University of Washington School of Law
UW Law Digital Commons

Articles Faculty Publications

2016

Regulating Unicorns: Disclosure and the New Private Economy

Jennifer S. Fan
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/faculty-articles

Part of the Business Organizations Law Commons

Recommended Citation
Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. Rev. 583 (2016), https://digitalcommons.law.uw.edu/faculty-articles/57

This Article is brought to you for free and open access by the Faculty Publications at UW Law Digital Commons. It has been accepted for inclusion in Articles by an authorized administrator of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

Boston College Law Review

Volume 57 | Issue 2 Article 5

3-31-2016

Regulating Unicorns: Disclosure and the New Private Economy

Jennifer S. Fan
University of Washington School of Law, jsfan@uw.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/bclr

Part of the Administrative Law Commons, Banking and Finance Law Commons, and the Secured Transactions Commons

Recommended Citation
Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C.L. Rev. 583 (2016), http://lawdigitalcommons.bc.edu/bclr/vol57/iss2/5

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

REGULATING UNICORNS: DISCLOSURE AND THE NEW PRIVATE ECONOMY

JENNIFER S. FAN*

Abstract: "Unicorns" are private companies with valuations of a billion dollars or more. As their name indicates, unicorns were originally so rare as to be almost mythical. But Uber and other technology companies have ushered in a new era: we now have a blessing of unicorns, each one of which has the potential to transform financial and cultural norms. Yet from a legal perspective, these behemoths are regulated just like their much smaller, non-mythical counterparts. Unicorns' dizzying valuations have not been matched with any expansion or recalibration of regulation. As a result, vital information about these companies remains secret, perhaps for years, until an IPO moves a unicorn into the public realm. This Article argues that this one-size-fits-all regulatory framework is insufficient. Though nominally private, the size and influence of unicorns renders their effect in the marketplace much more like that of a publicly held corporation. The fate of a unicorn affects stockholders, employees, and regional or even national economies. Regulation of unicorns should recognize that outsized power. As a result, this Article proposes rethinking the current regulatory regime in the context of unicorns. This Article is the first to critique the unicorn phenomenon within the securities regulation framework. It argues for enhanced disclosure requirements that will alleviate the risks of unicorns without restraining their innovation. It concludes by suggesting what types of disclosures are necessary, how such information should be disclosed, and when it should be disclosed.

INTRODUCTION

As recently as 2010,[1] a private company would not be valued at $1 billion—such a valuation was considered in the realm of fantasy.[2] But now, ven-

© 2016, Jennifer S. Fan. All rights reserved.

* Jennifer S. Fan is Faculty Director of the Entrepreneurial Law Clinic at the University of Washington School of Law. The author wishes to thank Anita Krug, Tom Lin, Diane Mulcahy, Sean O'Connor, Liz Porter, and Craig Sherman for their insightful comments during the drafting process. Thanks also to participants in the 2016 Law & Entrepreneurship Association Annual Retreat. Julie Liu, Cheryl Nyberg, Alena Wolotira, and Zoe Wong provided excellent scholarship support.

[1] Aileen Lee, *Welcome to the Unicorn Club: Learning from Billion-Dollar Startups*, TECHCRUNCH (Nov. 2, 2013), [https://perma.cc/9MZL-6MZG] (indicating that "unicorns" were relatively rare as of late 2013); *cf. The Unicorn List: Current Private Companies Valued at $1B and Above*, CB INSIGHTS (updated daily), https://www.cbinsights.com/research-unicorn-companies [https://perma.cc/3W8M-82HH] [hereinafter *Unicorn List*].

ture capital deals with dizzying valuations[3] and financings of $100 million or more are featured prominently in the media.[4] In fact, venture capital-backed technology companies have had more than five times the number of $500 million or more rounds from 2014 to June 2015 than the prior four years combined.[5]

But what legal implications do these valuations have? What role have different investors played in creating unicorns (private companies valued at over $1 billion) or decacorns (private companies valued at over $10 billion)? How have the terms of venture capital deals changed in light of these lofty valuations? Have investors in unicorns been able to obtain special downside protection? Why are unicorns staying private longer? Should private companies with these high valuations be subject to different disclosure requirements? How does the advent of unicorns affect stockholders, employees, and local economies? Although business leaders have had robust discussions about these top-

---

[2] Powerhouses like Amazon and Google were never worth $1 billion when they were private companies. *See* Erin Griffith & Dan Primack, *The Age of Unicorns*, FORTUNE (Jan. 22, 2015, 7:00 AM), http://fortune.com/2015/01/22/the-age-of-unicorns/ [https://perma.cc/DM9N-RD4V].

[3] Valuations are the amounts that venture capitalists, or VCs, determine that companies are worth. There is no exact science to this, but "VCs typically take into account many factors when deciding how to value a potential investment—some are quantifiable whereas others are completely qualitative." BRAD FELD & JASON MENDELSON, VENTURE DEALS: BE SMARTER THAN YOUR LAWYER AND VENTURE CAPITALIST 39 (2011). These factors may include the stage of the company, competition with other funding sources, experience of the entrepreneur and leadership team, the VC's natural entry point, financials, and the current economic climate. *See id.* at 39–40.

[4] Evelyn M. Rusli, *Startup Values Set Records*, WALL STREET J. (Dec. 29, 2014, 7:50 PM), http://www.wsj.com/articles/tech-startup-values-reach-the-sky-1419900636 [https://perma.cc/FJE6-BND3]. In fact, financings in the technology sector commonly raise $100 million or more. *The Insanely Common $100 Million+ Financing Round*, CB INSIGHTS (May 21, 2015), https://www.cbinsights.com/blog/mega-financing-round/ [https://perma.cc/62NU-BKP8]. Some private companies have raised over $1 billion in one financing. *See Forget Billion-Dollar Valuations: These 7 Companies Raised $1B or More in a Single Round*, CB INSIGHTS (Oct 1, 2015), https://www.cbinsights.com/blog/billion-dollar-rounds/ [https://perma.cc/EC4L-5FZP] (identifying Didi Kuaidi, SoFi, Airbnb, Coupang, Uber, SpaceX, Xiaomi, Flipkart, Facebook, and JD.com as companies that raised a billion dollars or more in a single round, and noting that Uber had raised four $1 billion rounds). The 2015 year-end review by the National Venture Capital Association ("NVCA") aptly captures the venture capital deal space:

> Investment levels in 2014 were remarkable in that they were the highest amount since 2000, and the third-highest ever at $49.3 billion. This compares with $30.1 billion in 2013, which was in line with the prior several years. However, the headlines and the dramatic increase were driven by a dozen or so companies receiving very large venture rounds in 2014. If you remove those deals from the totals, the numbers look more traditional.

