

INTRASTATE CROWDFUNDING IN ALASKA: IS THERE SECURITY IN FOLLOWING THE CROWD?

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ABSTRACT

This Note analyzes the potential of crowdfunding for the State of Alaska. Crowdfunding can open up new sources of revenue for small businesses while simultaneously providing an avenue for Alaskans to invest in their own communities. The potential, however, must be weighed against the risk of fraud, poorly run businesses, and the lack of protection for investors. It is the responsibility of the Alaska legislature, the State's securities administrators, and the Securities and Exchange Commission to ensure that investors are adequately protected. This Note discusses Alaska's crowdfunding legislation, the Alaska Intrastate Crowdfunding Exemption, and recommends changes to the legislation that account for the risks involved in crowdfunding while still capturing its potential.

INTRODUCTION

Kyle DeWitt and Tim Schmidt are residents of Tecumseh, Michigan, passionate about brewing beer, and young entrepreneurs.¹ Shortly after meeting, they developed a plan to open their own brewery, Tecumseh Brewing Company.² Kyle would be the General Manager and Tim the Head Brewer.³ As is common with many young entrepreneurs, they could not acquire sufficient financing and were repeatedly denied a bank loan.⁴

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1. KRISTINA CAMPA-GRUCA ET AL., MICHIGAN AND INTRASTATE INVESTMENT CROWDFUNDING 15 (2015), www.crowdfundingmi.com/wp-content/uploads/2015/04/crowdfunding-MILE-2015-whitepaper-ford-school-team.pdf.

2. *Id.*

3. *Id.*

4. *Id.*

Their prospects were looking bleak until a friend told them about the Michigan Invests Locally Exemption (MILE) Act.⁵ The premise of the law is simple: Companies in Michigan can sell up to \$1 million worth of equity to Michigan residents without registering with the Securities and Exchange Commission (SEC),⁶ so long as the company and its investors meet a relatively straightforward set of requirements. These include, for instance, how much each investor can contribute.⁷ Imagine a campaign similar to what one would see on Kickstarter or GoFundMe, but instead of receiving a reward based on the amount contributed, the investor receives equity and a share of the profits.

Kyle and Tim developed a plan to raise between \$150,000 and \$175,000 in ninety days through a local funding portal called Localstake.⁸ They promised investors a 150% return distributed through seven percent of monthly sales revenue with expected payback within five years.⁹

It only took forty-five days for Kyle and Tim to raise the full \$175,000, and when they showed their newfound capital to one of the same banks that previously turned them down, Kyle and Tim received a \$200,000 loan.¹⁰ Two years later, Tecumseh Brewing Company is located in downtown Tecumseh and open for business.¹¹

The MILE Act is part of a nationwide trend of state-level intrastate crowdfunding exemptions following the federal Jumpstart Our Business Startups (JOBS) Act¹² in 2012. As of October 2017, there are thirty-six states with an intrastate crowdfunding exemption, and Alaska recently joined the crowd.¹³ The Alaska Intrastate Crowdfunding Exemption (AICE) functions similarly to the MILE Act in Michigan and is intended to open new avenues of local capital to Alaskan entrepreneurs and businesses.¹⁴

5. *Id.*

6. Before an issuer may sell securities, the sale must be registered with the Securities and Exchange Commission or it must fit into an exemption. *See infra* notes 23–25 and accompanying text

7. MICH. COMP. LAWS ANN. § 451.2202a (West 2013).

8. CAMPA-GRUCA ET AL., *supra* note 1, at 15.

9. *Id.*

10. *Id.* at 15–16.

11. *About Us*, TECUMSEH BREWING COMPANY, <http://www.tecumsehbrewing.co.com/about-us.html> (last visited Sept. 13, 2017).

12. Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified at 15 U.S.C. § 77(a), (c)).

13. N. AM. SEC. ADMIN. ASS'N, NASAA INTRASTATE CROWDFUNDING UPDATE: NOVEMBER 16, 2016 3 (2016), <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2014/12/NASAA-Intrastate-Crowdfunding-Update-111616.pdf>.

14. *See, e.g.,* Mia Costello, *Crowdfunding Law Opens Doors for Alaska Entrepreneurs, Investors*, ALASKA DISPATCH NEWS (Sept. 21, 2016), <https://www.adn.com/opinions/2016/09/21/crowd-funding-law-opens-doors-for-alaska-entrepreneurs-investors/>.

It is often difficult for new businesses to acquire capital in their early stages. Rural environments, where “angel investors” seldom venture, amplify this difficulty.¹⁵ Alaska’s sizeable rural population and its struggling economy have made capital acquisition especially difficult for entrepreneurs.

It is easy, however, to point to stories such as Tecumseh Brewing Company and declare equity crowdfunding a success. Though there is enormous potential in equity crowdfunding to open up new avenues of capital and increase community involvement, there are also numerous reasons for Alaska to proceed with caution. For instance, many securities law experts have concluded that equity crowdfunding is ripe for fraud.¹⁶ Equity crowdfunding creates a dangerous situation because it allows businesses to obtain funding from unsophisticated investors,¹⁷ while requiring only minimal financial disclosures. Even setting aside the risks of fraud, the unfortunate truth is that about one-third of small businesses in the United States fail within the first three years.¹⁸ These investments appear even more unsound considering that businesses are only likely to resort to equity crowdfunding when they have exhausted other sources for raising capital (e.g., the inability to obtain a bank loan). As one critic has put it, “[W]hat kinds of companies would ever want to use non-accredited investor crowdfunding? Desperate ones.”¹⁹ In addition, crowdfunding investors often do not receive the same level of investor protection that venture capital firms receive because the former are not

15. See generally Andrew A. Schwartz, *Rural Crowdfunding*, 13 U.C. DAVIS BUS. L. J. 283 (2013) (describing importance of “angel investors,” who can provide landmark funding to small startups and entrepreneurs, and the lack of access to them for rural startups).

16. Sean M. O’Connor, *Crowdfunding’s Impact on Start-Up IP Strategy*, 21 GEO. MASON L. REV. 895, 896 (2014).

17. “Unsophisticated investors” is a term of art meant to describe an unexperienced investor that the SEC needs to protect. See Luis A. Aguilar, Commissioner, U.S. Sec. and Exch. Comm’n, Public Statement: Revisiting the “Accredited Investor” Definition to Better Protect Investors (Dec. 17, 2014), <https://www.sec.gov/news/statement/spch121714laa.html>). Generally, the SEC defines a sophisticated investor as one that has sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of an investment. See 12 JOSEPH C. LONG ET AL., BLUE SKY LAW § 7:89 (2017).

18. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, ENTREPRENEURSHIP AND THE U.S. ECONOMY, https://www.bls.gov/bdm/entrepreneurship/bdm_chart3.htm (last updated April 28, 2016).

19. Jim Saksa, “Kickstarter, but with Stock”, SLATE (June 23, 2014), http://www.slate.com/articles/business/moneybox/2014/06/sec_and_equity_crowdfunding_it_s_a_disaster_waiting_to_happen.html.

typically sophisticated enough to seek protections—such as dilution protection, control, or rights—and furthermore lack the necessary bargaining power to attain them.

Regardless of the risks, equity crowdfunding is available in two forms. Alaskan small businesses conducting an equity crowdfunding offering can use either AICE or Regulation Crowdfunding, another method of crowdfunding implemented by Congress in the JOBS Act. Though having two avenues for equity crowdfunding can complicate compliance, both options offer advantages and disadvantages for businesses and investors. While Regulation Crowdfunding will not change unless done so by Congress, there are ways the State of Alaska can improve AICE and protect investors.

This Note introduces crowdfunding, explains the options available in Alaska today, provides a summary of the advantages and disadvantages of each type of crowdfunding, as well as crowdfunding generally, and recommends ways the State of Alaska can modify AICE to make it more accessible for businesses while protecting investors.

