licenses to entities seeking to operate portals that facilitate intrastate crowdfunding in Ohio.²⁶² However, by placing this licensing task within the Division of Securities, it could possibly overload the Division, which will have a slew of new regulations to promulgate and laws to comply with all while also attempting to vet and hand out portal licenses. The SEC was overwhelmed with having to create regulations, pass out licenses, and regulate the industry, which in turn undermined the effectiveness of the JOBS Act. Anything that creates the possibility of a backlog, like portals waiting to hear if they are licensed, inherently prohibits an efficient process. Lastly, the Ohio Division of Securities was given the power to create reasonable rules to enforce HB

²⁵⁶ JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 304 (Rachel E. Barkow et al. eds., 8th ed. 2017).

²⁵⁷ See H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020) (Dec. 17, 2020) <https://www.legislature.ohio.gov/legislation/legislation-votes?id=GA133-HB-312>.

²⁵⁸ *Supra* Part II; Schwartz, *supra* note 6, at 887.

²⁵⁹ *Supra* Part II.

²⁶⁰ Black & de la Vina, *supra* note 139, at 57–58.

²⁶¹ H.B. 312 §1701.05(A), 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁶² *Id.* §17.07.17(A)(5).

312.²⁶³ In the end, there are a number of sections that prohibit efficiency in intrastate crowdfunding in Ohio. Ohio must attempt to prevent the same mistakes that occurred at the federal level, but as HB 312 stands, the same mistakes are inevitable. But, maybe HB 312 is more inclusive than efficient.

An inclusive intrastate crowdfunding bill would be one where any and all entrepreneurs are invited to pitch their company to “the crowd” through an internet portal. A highly inclusive bill would be a strong first step in getting Ohio to achieve Representative Powell’s goal of making Ohio the most business-friendly state in the country.²⁶⁴ However, inclusivity must be limited in some way to prevent fraud.²⁶⁵ The SEC recognized this and has regulations that apply at both the federal and state level to prevent fraud in crowdfunding.²⁶⁶ With that being said, HB 312 is also not an inclusive bill. A bill to *Permit Certain Intrastate Crowdfunding* places strict limits on who and what can use intrastate crowdfunding in Ohio. While no one has advocated for a fully inclusive system, the entry requirements in HB 312 significantly hinder who can use crowdfunding at all. The enacted HB 312 fails to account for startups that are not yet operating in the state. As the law stands, only currently existing entities within the state can use OhioInvests.²⁶⁷ Further, HB 312 also places strict regulations on how much a person can invest in an Ohioinvests offering. While the limit is set at \$10,000, that number is the same for all residents of Ohio.²⁶⁸ Therefore, the investing limit creates an underinclusive environment by not permitting larger investments for more sophisticated investors and possibly limits the effectiveness of the bill. Lastly, HB 312 places hefty disclosure requirements on SMEs that will again limit who is able to use it.²⁶⁹ If the purpose of the bill is to create a business-friendly environment in Ohio, placing strict limits in the bill to keep people out is the antithesis of that purpose. Therefore, HB 312 falls short in the area of inclusivity as well.

In the end, intrastate bills in the United States are intended to be both inclusive and efficient. However, HB 312 fails to meet either of those goals because it neither speeds up the process of gaining capital nor allows anyone, with a few exceptions, to use crowdfunding to succeed. Therefore, this Note proposes that Ohio must recreate an intrastate bill that works to be more inclusive and efficient. Through that, Ohio might be able to reach its goal of becoming a state in which entrepreneurs seek to start their businesses.

²⁶³ *Id.* §17.07.19(D).

²⁶⁴ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin., supra* note 30 (statement of Rep. Jena Powell, Sponsor, H.B. 10).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 907–08.

²⁶⁷ H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

V. BLUEPRINT FOR INTRASTATE SUCCESS IN OHIO

While Ohio had some workable provisions in its first attempts and in the 2020 HB 312, there is still room for growth to make a bill that is more efficient and inclusive. Instead of attempting to pass a crowdfunding bill before the session ended, the Ohio Legislators should have looked to states like Michigan (MILE Act) and countries like New Zealand to see what makes an efficient and inclusive intrastate crowdfunding platform.²⁷⁰ However, even efficient bills like the MILE Act could be made stronger. One benefit to being one of the last states to pass an intrastate bill is that the Legislators have the ability to see what worked and what did not in other areas. This part of the Note seeks to provide a blueprint for altering HB 312 to achieve the goal of both the legislature and crowdfunding in general: to create a successful intrastate crowdfunding legislation in Ohio that focuses on efficiency, while not wholly neglecting inclusivity. To do this, a comparison to Ohio's three previous attempts at an intrastate bill and sections of the 2020 HB 312 will be used to craft four clear sections deserving of analysis. These sections include restrictions on entities seeking to use intrastate crowdfunding, limits on investors and the amounts raised, disclosure requirements, and portal operations. While there are certainly more than four categories in HB 312, these provisions have the greatest impact on investors and entrepreneurs and are given the most flexibility for states to change from SEC regulations.²⁷¹

