SOX-Less Capital Raising: An Empirical Study of Sarbanes-Oxley's Legacy on Companies Leaving the Public Markets

*By Samuel C. Keltner**

INTRODUCTION

Private markets are currently all the rage. Issuers raise more money today in the private markets than in the public markets.[1] Private companies can raise substantial amounts of capital without the complications and cost of conducting an IPO or meeting the requirements imposed upon an Exchange Act reporting company.[2] Indeed, following the passage of Sarbanes-Oxley (SOX), there was both a substantial drop in the number of companies choosing to enter the public markets and a rise in the number of companies choosing to exit them.[3] SOX brought sweeping reform to corporate governance, disclosure, and liability. These reforms along with the introduction of Section 404—management discussion of internal controls—have caused compliance costs for public companies to skyrocket.[4]

The extent of SOX as a push factor out of the public markets has been a subject of debate since its passage.[5] Commentators have suggested that market forces independent of SOX were behind the decline in IPOs and increase in companies leaving the public market.[6] Moreover, while the JOBS Act sought to make it easier for smaller companies to access the public markets,[7] it also made it easier for companies to raise money in the private markets by allowing private offerings under Rule 506(c) and Regulation A+.[8]

Early empirical studies sought to analyze the prevalence of SOX's high compliance costs or "SOX-based reasoning" in issuer's decisions to leave the public markets using going private or going dark transactions.[9] Since "going private" transactions, where an affiliate takes an issuer private, are subject to the special disclosure requirements of Rule 13e-3, they quickly became a favorite point of analysis.[10] While there is no such requirement for issuers leaving the public markets without an affiliate or "going dark" issuers, studies still analyzed their filings for hints of SOX-based reasoning.[11] This paper seeks to provide an end point

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for empirical SOX-based analysis of issuers going private and going dark. It presents results showing a decline in the prevalence of SOX-based reasoning amongst these issuers since 2017 and explores the implications of this decline along a variety of lines including the public markets, the continued federalization of corporate governance, differences between going private and going dark, and the competitiveness of the US capital markets.

In Part I, the Article explores the reforms brought by SOX and outlines how commentators thought of the Act in the years following its passage. In Part II, the Article shifts to provide a brief overview of the mechanics of going private and going dark and outlines the framework for the results presented in the next part. In Part III, the Article presents the results starting first with the aggregate trends and then SOX specific results for each form highlighting the declining trend in the use of SOX based reasoning in issuers over time. Finally, in Part IV, the Article analyzes the results and discusses their implications. The Article pinpoints 2017 as the turning point for issuers using SOX as a reason to leave the public market and argues that absent major reform the remaining issuers are here to stay. From there, the Article pivots to discuss this decline for the future of efforts around the federalization of corporate governance and argues that such future efforts will be aimed at the private markets. Following this, the Article explores the difference in results between going private and going dark issuers and provides suggestions as to why Rule 13e-3 issuers report SOX as a reason more often than going dark issuers. Finally, the Article concludes that SOX's dampening influence on the public markets is past its peak and extrapolates this conclusion to predict trends among foreign issuers.

I. SARBANES OXLEY AND THE COSTS OF BEING PUBILC

Following major corporate and accounting scandals that resulted in the collapse of Enron, WorldCom, and other companies in the early 2000s, Congress sought to prevent corporations from participating in similarly fraudulent conduct.[12] The results of these efforts are encompassed in SOX.[13] Its passage sought to effectuate widespread reform in management, disclosure, and accounting practices.[14] With these reforms came fears of increased compliance costs and an increased incentive for companies to remain private or leave the public markets.[15] This part explores the substantive provisions of SOX and provides an overview of the fears that the business community, practitioners, and academics shared following SOX's passage.

A. The Burdens of SOX

Compliance is a cost-center and issuers weigh this factor heav-

ily when considering their options for capital raising. In the public markets, SOX created large compliance costs by reforming "governance, reporting and disclosure rules for public companies."[16] Here, the Article provides a brief survey of SOX changes regarding corporate governance, disclosure, and litigation spaces.[17]

First, in the corporate governance space, SOX prohibits issuers from making company loans to directors or executive officers,[18] requires companies to disclose the existence or nonexistence of a code of ethics for its officers, directors, and employees,[19] mandates the creation of an entirely independent director staffed audit committee,[20] allows for executive compensation claw backs for noncompliance with Commission financial reporting requirements,[21] and lowers the standard by which individuals could be barred from being an officer or director of a public company.[22] In addition to the requirement of having entirely independent directors with at least one of those directors being considered a financial expert,[23] the audit committee also has the direct responsibility of appointing an independent auditor,[24] establishing procedures for handling complaints regarding accounting practices,[25] the ability to engage outside advisors as necessary,[26] and access to appropriate funding to pay the fees of the auditors, outside advisors, and its administrative expenses.[27]

Second, in the disclosure space, SOX requires the CEO and CFO to make certifications of a fair and accurate representation in all periodic reports.[28] These certifications attach personal liability to the CEO and CFO for any misstatement made in the reports.[29] SOX also requires publicly held issuers to disclose any "off-balance sheet transaction, arrangement or obligation that may have a material effect on the financial condition of the corporation."[30] Further still, SOX requires management to "create, maintain, and assess internal controls" in their annual report and auditors to attest to the accuracy of that assessment.[31] Between internal compliance and auditor costs, Section 404 is most expensive provision for issuers to comply with.[32] Finally, SOX reformed the real-time disclosure framework, requiring disclosures be made in plain English.[33] This prompted the Commission to add several new disclosure items that issuers must report within four business days of their occurrence.[34]

SOX also provides the SEC and private litigants with new tools to pursue litigation against public companies. SOX expanded the statute of limitation for pursuing a private claim based on fraud, deceit or manipulation—of particular importance, claims brought under § 10(b)—from one year after discovery of the facts and in no event more than three years after such violation to two years after discovery of the facts and in no event more than five years

after such violation.[35] SOX also creates to created a private right of action for employee whistleblowers who have been retaliated against for providing information regarding conduct reasonably believed to violate SEC regulations or federal law.[36] In addition, SOX attached criminal liability to executives and directors who knowingly certified a fraudulent disclosure.[37] Along these lines, SOX disallowed debt discharge in bankruptcy in judgements or settlements of securities fraud.[38] SOX also empowered the SEC to pursue equitable remedies such as “disgorgement, ordering an accounting, appointment of a receiver, asset freeze, and restructuring of the board of directors.”[39] Finally, SOX enhanced several criminal sanctions, increasing the maximum punishment of crimes such as wire fraud, criminal securities fraud, and obstructing an investigation into the 20–25 year range.[40]

All told these requirements are significant and require substantial costs to maintain compliance. Together, SOX compliance means costs spent on consulting services, audits, process management, workflow, documentation, planning, and security.[41] There are other hidden costs including training regarding managing the system of internal control, training IT staff, managing and running software tools, and training auditing and management staff.[42] In 2003, the SEC estimated compliance with the assessment of internal controls provision would cost public issuers in aggregate $1.24 billion and 5,396,266 man hours.[43] Four years later, a simple cost model put forth suggested that for every $1 billion in revenue, issuers should expect $1 million of compliance costs.[44] While today SOX compliance hours have declined from their peak in 2007,[45] public companies are still trying to find ways to lower their compliance burden.[46] For example, between 2021 and 2022, SOX compliance costs are up on average 18%.[47] Further, the number of companies spending $2 million between 2021 and 2022 increased while the number the companies spending less than $500,000 decreased.[48] Whether that can be attributed to smaller issuers dropping out of the public market or costs increasing across the board is debatable.[49]

B. Initial Fears and Thinking Today

Fears about the compliance costs of SOX for public companies took root during the discussion of the Act[50] and in years following its enactment.[51] In the period following SOX’s passage, there was a decline in the number of new IPOs and a rise in the number of unicorns.[52] Further still, there was a trend of public companies choosing to “go dark” or delist and deregister their securities from the public markets and thus exit the public company regulatory space.[53] In the period from 1996 to 2012, the total number of public companies in the United States halved.[54] Two prominent

working groups found that the high costs of SOX compliance were causing U.S. capital markets to become less competitive.[55] The press began to lament the death of the public company.[56]

While the overall picture appeared to support the narrative that compliance costs were keeping companies out of the public markets and driving public companies private, academics began to become suspicious of the cost narrative. In the IPO space, empirical studies began to suggest that small firm IPOs were declining before SOX[57] and that "market forces independent of regulation" were causing the decline in IPOs.[58] These findings never impacted the policy making community or did much to allay the public perception.[59] Indeed, the JOBS Act not only attempted to make it easier for smaller companies to avoid the compliance burden through classification as an EGC but also created a greater incentive for companies to raise money in the private markets by allowing private offerings under Rule 506(c) and Regulation A+.[60]

Today, scholars and practitioners view SOX reforms under different rubrics. Professor Steinberg views SOX and the subsequent Dodd-Frank[61] reforms as part of a process of the federal government taking aspects of corporate law regulation away from the states.[62] In his view, SOX is not so much groundbreaking in its novelty but rather as a culmination of years of attempts by the federal government to displace parts of state corporate law.[63] Another view sees SOX as part of a story of the breakdown between the "Public-Private" divide in securities law.[64] Professor Georgiev argues SOX was the impetus for the subsequent "deregulatory cascade"[65] that lead to the rise in private capital and decline of public capital raising thanks especially to reforms to 506(b).[66] Where 506(b) once started as a means for small businesses to raise capital, unicorns now regularly take advantage of the unlimited offering amount and unlimited availability to accredited investors to raise extraordinary amounts of capital.[67] Along similar lines, another strain of scholarship focuses on the effect SOX has on small issuers deciding to remain private or deciding to delist or go private looking at both the push factors in the public markets and pull factors in the private markets.[68]

II. GOING PRIVATE V. GOING DARK

Considering the costs of SOX and the attractiveness of the private markets, the Article turns now to the mechanics of leaving the public market. Delisting, deregistering, and going private, colloquially, refer to a process by which a company leaves a national exchange and exits the sphere of public securities regulation.[69] However, in practice these terms have slightly different connotations. Delisting refers to the process by which a

company is no longer listed on a national exchange.[70] Deregistering, or "going dark," is the process by which a public company ceases to become a reporting company and stops making mandated disclosure.[71] In contrast, to "go private" or be "taken private" refers to the process by which an affiliate acquires all the outstanding securities of the issuer and takes the company out of the public markets.[72] These transactions are governed not only by the laws surrounding mergers and acquisitions but also by Exchange Act Rule 13e-3.[73] This part briefly describes the process by which a company goes private under Rule 13e-3 and the process by which a company goes dark culminating in the filing of a Form 15 or Form 25.