Part I introduces securities law, including the registration of securities and exemptions from registration. Part II gives the history of crowdfunding and highlights the types of crowdfunding options available. This part also considers reasons one might be wary or optimistic about crowdfunding, especially in Alaska where the current recession and the state's rural geography exacerbate issues that already make it difficult for small businesses to raise capital. Part III delves into the state of equity crowdfunding today. It begins with a summary of the JOBS Act and its implementation of Regulation Crowdfunding. It then discusses Rule 147 and Rule 147A (the SEC's federal intrastate crowdfunding rules) and their applicability to equity crowdfunding. This part includes a summary of the limitations and restrictions on Regulation Crowdfunding and AICE. Lastly, this part discusses AICE and its connection to Rule 147. Part IV compares Regulation Crowdfunding and AICE, including a discussion of the benefits and drawbacks of each option and how they compare. Part V proposes amendments to AICE including modifying the exemption to utilize Rule 147A, increasing the investment cap, and requiring the use of a funding portal. A brief conclusion follows.

I. SECURITIES REGULATION AND EXEMPTIONS

The SEC was established in response to the stock market crash of 1929 and was given its authority through the Securities Exchange Act of 1934.²⁰ The mission of the SEC “is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”²¹ While the SEC serves numerous purposes in the economy, the focus of this Note is the SEC’s role in the registration, or rather exemption, of intrastate securities prior to sale.²²

Generally, if a company wants to sell a security,²³ the company must register that security or sale with the SEC.²⁴ Alternatively, the security or sale must fit within an exemption.²⁵ Registration is often prohibitively expensive and time-consuming for small companies in need of capital.²⁶ Thus, the exemptions become important. While there are numerous exemptions available for these companies, each exemption comes with requirements and restrictions that still make raising capital difficult, especially for capital-strapped companies.²⁷

When funding is difficult to acquire for small businesses, the first source that entrepreneurs often turn to for capital is their local bank.²⁸ Nearly half of all money lent to small businesses comes from community banks.²⁹ However, one-third of small businesses fail within the first three years, making many banks and lending institutions wary of making such

20. U.S. SEC. AND EXCH. COMM’N, *What We Do*, <https://www.sec.gov/Article/whatwedo.html> (last visited Oct. 4, 2017).

21. *Id.*

22. This Note will not attempt to delve deeply into securities regulations, the SEC, or the intricacies of the rules and law at play. The objective is to provide enough background information for an unfamiliar reader to gain an understanding of the regulatory forces facing entrepreneurs, the nature of crowdfunding, and the recent trend towards crowdfunding.

23. See HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *GOING PUBLIC HANDBOOK* § 2:1 (2017) (explaining that, generally, a security is a fungible, negotiable financial instrument that represents some type of financial value).

24. Section 5 of the Securities Act prohibits sales of securities until a registration statement is filed with the SEC. Securities Act of 1933 § 5(c), 15 U.S.C. § 77e(c) (2012).

25. *Id.*

26. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 42–43 (2012).

27. *Id.* at 44–46.

28. Rutheford B. Campbell, Jr., *Regulation A: Small Businesses’ Search for “A Moderate Capital”*, 31 DEL. J. CORP. L. 77, 88 (2006) (“The normal progression for a growing small business, therefore, is to exhaust its line of institutional credit and then to seek other sources of external capital.”).

29. TANYA D. MARSH & JOSEPH W. NORMAN, AM. ENTER. INST., *THE IMPACT OF DODD-FRANK ON COMMUNITY BANKS* 12 (2013), http://images.politico.com/global/2013/05/06/2013-05_marshall-norman.html (“\$1 out of every \$2 lent to small businesses comes from community banks.”).

loans because companies frequently lack sufficient collateral and a proven record of accomplishment.³⁰ In addition, regulations³¹ and collateral requirements³² hinder the ability of banks to lend to individuals and small companies. Moreover, these loans are becoming more difficult to obtain as community banks consolidate into larger banks.³³ Larger banks prefer to lend to larger, more established companies because of the lower risk and higher profitability of larger loans.³⁴ For these reasons, small business borrowers spend an average of 25 hours filling out paperwork for a single bank loan, often must approach multiple banks, and wait weeks or months for approval.³⁵ As such, while bank loans are undeniably an essential source of capital for small businesses, they are often effectively unavailable to new companies, especially in rural communities, like many parts of Alaska.

The next funding source entrepreneurs might turn to are friends and family.³⁶ This source, however, is only available to a minority of entrepreneurs,³⁷ and even those lucky few who have this option available may be hesitant, for personal reasons, to borrow from friends and family.³⁸ Again, these resources are even scarcer in rural communities and during economic downturns, which is currently the case in Alaska.

30. BUREAU OF LABOR STATISTICS, *supra* note 18.

31. Campbell, *supra* note 28, at 87; *see also* Karen G. Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game* 5 (Harv. Bus. Sch., Working Paper No. 15-004, 2014) (“Federal Reserve economists have recently modeled that additional regulatory burdens are forcing banks to hire additional full-time employees focused on oversight and enforcement, which can hurt the return on assets of some community banks by as much as 40 basis points.”).

32. Campbell, *supra* note 28, at 88; *see also* NAT’L SMALL BUS. ASS’N, SMALL BUSINESS ACCESS TO CAPITAL SURVEY 2 (2012), <http://www.nsba.biz/wp-content/uploads/2012/07/Access-to-Capital-Survey.pdf> (“The prospect of getting financed as a small business—even in a growing economy—is very difficult simply due to the fact that many small businesses lack the assets necessary for a traditional bank loan, making them a riskier lending option for banks.”).

33. Mills & McCarthy, *supra* note 31, at 6 (indicating that the number of community banks decreased from 14,000 in the mid-1980s to less than 7000.).

34. *Id.*

35. *Id.*

36. Andrew A. Schwartz, *Teenage Crowdfunding*, 83 U. CIN. L. REV. 515, 521 (2014).

37. *See* Annalise H. Farris, *Strict in the Wrong Places: State Crowdfunding Exemptions’ Failure to Effectively Balance Investor Protection and Capital Raising*, 38 CAMPBELL L. REV. 267, 279 (2016).

38. *See* Ed McLaughlin, *Here Are All the Ways You Can Fund Your Startup*, FORTUNE (Oct. 31, 2016), <http://fortune.com/2016/10/31/raising-startup-money/> (describing starting his company, the author cites concerns of putting friends’ and family’s money at risk, damaging relationships, and having control issues).

Credit cards are the next most frequently utilized external resource.³⁹ Dependence upon credit cards, however, can have serious negative consequences due to devastating interest rates,⁴⁰ which can burden a fledgling business with a quick accumulation of debt.⁴¹

Alternatively, some small businesses are able to acquire capital from venture capital firms or angel investors.⁴² However, the Small Business Association found that each year approximately 300 out of 600,000 new businesses—less than one out of every one thousand new businesses—receive funding annually from venture capital firms.⁴³ Part of the issue may be where the small business is located. Capital from venture capital firms or angel investors is so difficult to acquire because these investors tend to demonstrate strong local biases, investing primarily, or even exclusively, in businesses located near the firm's office, in places like San Francisco, New York, and Los Angeles.⁴⁴ And even when venture capital or angel investor funding is available, it often comes at the cost of giving up more control of the new business than the entrepreneur would prefer.⁴⁵

39. See NAT'L SMALL BUS. ASS'N, 2015 YEAR-END ECONOMIC REPORT 10 (2016), www.nsha.biz/wp-content/uploads/2016/02/Year-End-Economic-Report-2015.pdf (reporting that of 300 small businesses surveyed, 31% use credit cards, behind only bank loans and reinvesting earnings from the business).

40. See *id.* (indicating that the average interest rate reported in a survey of 300 small businesses was 15.6%, and 22% of small businesses reported an interest rate greater than 20%).

41. See *id.* (indicating that 24% of 300 small businesses surveyed carried a balance of more than \$10,000).

42. See Angel Investor, Investopedia, <http://www.investopedia.com/terms/a/angelinvestor.asp> (defining "angel investors" as investors who provide funding to small startups and entrepreneurs to propel them through early stages of the enterprise).

43. Dileep Rao, *Why 99.95% of Entrepreneurs Should Stop Wasting Time Seeking Venture Capital*, FORBES (July 22, 2013), <https://www.forbes.com/sites/dileeprao/2013/07/22/why-99-95-of-entrepreneurs-should-stop-wasting-time-seeking-venture-capital/#10dcc61246eb>.