NAT'L VENTURE CAPITAL ASS'N, 2015 NATIONAL VENTURE CAPITAL ASSOCIATION YEARBOOK 9 (2015) [hereinafter NVCA YEARBOOK].

[5] *See The Half-Billion Dollar Round Explosion*, CB INSIGHTS (June 8, 2015), https://www.cbinsights.com/blog/half-billion-dollar-explosion/?utm_source=CB+Insights+Newsletter&utm_campaign=84673cad32-500MRound06_09_2015&utm_medium=email&utm_term=0_9dc0513989-84673cad32-86759461 [https://perma.cc/C2KU-M5N4].

ics, legal scholars have remained relatively silent about the implications of unicorns in the transactional law context. In particular, scholars have not looked at whether unicorns should have disclosure obligations similar to public companies and what the ramifications are for employees and minority stockholders when companies stay private longer.[6]

This Article argues that once a private company reaches unicorn status, it should be subject to some of the same reporting obligations as public companies to provide greater transparency and protect minority stockholders (i.e., employees). Although venture capital investors expect that the companies they invest in provide certain financial information to them (which is then memorialized in an investors' rights agreement),[7] other stockholders and interested parties typically do not have rights to such information. In particular, minority investors and other stockholders, such as employees or former employees who have exercised stock options, have limited or no rights to obtain financial information and other information relevant to making an investment decision. Although the Jumpstart Our Business Startups Act of 2012[8] ("JOBS Act") was intended to democratize the equity investment process, it did not adequately consider the implications of large private companies staying private longer by raising significant sums of money without the scrutiny of the public markets and their related disclosure, audit, and legal obligations. Many scholars have offered various viewpoints about the value and impact of disclosure generally,[9] but no one has analyzed whether this one-size-fits-all regulatory framework for private companies is sufficient for unicorns. This Article is the first to offer a proposal for how to regulate private companies when they enter the unicorn category and their valuations and impact equal or surpass that of public companies.

This Article proceeds in four parts. Part I explains what a unicorn is and what role it plays in the current innovation ecosystem.[10] It then provides an overview of a venture capital deal, the importance of Regulation D, and the legal documents that are used to memorialize it.[11] Part II argues that although unicorns are technically private companies, their size and influence render their effect in the marketplace much more like that of a publicly held corporation.[12] The fate of a unicorn affects stockholders, employees, and regional or even national economies. Therefore, regulation of unicorns should recognize

---

[6] To be clear, scholars have suggested tiered systems of disclosure, but in contexts other than unicorns. *See infra* notes 98–167 and accompanying text (discussing disclosure).

[7] *See infra* notes 87–91 (providing more information on investors' rights agreements).

[8] Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106, 126 Stat. 306 (codified as amended in scattered sections of 15 U.S.C. (2012)).

[9] *See infra* notes 98–167 and accompanying text (discussing disclosure).

[10] *See infra* notes 19–97 and accompanying text.

[11] *See infra* notes 45–97 and accompanying text.

[12] *See infra* notes 98–167 and accompanying text.

that outsized power and create new tools for the care and feeding of unicorns to alleviate their risks without restraining their innovation. Part III analyzes the Form D[13] filings and Restated Certificates of Incorporation of five prominent unicorns—Airbnb, Inc. ("Airbnb"), Dropbox, Inc. ("Dropbox"), Pinterest, Inc. ("Pinterest"), Snapchat, Inc. ("Snapchat"), and Uber Technologies Inc. ("Uber")—to demonstrate the failings of the current regulatory regime.[14] This Part delves into what type of information is available, where more information needs to be disclosed, and what the implications may be for minority stockholders and employees based on publicly available information.[15] Finally, Part IV looks at the new trend of late mega-fundings, also known as "private IPOs" (initial public offerings)[16] for unicorns, which allows these companies to continue to operate with little transparency.[17] This Article concludes that private IPOs only exacerbate the problems with transparency and equity that different stockholders of unicorns currently face, and further illustrate the need for enhanced disclosure.[18]

I. The Rise of the Unicorns and the Anatomy of a Venture Capital Deal

A. The Rise of the Unicorns: The New Normal

Aileen Lee, founder of Cowboy Ventures, famously coined the phrase "unicorns," describing companies valued at a billion dollars or more, in her seminal article in *TechCrunch* in 2013.[19] At that time, thirty-nine companies were identified in the unicorn category, which translated into roughly "0.7 per-

---

[13] *Form D, Notice of Exempt Offering of Securities*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/forms/formd.pdf [https://perma.cc/55JN-CCWW]. If an issuer of securities relies on an exemption from registration provided in Regulation D, it must file a Form D with the Securities and Exchange Commission ("SEC"), and with any state that requires it, within fifteen calendar days after the "date of first sale" of securities in an offering containing the information requested. *Id.*; *see also infra* notes 66–67 and accompanying text (discussing Form D requirements).

[14] *See infra* notes 168–321 and accompanying text.

[15] *See infra* notes 168–321 and accompanying text.

[16] A so-called "private IPO" is not an initial public offering at all. Because the median IPO raises $101 million, private companies that have financings that raise more than $100 million have become known as private IPOs. *Data: There Are Now Over 9x More Private IPOs Than Actual Tech IPOs*, CB INSIGHTS (Apr. 19, 2015), https://www.cbinsights.com/blog/private-ipo-tech/ [https://perma.cc/N2YY-XWCJ].

[17] *See infra* notes 322–345 and accompanying text.

[18] *See infra* notes 346–348 and accompanying text.