First, for intrastate crowdfunding to be more efficient and inclusive in Ohio, it would have to provide fewer restrictions than other exemptions that entities could use to raise money.²⁷² The 2020 HB 312 begins to provide this by removing the long requirements from HB 593 and HB 10 and creating this either/or regulation, where entities only have to meet one of the three options.²⁷³ However, the legislators were nervous about making it easier for SMEs to meet crowdfunding conditions due to the possibility of fraud.²⁷⁴ In part, it requires that the business *either* has its principal office in Ohio, has at least 80% of its assets in Ohio, or the entity derived at least 80% of its gross revenue in the state.²⁷⁵ However, HB 312 leaves out one key group of entrepreneurs: people seeking to start their business in Ohio. So, these entrepreneurs have the option to register their principal place of business in Ohio, but the other two options are unavailable to them, limiting inclusivity, but mainly creating a barrier for efficient capital-raising for new SMEs. Further, intrastate crowdfunding is used to help innovators determine whether their idea is viable.²⁷⁶ Therefore, an Ohio bill must account for this additional group in order to make the bill more efficient and inclusive.

²⁷⁰ Schwartz, *supra* note 6, at 885–86.

²⁷¹ Securities Act of 1933 §3(a), 15 U.S.C. § 77(a).

²⁷² Joyce, *supra* note 211, at 371.

²⁷³ See Carla Napolitano, Ohio Legis. Serv. Comm'n, Bill Analysis, H.B. 312, 133d Gen. Assemb., at 3–4 (2020); H. B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁷⁴ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Jason Warner, H.B. 10).

²⁷⁵ H. B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁷⁶ Won, *supra* note 12, at 1409.

Ohio should add a condition to require the entity to have a business plan that describes the entity's plan to conduct at least 80% of its operations within the state. This would create a new uniform "80% rule," which makes it easier for entrepreneurs to understand what is required to begin intrastate crowdfunding, increasing efficiency in being able to launch their intrastate crowdfunding campaign. Further, the 80% entry requirement will require the entity to get approval from the Division of Securities by submitting either the business plan for verification or forms that provide evidence of the SME's assets or gross revenue before being allowed to engage in intrastate crowdfunding. While requiring businesses to get approval from the Division of Securities may hinder both efficiency and inclusivity, it may prevent those rare instances of fraud in crowdfunding, which the legislature must consider before an intrastate crowdfunding bill would gain any traction.²⁷⁷ The Division of Securities is the enforcement agency in HB 312, giving them the ability to fine entities and portals, and making them the obvious choice to continue the regulation of crowdfunding in Ohio.²⁷⁸ Lastly, these requirements are significantly less burdensome than the requirements under Regulation 147/147A, Regulation D, or those mentioned in HB 593, 10, or the 2019 and 2020 HB 312.²⁷⁹ Compliance with Regulation 147/147A or Regulation D requires constant disclosures to the SEC and the retainer of an attorney in order to understand how to fully comply with the regulations, whereas, through this new proposal, entities would be able to save on the costs by having fewer requirements to meet when launching their capital campaign and may only need an attorney through the initial offering.²⁸⁰ Therefore, this new proposal could make intrastate crowdfunding more efficient, effective, and inclusive within the state.

Second, limits must be placed on both the amount allowed to be raised and the kinds of people who can invest.²⁸¹ Ohio should retain the \$5 million offering limit from HB 312, as it would give Ohio the highest offering limit in the country, and \$5 million is the maximum limit within federal law and keeps Ohio compliant with the JOBS Act.²⁸² This would achieve the legislature's goal of making Ohio "the most business friendly state in the country."²⁸³ Therefore, the offering limit requires very little change from the way it stands currently.²⁸⁴ Moreover, this high limit allows SMEs to use crowdfunding concurrently with other sources of capital raising, rather than just using it initially to "fill the gap."

²⁷⁷ *Supra* Part III.C.

²⁷⁸ H.B. 10, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017–2018).