44. Rob Beuschen, *The Surprising Bias of Venture Capital Decision-Making*, TECHCRUNCH (Sept. 24, 2015), <https://techcrunch.com/2015/09/24/the-surprising-bias-of-venture-capital-decision-making/> (noting research showing that from 1980 to 2009, approximately half of venture capital investments were provided to businesses within 233 miles of the venture capital firm).

45. See Steven D. Solomon, *A Lesson in Control*, N.Y. TIMES DEALBOOK (Nov. 10, 2010), <https://dealbook.nytimes.com/2010/11/10/a-lesson-in-control/> ("There is a saying that once you accept venture capital, you have sold your company.").

II. CROWDFUNDING

Though the internet has proliferated crowdfunding, its roots in the United States actually date back to the nineteenth century and forever changed the skyline of New York City. In 1885, the Statue of Liberty arrived from France.⁴⁶ The American Committee of the Statue of Liberty, however, was \$100,000 short of the \$250,000 needed (approximately \$6.3 million in today's value) to assemble the statue and build a granite plinth.⁴⁷ When the City of New York and Congress refused to pay, the cities of Baltimore, Boston, Philadelphia, and San Francisco all offered to pay—in exchange for the statue's relocation.⁴⁸ But Joseph Pulitzer, the renowned publisher, launched a fundraising campaign in the *New York World*, and in five months raised \$101,091 from more than 160,000 donors.⁴⁹ The extra \$1091 was given as a gift to the sculptor, and today Lady Liberty serves as a beacon of hope to millions of immigrants and refugees entering the United States through New York City.⁵⁰

Today, crowdfunding is commonly associated with websites like Indiegogo,⁵¹ GoFundMe,⁵² and KickStarter.⁵³ The purpose of crowdfunding is to connect entrepreneurs (or really anyone) with new resources for capital. In a typical crowdfunding model, a large number of individuals each contribute a small amount to help an individual, business, or organization reach its fundraising goals.⁵⁴ The potential of crowdfunding is enormous: Indiegogo, GoFundMe, and KickStarter alone have facilitated the distribution of more than \$8.3 billion between 2008 and 2017.⁵⁵

46. *The Statue of Liberty and America's Crowdfunding Pioneer*, BBC MAGAZINE (Apr. 25, 2013), <http://www.bbc.com/news/magazine-21932675>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Indiegogo is an online platform that connects creative entrepreneurs with a global community of backers. *About Us*, INDIEGOGO <https://www.indiegogo.com/about/our-story> (last visited Sept. 11, 2017).

52. GoFundMe is an online social fundraising platform where backers can donate to campaigns and causes. *About Us*, GOFUNDME <https://www.gofundme.com/about-us> (last visited Sept. 11, 2017).

53. KickStarter is an online platform that helps artists, musicians, and other creators access resources by connecting them with a global network of backers. *Hello*, KICKSTARTER <https://www.kickstarter.com/about?ref=nav> (last visited Sept. 11, 2017).

54. Bradford, *supra* note 26, at 10.

55. *See About Us*, *supra* note 52 (indicating that over four billion dollars has been raised on GoFundMe since 2010); *see also Hello*, *supra* note 53 (indicating that over three billion dollars has been raised on KickStarter since 2009); *How It Works*, INDIEGOGO, <https://www.indiegogo.com/how-it-works> (last visited Sept. 11, 2017) (indicating that over one billion dollars has been raised since 2008).

A. Types of Crowdfunding

There are four distinct types of crowdfunding: rewards, lending, donation, and equity.⁵⁶ Rewards crowdfunding is the most common type of online crowdfunding and is often used by websites like Kickstarter.⁵⁷ In a rewards crowdfunding model, varying levels of rewards (at least three) correspond to pledge amounts.⁵⁸

Lending-based crowdfunding, also known as “peer-to-peer,” raises funds through loans from individuals that are meant to be paid back over a pre-determined time and at a set interest rate.⁵⁹ Lending-based crowdfunding is preferable for some entrepreneurs because it reduces the cost of a traditional loan by cutting out the intermediary (the bank).⁶⁰

Next, donation crowdfunding does not require an exchange as part of the investor’s contribution and is mostly used for social causes or by charities.⁶¹

Lastly, and most relevantly for this Note, equity crowdfunding gives investors a share of the profits of the business.⁶² Since equity crowdfunding clearly involves the sale of a security, and therefore requires registration under the SEC rules,⁶³ it was rarely used in the United States prior to the JOBS Act of 2012, which created a crowdfunding exemption.⁶⁴ In 2011, ProFounder was the largest equity-based

56. *Types of Crowdfunding*, FUNDABLE <https://www.fundable.com/crowdfunding101/types-of-crowdfunding> (last visited Sept. 11, 2017).

57. *Id.*

58. *Id.* An example of reward-based crowdfunding was used by Coolest Cooler to fund the production of the Coolest Cooler, which includes a built in Bluetooth speaker, USB charger, blender, and numerous other features. *See Coolest Cooler: 21st Century Cooler That’s Actually Cooler*, KICKSTARTER, <https://www.kickstarter.com/projects/ryangrepper/coolest-cooler-21st-century-cooler-thats-actually> (last visited Sept. 14, 2017). Backers were able to contribute at eleven different levels each corresponding to a different reward. *Id.* Examples included a re-usable party cup for a \$25 contribution, a Coolest Cooler for a \$165 contribution, and a party for a \$2000 contribution. *Id.*

59. Andrew Verstein, *The Misregulation of Person-to-Person Lending*, 45 U.C. DAVIS L. REV. 445, 452 (2011).

60. *Id.*

61. *Types of Crowdfunding*, *supra* note 56. For example, in response to a shooting at an Orlando nightclub in June, 2016, a GoFundMe page was set up to gather donations for the victims and their families. *Pulse Tragedy Community Fund*, GOFUNDME, <https://www.gofundme.com/OrlandoUnited> (last visited Sept. 11, 2017). Over \$550,000 was raised, and nothing was offered in return for the donations. *Id.*

62. Bradford, *supra* note 26, at 24; *see also* Joseph Hogue, *Types of Crowdfunding Deals and Investment*, CROWD101 (Aug. 2, 2016), <http://www.crowd101.com/types-crowdfunding-deals-investment/> (explaining the different investment opportunities crowdfunding could provide).

63. *See supra* notes 23–24 and accompanying text.

64. Bradford, *supra* note 26, at 24.

crowdfunding website in the United States, until it ceased selling securities in response to a consent order from the California Department of Corporations barring it from selling securities unless it registered as a broker-dealer.⁶⁵

B. The Cases For and Against Crowdfunding in Alaska.

The benefits of equity crowdfunding are immense and should not be understated. An important, but often ignored, benefit is that equity crowdfunding can open up new streams of capital to rural communities. Small or new businesses, especially in rural communities, face numerous hurdles, including inadequate access to capital.⁶⁶ By helping lower those barriers to acquiring capital, equity crowdfunding can help grow small businesses, which in turn helps create jobs.⁶⁷ As Alaska's economy struggles with low oil prices, it is important for the State to look for new and innovative ways to help small businesses.⁶⁸ As of 2017, Alaska is in a recession⁶⁹ and has the second highest unemployment rate of any state.⁷⁰ Since the 1970s, small businesses have accounted for 55% of all jobs and 66% of new jobs in the United States.⁷¹ In Alaska, 53% of employees work

65. *Id.* Under section 15 of the Securities Exchange Act of 1934, most "brokers" and "dealers" must register with the SEC. See U.S. SEC. AND EXCH. COMM'N, *Fast Answers: Broker-Dealer Registration*, <https://www.sec.gov/fast-answers/answersbdregishtm.html> (last modified Jan. 14, 2013).

66. See *supra* note 39 and accompanying text.

67. CROWDFUND CAPITAL ADVISORS, HOW DOES CROWDFUNDING IMPACT JOB CREATION, COMPANY REVENUE AND PROFESSIONAL INVESTOR INTEREST? 4, <https://crowdfundingpr.files.wordpress.com/2014/01/how-does-crowdfunding-impact-job-creation-and-company-revenue.pdf> (last visited Sept. 16, 2017).