[19] Ms. Lee's definition of unicorn included venture-backed "U.S.-based software companies . . . valued at over $1 billion by public or private market investors" founded between 2003 and 2013. Lee, *supra* note 1. The definition of unicorn now applies to private companies with valuations of $1 billion or more. *Id.*

cent of venture-backed consumer and enterprise software startups."[20] This would equate to one in 1538 companies of that kind becoming unicorns.[21] Ms. Lee noted that in the previous decade there were four new unicorns per year on average, with Facebook being a "super-unicorn."[22] Further, liquidity events[23] for unicorns took place, on average, more than seven years from the founding of the company.[24] Recently, it was reported that a startup has a 1.28% chance of achieving unicorn status.[25] "Interestingly, 15 companies [that] raised their first round of financing in 2013 or 2014 have already jumped into the billion dollar club highlighting the increasing pace at which unicorns are anointed."[26]

At first glance, the moniker "unicorn" seems appropriate for the elite companies achieving valuations of a billion dollars or more. Each of the members of this unicorn club represents disruptive innovation that has the potential to change the face of how we use everyday services, how we communicate with others, and how we interact with technology in every facet of our lives. Upon closer inspection, however, these so-called unicorns are not a rarity. In fact, the number of unicorns has continued to climb at what some may say is an alarming speed, and now blessings[27] of unicorns abound. Interestingly, the legal underpinnings for the venture capital deals in the unicorn realm have remained largely unchanged despite these dizzying valuations.

Unicorns are now ubiquitous.[28] Indeed, some entrepreneurs have one objective when raising money—reaching a billion-dollar valuation.[29] As one

---

[20] *Id. But cf.* Fred Wilson, *The Billion Dollar Valuation Club*, AVC (Nov. 3, 2013), http://avc.com/2013/11/the-billion-dollar-valuation-club/ [https://perma.cc/PV75-5RVZ] (disputing the actual numbers that Ms. Lee used).

[21] As Ms. Lee observed, "The tech news may make it seem like there's a winner being born every minute—but the reality is, *the odds are somewhere between catching a foul ball at an MLB game and being struck by lightning in one's lifetime. Or, more than 100x harder than getting into Stanford*." Lee, *supra* note 1.

[22] *See id.* (defining a super-unicorn as a private or public company worth more than $100 billion). Ms. Lee claims that one to three such super-unicorns are born each decade. *Id.* Past unicorns were Google and Amazon in the 1990s, Cisco in the 1980s, Apple, Oracle, and Microsoft in the 1970s, and Intel in the 1960s. *Id.*

[23] Liquidity events are either initial public offerings or a merger or acquisition in the venture capital context. In the deal documents for a venture capital financing, the definition of what constitutes a liquidity event is negotiated.

[24] Lee, *supra* note 1.

[25] *Your Startup Has a 1.28% Chance of Becoming a Unicorn*, CB INSIGHTS (May 25, 2015), https://www.cbinsights.com/blog/unicorn-conversion-rate/ [https://perma.cc/KXD4-TBDP].

[26] *Id.*

[27] A group of unicorns is called a blessing. *See, e.g.*, Stephen Gandel, *Here's Why the Tech Unicorns' Dreams Won't Come True*, FORTUNE (Oct. 16, 2015, 6:08 AM), http://fortune.com/2015/10/16/unicorns-ipo-market/ [https://perma.cc/EB8R-4EQZ]; Alan Murray, *A Blessing of Unicorns*, FORTUNE (Jan. 22, 2015, 7:15 AM), http://fortune.com/2015/01/22/a-blessing-of-unicorns/ [https://perma.cc/78WL-RHRU].

[28] *The Increasingly Crowded Unicorn Club in One Infographic*, CB INSIGHTS (Oct. 26, 2015), https://www.cbinsights.com/blog/increasingly-crowded-unicorn-club/ [https://perma.cc/QUN8-GYBY].

startup founder said of the billion-dollar valuation, "It does make a difference psychologically. One billion is better than $800 million because it's the psychological threshold for potential customers, employees, and the press."[30] Venture capital database *CB Insights* maintains a real-time list of these unicorns.[31] The number of unicorns rose especially quickly in 2015;[32] in the second quarter of 2015, a new unicorn emerged every three business days.[33] As of March 16, 2016, the top ten unicorns were collectively valued at a staggering $234.5 billion.[34] To put this in perspective, this valuation equals nearly forty-three percent of the total valuation of the 155 private companies identified as unicorns.[35] Furthermore, the valuations of some of these unicorns surpass those of companies that recently went public, such as Box—provider of a secure content platform for businesses—and Twitter—an online social networking site that allows users to publicize short messages. Box and Twitter had market valuations of $1.48 billion[36] and $11.41 billion,[37] respectively, on March 16, 2016.

These mythical unicorns are now so common that a new type of unicorn—the "decacorn"—has come into general parlance; these are companies with a valuation of $10 billion or more.[38] Private companies in the decacorn category, like Airbnb, Dropbox, Pinterest, Snapchat, and Uber, are household

---

[29] *See* Griffith & Primack, *supra* note 2. For example, Stewart Butterfield, a startup founder, believed his startup, Slack, a business software company based in San Francisco, needed "the cachet of the billion-dollar mark." *Id.*

[30] *Id.*

[31] Not everyone is in agreement on the exact number of unicorns. The list by *CB Insights* is the most current. As of March 16, 2016, there are 155 unicorns globally. *See Unicorn List*, *supra* note 1. Notably, *The Wall Street Journal* and Dow Jones VentureSource are also keeping a list, titled "The Billion Dollar Startup Club," which lists 146 unicorns globally. *See* Scott Austin et al., *The Billion Dollar Startup Club*, WALL STREET J. (last updated Mar. 2016), http://graphics.wsj.com/billion-dollar-club/ [https://perma.cc/B5UG-ZRXW].

[32] *But cf.* Amit Karp, *Betting Against Unicorns*, VENTURING STARTUP NATION (June 1, 2015), http://amitkarp.com/2015/06/01/betting-against-unicorns/?utm_source=CB+Insights+Newsletter&utm_campaign=f9ceb3980d-Insuranceinvesting06_02_2015&utm_medium=email&utm_term=0_9dc0513989-f9ceb3980d-86759461 [https://perma.cc/WJG3-B3LX] (explaining why the high valuations for Snapchat, Dropbox, Spotify, Square, and WeWork are not justified).

[33] E-mail Newsletter from Anand Sanwal, CEO & Co-Founder, *CB Insights*, to *CB Insights* blog subscribers (July 23, 2015, 6:57 AM) (on file with author) ("Unicorns, once considered mythical and rare, are, in reality, no longer all that special. In Q2 2015, there was a new unicorn added to the club every 3 business days.").