A. Going Private and Special Considerations under Rule 13e-3

As opposed to "going dark," the phrase "going private" refers to a specific transaction by which an affiliate buys out any remaining shareholders through either a merger or tender offer and afterward delists and deregisters the company.[74] These transactions are unique because of the "opportunity for overreaching of unaffiliated security holders by an issuer or its affiliates."[75] This opportunity for overreach is created by "the lack of arm's length bargaining and the inability of unaffiliated security holders to influence corporate decisions to enter into such transactions."[76] The Commission was not the only institution concerned with overreach in these transactions and some state courts were also quick to establish fiduciary standards particular to them.[77]

However, unlike the states, the Commission does not have the authority to regulate corporate fiduciary duties directly and must instead do so by creating filing, disclosure, and dissemination requirements.[78] The application of Rule 13e-3 depends on three factors: (1) whether the transaction qualifies as a "Rule 13e-3 transaction," (2) whether there is an exception under the Rule, and (3) whether the class of securities is registered under Section 12 or under Section 15(d) of the Exchange Act.[79]

A "Rule 13e-3 transaction" encompasses three different situations that cause the company to no longer be traded on the public markets.[80] The first is a "purchase of any equity security by the issuer of such security or by an affiliate of the issuer."[81] The second is a tender offer or invitation for tenders of any equity security by the issuer or an affiliate of the issuer.[82] Third, the rule applies to any solicitation of proxies (subject to Regulation 14A) or distribution of information statements (subject to Regulation 14C) to securities holders by an issuer or affiliate regarding a merger, reorganization, recapitalization or similar transaction.[83]

An affiliate for the purposes of Rule 13e-3 is the same as under

Rule 405.[84] The statutory definition of an affiliate under Rule 405 is exceedingly broad and analyzed on a case-by-case basis.[85] Generally, affiliate status will consider stock ownership (10% being a notable threshold), one's position in the company, and relationships with insiders.[86] Readers should not confuse 13e-3 with the requirements of 13D which require a shareholder to disclose the acquisition of 5% or greater stake in an issuer.[87]

There are two notable exceptions that fall outside of 13e-3's reach. The first exception includes "second-step, clean up transactions" which occur within one year of a tender offer where the bidder became an affiliate as a result.[88] First, the consideration in the second step transaction must be at least equal to that offered in the tender offer.[89] Next, if the tender offer was made for any or all securities of a class of the issuer, the affiliate must fully disclose in the second step their intention to engage in a Rule 13e-3 transaction and that such transaction is similar to the terms described in the original tender offer.[90] However, if the tender offer was for less than all the securities of a class of the issuer, the tender offer must have included a plan of merger or plan of liquidation between the affiliate and the issuer and the second step Rule 13e-3 transaction must occur pursuant to the plan from the tender offer.[91] Another exception relies on consideration for the issuer's equity securities being equity securities in the purchaser subject to the three requirements, including: (1) the offered stock must have substantially the same rights as the redeemed stock, (2) the offered stock is registered under Section 12, and (3) if the redeemed stock was listed on a national exchange or authorized to be quoted in an interdealer quotation system the offered stock must also have those qualities.[92]

The application of Rule 13e-3 also depends on whether the class of securities is registered under Section 12 or Section 15(d) of the Exchange Act.[93] Both types of issuers are subject to the additional disclosure requirements.[94] However, Section 12 issuers are subject to the additional antifraud provisions in Rule 13e-3 whereas Section 15(d) issuers are only subject to other antifraud provisions such as Rule 10b-5.[95]

Compliance with Rule 13e-3 centers on meeting the disclosure requirements as set forth in Schedule 13e-3.[96] In the disclosure, the issuer or affiliate must discuss, among other things, the fairness of the transaction, addressing both fair dealing and fair price.[97] Further still, and importantly for this paper, the issuer or affiliate must disclose the purposes, alternatives, reasons, and effects of the transaction.[98] Due to the frequency by which these transactions are challenged in court, issuers and affiliates have an incentive to cast a wide net when it comes to disclosing the reasons for the transaction.[99] Finally, the issuer or affiliate must

also disclose the terms of the transaction as well as furnish a summary term sheet.[100] Because of the mandatory disclosure of the reasons for conducting the transaction included in the disclosure itself and investment banker opinion letter, Rule 13e-3 transactions provide a rich source of information.

B. Going Dark—Delisting and Deregistering

The process by which a company terminates or suspends its Exchange Act obligations depends on how the company initially registered its securities or otherwise became subject to the Exchange Act. There are three ways a company may initially become subject to the Exchange Act reporting requirements: (1) becoming listed on a national exchange,[101] (2) being required to list on a national exchange after meeting an asset threshold of $10 million and achieving either 2,000 total investors of record or 500 non-accredited record equity holders,[102] or (3) the company conducts a registered offering but does not list their securities on any exchange.[103]

For a security subject to the Exchange Act under Section 12(b) the process begins by notifying the exchange of its intention to delist from the exchange at least ten days before filing the Form 25.[104] Often a securities exchange will make the determination that a company no longer meets the listing requirements and notify the SEC.[105] Ten days after the Form 25 is filed and the other requirements of Rule 12d2-2 are met, the company's obligations to file reports under Section 13(a) are suspended.[106] Ninety days later, deregistration takes effect and the issuer is no longer subject to any Exchange Act requirements.[107]

For companies subject to the Exchange Act under Section 12(g), the process is more involved. First, an issuer must determine if it either (1) has less than 300 equity holders of record or (2) less than 500 equity holders of record if an issuer's assets have not exceeded $10 million at the end of each of its last three fiscal years.[108] After the issuer confirms they are below these thresholds, it files a Form 15.[109] Following a 90 day waiting period, deregistration is completed.[110] If a company subject to the Exchange Act under 12(g) is also listed under 12(b), they cannot file the Form 15 until after the Form 25 is filed.[111]

Companies wishing to deregister but are not listed on any exchange must suspend their section 15(d) obligations.[112] Section 15(d) obligations are automatically suspended for any fiscal year other than the year the registration statement became effective if, at the beginning of that year, the class of securities that initially triggered the reporting obligations are fewer than 300 persons of record for non-bank issuers.[113] While the suspension is automatic by rule, a company must file a Form 15 with the SEC

as a notice of suspension within 30 days of the fiscal year to be effective.[114]

Collectively, this framework allows one to classify going private and going dark transactions. Delisting transactions are represented by issuers who file Form 25's, deregistering companies are represented by issuers filing Form 15, and companies going private are subject to the requirements of Rule 13e-3. There is some overlap between issuers filing these forms. For example, a listed company seeking to fully deregister may have to file a Form 25 and a Form 15 or Schedule 13e-3. In addition, Form 25 filers may simply be delisting their securities but remaining public. The results presented do not account for this overlap but instead present a view of all issuers who filed the form analyzed. In the next part, the Article applies this framework and uses it to determine how often issuers use SOX-related reasoning in their decision to leave the public markets.

III. RESULTS

A. Methodology

The results presented below were gathered using the following methods.[115] First, the Article presents the aggregate number of delisting, deregistering, and going private transactions. The number for each year was collected using an EDGAR search on LexisNexis, filtering out for amendments (/A), exhibits (EX, Exhibit), and any other form caught in the search and not being studied. Next, the Article presents results about the relevance of SOX by presenting results of a representative sample from each year for each of Form 15, Form 25, and Schedule 13e-3. The sample group was taken by randomly selecting ten issuers who filed between January 1st and December 31st of the subject year. Using that sample, an EDGAR search was performed for filings that mentioned SOX or the regulatory burden of being a public company. For the Schedule 13e-3 this often meant searching the "Reasons" section for a discussion on the regulatory burden of being a public company and searching documents incorporated by reference.[116] For the companies that filed a Form 15 and Form 25, this search would expand to proxy statements, 8-Ks, and 10-Ks that discuss a merger or transaction.[117]

For every issuer that mentioned SOX or regulatory burden as part of the reason why it was delisting, deregistering, or going private, a tally to the yes column was added. For every issuer that did not mention SOX or regulatory burden, a tally to the no column was added. A 1 value was assigned for every yes tally and 0 value for every no tally. Using these values, a Welch's t-test was conducted to validate the claims regarding the downward trend observed in the graphs.[118] In order to conduct this test, two

groups were separated for comparison and the mean, variance, and sample size for each was determined. The degrees of freedom were calculated or the number of values in a final calculation of a statistic that is free to vary. Using the calculated degrees of freedom, a T table was consulted to determine the T-value for comparison to the calculated value. Plugging in the variables into the Welch's T-test formula, a value was received and compared to the T-value from the chart. If the calculated value was less than the T-value from the chart, the statistic calculated comparing the two groups is significant. If the calculated value was greater than the value from the chart, the difference is not significant. The math associated with each step can be found step by step in the appendix below.