68. See Mia Costello, *Innovation is Key to a Growing Economy*, ALASKA SENATE MAJORITY (Sept. 28, 2016), <https://www.alaskasenate.org/2016/press/news/costello-key-to-growing-an-economy> (discussing the need for the Innovating Alaska Act, state Senator Costello cites the floundering oil prices and struggling economy).

69. See Alex Demarban, *Recession Grips Alaska as Employment Losses Hit New Sectors*, ALASKA DISPATCH NEWS (Dec. 2, 2016), <https://www.adn.com/business-economy/2016/12/02/recession-grips-state-as-employment-losses-in-alaska-grow-hitting-new-sectors/>; see also Charles Wohlforth, *Economists say Recession Will Last Three More Years, Followed by a Smaller, Poorer Alaska*, ALASKA DISPATCH NEWS (Jan. 20, 2017), <https://www.adn.com/opinions/2017/01/20/economists-say-recession-will-last-three-more-years-followed-by-a-smaller-poorer-alaska/>.

70. As of August 2017, Alaska's unemployment rate was 7.2%. U.S. BUREAU OF LABOR STATISTICS, LOCAL AREA UNEMPLOYMENT STATISTICS, <https://www.bls.gov/web/laus/laumstrk.htm> (last modified Sept. 15, 2017).

71. MARY WAMSLEY & JESSICA HART, USING A LENDER SERVICE PROVIDER TO START OR GROW YOUR SBA DEPARTMENT 5 (June 13, 2017), https://www.sba.gov/sites/default/files/articles/Using_a_LSP_-_June_13_2017.pdf.

for small businesses.⁷² Not only do small businesses bring jobs, but they can also improve quality of life in neighborhoods by introducing new products and services into an area. Helping Alaska's small businesses is therefore crucial, especially during difficult economic times.

Equity crowdfunding may also provide a viable option where a downturn in the economy has restricted access to bank loans or the area is too rural for a venture capital firm to access. Further, crowdfunding may be available to small businesses that lack the proper collateral or credit history to receive a bank loan.⁷³ In other words, equity crowdfunding can fill important funding gaps for many small businesses.

Additionally, crowdfunding promotes investment from individuals who might otherwise be prevented from investing because the SEC classifies them as unsophisticated investors and therefore imposes restrictions on them. New investors can lead to increased communication and a stronger flow of ideas. It is also worth noting that thirty-five other states have passed their own intrastate crowdfunding exemptions, meaning that there is some agreement among the states as to the benefits of facilitating crowdfunding.⁷⁴ While it is important for Alaska to protect its investors, the State must also protect its communities by facilitating an environment that is as friendly to business as that in other states.

As with most policies, there are significant reasons for the State of Alaska to proceed cautiously as it pursues intrastate equity crowdfunding. Fraud is the most obvious concern when, as in the case of equity crowdfunding, a business sells unregistered securities to unsophisticated and unaccredited investors⁷⁵ while making minimal disclosures.⁷⁶ Since equity crowdfunding only requires minimal disclosures, it is likely more difficult for regulators to investigate frauds

72. U.S. SMALL BUS. ADMIN., ALASKA SMALL BUSINESS PROFILE 9 (2016), <https://www.sba.gov/sites/default/files/advocacy/Alaska.pdf>.

73. Bradford, *supra* note 26, at 102.

74. N. AM. SEC. ADMIN. ASS'N, *supra* note 13.

75. "Very generally, an accredited investor is an investor who is sufficiently sophisticated so as not to need the protections of the federal securities laws, but such an investor generally is defined in terms of wealth, on the theory that an accredited investor can hire knowledgeable and sophisticated advisors." Roberta S. Karmel, *Regulation by Exemption: The Changing Definition of an Accredited Investor*, 39 RUTGERS L.J. 681, 683 (2008).

76. See ALAN R. BROMBERG & LEWIS D. LOWENFELS, 7 BROMBERG & LOWENFELS ON SECURITIES FRAUD § 13:207 ENFORCEMENT PRIORITIES IN THE CONTEXT OF EQUITY CROWDFUNDING (2d ed. 2017) ("The less disclosure one needs to make, the greater degree to which one can defraud an investor in a way that is difficult to detect or prosecute.").

in crowdfunding than it is with other types of capital raises.⁷⁷ In addition, it is unclear how regulators will prioritize investigating fraud that takes a relatively small amount of money from many people compared with fraud that involves a large sum of money from just a few people.

SEC v. Ascenergy LLC was one of the first crowdfunding fraud cases brought by the SEC.⁷⁸ After raising approximately five million dollars from approximately ninety investors to develop oil and gas wells, Ascenergy's CEO spent \$1.2 million on payments to himself or on expenses having nothing to do with oil and gas.⁷⁹ The CEO also transferred the remaining \$3.8 million to a holding company with no apparent connection to oil and gas.⁸⁰ But this is likely a rare case. In many crowdfunding campaigns, even if an investor suspects fraud, it will likely be prohibitively expensive for her to hire an attorney since the investment amount is so small. In addition, the SEC is unlikely to be able to keep up given its limited resources and the growth of crowdfunding.

Another concern with crowdfunding, beyond fraud by the issuer,⁸¹ is susceptibility to bad timing, bad luck, or bad planning.⁸² For instance, a group called ElevationLab recently used rewards-based crowdfunding on Kickstarter to raise nearly \$1.5 million from over 12,000 backers in order to create an aluminum docking station for the iPhone.⁸³ Unfortunately for ElevationLab and its investors, Apple redesigned the iPhone shortly after the fundraising campaign, rendering the crowdfunded device incompatible with its charging dock and sending ElevationLab designers scrambling to update the product.⁸⁴ Perhaps a traditional equity raise targeting sophisticated investors would have caused some investors to ask the basic question: "What happens if Apple changes its product since our product is directly dependent upon compatibility with the iPhone?"⁸⁵

77. See *id.* at § 13:208 ("Exposing unsophisticated investors to risky investments without adequate disclosure unduly sacrifices investor-protection goals to the perceived need to lower the disclosure barriers for small businesses and crowdfunding techniques.").

78. Plaintiff's Complaint, *SEC v. Ascenergy LLC*, 2015 WL 6513864 (D. Nev., Oct. 28, 2015).

79. *Id.*

80. *Id.*

81. The "issuer" is the company or organization that is selling the securities. See Securities Act of 1933 § 2(a)(4), 15 U.S.C. § 77b(a)(4) (2012).

82. See BROMBERG & LOWENFELS, *supra* note 76, at § 13:212.

83. *Elevation Dock: The Best Dock For iPhone*, KICKSTARTER, <https://www.kickstarter.com/projects/hop/elevation-dock-the-best-dock-for-iphone/> (last visited Sept. 14, 2017).

84. BROMBERG & LOWENFELS, *supra* note 76, at § 13:212.

85. *Id.*

Another challenge for crowdfunding investors is that they may lack the sophistication and bargaining power to negotiate for protections against risks that venture capitalists often require.⁸⁶ The most prevalent of these protections is against future dilution.⁸⁷ It is highly unlikely that a venture capital firm would invest in a company without dilution protection, but crowdfunding investors likely lack both the sophistication to understand the need for dilution protection as well as the bargaining power to negotiate for it.⁸⁸ In addition, venture capital firms often secure their investment by establishing some level of control in the company and acquiring tag-along and preemptive rights.⁸⁹ For similar reasons as above, these protections are not available for crowdfunding investors.

Lastly, in a crowdfunded company, the issuer fully controls the operations of the company and makes minimal disclosures to investors. This creates a risk of “self-dealing, excessive compensation, [and] misuse of corporate opportunities.”⁹⁰

Thus, crowdfunding has enormous potential for Alaska and is worth embracing. Still, the State should proceed with caution. Ideally, an appropriate balance can be struck that opens up new sources of capital for businesses while also protecting investors.⁹¹

86. John S. (Jack) Wroldsen, *The Social Network and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists' Dilution of the Crowd*, 15 VAND. J. ENT. & TECH. L. 583, 614 (2013).