[34] *Unicorn List*, *supra* note 1.

[35] *See id.*

[36] *Box, Inc. Key Statistics*, YAHOO! FINANCE (updated daily), http://finance.yahoo.com/q/ks?s=BOX+Key+Statistics [https://perma.cc/DD4V-B6HJ].

[37] *Twitter, Inc. Key Statistics*, YAHOO! FINANCE (updated daily), http://finance.yahoo.com/q/ks?s=twtr+Key+Statistics [https://perma.cc/THB7-9CUZ].

[38] Jillian D'Onfro, *There Are So Many $10 Billion Startups That There's a New Name for Them: 'Decacorns,'* BUS. INSIDER (Mar. 18, 2015, 9:42 AM), http://www.businessinsider.com/decacorn-is-the-new-unicorn-2015-3 [https://perma.cc/57G3-YK49].

names.[39] Against the backdrop of this investing frenzy, many industry experts predict that the current economic bubble will burst.[40] Further, some state that the unicorns are overvalued.[41] One prominent venture capitalist, Bill Gurley, a partner at Benchmark, observed that "[S]ilicon Valley as a whole, or . . . the venture-capital community or startup community, is taking on an excessive amount of risk right now—unprecedented since '99" (the last tech bubble).[42] As it stands, only a few venture capital firms have had a high success rate with unicorns.[43]

Ironically, for all the hype around unicorns, investors who wish to participate in financings for such unicorns in the later stages of a company tend to get lower returns:

> In fact, only 27% of the investments made by VCs in [u]nicorns have been "fund makers"—an investment that pays back the entire value of its fund, a kind of measuring stick in the VC world. In other words, most VCs investing in [u]nicorns are not coming away with outsized returns.[44]

B. Anatomy of a Venture Capital Deal

Where do unicorns fit in the funding universe? In order to understand unicorns, we must look to the anatomy of a venture capital deal and key terms.

---

[39] *See id.*

[40] *See* Wilson, *supra* note 20. One such expert, Drew Nordlicht (Partner and Managing Director of HighTower Advisors) states:

> Private companies are staying private [longer], so the institutional community is simply going where they can get access to larger growing companies in need of capital . . . . The worry here is that these funds have an investor base that can redeem on any given day, causing a liquidity drain and forced selling inside the portfolio.

Jeremy Quittner, *Why Your Business Has a Unicorn Problem*, INC. (May 13, 2015), http://www.inc.com/jeremy-quittner/more-insitutional-investors-and-more-unicorns-and-the-tech-bubble-question.html [https://perma.cc/8HN9-7AVY] (first alteration in original).

[41] *Cf.* Lizette Chapman, *'Unicorn' Startups Say High Valuations Justified*, *Citing Big Growth Ahead*, WALL STREET J.: VENTURE CAP. DISPATCH (May 7, 2015, 4:25 PM), http://blogs.wsj.com/venturecapital/2015/05/07/unicorn-startups-say-high-valuations-justified-citing-big-growth-ahead/ [https://perma.cc/HRL2-K7VY].

[42] Yoree Koh & Rolfe Winkler, *Venture Capitalist Sounds Alarm on Startup Investing*, WALL STREET J. (Sept. 15, 2014, 3:17 AM), http://www.wsj.com/articles/venture-capitalist-sounds-alarm-on-silicon-valley-risk-1410740054 [https://perma.cc/GTS9-M5NE].

[43] *See Which Venture Capital Firms Are Best at Spotting Unicorns Early?*, CB INSIGHTS (Mar. 2, 2015), https://www.cbinsights.com/blog/billion-dollar-startup-venture-capital/ [https://perma.cc/39RS-L7GK]; *see also The Exceedingly Rare Unicorn VC*, CB INSIGHTS (Nov. 21, 2013), https://www.cbinsights.com/blog/billion-dollar-exit-venture-capital/ [https://perma.cc/2FA4-Q4P3] (charting aggregate data about the number of unicorns in venture capital firms' portfolios).

[44] Chris Woodford, *Investing: Unicorns Are Pretty, but Dragons Are More Desirable*, WORKING CAP. REV. (Mar. 13, 2015), http://workingcapitalreview.com/2015/03/unicorns-are-pretty-but-dragons-are-more-desirable/ [https://perma.cc/NEC5-HNY8].

Before embarking on that discussion, however, it is important to understand what venture capital is and what it has the potential to do.[45] Venture capital is the term commonly used to describe investments in highly speculative businesses, often early-stage technology companies.[46] Such investments are illiquid and venture capitalists may not get liquidity for their investment for years after the investment has been made, typically when the company goes public or is acquired.[47] At this point, the venture capital firms and others who have invested in the company get liquidity if the company goes public or is acquired.[48] Venture capital brings not only money to a potentially disruptive, innovative company, but the expertise of the venture capital partners who typically take a board seat on the company as well.[49]

---

[45] According to the NVCA,

> Venture capital has enabled the United States to support its entrepreneurial talent and appetite by turning ideas and basic science into products and services that are the envy of the world. Venture capital funds build companies from the simplest form—perhaps just the entrepreneur and an idea expressed as a business plan—to freestanding, mature organizations.

NVCA YEARBOOK, *supra* note 4, at 7.

[46] *See, e.g.*, John Greathouse, *Pssst . . . Here's How to Become a Venture Capitalist*, FORBES (Sept. 18, 2012, 10:39 AM), https://web.archive.org/web/20151220230430/http://www.forbes.com/sites/johngreathouse/2012/09/18/pssst-heres-how-to-become-a-venture-capitalist/.

[47] NVCA YEARBOOK, *supra* note 4, at 7 ("This money funds new ideas that could not be financed with traditional bank financing, that threaten established products and services in a corporation, and that typically require five to eight years to be launched."). The 2015 NVCA Yearbook describes venture capital as

> quite unique as an institutional investor asset class. When an investment is made in a company, it is an equity investment in a company whose stock is essentially illiquid and worthless until a company matures five to eight years down the road. Follow-on investment provides additional funding as the company grows. These "rounds," typically occurring every year or two, are also equity investment, with the shares allocated among the investors and management team based on an agreed "valuation."

Id.