B. Aggregate Trends

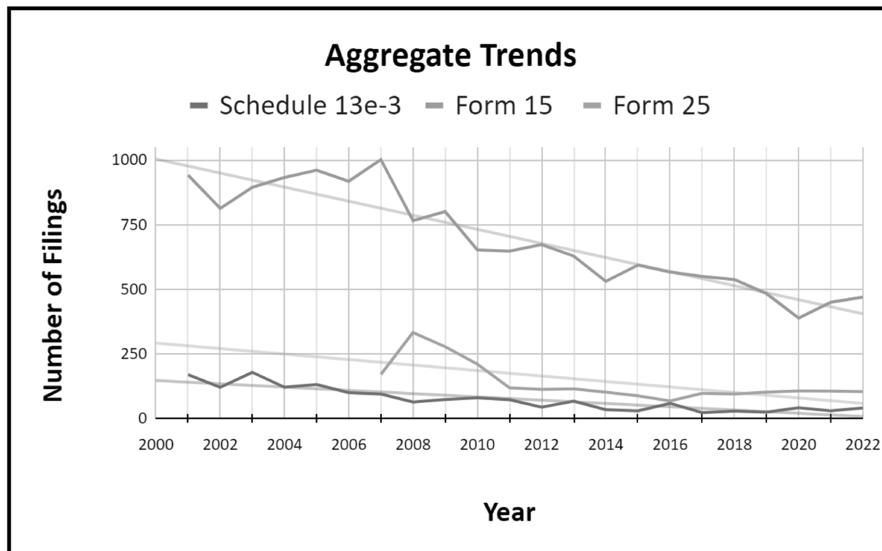

Figure 1: Showing a declining trend in issuers leaving the public markets since the 2000s. This graph is presented to highlight that factors beyond SOX based reasoning influence an issuer's decision to leave the public markets.

As illustrated above, there has been a general decline in the aggregate number of filings across each form type. Notably, deregistering events as measured by Form 15 are down markedly from their peak of about 1000 in 2006. Both the number of delisting events as measured by Form 25 and going private transaction as measured by Schedule 13e-3 peaked in the 2000s before tapering off throughout the rest of the 2010's. These aggregate trends are presented to not only provide context for the discussion of later federal reforms below but also to show that the total number of these transactions are in decline, highlighting that other factors beyond SOX are in play when it comes to influencing a decision to go dark or go private.[119] This Article focuses solely on the continuing effect of SOX in those decisions.

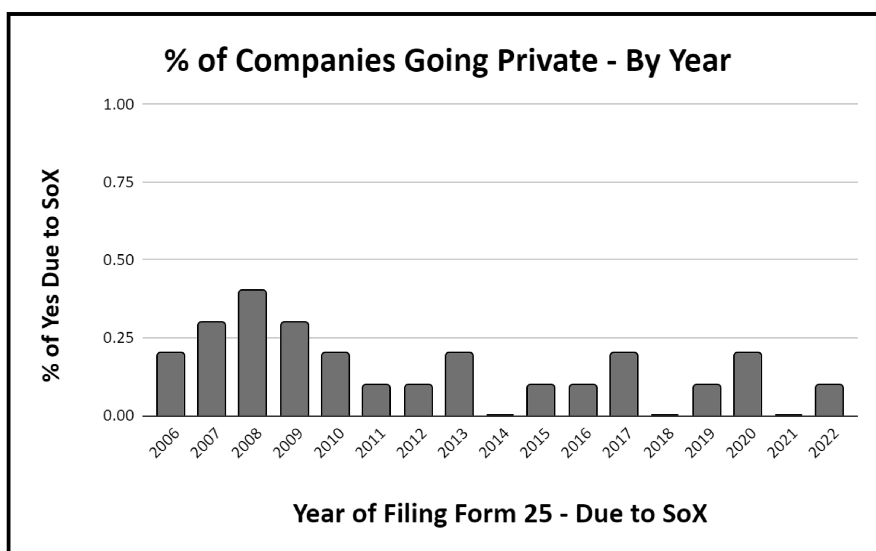

Figure 2: Results for Form 25 issuers citing SOX based reasoning for leaving the public markets.

C. Delisting—Form 25

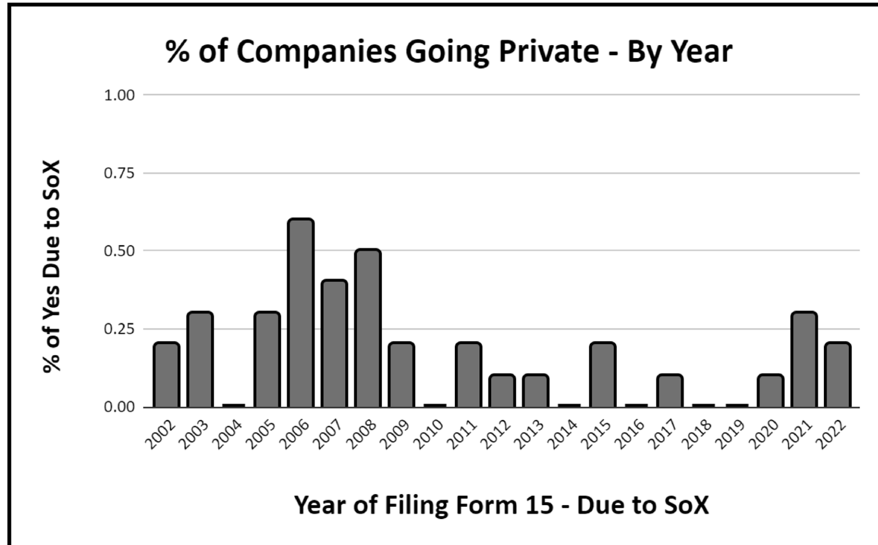

Figure 3: Results for Form 15 issuers citing SOX based reasoning for leaving the public markets.

As seen above, there has also been a decline in the percentage of companies that filed Form 25's due to SOX between the years 2017 and 2022. There was a statistically significant[120] 45% decline in the number of companies who mentioned SOX as an issue in the years between 2017–2022 when compared to the years 2006–2016.

D. Deregistering—Form 15

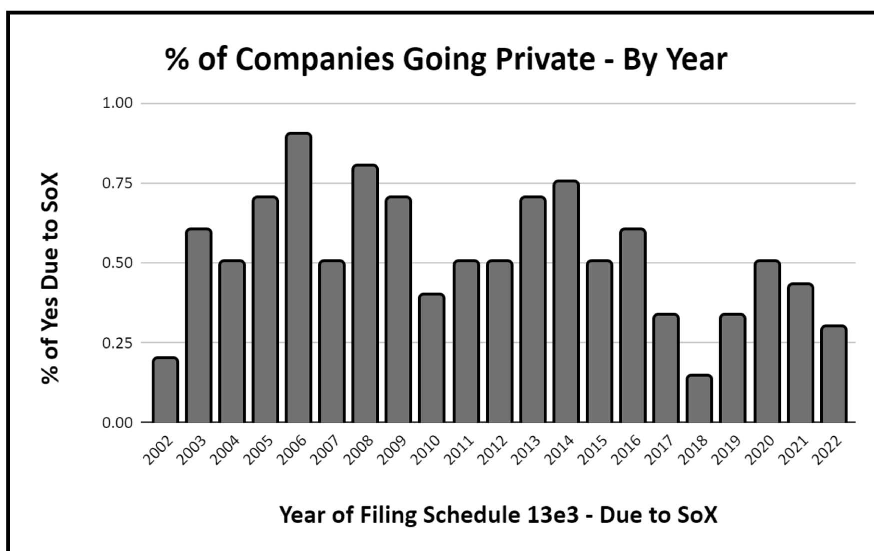

Figure 4: Results for Schedule 13e-3 issuers citing SOX based reasoning for leaving the public markets.

As illustrated above, there has been a decline in the percentage of companies that filed Form 15s due to SOX between the years 2017 and 2022. There was a statistically significant,[121] 44% decline in the number of companies who mentioned SOX as an issue in the years between 2017–2022 when compared to the years 2002–2016.

E. Going Private—Schedule 13e-3

As shown above, there has been a decline in the percentage of companies that filed Schedule 13e-3's due to SOX between the years 2017 and 2022. There was statistically significant,[122] 39% decline in the number of Schedule 13e-3 filers mention SOX as reason for conducting the transaction between 2017–2022 than there was between 2002–2016. These results are telling because issuers conducting a Rule 13e-3 transaction are required to include a discussion of the reasons for their transaction.[123] Therefore, unlike going dark events, this means there is more certainty as to rationale for choosing to conduct the transaction.

IV. DISCUSSION

The collected data shows a decline in both the aggregate number of issuers going private or going dark and the number of issuers mentioning SOX as a reason for conducting these transactions. The Article now turns to the implications of these results for the state of the public markets and the rising use of the private markets, the federalization of corporate governance, going private vs. going dark transactions, and the competitiveness of the US capital markets.

A. Implications for the Public Markets

The results provided support a number of conclusions. First, absent a change in the legal framework, the number of companies deciding to deregister, delist, or go private because of SOX appears to have peaked in 2017. Second, public companies have largely found methods to handle the requirements of SOX, explaining the trail off in companies listing it as an issue over time. Third, the turning point year of 2017 found across all three samples represents the end of companies going dark or deregistering to take advantage of the private capital markets.

Across all three sample groups, the number of issuers mentioning SOX decreased since the passage of the Act. The peak of issuers mentioning it across all three forms occurred in the mid to late 2000's, right after the passage of SOX. Starting with Schedule 13e-3, which has the advantage of requiring an issuer to list its reasons for conducting the transaction, companies going private appear to be less motivated by the costs of SOX than before. This is a telling insight into the thought process of insiders taking issuers private—a traditional rationale for conducting

such a transaction appears to no longer be as potent.[124] Continuing to Form 15 and Form 25 issuers or those "going dark," there is a similar trend. Of course, since nothing requires these issuers to disclose their rationale for conducting a going dark merger or reverse tender offer, there may be more companies than captured in the sample who are influenced by SOX.[125] Given that for all three of the samples, there has been a decrease in the number of issuers going dark or going private because of SOX for a five-year period, this trend will likely continue and not return to the early 2000s high.