87. When an issuer has the power to issue new shares, it can dilute current shareholders unless there is a provision in the contract protecting the shareholder. *Id.* For example, if an investor owns 5,000 common shares and there are 100,000 common shares outstanding then the investor owns 5% of the company. If the issuer issues 100,000 new common shares to people other than the investor, then the investor's ownership is diluted to 2.5% since the investor now controls 5,000 of 200,000 outstanding common shares.

88. *Id.* at 624 (“Virtually no sophisticated venture capitalist invests in start-up companies without certain fundamental protections present in preferred-stock contractual arrangements, such as anti-dilution provisions and tag-along rights. Crowdfunders, though, are unlikely to negotiate similar protections because of their weak bargaining positions (due in large part to collective-action problems) and lack of sophistication in start-up company investing.”).

89. *Id.* at 615–16. Tag-along rights protect investors from being excluded from a profitable exit event such as an IPO or merger. *Id.* at 619–20. Preemptive rights allow shareholders to purchase new shares in subsequent offerings to avoid dilution. *Id.* at 621–22.

90. Bradford, *supra* note 26, at 107.

91. See *infra* Part V.

III. CROWDFUNDING TODAY

A small business wishing to utilize crowdfunding has two options. The first is Regulation Crowdfunding, which was created by the JOBS Act and exempts qualified issuers from the SEC's registration requirements. Any issuer meeting the Regulation Crowdfunding requirements, regardless of location, can utilize Regulation Crowdfunding. The second option allows a small business to utilize its domicile state's state-level intrastate crowdfunding, e.g., AICE in Alaska. These laws provide an additional pathway for small businesses to gain exemption from the SEC's registration requirements. As explained in more detail below, many states' statutes explicitly require that the offering comply with SEC Rule 147. In Alaska, AICE is tied to SEC Rule 147,⁹² meaning that the requirements of Rule 147 must in addition to other requirements imposed by the State of Alaska. This part overviews the statutory requirements for Regulation Crowdfunding and AICE.

A. The JOBS Act and Regulation Crowdfunding.

President Obama signed the JOBS Act on April 5, 2012,⁹³ with the purpose to "increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies."⁹⁴ Title III of the JOBS Act, titled the Crowdfund Act, created Regulation Crowdfunding.⁹⁵ In short, the JOBS Act amended section 4 of the Securities Act of 1933 to create a new crowdfunding exemption from the registration requirements of section 5.⁹⁶ Pursuant to Title III of the JOBS Act, the SEC adopted rules regulating crowdfunding using the internet.⁹⁷

An offering relying on Regulation Crowdfunding must meet a series of requirements. First, the maximum aggregate amount of securities sold to all investors in a twelve-month period cannot exceed \$1 million.⁹⁸ There

92. Rule 147 is a federal rule that, if complied with, allows businesses to raise funds without registering with the SEC. *See infra* notes 110–26 and accompanying text for details regarding Rule 147 and its requirements. A couple of states—for example, Maine—have tied their intrastate exemption to SEC Rule 504. ME. REV. STAT. ANN. tit. 32, § 16304(6-A) (2015). Though this presents an interesting contrast to Alaska's exemption, this Note will not discuss the pros and cons of an intrastate exemption which utilizes Rule 504.

93. Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified at 15 U.S.C. § 77(a), (c)).

94. *Id.*

95. *Id.* §§ 301, 302.

96. Jacques F. Baritot, *Increasing Protection for Crowdfunding Investors Under the Jobs Act*, 13 U.C. DAVIS BUS. L.J. 259, 267 (2013).

97. *See* Crowdfunding, SEC Release No. 33-9974 (Oct. 30, 2015).

98. 15 U.S.C. § 77d(6)(A)) (2012).

is also a cap on the amount each investor can contribute, which varies depending on the investor's annual income.⁹⁹ Second, all investments must occur through a "funding portal" (a website registered with the SEC and meeting certain qualifications).¹⁰⁰

Third, a company using Regulation Crowdfunding must provide annual financial statements and information about the company's operations.¹⁰¹ The amount of disclosure required for the offering varies depending on the amount raised. For issuers offering \$100,000 or less, the issuer must provide federal income tax returns certified by the principal executive officer. If the issuer's offering is greater than \$100,000, but less than \$500,000, the issuer must provide financial statements reviewed by an independent public accountant.¹⁰² If the offering is greater than \$500,000, for first time Regulation Crowdfunding issuers, an independent public accountant must *review* the issuer's financial statements.¹⁰³ When issuers have previously used Regulation Crowdfunding and are offering more than \$500,000, an independent public accountant must *audit* the financial statements.¹⁰⁴

The requirements for the financial statements vary based on the amount of money raised.¹⁰⁵ Disclosure about the company's operations include, but are not limited to: (1) information about officers, directors, and owners; (2) the business conducted by the company; (3) the intended use of the investment proceeds; (4) the price to the public for the securities and the method for determining this price; (5) the target offering amount and the deadline; (6) whether the issuer will accept investments in excess

99. *Id.* If an investor's annual income or net worth is less than \$100,000 then the investment limit is the greater of \$2000 or 5% of the annual income or net worth. U.S. SEC. AND EXCH. COMM'N, *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers* (May 13, 2016), <https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm>. If an investor's annual income and net worth are both greater than \$100,000, then the investor is limited to 10% of the lesser of annual income and net worth. *Id.* No investor can contribute more than \$100,000 in a twelve-month window regardless of annual income and net worth. *Id.*

100. 15 U.S.C. § 77d(6)(C). In addition, issuers may rely on funding portals to determine the aggregate amount contributed by investors; i.e., an issuer is not responsible for making sure that an investor is not exceeding its limit unless the issuer has knowledge that purchasing in the issuer's offering would cause the investor to exceed its limit. *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers*, *supra* note 99.

101. 15 U.S.C. § 77d-1(b)(4).

102. See *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers*, *supra* note 99.

103. *Id.*

104. *Id.*

105. *Id.*

of the target amount; (7) certain related-party transactions; and (8) information regarding the issuer's financial condition and financial statements.¹⁰⁶

Additional obligations are placed on the funding portals, including mandated disclosure to investors about the risks of investing in start-ups.¹⁰⁷ Funding portals must also ensure that investors affirm an understanding of the risks of crowdfunding, and obtain a background check on key company personnel.¹⁰⁸

B. Intrastate Crowdfunding Using Rule 147 and Rule 147A

Through the JOBS Act, Congress instructed the SEC to issue rules to implement the crowdfunding provision within 270 days of enactment.¹⁰⁹ The SEC ended up taking more than three years to revise Rule 147¹¹⁰ and created Rule 147A.¹¹¹ In the time between the passing of the JOBS Act and the SEC's implementation of Rule 147A, many states grew impatient and passed their own state-level crowdfunding exemptions. These state programs exempt small businesses from federal securities registration requirements pursuant to section 3(a)(11) of the Securities Act of 1933 and through Rule 147.¹¹² These state-level regulations completely exempt intrastate crowdfunding from SEC regulation so long as the issuer is organized in the state and all investors reside in the state. As of the writing of this Note, thirty-six states, including Alaska, have enacted intrastate equity crowdfunding exemptions, and the majority of these exemptions require compliance with Rule 147.¹¹³

In October 2016, the SEC updated Rule 147 and introduced Rule 147A with the purpose of "continuing to provide investor protections, updat[ing] and expand[ing] the capital raising avenues for smaller

106. 15 U.S.C. § 77d-1(b)(1); *see also* *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers*, *supra* note 99.

107. 15 U.S.C. § 77d-1(a)(5).

108. *Id.*

109. Pub. L. No. 112-106, 126 Stat. 320.

110. General Rules and Regulations, Securities Act of 1933, 81 Fed. Reg. 83,550 (Nov. 21, 2016) (codified at 17 C.F.R. § 230.147(d)).

111. *Id.* at 83,551 (codified at 17 C.F.R. § 230.147A); *see also* Exemptions to Facilitate Intrastate and Regional Securities Offerings, SEC Release No. 33-10238; 34-79161 (Oct. 26, 2016).

112. Securities Act of 1933, 15 U.S.C. § 77c(a)(11) (2012) (exempting "[a]ny security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory").