[48] *Id.* The 2015 NVCA Yearbook further notes:

> [V]enture funds generally exit their positions in [successful mature portfolio] companies by taking them public through an initial public offering (IPO) or by selling them to presumably larger organizations (acquisition, trade sale, or increasingly a financial buyer). This then lets the venture fund distribute the proceeds to investors, raise a new fund for future investment, and invest in the next generation of companies.

Id. at 10. Statistically speaking, "[a]lthough the investor has high hopes for any company getting funded, only one in six ever goes public and one in three is acquired." *Id.* at 7.

[49] Indeed, the 2015 NVCA Yearbook notes that:

> [D]aily interaction with the management team is common. This limits the number of startups in which any one fund can invest. Few entrepreneurs approaching venture capital firms for money are aware that they essentially are asking for 1/6 of a person! Yet that active engagement is critical to the success of the fledgling company.

Id.

New types of documents have been generated in the venture capital deal space, such as Series Seed financing documents[50] and Series AA financing documents[51] by Y Combinator, which provides seed money for startups in the amount of $120,000 in exchange for seven percent equity.[52] This Article does not delve into the intricacies of documents in the seed stage of a venture capital financing. Instead, it provides a brief overview of Regulation D and the five main documents that provide the framework for the later-stage venture capital deals. This overview will help to frame the discussion and analysis included in the subsequent Parts of this Article.

1. Regulation D

The mission of the SEC "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[53] In the simplest terms, when securities are offered in the United States, they must be registered with the SEC or qualify for one of the exemptions from the registration requirements.[54] In most venture capital financings, the private companies (also known as issuers) issuing securities rely on one of the three safe harbors of Regulation D, an SEC regulation under the Securities Act of 1933.[55]

---

[50] Series Seed is a crowdsourced set of documents released in 2010. Version 3.2, the latest version of the Series Seed documents, includes a Term Sheet, Stock Investment Agreement (which combines what was previously the Stock Purchase Agreement and Investors' Rights Agreement), and Certificate of Incorporation. *Version 3.2*, SERIES SEED (Feb. 25, 2014), http://www.seriesseed.com/posts/2014/02/version-32.html [https://perma.cc/5EDB-6JCL]. These documents are intended for smaller, early stage investments in the $500,000 to $1.5 million range and were "designed to keep the most essential terms for the transaction and postpone the other terms for a later fundraising round where such an investment would be warranted." *About the Series Seed Documents*, SERIES SEED (Feb. 24, 2010), http://www.seriesseed.com/posts/2010/02/about-the-series-seed-documents.html [https://perma.cc/Z9A9-E3WG].

[51] Series AA financing documents are open-source documents available on the Y Combinator website. *Startup Documents*, Y COMBINATOR, https://www.ycombinator.com/documents/#seriesaa [https://perma.cc/R9N4-L6WP]. They include a Series AA Certificate of Incorporation, Series AA Investors' Rights Agreement, Series AA Stock Purchase Agreement, and board and stockholder consents. *Id*. They were developed in 2008 for Y Combinator-funded startups to use when raising money with angels, with the goal of streamlining the early stage equity financing process. *See id.*

[52] In addition to providing funding, Y Combinator also expects the founding team of the startups that it chooses to fund the startups' move to the Bay Area for three months and to attend weekly dinners at Y Combinator that include talks by startup experts in various fields. *About Y Combinator*, Y COMBINATOR, https://www.ycombinator.com/about/ [https://perma.cc/A64H-U9Q3]. It hosts a Demo Day ten weeks into the program, which gives the startups an opportunity to showcase their products and services to a select audience. *Id.*

[53] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml [https://perma.cc/RN94-EQQX].

[54] *See* Use of Regulation D, 17 C.F.R. § 230.500(a) (2015).

[55] *See* CONSTANCE E. BAGLEY & CRAIG DAUCHY, THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW 175 (4th ed. 2012). Note, however, that if an issuer fails to meet the parameters of Regulation D, it may still qualify for an exemption under section 4(a)(2) of the Securities Act of 1933 (provided that

One of the most important elements of Regulation D is the definition of "accredited investor" that is set forth in Rule 501 of Regulation D.[56] Simply put, venture capital funds that meet certain assets tests, wealthy individuals who meet certain threshold requirements, and directors and executive officers of companies are all deemed accredited investors.

The theory behind Regulation D is that accredited investors are financially sophisticated and therefore do not need all the protections of the securities laws.[57] Typically, venture-backed companies rely on Rule 506(b) of Regulation D because it permits sales of securities for more than $5 million.[58] Rule 506(b) allows offerings of any amount to an unlimited number of accredited investors and up to thirty-five sophisticated, unaccredited investors.[59] Rule 506(c) of Regulation D differs because it allows private securities offerings to be made through general solicitations (through the television, newspaper, or social media), but only to accredited investors.[60] Under this new section of Rule 506, which was promulgated under the JOBS Act, issuers must take reasonable steps to verify that purchasers are accredited investors.[61] Companies relying on Rule 506(b) or 506(c) are subject to Rule 10b-5 anti-fraud provisions for any persons making untrue statements, and there are "bad actor" restrictions regarding who can participate in offerings.[62] The other Regulation D safe harbors, set forth in Rules 504 and 505, are not commonly used because they set

---

it meets the conditions set forth therein). *See* 15 U.S.C. § 77d (2012) (exempting certain transactions from registration requirements). Anecdotally, in the author's conversations with well-known lawyers who specialize in venture capital financings, Series A and Series B companies raising money only from venture capitalists are increasingly relying on section 4(a)(2) and are not filing Forms D.

[56] The full definition of "accredited investor" can be found at 17 C.F.R § 230.501(a) (2015).

[57] *See* BAGLEY & DAUCHY, *supra* note 55, at 175. Note, however, that there are many in the securities regulation field, such as SEC Commissioner Luis A. Aguilar, who argue that revisiting the definition for "accredited investor" would be prudent. *See* Public Statement, Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Revisiting the "Accredited Investor" Definition to Better Protect Investors (Dec. 17, 2014), http://www.sec.gov/news/statement/spch121714laa.html [https://perma.cc/C7ZJ-4VXM]. Specifically, "there is nothing in the definition that helps to identify whether these individuals have the financial sophistication and/or investment experience to be able to assess whether any particular investment is appropriate for them." *Id.* Furthermore, because the definition of accredited investor hinges on certain income or accumulated net worth thresholds, it may be under-inclusive because it may not include potential investors who would be viewed as financially sophisticated. *See id.*

[58] 17 C.F.R § 230.506(b) (2015).