Second, the results behind the drop suggest issuers have largely found means to handle the costs of complying with SOX. The exact reasons behind this drop are likely multifaceted ranging from increased streamlining of compliance procedures, compliance technology, better training,[126] and issuers who were not able to do these things efficiently already having gone dark or private. Congress and the Commission only set out who must comply and what they have to provide.[127] How companies choose to comply with those requirements was up to them, and some companies handled it better than others.[128] The results suggest that those companies who remain public were either able to last long enough to adopt streamlined methods of compliance from competitors or were savvy enough to find ways to reduce compliance costs themselves.[129]

SOX created some compliance costs that issuers could not avoid, for example, auditor attestation to internal controls, training internal staff, and increased disclosure costs.[130] However, it did not eliminate an issuer's ability to tailor their compliance program. Early scholarship feared that SOX costs disproportionately affected smaller firms.[131] While commentators tracked this fear for small company IPO's,[132] SOX's effect on small companies delisting has not been as well tracked. Last year, costs increased 27% for smaller reporting companies.[133] This suggests that issuers may again start going dark or going private to avoid costs. Moreover, commentators should conduct further study on the outcomes of EGC's and Small Reporting Issuers and whether the lessened SOX burdens led to favorable results for such issuers.

Finally, across all three forms there was a decrease starting in 2017. Why is 2017 the year where SOX appearances started to decline precipitously? One explanation for this decline could be that issuers' ability to comply with SOX has increased to the point where costs are no longer a prohibitive factor. However, based on data from the field, this is unlikely to be the case.[134] Another explanation is that the issuers who could not cope with increasing costs of SOX left the public markets in the 2000s. Thus, by the late 2010s the firms that were greatly challenged by

the increased costs of SOX had largely left the public markets. It is not possible with the data presented to provide a conclusive answer to this hypothesis. However, it is likely that this is a factor. A final explanation is that issuers looking to avoid SOX costs have been using reforms in the private capital markets under the JOBS Act.[135] The JOBS Act was passed in 2012 and introduced Rule 506(c) and Regulation A+.[136] Unicorns have been able to use these and the already existing Rule 506(b) exemption to raise billions of dollars.[137] This result would be surprising because the JOBS Act and subsequent rule making aimed to make it easier for issuers to access the public markets through the creation of the EGC and expansion of Small Reporting Issuer framework to lower the burden of SOX-based disclosure.[138] Notably, both EGC's and Small Reporting Issuers have exemptions from SOX 404(b) requiring auditor attestation, a huge cost point.[139] Again, the data provided here cannot provide conclusive results, but it is likely that this was also a consideration because SOX-less capital raising in the private markets became easier and reform aimed to bring issuers back into the public markets was not as effective.[140]

B. Implications for the Federalization of Corporate Governance

There are two conflicting but possible conclusions that one can draw from the results regarding the federalization of corporate governance. First, now that the remaining public companies have come to terms with SOX compliance demands, the SEC and the federal government have more leeway to federalize aspects of corporate governance. Thus, the creeping process of the federal government displacing aspects of state corporate law Professor Steinberg describes in his work can not only continue but also take larger steps.[141] Second, using the data provided, one could also argue the counter point that since SOX and the JOBS Acts drove so many companies out of the public market, the reach of the federalization of corporate governance has been greatly reduced. Thus, further efforts to combat or promote the federalization of corporate governance should focus on the regulation of the private markets and private companies.

SOX compliance as a key concern for companies going private is on the decline and the end of the public company has not come to pass. What implications does this have for the future for the evolving process that is the federalization of corporate governance? First, while there is some limit to how much regulatory burden a public company can handle, it appears that SOX has not pushed that burden to its limit.[142] The implications of this conclusion are best applied to more recent efforts such as the proposed environmental disclosures in the regular reporting

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framework.[143] While policymakers, regulators, and businesspeople should be concerned about the merits of regulation and unnecessary compliance burdens, there should be little concern about SOX's costs continuing to drive companies out of the public markets. Having coped to date, they are unlikely to leave absent another large-scale reform.[144]

This conclusion not only affects the costs for public issuers but also the substance of reforms. The drop in SOX-related going dark or going private transactions suggests that those issuers that remain in the public markets have developed a compliance program that operates at an acceptable cost to the company.[145] Regulators and lawmakers can take advantage of that existing compliance framework in future reforms. For example, the SEC could regulate other aspects of internal control through the existing framework with little extra cost.[146]

The most recent developments in the federalization of corporate governance have occurred using the securities laws.[147] However, as the results show, a large number of public companies have decided to exit the public markets and thus fall outside of the regulatory umbrella created by SOX.[148] While large private companies may want to adopt the structure and practices of public companies as a matter of best practice,[149] nothing in the federal securities laws is requiring these private companies to conduct their corporate governance in a certain manner.[150] So for the advocate of a stronger presence of the federal government in corporate affairs, what are some steps the federal government can take in the private markets?

One strategy would be to incentivize private issuers back into the public markets and under the umbrella of SOX by either increasing the difficulty of performing a private offering or by making it easier to function as a public company. Reforms using this approach could target the private market by raising the requirements for qualifying as an accredited investor,[151] placing caps on the aggregate amount that may be raised in a private offering,[152] expanding the definition of the bad actor disqualifier,[153] or changing the language of Section 12(g) to reflect the number of beneficial holders of shares and not shareholders of record.[154] Reforms targeting the public markets using this approach could expand the time and benefits of being an EGC or Small Reporting Issuer[155]

Another suggestion would be to apply a regular reporting regime to private issuers. Currently, in private offerings, accredited investors are considered to have access to registration type information.[156] However, as many commentators have noted, that presumption is not always justified.[157] Already Commissioner Crenshaw has discussed revising Reg D so that issuers provide

material financial information in Form D.[158] She suggested considering a less strenuous but annual disclosure requirement for private issuers similar to that currently used in Reg A offerings.[159] While Commissioner Crenshaw's views are her own, her comments suggest that the Commission is increasingly looking to expand its influence in the private markets.[160] It is an open question whether the Commission actually has the statutory authority to implement these reforms.[161] Professor Platt argues that this proposal would fail Chevron Step One because the Exchange Act appears to draw a "foundational fault-line: public companies have to make period disclosures; private ones don't."[162] He further points out that the disclosure framework set up under Reg A was expressly authorized by Congress in the JOBS Act and not by an authority in the Exchange Act.[163] While the specifics and merits of this debate go beyond the scope of this Article, the results here support the idea that there exists a substantial cadre of large companies raising capital outside the purview of regulatory authorities.[164] Regardless of whether the Commission already has the power or Congress has to expressly grant it that authority, the discussion of the issue suggests that reform of the private markets in some manner will be proposed soon.

Finally, reformers should look to the resale of securities acquired in a private offering. Currently, before a broker can initiate a trade, it must provide information about the issuer pursuant to Rule 15c2-11.[165] Rule 15c2-11 requires that a bare minimum of information be disclosed, including: (1) a "current" balance sheet, where "current" means the balance sheet was issued sixteen months before the publication or submission of the quotation; (2) a mere description of the business, description of products, and extent of the issuer's facilities; (3) and updates to these descriptions provided once every twelve months.[166] By requiring the issuer to provide more information and provide it more frequently, the Commission would in effect increase the disclosure requirements for and the Commission's reach over private companies.[167] As a matter of principle, investors should have access to adequate information when they make investment decisions.[168] Reforms in this area could start by requiring a more "current" balance sheet than sixteen months, requiring issuers to disclose more substantive information, and requiring updates every three months instead of twelve.[169]

C. Explaining the Higher Rate Reporting of SOX-Based Reasoning Among Going Private Issuers vs. Going Dark Issuers

Another interesting observation made is the much higher rates of SOX-related reasoning between the issuers going private

(Schedule 13e-3) vs. the issuers going dark (Form 25 and Form 15). This observation could either show that the two types of transactions have different preconditions or that there is under/over reporting of the actual prevalence of SOX-based reasoning.

First, is there something about going private transactions that would make the prevalence of SOX-based reasoning significantly higher than in going dark transactions?[170] The most obvious difference is the motivation of the party conducting the transaction.[171] In a going private transaction, an affiliate or insider acquires the company.[172] Whether this is a private equity buyout, an individual, or management, an affiliate is likely aware of SOX compliance costs to the issuer.[173] Further still, an affiliate may just be using the costs of SOX as an excuse for a squeeze out of minority shareholders.[174] Counter to this thinking is that by the end of both transactions the issuer is no longer publicly listed or registered. Indeed, in both cases an issuer gets to escape the burdens of mandatory SOX reporting and whether the costs are top of mind is probably a similar issue in this context as well.

Next, if the two transactions could be compared, does the increased reporting of SOX-based reasoning among going private issuers suggest an under-reported number of going dark issuers using SOX-based reasoning when considering going dark? Potentially. Going private transactions have the advantage of requiring issuers to be transparent and disclose the reasons for choosing to conduct the transaction.[175] There is no obligation for going dark issuers to disclose to shareholders or regulators why their directors voted to take the company private.[176] This lack of disclosure makes it difficult to determine the actual reasoning of the management in most cases. To get data like that offered by Schedule 13e-3, a more intensive study would have to be done surveying a sample of issuers.

There is also the potential that Schedule 13e-3 filers are over-reporting the prevalence of SOX-based reasoning when determining whether to go private. It would be easy for attorneys filling out the schedule to copy paste from a form document the reasoning from previous deals. This conclusion is likely because of the scrutiny this schedule receives. Indeed, going private transactions often result in shareholder litigation so casting the widest possible net of disclosure is likely the best strategy in preparation for future litigation.[177] Again the only way to really determine what factors management actually considered would be to conduct a survey.

In summary, the statistics are only as good as the data provided. For researchers attempting to understand the space, EDGAR filings can only go so far. The information gathered here shows a significant difference between going private transactions

and going dark transactions.[178]

D. Implications for Competitiveness of US Capital Markets

During the passage of SOX[179] and in subsequent articles following,[180] commentators feared the end of the reign of US capital markets. The marked decrease in companies deciding to go private or go dark since 2017 combined with other studies on the effects on the number of IPOs because of SOX[181] should lay these fears to rest or at least substantially allay those fears. The death of the public company has not come to pass and the rate by which SOX's role in prompting companies to go dark or private is declining.[182]

Since 2017, issuers have been less inclined to name SOX as a reason for exiting the public markets. While the results offered here are not definitive evidence that the US capital markets are dead, dying, or vice versa, they suggest that whatever competitive dampening SOX had on the public markets[183] is past its peak influence at least for domestic issuers. The research presented here did not look at foreign issuers on domestic exchanges.[184] However, given the across-the-broad decline in SOX-based reasoning for going private and going dark, it is likely that the same trend has occurred for foreign issuers.