²⁷⁹ *Supra* Part III.

²⁸⁰ Vignone, *supra* note 78, at 813.

²⁸¹ Murphy, *supra* note 226, at 779.

²⁸² H.B. 312, 133d Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁸³ *Permits Certain Intrastate Equity Crowdfunding: Hearing on H.B. 312 Before the S. Comm. on Fin.*, *supra* note 30 (statement of Rep. Jena Powell, Sponsor, H.B. 10).

²⁸⁴ *See generally* H.B. 312, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

However, where Ohio must alter HB 312 is by adding in an “all-or-nothing” provision in its bill.²⁸⁵ This provision provides that the money invested by investors will be held in escrow until the entity meets its fundraising goal. This provision is at the cost of inclusivity, as entities who cannot meet their goals will have intrastate crowdfunding made unavailable to them. But it is important for investor protections and efficiency, because if a company cannot obtain sufficient attention through crowdfunding, it might be an indicator of its success.²⁸⁶ A failure to meet the goal gives the investors a refund of their investment and creates zero loss. This is an important provision in protecting investors against less successful entities, because it requires the entity to really consider its financing needs before posting its goal and will assist less sophisticated investors in seeing what can get more sophisticated investors to invest.²⁸⁷ Unlike the North Carolina version, Ohio should not allow investors to withdraw their investment whenever they want leading up to the entity hitting its goal. The only option for withdrawal in Ohio should be if the entity fails to meet its goal. This assists in the efficiency that entities seek through intrastate crowdfunding in getting capital faster than through other methods.²⁸⁸ While it will not entirely mitigate the high risk of loss, anything the State can do to protect those less sophisticated investors from large losses can ensure that OhioInvests is a long-term viable option within the state.

Setting investor eligibility requirements involves difficult trade-offs. Each of the Ohio bills limited unaccredited investors to \$10,000 in a single transaction.²⁸⁹ While this is the standard practice, it does not account for more sophisticated investors who might have a higher net worth and some experience with investing in securities. It also allows those less sophisticated investors to invest \$10,000 in a single transaction with no regard towards their income, creating catastrophic scenarios for investors who invest that limit, but might not have the income to support it. This, in turn, could scare others away from taking part in the intrastate crowdfunding process. Therefore, Ohio must create a different rule for unaccredited investors and provide both set dollar limits and a percentage limit based on income. For example, unaccredited investors making \$100,000 or less will be allowed to invest no more than 5% of their income in a twelve-month period, and no more than \$1,500 per transaction. This limits the risk and possible loss of each investor in a single transaction but allows them to invest in more entities based on their income, which is important to both allow new people to get into the market, while also supporting the SMEs who need intrastate crowdfunding. Additionally, unaccredited investors making more than \$100,000 will be allowed to invest no more than 15% of their income in a twelve-month period and are limited to

²⁸⁵ Uriel S. Carni, *Protecting the Crowd Through Escrow: Three Ways That the SEC Can Protect Crowdfunding Investors*, 19 FORDHAM J. CORP. & FIN. L. 683 (2014); see Mathews, *supra* note 33, at 315; see H.B. 593, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016).

²⁸⁶ Tina Rosenberg, *On the Web, A Revolution in Giving*, N.Y. TIMES (Mar. 31, 2011), <http://opinionator.blogs.nytimes.com/2011/03/31/on-the-web-a-revolution-in-giving/> (quoting Ethan Zuckerman, senior researcher at Harvard’s Berkman Center for Internet and Society).

²⁸⁷ Bradford, *supra* note 16, at 139–41.

²⁸⁸ See Mathews, *supra* note 33, at 315.

²⁸⁹ H.B. 312, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

no more than \$10,000 per transaction. While this would limit unaccredited investors, accredited investors will still comply with the current SEC regulations, meaning that individuals worth more than \$1,000,000 and institutions that qualify as accredited investors under 17 C.F.R. Parts 230 and 240 can invest without any quantity limits.²⁹⁰ This new provision would allow SMEs in Ohio to “test the waters” for others.²⁹¹ States are traditionally seen as experimental laboratories, so by Ohio becoming the first state to set a limit like this, it can explore intrastate crowdfunding in a new way and help fill the void of information regarding this newer form of investing.²⁹²