113. N. AM. SEC. ADMIN. ASS'N, *Intrastate Crowdfunding Legislation*, <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2014/12/NASAA-Crowdfunding-Index-8-17-2017.pdf> (last updated Aug. 17, 2017).

companies, allowing them to more fully take advantage of changes in technology and business practices.”¹¹⁴ The two rules are similar in many respects. The issuer must be a permanent resident *and* doing business in the state,¹¹⁵ the issuer must reasonably believe all purchasers to be residents of the state,¹¹⁶ the purchaser may not resell the security to an out-of-state resident within six months,¹¹⁷ and there must be an attached legend stating, among other things, the security is not registered and cannot be resold to an out-of-state resident.¹¹⁸ Rule 147A also acted as an updated and more appealing version of Rule 147.¹¹⁹

Rule 147 exists as a safe harbor within section 3(a)(11) in that it “provides objective standards for local businesses seeking to rely on section 3(a)(11).”¹²⁰ This safe harbor applies to offerings taking place entirely intrastate. Since Rule 147 is based on the language of section 3(a)(11), all offers and sales must be made only to residents of the state where the issuer is a resident.¹²¹ This inability to *offer* to out-of-state residents hinders intrastate crowdfunding since it largely precludes the use of the third-party internet advertisements.¹²² As such, it is not entirely clear whether businesses in states such as Alaska can advertise on their own websites and social media pages. On one hand, Alaska’s interpretation of AICE allows general solicitation and expressly allows advertising limited information about the offering through a website.¹²³ At the same time, the SEC’s Compliance and Disclosure questions interpreting Rule 147 indicate the question of whether an internet advertisement constitutes an offer is a factual-based inquiry dependent

114. See U.S. SEC. & EXCH. COMM’N, SEC Adopts Final Rules to Facilitate Intrastate and Regional Securities Offerings, SEC Press Release No. 2016-226 (Oct. 26, 2016), <https://www.sec.gov/news/pressrelease/2016-226.html>.

115. 17 C.F.R. § 230.147A(c) (2017).

116. *Id.* § 230.147A(d).

117. *Id.* § 230.147A(e).

118. *Id.* § 230.147A(f).

119. See *id.* (“New Rule 147A would be substantially identical to Rule 147 except that it would allow offers to be accessible to out-of-state residents and for companies to be incorporated or organized out-of-state.”).

120. See Exemptions to Facilitate Intrastate and Regional Securities Offerings, 80 Fed. Reg. 69,787 (Oct. 26, 2016). In securities regulation, safe harbors are created to clarify the requirements of an exemption. See *id.* If an issuer qualifies for Rule 147 then, by definition, the issuer fits within section 3(a)(11).

121. 15 U.S.C. § 77c(a)(11) (2012).

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

123. ALASKA ADMIN. CODE tit. 3 § 08.840(c) (2016).

on the circumstances.¹²⁴ According to the SEC, this inquiry considers whether computers are allowed to view the advertisement based on in-state IP addresses and whether disclaimers were used.¹²⁵

The SEC created Rule 147A to clear the air and do away with much of the ambiguity of *offering* under Rule 147.¹²⁶ Just as Rule 147 operates as a safe harbor to section 3(a)(11), Rule 147A provides a set of requirements, which, if met, exempt an offering from registration. However, states that previously tied their exemption to Rule 147 are unable to take advantage of Rule 147A's clarity.

The prohibition on offering is the most notable difference between Rule 147 and Rule 147A. Rule 147A prohibits completing a sale to out-of-state residents, but allows an offer to be made to out-of-state residents, which creates much more flexibility for the issuer since it no longer has to worry about out-of-state residents viewing the offer.¹²⁷ Since Rule 147A is an entirely independent exemption created through the SEC's general rulemaking authority of section 28, it is not required to comply with the language of section 3(a)(11).¹²⁸

In addition to Rule 147A allowing offers, although not sales, to out-of-state residents, it also removes the requirement from Rule 147 that issuers be incorporated and organized in the state where the offering is taking place, so long as the issuer can demonstrate that their business qualifies as in-state in nature.¹²⁹ This modification was made with the intention of "expand[ing] the number of businesses that will be able to seek intrastate financing under Rule 147A, as compared to amended Rule 147."¹³⁰

In summary, the SEC created two options: Rule 147 and Rule 147A. Rule 147A is far more accessible to issuers since it allows offers to reach out-of-state residents and thus allows advertisements on third party

124. U.S. SEC. AND EXCH. COMM'N, *Compliance and Disclosure Interpretation Question 141.05*, <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> (last updated Apr. 19, 2017).

125. *See id.*

126. 17 C.F.R. § 230.147A(f) (2017) ("New Rule 147A would be substantially identical to Rule 147 except that it would allow offers to be accessible to out-of-state residents and for companies to be incorporated or organized out-of-state.").

127. *Id.* § 230.147A(d) (2017) ("Sales of securities pursuant to this section (§ 230.147A) shall be made only to residents of the state or territory in which the issuer is resident . . .").

128. Exemptions to Facilitate Intrastate and Regional Securities Offerings, Securities Act Release Nos. 33-10238; 34-79161, 81 Fed. Reg. 83,494, 83,496 (Nov. 27, 2016) ("We are adopting new Rule 147A pursuant to our general exemptive authority under Section 28 of the Securities Act, and therefore, new Rule 147A will not be subject to the statutory limitations of Section 3(a)(11).").

129. *Id.*

130. *Id.*

websites. The purpose of creating a Rule 147A while leaving the less practical Rule 147 in place was to permit issuers to continue to use state law exemptions that are tied to Rule 147, such as AICE.¹³¹

C. Alaska's Intrastate Crowdfunding Exemption

Many states, including Alaska, have created their own intrastate exemption.¹³² In 2016, the Alaska legislature amended the Alaska Securities Act to create a specific exemption from registration for the offer and sale of securities.¹³³ The exemption became effective on November 26, 2016 and is specifically tied to section 3(a)(11) and Rule 147, and therefore includes the prohibition on offering to out-of-state residents described above.¹³⁴

Legislative History

Alaska State Senator Mia Costello's sponsoring statement for AICE states that the program is intended to help "Alaskans start and invest in local businesses by enacting a new finance mechanism in state law."¹³⁵ The bill received support from numerous independent organizations including the Alaska Independent Power Producers Association,¹³⁶ the Anchorage Economic Development Corporation,¹³⁷ and the American Council of Life Insurers.¹³⁸ Since its introduction in the Senate, AICE has been tied to Rule 147 and thus does not allow general advertising or solicitation on third party websites.¹³⁹

131. See Exemptions to Facilitate Intrastate and Regional Securities Offerings, 80 Fed. Reg. 69,787 (Nov. 10, 2015) (to be codified at 17 C.F.R. pt. 230) (acknowledging that numerous states have enacted crowdfunding provisions which require compliance with section 3(a)(11) and Rule 147).

132. S.B. 126, 2016 Alaska Sess. Law ch. 38.

133. *Id.*

134. *Id.*

135. Small Security Offerings, ALASKA S. LABOR AND COMMERCE STANDING COMM. MINUTES, 29th Leg., 1st Sess. (Feb. 11, 2016) (statement of Sen. Mia Costello at 2:18:43 PM).

136. Letter from Duff W. Mitchell, Exec. Dir., Alaska Indep. Power Producers Ass'n., to Mia Costello, Senator, Alaska State Senate (Mar. 4 2016), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=64924.

137. Letter from Bill Popp, President & CEO, Anchorage Econ. Dev. Corp., to Sen. Mia Costello, (Apr. 6, 2016), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=66238.

138. Carl B. Wilkerson, *Statement of the American Council of Life Insurers on Senate Bill 108 and House Bill 194 in the Alaska Legislature* (Apr. 1, 2016), www.akleg.gov/basis/get_documents.asp?session=29&docid=65952.

139. *Comparison of Proposed AS 45.56 to Current AS 45.55*, ALASKA STATE LEGISLATURE (Feb. 6, 2016), http://www.legis.state.ak.us/basis/get_documents.asp?session=29&docid=40360.

Who Can Use AICE?