CONCLUSION

The private markets grew substantially since the passage of SOX and the subsequent passage of the JOBS Act. However, the number of companies going private or dark because of SOX-related concerns has been and will likely continue to be on the decline in the coming years as issuers continue to determine that the benefits of public status outweigh the burdens of SOX. This decline will have implications for a wide variety of concerns in the markets.

While public companies are no longer likely to leave the public markets because of SOX, is it likely that additional regulatory burdens will prompt them to do so? Further, as the size and importance of the private markets have grown, it is unlikely that the private markets will continue to operate largely outside of the Commission's regulatory umbrella.[185] As the Commission gears up to reform the status quo in the private markets, private issuers should prepare for this eventuality and commentators need to focus their attention to possible reforms. Finally, if SOX's dampening influence on the public markets is past its peak, what steps need to be taken to increase or preserve the United States's competitiveness? Along these lines, further study should also specifically sample SOX's effects on foreign issuers.

SOX greatly changed the regulatory landscape when it was first introduced in 2001. Twenty years later, however, it appears that its considerable burdens are no longer prompting companies to abandon their public status. Significantly, the exodus of companies who left the market in the years following the Act's passage, combined with those companies who determined to remain private, has created a significant number of issuers in a space where the Commission's influence is minimal. While the private markets are currently all the rage, issuers should not expect the landscape to remain the same forever.

APPENDIX

A. Form 25 Calculations

Table of Form 25 Responses from Random Samples (From 2006 — 2022):

SOX Mentioned	Yes	No	Number Examined
2022	1	9	10
2021	0	10	10
2020	2	8	10
2019	1	9	10
2018	0	10	10
2017	2	8	10
2016	1	9	10
2015	1	9	10
2014	0	10	10
2013	2	8	10
2012	1	9	10
2011	1	9	10
2010	2	8	10
2009	3	7	10
2008	4	6	10
2007	3	7	10
2006	2	8	10
Total	26	144	170

Calculation Comparing the Two

As seen in the graph above, there was a drastic decline in the percentage of companies that filled Form 25s due to SOX in the

year 2017 through 2022. There was roughly a 45% decline in the number of companies that filled Form 25s from 2017–2022 compared to the number of companies that filed Form 25s from 2006–2016.

	Yes	No	% Yes
Filled Form 13e3 On or After 01/01/2017	6	54	10.0%
Filled Form 13e3 Before or on 12/31/2016	20	90	18.2%

Validating the Claim

$$T\ value = \frac{mean1 - mean2}{\sqrt{\frac{var1}{n1} + \frac{var2}{n2}}}$$

Year	Yes	No	Mean	Variance
2016	1	9	0.1	0.100
2015	1	9	0.1	0.100
2014	0	10	0	0.000
2013	2	8	0.2	0.178
2012	1	9	0.1	0.100
2011	1	9	0.1	0.100
2010	2	8	0.2	0.178
2009	3	7	0.3	0.233
2008	4	6	0.4	0.267
2007	3	7	0.3	0.233
2006	2	8	0.2	0.178

Mean1	0.182
Variance1	0.152
Sample Size (N1)	11

Year	Yes	No	Mean	Variance
2022	1	9	0.1	0.100
2021	0	10	0	0.000
2020	2	8	0.2	0.178
2019	1	9	0.1	0.100
2018	0	10	0	0.000
2017	2	8	0.2	0.178

Mean2	0.100
Variance2	0.093
Sample Size (N2)	6

$$T\ value = \frac{.182 - .100}{\sqrt{\frac{0.152}{11} + \frac{0.093}{6}}} = 0.479$$

Degrees of Freedom Calculation

$$Degrees\ of\ Freedom = \frac{(\frac{Var1^2}{n1} + \frac{var2^2}{n2})^2}{\frac{(\frac{Var1^2}{n1})^2}{n1-1} + \frac{(\frac{var2^2}{n2})^2}{n2-1}}$$

$$Degrees\ of\ Freedom = \frac{(\frac{0.152^2}{11} + \frac{0.093^2}{6})^2}{\frac{(\frac{0.152^2}{11})^2}{11-1} + \frac{(\frac{0.093^2}{6})^2}{6-1}} = 14.6\ or\ 14$$

Comparison and Conclusion

The critical t-test value for a 95% level of confidence for a one-tailed distribution at 14 degrees of freedom is 2.145.[186] The t-test value from comparing our two samples is 0.479. Since 0.479 is less than 2.145 we can reject the null hypothesis that these two samples are not significant, meaning that the two samples are significantly different. Further validating that the two random samples of the 170 companies filing Form 25s from 2006–2022 is trending down due to SOX after 2016.

B. Form 15 Calculations

Table of Form 15 Responses from Random Samples (From 2002 — 2022):

SOX Mentioned	Yes	No	Number Examined
2022	2	8	10
2021	3	7	10
2020	1	9	10
2019	0	10	10
2018	0	10	10
2017	1	9	10
2016	0	10	10
2015	2	8	10
2014	0	10	10
2013	1	9	10
2012	1	9	10
2011	2	8	10
2010	0	10	10
2009	2	8	10
2008	5	5	10
2007	4	6	10
2006	6	4	10
2005	3	7	10
2004	0	10	10
2003	3	7	10
2002	2	8	10
Total	38	172	210

Calculation Comparing the Two

See graph above. There was a drastic decline in the percentage of companies that filled Form 15s due to SOX in the year 2017 through 2022. There was roughly a 44% decline in the number of companies that filled Form 15s from 2017–2022 compared to the number of companies that filed Form 15s from 2002–2016.

	Yes	No	% Yes
Filled Form 15 On or After 01/01/2017	31	119	20.7%
Filled Form 15 Before or on 12/31/2016	7	53	11.7%

Validating the Claim

To validate this claim, I conducted a Welch's t-test to compare the means and variances of the companies that filled Form 15s Before or on 12/31/2016 to the companies that filled On or After 01/01/2017 to see if there is a significant difference in the number of companies that filled Form 15s due to SOX in their respective sampling groups.

$$T\ value = \frac{mean1 - mean2}{\sqrt{\frac{var1}{n1} + \frac{var2}{n2}}}$$

Year	Yes	No	Mean	Variance
2016	0	10	0	0.000
2015	2	8	0.2	0.178
2014	0	10	0	0.000
2013	1	9	0.1	0.100
2012	1	9	0.1	0.100
2011	2	8	0.2	0.178
2010	0	10	0	0.000
2009	2	8	0.2	0.178
2008	5	5	0.5	0.278
2007	4	6	0.4	0.267
2006	6	4	0.6	0.267
2005	3	7	0.3	0.233
2004	0	10	0	0.000
2003	3	7	0.3	0.233
2002	2	8	0.2	0.178

Mean1	0.207
Variance1	0.146
Sample Size 1(N1)	15

Year	Yes	No	Mean	Variance
2022	2	8	0.2	0.178
2021	3	7	0.3	0.233
2020	1	9	0.1	0.100
2019	0	10	0	0.000
2018	0	10	0	0.000
2017	1	9	0.1	0.100

Mean2	0.117
Variance2	0.102
Sample Size 2 (N2)	6

$$T\ value = \frac{0.207 - 0.117}{\sqrt{\frac{0.146}{15} + \frac{0.117}{6}}} = 0.551$$

Degrees of Freedom Calculation

$$Degrees\ of\ Freedom = \frac{(\frac{Var1^2}{n1} + \frac{var2^2}{n2})^2}{\frac{(\frac{Var1^2}{n1})^2}{n1-1} + \frac{(\frac{var2^2}{n2})^2}{n2-1}}$$

$$Degrees\ of\ Freedom = \frac{(\frac{0.146^2}{15} + \frac{.102^2}{6})^2}{\frac{(\frac{0.146^2}{15})^2}{15-1} + \frac{(\frac{0.102^2}{6})^2}{6-1}} = 13.4\ or\ 1$$

Comparison and Conclusion

The critical t-test value for a 95% level of confidence for a one-tailed distribution at 13 degrees of freedom is 2.16.[187] The t-test value from comparing our two samples is 0.551. Since 0.551 is less than 2.16, we can reject the null hypothesis that these two samples are not significant, meaning that the two samples are significantly different. Further validating that the two random samples of 210 companies filing Form 15s from 2002–2022 is trending down due to SOX after 2016.

C. Schedule 13e-3 Calculations

Table of 13e3 Responses from Random Samples (From 2002 — 2022):

SOX Mentioned	Yes	No	Number Examined
2022	3	7	10
2021	3	4	7
2020	5	5	10
2019	2	4	6
2018	1	6	7
2017	2	4	6
2016	6	4	10
2015	4	4	8
2014	6	2	8
2013	7	3	10
2012	5	5	10
2011	5	5	10
2010	4	6	10
2009	7	3	10
2008	8	2	10
2007	5	5	10
2006	9	1	10
2005	7	3	10
2004	5	5	10
2003	6	4	10
2002	2	8	10
Total	102	90	192

Calculation Comparing the Two

As seen in the graph above, there was a drastic decline in the percentage of companies that filled Schedule 13e-3s due to SOX in the year 2017 through 2022. There was roughly a 39% decline

in the number of companies that filled Form 13e3s from 2017–2022 compared to the number of companies that filed Form 13e3s from 2002–2016.