[59] *Id.*

[60] 17 C.F.R § 230.506(c); *accord* Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573, 1621 (2013) ("The reality is that with the removal of the general solicitation ban for Rule 506 offerings, this most-used exemption is now available with no mandated disclosure, with no limits on the selling process and without the usual incentives for due diligence found elsewhere in securities selling.").

[61] 17 C.F.R § 230.506(c)(2)(ii).

[62] 17 C.F.R § 230.506(d).

limitations on the dollar amount of the offerings.[63] If a company sells securities under Rules 505 or 506(b) to any purchaser that is not an accredited investor, it must furnish the information specified under Rule 502(b)(2) at a reasonable time prior to the sale.[64] The information required depends on the size of the offering; in the context of unicorns, Rule 502(b)(2)(B)(3) would apply ("Offerings over $7,500,000").[65] Therefore, unaccredited investors could expect to receive, at a minimum, unaudited financial statements with the exception of the balance sheet, which should be audited and dated within 120 days of the start of the offering. Although not required, the company could also choose to provide that same information to accredited investors.

In connection with relying on Regulation D, a Form D must be filed within fifteen calendar days of the date of first sale for each new offering of securities.[66] A Form D requires information related to the issuer's identity, principal place of business and contact information, related persons (executive officers, directors, and promoters), industry group, issuer size (which the issuer can decline to disclose), federal exemption(s) and exclusion(s) claimed, type of filing, duration of offering, type(s) of securities offered, whether it is a business transaction, whether there is a minimum investment, whether there is sales compensation, the offering and sales amount, whether there are unaccredited investors, the total number of investors who already have invested in the offering, sales commissions and finder's fees expenses, and use of proceeds.[67]

---

[63] Rule 504 exempts offerings of up to $1 million within a twelve-month period and imposes no limits on the number of purchasers. 17 C.F.R. § 230.504 (2015). Rule 505 exempts offerings up to $5 million within a twelve-month period and limits the number of unaccredited investors. 17 C.F.R. § 230.505 (2015).

[64] Although companies are not required to furnish such information to accredited investors, there is a note in Rule 502(b)(1) that indicates that it would be advisable in light of the antifraud provisions of the federal securities laws. *See* 17 C.F.R. § 230.502(b)(1) (2015) ("Note: When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.").

[65] *See id.* § 230.502(b)(2). Rule 502(b)(2)(B)(3) reads:

> *Offerings over $7,500,000.* The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

Id. § 230.502(b)(2)(B)(3).

[66] *See Form D*, *supra* note 13, at 5.

[67] *Id.*

2. Term Sheet

The five main documents included in a traditional venture capital deal are the certificate of incorporation, the stock purchase agreement, the investors' rights agreement (which is sometimes referred to as the registration rights agreement), the right of first refusal and co-sale agreement, and the voting agreement.[68] These documents are standard for venture capital deals. Before these five documents are drafted, however, both sides will agree on basic terms, as described in a term sheet,[69] a document that sets forth a roadmap for the terms of the deal. At the most basic level, the term sheet is about money and control. It provides the pre- and post-money valuation[70] of the company, the price per share for the particular series of stock,[71] the capitalization of the company, and the specific terms of the certificate of incorporation. Although the investors' rights agreement and the right of first refusal and co-sale agreement are referenced in the term sheet, the certificate of incorporation, the voting agreement, and the representations and warranties section of the stock purchase agreement (and related disclosures) are usually the documents that take the most amount of time to negotiate.

3. Certificate of Incorporation

The certificate of incorporation is a public document filed with the Secretary of State of the state in which the company is incorporated. It sets forth the rights, preferences, privileges, and restrictions of each class and series of stock.[72] The major provisions in the certificate of incorporation are: capitaliza-

---

[68] Typically, when company counsel has relevant experience, company counsel will draft the deal documents, and investors' counsel will comment. Ancillary documents, such as the management rights letter and company counsel's legal opinion, are not discussed in this Article, although they are featured on the NVCA's website. *See Model Legal Documents*, NAT'L VENTURE CAPITAL ASS'N, http://nvca.org/resources/model-legal-documents/ [https://perma.cc/29VP-LBAE].

[69] *See, e.g.*, NAT'L VENTURE CAPITAL ASS'N, MODEL LEGAL DOCUMENTS, TERM SHEET, http://nvca.org/resources/model-legal-documents/ [https://perma.cc/29VP-LBAE] (follow hyperlink to "Term Sheet").

[70] The pre-money valuation is the amount the venture capitalist determines that the company is worth before the investment. *See* FELD & MENDELSON, *supra* note 3, at 36. It is determined by looking at a number of factors as detailed *supra* note 3. *See also* FELD & MENDELSON, *supra* note 3, at 39–40. The post-money valuation is the sum of the pre-money valuation plus the amount of money the investors intend to put into the company. *See* FELD & MENDELSON, *supra* note 3, at 39–40.

[71] The price per share is calculated by dividing the pre-money valuation by the fully-diluted number of shares. A fully-diluted basis is "a methodology for calculating any per share ratios whereby the denominator is the total number of shares issued by the company on the assumption that all warrants and options are exercised and preferred stock." *See* NVCA YEARBOOK, *supra* note 4, at 99.

[72] *See* NAT'L VENTURE CAPITAL ASS'N, MODEL LEGAL DOCUMENTS, CERTIFICATE OF INCORPORATION, http://nvca.org/resources/model-legal-documents/ [https://perma.cc/29VP-LBAE] (follow hyperlink to "Certificate of Incorporation") [hereinafter MODEL COI].

tion,[73] dividends,[74] liquidation preference,[75] conversion,[76] antidilution protection,[77] redemption,[78] voting,[79] protective provisions,[80] and pay-to-play.[81]

---

[73] Capitalization sets forth the number of shares of preferred stock and common stock. The common stock number should take into account the preferred stock on an as-converted to common basis as well as the stock option pool. *See id.* at 3–4.