AICE is available to for-profit corporations or business cooperatives that have their principal place of business in Alaska.¹⁴⁰ Issuers must meet the requirements of Rule 147 and so the securities must be offered and sold only to persons with established residency in Alaska at the time of purchase.¹⁴¹ The issuer must obtain documentary evidence from each prospective purchaser and have a reasonable basis to believe that each purchaser has established residency in Alaska.¹⁴²

Limitations and Restrictions

The total amount of funds raised through an AICE offering cannot exceed \$1 million per year and the issuer may not accept more than \$10,000 from a single purchaser.¹⁴³ In addition, the issuer must reasonably believe that each purchaser is purchasing with investment intent and not for sale in connection with a distribution.¹⁴⁴ An issuer using an AICE offering must deposit all funds into an escrow account until the minimum target dollar amount for the offering is met.¹⁴⁵

Purchasers in an AICE offering must be informed that the securities have not been registered, are exempt under AICE, and may not be resold unless the securities are registered or the resale fits into another exemption.¹⁴⁶ Prior to a sale, purchasers must also be provided with information about the issuer, the directors, and the offering.¹⁴⁷ Lastly, and

140. ALASKA STAT. § 45.55.175(1) (2016).

141. *Id.* § 45.55.175(2).

142. *Id.*

143. *Id.* § 45.55.175(2)–(3). There is an exception in the personal contribution limit for accredited investors as defined by Rule 501. An individual can be an accredited investor by being a director, executive officer, or general partner of the issuer, having an individual net worth of greater than \$1,000,000, or an annual income of \$200,000. 17 C.F.R. § 230.501 (2017).

144. ALASKA STAT. § 45.55.175(5). The SEC is often concerned with the intent of the investor so the purchaser does not serve as a conduit for a wider distribution. *See* Nonpublic Offering Exemption, Securities Act Release No. 33-4552, 27 Fed. Reg. 11,316 (Nov. 6, 1962). The fear in this situation is that an in-state investor could purchase through an intrastate offering then sell to an out-of-state investor. *See id.* Thus, the SEC shifts the burden to the issuer to determine if the investor is purchasing with the intent to hold the security or to turn around and sell it. *See id.*

145. ALASKA STAT. § 45.55.175(7).

146. *Id.* § 45.55.175(10).

147. This information includes “(1) the name and physical address of the issuer, officers, directors, and controlling persons; (2) a description of the experience and qualifications of the issuer, officers, directors, and controlling persons; (3) a description of the business, including how long it has been in operation and the specific reason for the offering; (4) a discussion in plain language of the significant factors material to the offering, including those that

importantly in view of the potential pitfalls of crowdfunding, purchasers must sign a statement at the time of sale stating: “I acknowledge that I am investing in a high-risk, speculative business venture, that I may lose all of my investment, and that I can afford the loss of my investment.”¹⁴⁸

In an AICE offering, general solicitation is allowed, but the issuer must file notice with the Department of Commerce, Community, and Economic Development either more than ten days before the use of general solicitation or within fifteen days after the first sale in the offering (whichever is less).¹⁴⁹ A general announcement is allowed so long as the information is limited to basic information, such as the name, address, and telephone number of the issuer, a brief twenty-five word or less description of the business, and the price of the security.¹⁵⁰

While AICE does present an intriguing opportunity for issuers in Alaska, there are components of the current law that make it difficult or impractical to utilize. If an issuer wishes to raise capital through equity crowdfunding, it must weigh the benefits and drawbacks of AICE and compare the results with Regulation Crowdfunding. These advantages and disadvantages, which are analyzed in the next section, vary depending on an issuer’s constraints and objectives.

make the offering speculative or risky; (5) the total offering amount and how the issuer expects to use the proceeds of the offering, including compensation and expenses related to the offering; (6) the minimum target offering amount the issuer is seeking to raise through the offering and the deadline to raise the minimum target offering amount; (7) the terms and conditions of the securities being offered, the total amount of securities that are outstanding before the offering, and the total amount of securities being offered or sold in reliance on the exemption in AS 45.55.175; and (8) a description of any litigation or legal proceedings within the past five years, if any, involving the issuer or any persons associated with the issuer.” Memorandum from Scott Meriwether, Office of the Lieutenant Governor, to Micaela Fowler, Dep’t of Commerce, Cmty. & Econ. Dev., 6-7 (Oct. 28, 2016), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=105544>.

148. ALASKA STAT. § 45.55.175(11).

149. *Id.* § 45.55.175(8). The statute says that notice must be made to “the administrator.” *Id.* The “administrator” is defined as “the commissioner of commerce, community, and economic development or a designee of the commissioner.” *Id.* § 45.55.990(1).

150. *Id.* § 45.55.175(18)(e).

IV. REGULATION CROWDFUNDING VS. AICE

When an Alaskan wishes to use crowdfunding to raise capital for her company, she must weigh the pros and cons of AICE and Regulation Crowdfunding. Given the current state of the laws, as explained in detail below, each method has certain advantages that make it appealing depending on the nature of the business, the size of the company, and the amount of capital sought.

A. Pros and Cons of Intrastate Crowdfunding

While AICE's intrastate nature may appear to be its greatest handicap, it may not actually be all that limiting. The majority of companies likely to use crowdfunding are small- to medium-sized businesses without interstate clients. The types of businesses that have used crowdfunding so far are mostly retail in nature and would likely raise money locally in any event.¹⁵¹ These include breweries, grocery stores, nightclubs, electronics stores, hair salons, dog groomers, sushi restaurants, ice cream makers, baseball bat makers, senior care facilities and others.¹⁵²

Most importantly, intrastate crowdfunding offerings are relatively inexpensive because the rules are reasonably straightforward and they do not require the same level of disclosure as Regulation Crowdfunding.¹⁵³ Since the rules are relatively easy to understand, they are easier to follow, which decreases entry barriers and accidental violations.

An additional advantage of AICE is that while a Regulation Crowdfunding accredited investor can contribute a maximum of \$100,000, accredited investors can invest as much as they wish across AICE crowdfunding campaigns.¹⁵⁴ However, an AICE unaccredited investor can invest a maximum of \$10,000 per crowdfunding campaign, which can make raising large amounts of capital difficult.¹⁵⁵

151. ANYA COVERMAN, TYPES OF BUSINESSES USING INTRASTATE CROWDFUNDING, INTRASTATE EQUITY CROWDFUNDING 6 (Nov. 19, 2015), <https://www.sec.gov/info/smallbus/sbforum119015-coverman-presentation.pdf>.

152. *Id.*

153. Michael Vignone, *Inside Equity-Based Crowdfunding: Online Financing Alternatives for Small Businesses*, 91 CHI.-KENT L. REV. 803, 813 (2016).

154. See Michael S. Piowar, *Dissenting Statement at Open Meeting on Crowdfunding and Small Business Capital Formation*, U.S. SEC. AND EXCH. COMM'N (Oct. 30, 2015), <https://www.sec.gov/news/statement/piowar-regulation-crowdfunding-147-504.html> (“[E]ven if you are Warren Buffet or Bill Gates, you are limited to investing no more than \$100,000 during any 12-month period in all crowdfunding investments.”)

155. ALASKA STAT. § 45.55.175(2)-(3) (2016).

B. Pros and Cons of Regulation Crowdfunding

Regulation Crowdfunding allows businesses to solicit both accredited and unaccredited investors, without geographical restrictions, and relatively inexpensively compared to other offerings accessing the same investors.¹⁵⁶ Part of this ease is due to much of the burden being put on the funding portal rather than the issuer. As a result, funding portals may take as much as fifteen percent of the capital raised.¹⁵⁷

Regulation Crowdfunding's regulatory burden is still high when compared to AICE. For example, a Regulation Crowdfunding offering of more than \$500,000 requires audited financials, which can be prohibitively expensive for many small businesses.¹⁵⁸ The SEC estimates these costs can be as high as four percent of the capital raised.¹⁵⁹

In total, the SEC estimates that for an offering of \$100,000 or less, costs may be as high as \$11,667; for an offering of \$100,000 to \$500,000, costs may be as high \$86,333; and for an offering of more than \$500,000, costs may be as high as \$119,583.¹⁶⁰ These high costs were one of the reasons SEC Commissioner Michael Piowar dissented from the rules, calling them "a complex web of provisions and requirements for compliance" and fearing that "[s]uch burdens will spook many small businesses from pursuing crowdfunding as a viable path to raising capital."¹⁶¹ Overall, the disclosures required under Regulation Crowdfunding are more extensive than intrastate crowdfunding, which contains less burdensome and expensive requirements.