	Yes	No	% Yes
Filled Form 13e3 On or After 01/01/2017	16	30	34.8%
Filled Form 13e3 Before or on 12/31/2016	86	64	57.3%

Validating the Claim

$$T\ value = \frac{mean1 - mean2}{\sqrt{\frac{var1}{n1} + \frac{var2}{n2}}}$$

Year	Yes	No	Mean	Variance
2016	6	4	0.6	0.267
2015	4	4	0.5	0.286
2014	6	2	0.75	0.214
2013	7	3	0.7	0.233
2012	5	5	0.5	0.278
2011	5	5	0.5	0.278
2010	4	6	0.4	0.267
2009	7	3	0.7	0.233
2008	8	2	0.8	0.178
2007	5	5	0.5	0.278
2006	9	1	0.9	0.100
2005	7	3	0.7	0.233
2004	5	5	0.5	0.278
2003	6	4	0.6	0.267
2002	2	8	0.2	0.178

Mean1	0.589
Variance1	0.238
Sample Size (N1)	15

Year	Yes	No	Mean	Variance
2022	3	7	0.300	0.233
2021	3	4	0.429	0.286
2020	5	5	0.500	0.278
2019	2	4	0.333	0.267
2018	1	6	0.143	0.143
2017	2	4	0.333	0.267

Mean2	0.340
Variance2	0.246
Sample Size (N2)	6

$$T\ value = \frac{0.589 - 0.340}{\sqrt{\frac{0.238}{15} + \frac{0.246}{6}}} = 1.05$$

Degrees of Freedom Calculation

$$Degrees\ of\ Freedom = \frac{(\frac{Var1^2}{n1} + \frac{var2^2}{n2})^2}{\frac{(\frac{Var1^2}{n1})^2}{n1-1} + \frac{(\frac{var2^2}{n2})^2}{n2-1}}$$

$$Degrees\ of\ Freedom = \frac{(\frac{0.238^2}{15} + \frac{0.246^2}{6})^2}{\frac{(\frac{0.238^2}{15})^2}{15-1} + \frac{(\frac{0.246^2}{6})^2}{6-1}} = 8.99\ or\ 9$$

Comparison and Conclusion

The critical t-test value for a 95% level of confidence for a one-tailed distribution at 9 degrees of freedom is 2.262.[188] The t-test value from comparing our two samples is 1.05. Since 1.05 is less than 2.262 we can reject the null hypothesis that these two samples are not significant, meaning that the two samples are significantly different. Further validating that the two random samples of the 192 companies filing Form 13e3s from 2002 — 2022 is trending down due to SOX after 2016.

D. Comparing Going Private v. Going Dark Transactions

Tables of 13e3 results and Form 15 results can be found in Section B and C of this Part respectively.

Claim

There was a significant difference between the number of 13e-3 "going private" filers mentioning SOX compared to Form 15 "going dark" filers.

Validating the Claim

$$T\ value = \frac{mean1 - mean2}{\sqrt{\frac{var1}{n1} + \frac{var2}{n2}}}$$

Critical Stats for Form 15 Filers 2002–2022

Mean1	0.181
Variance1	0.133
Sample Size (N1)	21

Critical Stats for Schedule 13e-3 Filers 2002–2022

Mean2	0.518
Variance2	0.240
Sample Size (N2)	21

$$T\ value = \frac{.181 - .518}{\sqrt{\frac{.133}{21} + \frac{.240}{21}}} = -2.532$$

Degrees of Freedom

$$Degrees\,of\,Freedom = \frac{(\frac{Var1^2}{n1} + \frac{var2^2}{n2})^2}{\frac{(\frac{Var1^2}{n1})^2}{n1-1} + \frac{(\frac{var2^2}{n2})^2}{n2-1}}$$

$$Degrees\,of\,Freedom = \frac{\left(\frac{.133^2}{21} + \frac{.240^2}{21}\right)^2}{\frac{\left(\frac{.133^2}{21}\right)^2}{21-1} + \frac{\left(\frac{.240^2}{21}\right)^2}{21-1}} = 31.3\ or\ 31$$

Comparison and Calculation

The critical t-test value for a 95% level of confidence for a one-tailed distribution at 30 degrees of freedom is 2.042[189] The t-test value from comparing our two samples is -2.532. Since -2.532 is less than 2.042 we can reject the null hypothesis that these two samples are not significant, meaning that the two samples are significantly different.

NOTES:

[1]Off. Advoc. Small Bus. Cap. Formation, Sec. Exch. Comm'n., Fiscal Year 2022 Office of the Small Business Advisor Annual Report 19 (2022) (finding that $4.45 trillion was raised in the private market compared to $1.23 trillion in the public market).

[2]Caroline A. Crenshaw, *SEC Commissioner Urges Reform of Regulation D and Private Markets*, CLS Blue Sky Blog (Feb. 2, 2023), https://clsbluesky.law.columbia.edu/2023/02/02/sec-commissioner-urges-reform-of-regulation-d-and-private-markets/.

[3]Fried, Firms Gone Dark, 76 U. Chi. L. Rev. 135, 140 (2009).

[4]Compliance costs have been driven both by internal compliance costs under § 404(a) and the requirement that auditors attest to the assessments accuracy under § 404(b). *SOX Compliance Amid Rising Costs, Labor Shortages and Other Post-Pandemic Challenges*, Protiviti (2022), https://www.protiviti.com/sites/default/files/2022-06/2022-sox-compliance-survey-protiviti.pdf [hereinafter Protiviti].

[5]*See, e.g.*, Georgiev, The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms, 18 N.Y.U. J. L. & Bus. 221, 263 (2021).

[6]*Id.*

[7]*See* Jumpstart Out Business Startups Act, Pub. L. No. 112-106, §§ 201, 401, 126 Stat. 306 (2012) [hereinafter JOBS Act]; *id.* at 265.

[8]*Id.* at 271–72. Rule 506(c) created a new private offering under Rule 506 and allowed issuers to solicit investors generally and accept investment from an unlimited number of investors. Regulation A was reformed to allow issuers to raise money private up to $20 million in the first tier and up to $75 million in the second tier. Issuers above the first tier threshold are subject to a framework of annual, semi-annual, and current reporting requirements. It should be noted that 506(b) remains by far the most popular exemption to date.

[9]*See, e.g.*, Afshar & Rose, Capital Markets Competitiveness: A Survey of Recent Reports, 2 Entrepreneurial Bus. L.J. 439, 450 (2007); Skouvakis, Exiting the Public Markets: A Difficult Choice for Small Public Companies Struggling with Sarbanes-Oxley, 109 Penn St. L. Rev. 1279, 1291 (2005); Wolff & Long IV, Post-SOX Trends in Delistings and Deregistration, 9 Rich. J. Global L. & Bus. 53, 54 (2010).

[10]Going private transactions by certain issuers or their affiliates, 17 C.F.R. § 240.13e-3.

[11]*See, e.g.*, Wolff & Long, *supra* note 9, at 54.

[12]Chatman, Myth of the Attorney Whistleblower, 72 SMU L. Rev. 669, 671 (2019).

[13]Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.) [hereinafter Sarbanes-Oxley].

[14]Ehud Kamar et al., Going Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis, 25 J. L. Econ. & Org. 107, 108 (2008).

[15]Carney, The Cost of Being Public After Sarbanes-Oxley: The Irony of “Going Private”, 55 Emory L.J. 141, 141 (2006); Redner, Thinking of Going Public? Think Twice, Then Read the Sarbanes-Oxley Act of 2002, 6 J. Small and Emerging Bus. L. 521, 523–27 (2002); Afshar & Rose, *supra* note 9, at 440.

[16]Sarbanes-Oxley §§ 301–409; Terrence Sheepey & Ross McGill, Sarbanes-Oxley: Building Working Strategies for Compliance 3 (2007); Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work), 35 Conn. L. Rev. 915, 942 (2003) (noting that SOX also created the PCOAB and increased liability for securities fraud).

[17]It should be noted that the survey of provisions here represents the baseline requirements. The Commission has altered certain disclosure duties for Emerging Growth Companies and Small Reporting Issuers in order to lessen disclosure costs and facilitate public capital formation. *See* Release Nos. 33-10513, 34-83550. I mention notable exceptions in the footnotes.

[18]Sarbanes-Oxley § 402, *adding*, § 13(k) to the Securities Exchange Act.

[19]*See* Sarbanes-Oxley § 406; Item 406 of Regulation S-K, 17 C.F.R. § 229.406 (2023).

[20]Sarbanes-Oxley § 301(3); Rule 10A-3, 17 C.F.R. § 240.10A-3 (2023).

[21]Sarbanes-Oxley § 304.

[22]Sarbanes-Oxley § 305, *amending*, § 20(e) of the Securities Act & 21(d)(2) of the Exchange Act.

[23]Sarbanes-Oxley § 407.

[24]Sarbanes-Oxley § 301.

[25]*Id.*

[26]*Id.*

[27]*Id.*; *see* Securities Act Release No. 8220 (2003); Exch. Act Release No. 48745 (2003); Marc I. Steinberg, Securities Regulation 306 (8th ed, 2022).

[28]Sarbanes-Oxley §§ 302(a), 906.

[29]Sarbanes-Oxley § 906. However, it should be noted that that the SEC has brought few cases for alleged violations.

[30]Sarbanes-Oxley § 401; Steinberg, *supra* note 27, at 309.

[31]Sarbanes-Oxley § 404; Steinberg, *supra* note 27, at 309.

[32]Sarbanes-Oxley § 404; Freer, Jr. & Burroughs, Unintended Consequences: Sarbanes-Oxley and Its Progeny, 7 S.C. J. Int’l L. & Bus. 47, 49 (2010). JOBS Act § 103; Exch. Act Release No. 34-88365 (Certain Small Reporting Companies and all Emerging Growth Companies are able to skip substantial costs under this section by not being required to provide the auditor attestation report).

[33]Sarbanes-Oxley § 409.

[34]*See* Securities Exchange Act Release No. 49424 (2004); Steinberg, *supra* note 27, at 312.

[35]28 U.S.C.A. § 1658; Sarbanes-Oxley § 804; Steinberg, *supra* note 27, at

315, 579 (noting how this was an express change made by Congress in SOX and how the statute clearly abides to fraud claims brought under § 10(b)).