Third, OhioInvests must change the disclosure requirements so as not to cause compliance to be an extreme burden on the SMEs in the hopes of increasing efficiency. House Bill 312 places a laundry lists of disclosure requirements that, in the end, are extremely expensive for the entities. Heavy disclosure requirements cause entities to avoid crowdfunding due to the high compliance costs.²⁹³ House Bill 312 requires disclosures before a person invests and multiple times a year, and requires specialized forms that require the hiring of a third party.²⁹⁴ However, to increase efficiency, disclosure pre-investment—meaning disclosures made to the Division of Security and the Portal before the funding campaign is launched—should be applied to every entity but be limited to only what would be required for the entity to receive a small business loan.²⁹⁵ This includes: business and personal credit scores, tax returns, income statements, business plans, and/or business organization documents.²⁹⁶ Because entities are generally seeking either a loan or to use intrastate crowdfunding, the disclosure requirements prior to launching their campaign should not be more burdensome than other alternatives.

For post-investment disclosures—meaning disclosures that will occur at set times after the campaign has concluded—Ohio should change the requirements based on the amount of the offering. These post-investment disclosures will require the same as the pre-investment disclosures, but will then include all financial statements, profit and loss statements, bank statements, and payroll records. States like North Carolina and Alaska have similar disclosure requirements like this, and they have proven to be both

²⁹⁰ See generally 17 C.F.R §§ 230, 240 (2020).

²⁹¹ Won, *supra* note 12, at 1412–13 (comparing how Exemptions A and B from the United Kingdom will allow the states to test the waters before soliciting money from investors).

²⁹² Mathews, *supra* note 33, at 305–06; see, e.g., Santosky v. Kramer, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²⁹³ Black & de la Vina, *supra* note 139, at 64.

²⁹⁴ See H.B. 593, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016); H.B. 10, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017–2018); H.B. 312, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019–2020).

²⁹⁵ Won, *supra* note 12, at 1412.

²⁹⁶ *Id.*

efficient and effective in protecting against fraud.²⁹⁷ The law for post-investment requirements should require entities asking for less than \$500,000 to have no financial disclosure requirements; entities asking for \$500,000–\$1 million to have annual financial disclosure requirements; entities raising between \$1 million–\$3 million to have semi-annual disclosure requirements; and entities seeking more than \$3 million in offerings to have quarterly disclosure requirements to shareholders and the Division of Securities. This uniform application will allow an entity to know what the disclosure requirements are from the start and what documents they must keep track of. But, more importantly, by keeping the cost low, Ohio is hopefully allowing the entities to use a little, and not most, of the money raised through crowdfunding to comply with these post-disclosure costs. Disclosures are a necessary evil of offering securities, but Ohio must recreate the law to ensure that it can accomplish the disclosure goals while not making them a barrier to inclusive entry.

Next, portals must be regulated. In all thirty-six states, including Ohio's HB 312, agencies within the state are given the ability to license privately operated portals to conduct intrastate crowdfunding in accordance with the law. Certain states' governments are also authorized to operate their own portals, but in none of the other states are the portals operated by *only* government entities.²⁹⁸ Inviting private entities to create intrastate crowdfunding portals could be beneficial to the state and encourage competition, but a different approach should be taken in Ohio. Ohio is fortunate enough to have a non-profit, JobsOhio, whose mission is to create economic development and capital investment in Ohio through business attraction, retention, and expansion efforts.²⁹⁹ This Note proposes that, in Ohio, the portal should be regulated by the Ohio Division of Securities but under the control of JobsOhio because having one centralized portal for the entire state could increase efficiency and ensure transparency.³⁰⁰ JobsOhio can then use the fees earned through intrastate campaigns to assist the state in other economic development initiatives. Then, the agency's six economic development partners spread throughout the state in six different regions would be responsible for the portal operations in their territory. The partners' close relationship with entrepreneurs in their region could make Ohio a leading state for efficient and inclusive portal operations. By moving portal operations into one centralized government/non-profit entity it would allow each regional office to cater the portal to its regional needs, which is important in a state where each region presents

²⁹⁷ See, e.g., Mathews, *supra* note 33, at 306–07; see, e.g., Glustrom, *supra* note 51, at 317.

²⁹⁸ *Intrastate Crowdfunding Legislation & Regulation*, N. AM. SEC. ADM'RS ASS'N (NASAA) <https://www.nasaa.org/industry-resources/securities-issuers/intrastate-crowdfunding-directory> (2019); see H.B. 593, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016), see H.B. 10, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017–2018); see H.B. 312, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019–2020); see JENNIFER A. PARKER, BILL ANALYSIS OF SUB. H.B. 10 AS RE-REPORTED BY S. RULES AND REFERENCE, S. 132nd, Reg. Sess., at 2 (2018).