[74] Dividends can provide additional time-based guaranteed upside to investors, but typically in financings on the West Coast, dividends are not "cumulative," meaning they are paid only if declared by the company's board of directors, and therefore have no meaningful value. Cumulative dividends were used in less than 10% of West Coast deals; in contrast, according to information from various law firm surveys, cumulative dividends were used in 30–50% of their East Coast deals. Dana M. Warren, *Venture Capital Investment: Status and Trends*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 19 (2012); WILSON SONSINI GOODRICH & ROSATI, THE ENTREPRENEUR'S REPORT: PRIVATE COMPANY FINANCING TRENDS, FULL-YEAR 2015, https://www.wsgr.com/publications/PDFSearch/entreport/Q42015/private-company-financing-trends.htm#top [https://perma.cc/PU85-MSPV] (noting that cumulative dividends were used in 12%, 13%, and 3% of its private company financings (all rounds) in 2013, 2014 and 2015, respectively, but not differentiating between East Coast and West Coast financings).

[75] Liquidation preference "impacts how the proceeds are shared in a liquidity event, which is usually defined as a sale of the company or the majority of the company's assets." FELD & MENDELSON, *supra* note 3, at 41. There are two components to it: the preference and participation. *Id.* For example, terms may indicate that holders of a particular series of preferred stock "shall be entitled to receive in preference to the holders of the Common Stock a per share amount equal to [X] times the Original Purchase Price plus any declared but unpaid dividends." *Id.* There are three types of participation: no participation (holders of preferred stock receive their money back first and receive nothing thereafter unless they choose to convert their stock to common stock), capped participation (holders of preferred stock receive their money back first and then share ratably with the holders of common stock up to a total liquidation amount per share equal to some multiple of the original purchase price), and full participation (holders of preferred stock receive their money back first and then share ratably with the holders of common stock with no cap). *See id.* at 42.

[76] Conversion includes the investors' right to convert preferred stock to common stock as well as the automatic conversion of preferred stock to common stock in the event of a firm commitment, underwritten initial public offering, or by a written request for such conversion from a certain percentage—such as a majority—of the preferred stock then outstanding. *See* MODEL COI, *supra* note 72, at 16.

[77] The antidilution provision is included "to protect investors in the event a company issues equity at a lower valuation than in previous financing rounds." FELD & MENDELSON, *supra* note 3, at 56. There are weighted average antidilution provisions (both broad- and narrow-based) and ratchet-based antidilution provisions. *See id.* at 56–57 (providing a detailed description of how antidilution works).

[78] Redemption is rarely invoked and is thought of as more of an East Coast term. *See* MODEL COI, *supra* note 72, at 33 n.60.

[79] Unless specified in the certificate of incorporation, both the preferred stock and common stock vote as one class upon certain transactions. For example, under Delaware General Corporation Law ("DGCL"), a class vote is not required in certain transactions, such as mergers, reorganizations, or distributions upon dissolution. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251 (West, Westlaw through 80 Laws 2016, ch. 202) ("Merger or consolidation of domestic corporations"); DEL. CODE ANN. tit. 8, § 275 (West, Westlaw through 80 Laws 2016, ch. 202) ("Dissolutions generally; procedure"). Under the DGCL, there can be class voting for the election of directors.

[80] Protective provisions are analogous to veto rights; investors can veto certain actions by the company. *See* MODEL COI, *supra* note 72, at 13–16.

[81] A "pay-to-play" provision requires investors to participate in future financings to maintain their pro rata share in order to avoid pre-negotiating penalties, such as the forced conversion of their preferred stock to common stock. *See id.* at i.

4. Stock Purchase Agreement

The stock purchase agreement provides for the purchase, sale, and closing of the venture capital financing. Specifically, it sets forth the price per share for the series of preferred stock being offered and the number of shares of preferred stock authorized for issuance in the offering.[82] It also includes the mechanics of the purchase of preferred stock—the closing date[83] and conditions to closing. There are also representations and warranties that the company makes to investors and vice-versa.[84] Sometimes founders may be asked to make representations and warranties as well, although this is much less common in venture capital financings generally.[85] Purchasers of the preferred stock are also asked to make a limited set of representations; this is primarily to establish that they are eligible to participate in the offering and qualify for exemptions under applicable state and federal securities law. In addition, there are covenants of the company and miscellaneous terms, such as amendment and waiver, payment of investors' counsel,[86] and a conflict waiver.

5. Investors' Rights Agreement

The investors' rights agreement governs the rights of the major investors as to how and when they can cause the company to register shares of common stock issuable to the investors. It also sets forth major investors' access to cer-

---

[82] *See generally* NAT'L VENTURE CAPITAL ASS'N, MODEL LEGAL DOCUMENTS, STOCK PURCHASE AGREEMENT, http://nvca.org/resources/model-legal-documents/ [https://perma.cc/29VP-LBAE] (follow hyperlink to "Stock Purchase Agreement") [hereinafter MODEL SPA] (discussing standard provisions in a stock purchase agreement).

[83] A stock purchase agreement can be drafted to allow for multiple closings.

[84] The representations and warranties made by the company can be hotly negotiated:

> The purpose of the Company's representations is primarily to create a mechanism to ensure full disclosure about the Company's organization, financial condition and business to the investors. The Company is required to list any deviations from the representations on a Disclosure Schedule, the preparation and review of which drives the due diligence process on both sides of the deal.

MODEL SPA, *supra* note 82, at 5 n.14.

[85] Founders' representations are not often seen:

> [These representations] are more likely to appear if Founders are receiving liquidity from the transaction, or if there is heightened concern over intellectual property (*e.g.*, the Company is a spin-out from an academic institution or the Founder was formerly with another company whose business could be deemed competitive with the Company), or in international deals. Founders' representations are even less common in subsequent rounds, where risk is viewed as significantly diminished and fairly shared by the investors, rather than being disproportionately borne by the Founders.

Id. at 22 n.44.