[36]Sarbanes-Oxley § 306.

[37]Sarbanes-Oxley § 906.

[38]Sarbanes-Oxley § 803, *amending*, § 523(a) of the Bankruptcy Code.

[39]Sarbanes-Oxley § 305(b), *amending*, § 21(d)(5) of the Exchange Act; Steinberg, *supra* note 27, at 318.

[40]18 U.S.C.A. §§ 1519, 1348, 1349; Steinberg, *supra* note 27, at 318.

[41]Sheepey & McGill, *supra* note 16, at 94.

[42]*Id.* at 97.

[43]Securities Act Release Nos. 33-8238, 34-47986 (2003).

[44]Sheepey & McGill, *supra* note 16, at 101. The authors note that this relationship varied widely. UK company BOC Group plc saw compliance costs double the expected amount while German company Dresdner Kleinwort Wasserstein (DrWK) saw lower but significant costs. BOC Group plc delisted and deregistered in 2006, DrWK's Allianz AG is listed as an ADR.

[45]Kevin Mayeda, *Solving the High Cost of SOX Compliance*, Auditboard (May 23, 2017), https://www.auditboard.com/blog/solving-the-high-cost-of-sox-compliance/.

[46]Strickland, Addressing Continued Rise in Sarbanes-Oxley Act Compliance Costs, J. Acct. (June 14, 2022), https://www.journalofaccountancy.com/news/2022/jun/addressing-continued-rise-sarbanes-oxley-act-compliance-costs.html.

[47]Protiviti, *supra* note 4.

[48]*Id.*

[49]*See id.*

[50]H.R. Rep. No. 107-414, at 61 (2002) (Senator Ron Paul noting the high compliance costs).

[51]*See, e.g.*, Afshar & Rose, *supra* note 9, at 450; Skouvakis, *supra* note 9, at 1291; Wolff & Long, *supra* note 9, at 54.

[52]For purposes of this paper unicorns are private companies with valuation upward of $1 billion. *See, e.g.*, *The Lure of the Private Firm*, ECONOMIST (Nov. 17, 2004), https://econ.st/3dUF6yy ("The Sarbanes-Oxley legislation . . . has imposed on public companies much onerous corporate-governance compliance—a source of constant complaint from bosses in America and beyond."); Garland, Fixing Public Markets' "Systemic Dysfunction," Wall St. J. (Nov. 9, 2009), https://on.wsj.com/3I5JUzk (reporting "evidence of a serious and systemic dysfunction" in public markets and asserting that Sarbanes-Oxley rules are "the main scapegoat") (internal quotations omitted); Begum Erdogan et al., *Grow Fast or Die Slow: Why Unicorns at Staying Private*, McKinsey & Company (May 2016), https://www.mckinsey.com/~/media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Grow%20fast%20or%20die%20slow%20Why%20unicorns%20are%20staying%20private/Grow-fast-or-die-slow-Why-unicorns-are-staying-private.pdf (graphing the growing length of time tech startups are staying private after reaching a $10 billion value).

[53]Fried, *supra* note 3, at 140.

[54]*See* Craig Doidge et al., *The U.S. Listing Gap* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21181, 2015) ("The number of U.S. listings fell from

8,025 in 1996 to 4,101 in 2012, whereas non-U.S. listings increased from 30,734 to 39,427.").

[55]*See* McKinsey & Co. & N.Y.C. Econ. Dev. Corp., Sustaining New York's and the US' Global Financial Services Leadership, 86–87 (2007) [hereinafter McKinsey Report], https://on.nyc.gov/3D6zMSR; Comm'n on Cap. Mkts. Regul., The Competitive Position of the U.S. Public Equity Market 1 (2007) [hereinafter Commission on Capital Markets Report], https://bit.ly/3xEn5Ob.

[56]*See, e.g.*, Zweig, The Demise of the IPO—and Ideas on How to Revive It, Wall St. J. (June 25, 2010), https://on.wsj.com/3D39mlc (analyzing various challenges to IPO activity and stating that the IPO market is in "suspended animation"); Alix Stuart, *Missing: Public Companies — Why is the Number of Publicly Traded Companies in the U.S. Declining?*, CFO MAG. (Mar. 22, 2011), https://bit.ly/3xEnCj9.

[57]*See* Bartlett III, Rose & Solomon, The Small IPO and the Investing Preferences of Mutual Funds, 47 J. Corp. Fin. 151, 163, 165 (2017).

[58]Rose & Solomon, Where Have All the IPOs Gone? The Hard Life of the Small IPO, 6 Harv. Bus. L. Rev. 83, 87 (2016) (notably this report found an uptick in voluntary delisting and takeover exits among small firms in the period studied due to SOX).

[59]*See* Georgiev, *supra* note 5, at 263.

[60]JOBS Act §§ 201, 401; *id.* at 265 ("The JOBS Act contained a smorgasbord of provisions related to equity crowdfunding, amendments to various securities offering rules, the creation of a new, time-limited regulatory category—the "emerging growth company" (EGC), and a directive to the SEC to study further changes to the securities disclosure regime."); Release Nos. 33-10884, 34-90300 (expanding issuers ability to communicate with investors prior to a private offering and increasing limits of some private offerings).

[61]Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[62]Marc I. Steinberg, Federalization of Corporate Governance 23 (2018) [hereinafter Federalization of Corporate Governance].

[63]*Id.; see also* Roe, Delaware and Washington as Corporate Law Makers, 34 D.E. J. Corp. L. 1 (2009); *see infra* Part III, A (a discussion of 13e-3 and the SEC attempting regulate private transactions).

[64]Georgiev, *supra* note 5, at 264.

[65]*Id.*

[66]Georgiev, *supra* note 5, at 267.

[67]Crenshaw, *supra* note 2; Steinberg, *supra* note 27, at 112–13.

[68]Rose & Solomon, *supra* note 58, at 96.

[69]De Wied et al., Going Private Transactions, Harv. L. Sch. F. Corp. Gov. (Apr. 15, 2020), https://corpgov.law.harvard.edu/2020/04/18/going-private-transactions/.

[70]Fried, *supra* note 3, at 140.

[71]De Wied, *supra* note 69.

[72]Arthur M. Borden & Joel A. Yunis, Going Private 10-4 (Release 52, 2016).

[73]Securities Exchange Act of 1934 § 13(e), 15 U.S.C.A. § 78m(e); Going private transactions by certain issuers or their affiliates, 17 C.F.R. § 240.13e-3; *id.* at 10-5.

[74]Borden & Yunis, *supra* note 72, at 10-7.

[75]Securities Exchange Act Release No. 34-17719 (1981).

[76]*Id.*

[77]The most famous line of cases regulating fiduciary duties in these transactions is in Delaware. *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (establishing "entire fairness"—fair price and fair dealing—as the sole standard to determine if a board properly negotiated a cash out merger of minority shareholders); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, Fed. Sec. L. Rep. (CCH) P 92525, 66 A.L.R.4th 157 (Del. 1986) (establishing a special duty for the board to maximize shareholder value when a takeover is imminent). However, Revlon duties have been markedly limited in the years following, *see e.g.*, *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, Fed. Sec. L. Rep. (CCH) P 94938 (Del. 1989); *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, Fed. Sec. L. Rep. (CCH) P 98063 (Del. 1994); *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59, 70–71 (Del. 1995) (holding that Revlon duties do not apply where 67% of the corporation is acquired for stock and the remainder for cash). *See generally* Steinberg, Nightmare on Main Street: The Paramount Picture Horror Show, 16 Del. J. Corp. L. 1, 15 (1991).

[78]Borden & Yunis, *supra* note 48, at 10-5.

[79]*Id.*; 17 C.F.R. § 240.13e-3.

[80]17 C.F.R. § 240.13e-3(a)(3)(ii).

[81]17 C.F.R. § 240.13e-3(a)(3)(i).

[82]*Id.*

[83]*Id.*

[84]*Id.*

[85]Rule 405, 17 C.F.R. § 230.405 (defining Affiliate as one with "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.").

[86]Steinberg, *supra* note 27, at 339.

[87]Filing of Schedules 13D and 13G, 17 CFR § 240.13d-1. The Commission has a proposed rule shortening the times shareholders would have to file Schedule 13D after acquiring beneficial ownership or filing an amendment to the Schedule. *See* Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 28440 (proposed Feb. 10, 2022) (to be codified at 17 C.F.R. §§ 232, 240).

[88]17 C.F.R. § 240.13e-3(g); *Fed.-Mogul Corp., SEC No-Action Letter*, 1980 WL 14867 (Sept. 29, 1980).

[89]17 C.F.R. § 240.13e-3(g)(1).

[90]*Id.*

[91]*Id.*

[92]17 C.F.R. § 240.13e-3(g)(2).

[93]Borden & Yunis, *supra* note 48, at 10-5, 10-6.

[94]*Id.*

[95]*Id.*; 17 C.F.R. § 240.13e-3(b), (c).

[96]17 C.F.R. § 240.13e-3; Schedule 13e-3, 17 C.F.R. § 240.13e-100.

[97]Borden & Yunis, *supra* note 48, at 10-46.4; Schedule 13e-3, 17 C.F.R. § 240.13e-100.

[98]Schedule 13e-3 item 7, 17 C.F.R. § 240.13e-100; Regulation M-A, Purposes, alternatives, reasons, and effects in a going-private transaction item 1013, 17 C.F.R. § 229.1013.

[99]De Wied, *supra* note 69.

[100]Schedule 13e-3 item 1 & 4, 17 C.F.R. § 240.13e-3; Regulation M-A, Items 1001, 1004(a), (c), 17 C.F.R. § 229.1013.

[101]Securities Exchange Act of 1934 § 12(b), 15 U.S.C.A. § 78l(b); Steinberg, *supra* note 16, at 254.

[102]Securities Exchange Act of 1934 § 12(g), 15 U.S.C.A. § 78l(g).

[103]Securities Exchange Act of 1934 § 15(d), 15 U.S.C.A. § 78o(d).