²⁹⁹ *About Us*, JOBSOHIO, <https://www.jobsohio.com/about-jobsohio/about-us/> (last visited Oct. 30, 2020).

³⁰⁰ See Hornuf & Schmitt, *supra* note 254, at 17 (stating how the less transparent a portal is, the more likely the campaign is to either not reach its fundraising goal or become insolvent within five years).

unique challenges.³⁰¹ While Ohio would be the first to do something like this, it would both assist the country in “testing the waters” and increase efficiency in allowing SMEs to raise capital in an arena that is highly complex and considered a hindrance to innovation.³⁰²

The last step that the Ohio Legislature must take to achieve true efficiency, while also working to become the most business-friendly state in the country, is to create a research and data collection provision of the bill.³⁰³ In order for an intrastate crowdfunding bill to be efficient and to ensure that it continues to be inclusive, it must have a codified structured process for collecting and analyzing data.³⁰⁴ Michigan’s MILE Act has an implemented means of collecting data and uses that data to determine the effectiveness of the law.³⁰⁵ Because of it, Michigan is considered the leader for entities looking to use crowdfunding to grow.³⁰⁶ If there is no way to collect or analyze data, then Ohio will be unable to determine what the state’s entrepreneurs need. If Ohio is going to continue to advertise itself as the state to which businesses should flock,³⁰⁷ then there must be an understanding of what is going to work and what will not, especially for the most vulnerable of entities, SMEs. This Note recommends that the collection and analysis of data be conducted by the Ohio Division of Securities. It already oversees the program through HB 312, but the legislature should add this additional responsibility and collect data in the areas of how much money is being raised, what percentage of capital is coming from crowdfunding, what specific regions are doing what, and investor information.³⁰⁸ Through this data, Ohio can publish a measurement of the economic impact crowdfunding is having on the state.³⁰⁹ The way the law stands now, Ohio has no mechanism for determining the efficiency, inclusivity, or effectiveness of OhioInvests. Therefore, in order to achieve the state’s goal, the legislature must change HB 312.

In the end, where there is SEC oversight, intrastate crowdfunding will never be as successful as it could be. And that stands true for Ohio’s HB 312. But, by attempting

³⁰¹ While also getting rid of the high cost associated with licensing portals, having one centralized portal could also remove another fee that the SMEs would have pay, which would again increase the number of SMEs who could use intrastate crowdfunding in the state.

³⁰² *Supra* Part IV.

³⁰³ Black & de la Vina, *supra* note 139, at 64.

³⁰⁴ *Id.* at 64–65.

³⁰⁵ *Id.* at 64.

³⁰⁶ *Id.*

³⁰⁷ See Andrew J. Tobias, *New Ohio Ad Campaign Aimed at Attracting Businesses Touts State’s Low Taxes...*, CLEVELAND.COM (Feb. 11, 2021), <https://www.cleveland.com/open/2021/02/new-ohio-ad-campaign-aimed-at-attracting-businesses-touts-states-low-taxes-sparks-online-debate.html> (discussing Ohio’s attempts in 2021 to get businesses to operate in Ohio).

³⁰⁸ Black & de la Vina, *supra* note 139, at 64–67.

³⁰⁹ *Id.*

to simplify the process and lessening regulations to make intrastate crowdfunding a more attractive option for SMEs, Ohio can help attract and retain businesses by becoming a state that is both more efficient and inclusive.

VI. CONCLUSION

Almost three-quarters of the United States, including Ohio, have taken crowdfunding into their local hands. Unfortunately, most states have failed to make intrastate crowdfunding effective. Intrastate crowdfunding is not a be-all, end-all solution to bridging the capital raising gap that many SMEs face every year. But, with careful (re)execution, and a (re)simplified process, Ohio could be on the forefront of intrastate crowdfunding legislation and become a state that entrepreneurs and innovators seek out to launch their businesses. Big Drop Brewing Co. proved that even in the lowest of economic recessions, equity-based crowdfunding could be used to help businesses achieve their goals. Therefore, Ohio has a lot to lose by not passing the most effective law. By altering HB 312 to achieve the true goals of crowdfunding, Ohio can increase innovation, which in turn will increase the job market, which would have a positive effect on the state economy.³¹⁰ Ohio was late to join the crowd, and when it did it did not put its best foot forward. Therefore, a new crowdfunding bill must be enacted, so that the next great class of entities can succeed in Ohio.

³¹⁰ Yushina, *supra* note 229.