156. Vignone, *supra* note 153, at 826. The only other way to reach this type of market would be to conduct a Regulation A+ offering (also known as a mini-IPO), which has higher regulatory burdens and is more expensive. *Id.* at 827.

157. The SEC estimates for intermediary fees as a percentage of offering proceeds are as follows: 5% to 15% for offerings of \$100,000 or less, 5% to 10% for offerings between \$100,000 and \$500,000, and 5% to 7.5% for offerings above \$500,000. Regulation Crowdfunding, Securities Act Release No. 33-9974, 80 Fed. Reg. 71,387 (May 16, 2016). For reference, a Regulation D offering has an intermediary fee of approximately 6.5% on average. *Id.*

158. The SEC estimates that the cost of having an accounting review of financial statements generally ranges from \$1,500 to \$10,000, and an audit generally ranges from \$2,500 to \$30,000. *Id.* at 71,499.

159. The SEC estimates that an average compliance cost of \$2500 for an offering of \$100,000, between \$2500 and \$5000 for an offering between \$100,000 and \$500,000, and between \$6000 and \$20,000 for an offering of more than \$500,000. *Id.* at 71,497.

160. *See id.* at 71,500 (including a table of costs).

161. Piowar, *supra* note 154.

V. HOW AICE CAN BE IMPROVED

There are ways AICE can be modified to better facilitate the flow of capital while still protecting investors. This section provides a series of proposals Alaska might adopt, each with different advantages and disadvantages.

A. Modification of AICE to Comply with Rule 147A Rather Than Rule 147

The easiest way to facilitate intrastate crowdfunding is to modify AICE to comply with Rule 147A. One avenue to accomplish this is to pass a new intrastate exemption that uses Rule 147A rather than Rule 147, or through a regulation that interprets the existing AICE to include Rule 147A. House Bill 170 passed the House in April, 2017.¹⁶² Although, the bill continues to tie AICE to Rule 147,¹⁶³ Alaska could look to Illinois as an example as it proceeds. Like Alaska, Illinois passed its intrastate exemption prior to the SEC introducing Rule 147A. In Illinois, the legislature is currently considering a bill that would amend its intrastate exemption to comply with Rule 147A rather than Rule 147.¹⁶⁴ If Alaska were to follow Illinois' lead, it would remove the restriction on offers made to out-of-state residents and allow the internet to be properly utilized to advertise and solicit potential investors.

B. Increase Offering Maximums

Alaska's \$1 million cap on the total amount of capital that can be raised is lower than a number of other states.¹⁶⁵ Although it might make sense to raise the cap, doing so would likely only affect a small number of issuers in Alaska. The types of businesses utilizing crowdfunding thus far are typically small enough in nature¹⁶⁶ so that offering more than \$1 million in equity would not be an option. Since the purpose of intrastate crowdfunding for many issuers is to fit into the gap created by a scarcity of bank loans and to help small businesses without enough collateral to obtain a bank loan, raising the limit above \$1 million likely would not

162. ALASKA H. JOURNAL, 30th Leg., 1st Reg. Sess. 1152-58 (Apr. 17, 2017)

163. *Id.*

164. H.B. 3791, 100th Gen. Assemb. Reg. Sess. (Ill. 2017).

165. For example, Arizona has an aggregate annual sales limit of \$2.5 million, ARIZ. REV. STAT. § 44-1844 (2015); Georgia has an aggregate annual sales limit of \$5 million, GA. COMP. R. & REGS. 590-4-2.08(1)(c) (2012); and Idaho has an aggregate annual sales limit of \$2 million, IDAHO CODE § 30-14 (2013).

166. See *supra* notes 151-54 and accompanying text.

affect crowdfunding's effectiveness. Instead, raising the cap would allow companies with a greater need for capital to utilize intrastate crowdfunding and avoid the high costs of Regulation Crowdfunding.

C. Require the Use of Funding Portals

AICE currently allows, but does not require, the use of a funding portal to sell intrastate securities. A possible solution that utilizes the internet, but still complies with Rule 147, is to require the use of a funding portal whereby potential investors must disclose their residency and can only view investment opportunities in their home state.¹⁶⁷ However, using funding portals, particularly in Alaska, may be more costly than beneficial. For example, these funding portals tend to focus on Regulation Crowdfunding rather than intrastate crowdfunding, so obtaining their cooperation may be problematic. In addition, the funding portals still cannot use general advertising or solicitation to out-of-state residents.

Similarly, funding portals face stiff compliance regulations. Alaska has created guidelines for intrastate funding portals, including that the funding portal must have its principal place of business in, be incorporated in, and have an active business license in Alaska.¹⁶⁸ The funding portal is responsible for providing a disclaimer explaining that the securities are only available to Alaska residents and requiring an affirmative representation that the visitor to the website is an Alaska resident.¹⁶⁹ The funding portal must file a notice form with the Department of Commerce, Community, and Economic Development, update its website, and file any material changes.¹⁷⁰ Funding portals are prohibited from soliciting, selling, or effecting transactions unless the portal is a registered broker-dealer with the state of Alaska.¹⁷¹ In addition, funding portals may not offer investment advice or compensate employees for the solicitation of securities.¹⁷² A funding portal must renew its notice each year and is subject to reasonable periodic, special, or other examinations by the Department of Commerce, Community, and Economic Development.¹⁷³

167. TRUCROWD, *About Us*, <https://us.trucrowd.com/about-truCrowd-and-Equity-Crowdfunding> (last visited Sept. 18, 2017).

168. ALASKA ADMIN. CODE tit. 3, § 08.880(a)(1) (2016).

169. *Id.* § 08.880(a)(2)-(3).

170. *Id.* § 08.880(a)(5)-(6).

171. *Id.* § 08.880(b)(1).

172. *Id.* § 08.880(b)(2)-(3).

173. *Id.* § 08.880(c)-(d).

Requiring the use of a funding portal represents a more conservative approach to crowdfunding that may be impractical for intrastate crowdfunding in a state like Alaska. Texas, for instance, requires all sales to be made through funding portals and makes the portal responsible for conducting background and regulatory checks on the issuer and its officers and directors.¹⁷⁴ In Texas, the funding portal must deny its services to an issuer if the portal has a reasonable basis to believe “[t]he issuer has engaged in, is engaging in, or the offering involves any act, practice, or course of business that will, directly or indirectly, operate as a fraud or deceit upon any person.”¹⁷⁵ The funding portal also must reject the issuer if it cannot adequately evaluate the risk of the offering.¹⁷⁶ If a funding portal engages in activities beyond the scope of its intrastate crowdfunding registration, it can face criminal, civil, and administrative liability.¹⁷⁷ In addition, a funding portal involved in an unregistered offering may face the same liability.¹⁷⁸

This level of regulation on funding portals may be more practical in Texas, which has a population more than thirty-five times greater than that of Alaska.¹⁷⁹ There is a stronger incentive for funding portals to comply with Texas’s regulations because they will likely see more activity and be able to better diversify their risk. Requiring the use of funding portals may not be viable for Alaska, even though it represents an approach that puts investor safety first.

CONCLUSION

Crowdfunding can unlock capital for businesses, create new opportunities for investors, and improve local communities in Alaska. Despite these benefits, it should be met with caution from Alaska’s state regulators and the SEC. These programs need to be closely monitored to ensure that unsophisticated investors are properly protected. The risks of fraud, poor decision making, and the lack of protection for investors must be balanced with the potential benefits to Alaskan businesses and communities.

174. 7 TEX. ADMIN. CODE § 115.19(d) (2015).

175. *Id.*

176. *Id.*

177. *Id.* § 139.25.

178. *Id.*

179. The U.S. census from July 2016 estimated that populations of Texas and Alaska are 27,862,596 and 741,894, respectively. *QuickFacts*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/table/PST045216/02,48> (last visited Sept. 29, 2017).