[104]Fried, *supra* note 3, at 139–141; *Form 25*, Sec. Exch. Comm'n (last accessed Mar. 20, 2023), https://www.sec.gov/files/form25.pdf.

[105]Jacobsen & Scharman, Going Dark—An Alternative to Sarbanes-Oxley Compliance, 20-Feb. Utah B. J. 12, 14 to 16 (2007).

[106]Removal from listing and registration, 17 C.F.R. § 240.12d2-2; *id.*

[107]Certifications of Termination of Registration Under Section 12(g), 17 C.F.R. § 240.12g-4.

[108]*Id.*

[109]Fried, *supra* note 3, at 139–141 n.21.

[110]Certifications of Termination of Registration Under Section 12(g), 17 C.F.R. § 240.12g-4.

[111]*Exchange Act Forms Question 111.01*, Sec. Exch. Comm'n, https://www.sec.gov/divisions/corpfin/guidance/exchangeactforms-interps (last updated Jan. 31, 2023).

[112]Suspension of Duty to File Reports Under Section 15(d), 17 CFR § 240.12h-3.

[113]*Id.*

[114]Suspension of duty to file reports, 17 CFR § 240.15d-6.

[115]Please see the appendix below for the raw data and calculations.

[116]*See, e.g.*, Weber inc., Rule 13E-3 Transaction Statement (Schedule 13e-3) (Jan. 17, 2023).

[117]*See, e.g.*, Vivint Smart Home, Inc., Certification and Notice of Termination of Registration Under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports Under Sections 13 and 15(d) of the Securities Exchange Act of 1934 (Form 15) (Mar. 20, 2023).

[118]A Welch's t-test is used to test for a significant difference between the mean of two unrelated groups. It is generally applied when there is a difference between the variations of two populations and also when their sample size is unequal. *Welch's t-test*, Voxco (last accessed Apr. 5, 2023), https://www.voxco.com/blog/welchs-t-test/.

[119]Muldoon, Remaining, or Going, Private: Traditional and New Rationales, Tex. J. Bus. L. 59, 62–72 (2020); Georgiev, *supra* note 5, at 269–75.

[120]*See infra* Appendix Section A.

[121]*See infra* Appendix Section B.

[122]*See infra* Appendix Section C.

[123]17 C.F.R. § 240.13e-3; Schedule 13e-3, 17 C.F.R. § 240.13e-100.

[124]Muldoon, *supra* note 119, at 63.

[125]*See infra* Part IV Section C.

[126]Sheepey & McGill, *supra* note 16, at 97–101.

[127]*Id.* at 93; *see, e.g.*, Release No. 34-88365 (lower requirements for Small Reporting Issuers); JOBS Act § 103 (lower requirements for EGC's).

[128]*Id.* at 101 (comparing the cost born by BOC Group plc and Dresdner Kleinwort Wasserstein).

[129]Joe Coulombe with Patty Civalleri, Becoming Trader Joe 184 (Lisler, Inc. ed., Houghton Mifflin Harcourt Publishing 1983) (noting how companies can gain a competitive advantage by effectively managing regulatory authorities).

[130]Sheepey & McGill, *supra* note 16, at 97–101.

[131]Freer & Burroughs, *supra* note 32, at 62.

[132]Rose & Solomon, *supra* note 58, at 101; Skouvakis, *supra* note 9, at 1291.

[133]Protiviti, *supra* note 4.

[134]*Id.* (Finding that many issuers are still struggling to contain SOX related compliance costs and train employees on proper compliance techniques.).

[135]Georgiev, *supra* note 5, at 264.

[136]*Id.* at 271–72.

[137]Crenshaw, *supra* note 2.

[138]Release Nos. 33-10513, 34-83550; Rose & Solomon, *supra* note 58, at 85 n.7.

[139]JOBS Act § 103; Securities Exchange Act Release No. 34-88365.

[140]*Id.*; Rose & Solomon, *supra* note 58, at 101; Skouvakis, *supra* note 9, at 1291.

[141]Federalization of Corporate Governance, *supra* note 62, at 23.

[142]*See infra* Part III (showing the decline in issuers filing all the forms in question).

[143]Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 6, 2022).

[144]With the recent collapse of Silicon Valley Bank and First Republic Bank large-scale reform may be closer than expected.

[145]*See* Protiviti, *supra* note 4.

[146]*See* Sheepey & McGill, *supra* note 16, at 188–94.

[147]Federalization of Corporate Governance, *supra* note 62, at 20–24.

[148]*See infra* Part III (showing a larger number of issuers leave the public markets in the years following SOX).

[149]Scott Parker, *Four Reasons All Private Companies Need SOX Compliance Program*, Auditboard (Oct. 14, 2020), https://www.auditboard.com/blog/4-reasons-private-companies-need-sox-compliance-programs/.

[150]18 U.S.C.A. §§ 1519, 1348, 1349.

[151]Regulation D, 17 C.F.R. § 230.501.

[152]Steinberg, *supra* note 27, at 112–13.

[153]Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering, 17 CFR § 230.506(d).

[154]Securities Exchange Act § 12(g), 15 U.S.C.A. § 78l(g).

[155]Gordon, The Jobs Act Trojan Horse: A Gift to Startups with Something Else Inside?, 3 Mich. J. Private Equity & Venture Cap. L. 213, 215 (2014); Jeff Seul, *Current Business and Legal Trends in the Organization, Funding, and Operation of Emerging Technology Companies*, 2014 WL 1234398, at *1 (2014).

[156]*See* SEC Rule 506(b), (c) 17 C.F.R. 230.506(b), (c).

[157]Marc I. Steinberg, Rethinking Securities Law 41 (2021) [hereinafter rethinking securities law]

[158]Crenshaw, *supra* note 2 (not speaking for the Commission); *see also* Zweig, *Digging Into a $344 Billion Investing Mystery*, The Wall Street J. (Apr. 7, 2023), https://www.wsj.com/articles/digging-into-a-344-billion-investing-mystery-c5a4a427?mod=Searchresults_pos1&page=1 (Noting how one man managed to raise $344 billion by fraud using Reg D).

[159]*Id.*; SEC News Release 2015-49 (2015). Regulation A+ requires issuers who exceed the $20 million threshold of tier 1 are subject to an annual, semi-annual, and current reporting framework. They must also provide audited financial statements.

[160]*Id.*

[161]Platt, (More) Legal Guardrails for a Unicorn Crackdown, N.Y.U. L. Rev. Online (forthcoming 2023).

[162]*Id.* at 12–14 (Supporting his argument that private companies are not registered under § 12 or § 15 and that the § 4(a)(2) safe harbor creates a distinct transaction not regulated by § 5).

[163]*Id.* at 16.

[164]*See infra* Part III.

[165]Publication or submission of quotations without specified information, 17 C.F.R. § 240.15c2-11.

[166]*Id.*; Rethinking Securities Law, *supra* note 157, at 87–88.

[167]Rethinking Securities Law, *supra* note 157, at 83 (discussing the lack of information present for non-reporting issuers whose securities trade in over-the-counter markets).

[168]*Id.* at 87–88.

[169]*Id.*

[170]*See infra* Appendix Section D (comparing *Going Private v. Going Dark*).

[171]Going private transactions by certain issuers or their affiliates, 17 C.F.R. § 240.13e-3.

[172]*Compare* 17 C.F.R. § 240.13e-3 *with* the process discussed in Fried, *supra* note 3, at 138–40.

[173]Protiviti, *supra* note 4 (illustrating how SOX compliance costs are not uniform).

[174]*See* Ventoruzzo, Freeze-Outs: Transcontinental Analysis and Reform Proposals, 50 Va. J. Int'l L. 841, 846 (2010) (noting the high costs of being public and interaction between affiliates and minority shareholders).

[175]Schedule 13e-3 Item 7, 17 C.F.R. § 240.13e-100.

[176]Fried, *supra* note 3, at 138–40.

[177]De Wied, *supra* note 69.

[178]*See infra* Appendix Section D (comparing *Going Private v. Going Dark*).

[179]*See, e.g.*, H.R. Rep. No. 107-414, at 61 (2002) (Senator Ron Paul noting the high compliance costs).

[180]*See, e.g.*, McKinsey Report, *supra* note 55, at 86–87; Commission on Capital Markets Report, *supra* note 55, at 1.

[181]Rose & Solomon, *supra* note 58, at 101; Georgiev, *supra* note 5, at 261–62.

[182]*Compare* results *infra* Part III C. D. & E., *with* Zweig, *supra* note 56; Stuart *supra* note 56 (showing that SOX related reasons for leaving the public markets have tapered off).

[183]McKinsey Report, *supra* note 55, at 86–87; Commission on Capital Markets Report, *supra* note 55, at 1.

[184]*See* Freer & Burroughs, *supra* note 32, at 49; CIO Insight Staff, *SarbOx Has Foreign Companies Decamping*, CIOinsight (Mar. 5, 2005), https://www.cioinsight.com/news-trends/sarbox-has-foreign-companies-decamping/; Hostak et al., An Examination of the Impact of the Sarbanes-Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firms, 18 Rev. Acct. Standards 522, 522 (May 7, 2013); Doidge et al., Has New York Becomes Less Competitive than London in Global Markets? Evaluating Foreign Listing Choices Over Time, 91 J. Fin. Econ. 253, 253 (Dec. 10, 2008).

[185]Crenshaw, *supra* note 2; Platt, *supra* note 161.

[186]James Jones, *Student's T-Table*, U. Rich., https://people.richland.edu/james/lecture/m170/tbl-t.html (last accessed Apr. 7, 2023).

[187]James Jones, *Student's T-Table*, U. Rich., https://people.richland.edu/james/lecture/m170/tbl-t.html (last accessed Apr. 7, 2023).

[188]James Jones, *Student's T-Table*, U. Rich., https://people.richland.edu/james/lecture/m170/tbl-t.html (last accessed Apr. 7, 2023).

[189]James Jones, *Student's T-Table*, U. Rich., https://people.richland.edu/james/lecture/m170/tbl-t.html (last accessed Apr. 7, 2023).