[86] It is customary for the company to pay investors' legal fees, which is typically capped at $25,000 to $40,000 for early stage financings. *See* FELD & MENDELSON, *supra* note 3, at 12.

tain information from the company, and their ability to participate in future equity offerings. Therefore, a fairly standard investors' rights agreement will include registration rights,[87] information rights,[88] board observation rights,[89] right to future stock issuances,[90] and post-closing covenants.[91]

6. Right of First Refusal and Co-Sale Agreement

The purpose of the right of first refusal and co-sale agreement is to keep a company's capital stock within the group of existing stockholders, thereby preventing transfer of control to competitors, non-strategic parties, and the like.[92] In the event that a "Key Holder" wants to transfer its holdings, it must first offer the company the right to purchase such shares and then offer that right to a defined group of investors (typically the major investors).[93] Only after the company and investors refuse to purchase the shares may the Key Holder proceed to sell its shares to the proposed transferee, and in that event, other investors are allowed to participate in the sale on a pro rata basis based on their holdings in the company.[94] Essentially, the right of first refusal and co-sale agreement is intended to restrict the transfer of shares by Key Holders with certain limited exceptions.[95]

---

[87] There are three types of registration rights: demand (investor demands that the private company file a registration statement), piggyback (investors "piggyback" on the company's intention to register its securities), and Form S-3 (short-form registration). *See* NAT'L VENTURE CAPITAL ASS'N, MODEL LEGAL DOCUMENTS, INVESTOR RIGHTS AGREEMENT 5–8 & n.7, http://nvca.org/resources/model-legal-documents/ [https://perma.cc/29VP-LBAE] (follow hyperlink to "Investor Rights Agreement") [hereinafter MODEL IRA].

[88] *See infra* notes 145–149 and accompanying text (discussing provisions in the NVCA's Model Investors' Rights Agreement).

[89] *See infra* notes 145–149 and accompanying text (discussing provisions in the NVCA's Model Investors' Rights Agreement).

[90] A right of first offer is the investors' right to participate in future issuances of stock (which differs from the right of first refusal under a right of first refusal and co-sale agreement). Under the terms of the right of first offer, the company must first offer each Major Holder (as that term is defined in the document) an opportunity to maintain their pro rata interest in the company in the next round of financing. *See* MODEL IRA, *supra* note 87, at 24–27.

[91] Post-closing covenants can range from purchasing insurance to fixing a problem post-closing that was discovered during the diligence process.

[92] *See generally* NAT'L VENTURE CAPITAL ASS'N, MODEL LEGAL DOCUMENTS, RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT, http://nvca.org/resources/model-legal-documents/ [https://perma.cc/29VP-LBAE] (follow hyperlink to "Right of First Refusal and Co-Sale Agreement") [hereinafter MODEL ROFR & CO-SALE AGREEMENT] (providing standard provisions in a Right of First Refusal and Co-Sale Agreement).

[93] "Key Holders" are typically defined as the stockholders (including founders and key employees) who hold a sizable chunk of the company's common stock.

[94] *See* MODEL ROFR & CO-SALE AGREEMENT, *supra* note 92, at 6.

[95] *See id.* at 9–11.

7. Voting Agreement

The voting agreement contractually obligates the founders (i.e., major stockholders) and investors to vote their shares in board elections in favor of particular individuals.[96] By doing so, the composition of the board is ensured. If negotiated by investors and agreed upon in the term sheet, drag-along rights[97] may also be included in the voting agreement.

II. THE CASE FOR INCREASED DISCLOSURE FOR UNICORNS

Part I provides background on unicorns as unique economic creatures that have become the new normal in venture capital financings. In light of this characterization, Part II argues that the current regulatory framework is not sufficient for the new reality of unicorns. Presently, the only documents available to the public are the companies' Form D filings[98] and restated certificates of incorporation.[99] According to Professor Louis Loss of Harvard Law School and Joel Seligman, President of the University of Rochester, "[T]here is the recurrent theme throughout [the federal securities laws] of disclosure, again disclosure, and still more disclosure. Substantive regulation has its limits. But 'the truth shall make you free.'"[100] The idea is that under a disclosure-based regime, the full and fair disclosure of pertinent information regarding the securities being marketed will adequately protect investors[101] by "provid[ing] investors with sufficient opportunity to evaluate the merits of an investment and

---

[96] This agreement must work in tandem with the certificate of incorporation. The voting agreement ensures that the designee of a particular preferred holder—typically the lead investor in a round—will have a particular "seat" on the board. Note, however, that the fact that a particular director was elected by certain holders of a particular class or series of stock does not negate that individual's fiduciary duties to all stockholders of the company. *See* Gilbert v. El Paso Co., Nos. 7075 & 7079, 1988 WL 124325, at *743 (Del. Ch. Nov. 21, 1988) ("The defendants correctly argue that the directors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups."), *aff'd*, 575 A.2d 1131 (Del. 1990).

[97] Drag-along rights contractually obligate minority stockholders to vote their shares in favor of a sale of the company, thereby preventing an attempt to block any such sale. *In re Trados Inc. Shareholder Litigation*, a 2013 Delaware Chancery Court decision, may bolster the case to include drag-along rights, as the court suggested in dicta that limiting the board's exposure to fiduciary claims may be possible by using drag-along provisions. *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 56–57 n.32 (Del. Ch. 2013).

[98] Form D filings are publicly available without cost through the SEC's website. *See EDGAR: Search Tools*, SEC. & EXCH. COMM'N, https://www.sec.gov/edgar/searchedgar/webusers.htm [https://perma.cc/633N-AKVS].

[99] A copy of a private company's certificate of incorporation may be purchased from the secretary of state of the state where the company was incorporated. *See, e.g.*, *Certification Memo*, STATE OF DEL. DIV. OF CORP., http://corp.delaware.gov/certmemo.pdf [https://perma.cc/DB4J-UET3].

[100] 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 45 (3d ed. revised 1998).

[101] Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 11–12.

fend for themselves."[102] As Justice Brandeis noted on this matter, "Sunlight is said to be the best of disinfectants . . . ."[103]

Uber (which is more fully discussed in Part III) is one example of a unicorn with an outsized impact. Its reach is vast—the company currently operates in six continents,[104] forty-five countries,[105] and 300 cities.[106] According to reports, it "services millions of customers and employs hundreds of thousands of drivers."[107] The number of drivers for this five-year-old company has increased dramatically to meet consumer demand. Recently, the Chief Executive Officer ("CEO") of Uber reported that the company had "26,000 drivers in New York City alone; 15,000 in London; 22,000 in San Francisco; 10,000 in Paris; and 20,000 in Chengdu, China."[108] Uber has over 3000 employees worldwide[109] and is expected to reach $10 billion in gross revenue at the end of 2015.[110] Because Uber nets twenty percent of every transaction, this amounts to $2 billion in net revenue for the company.[111] Despite these staggering numbers, little is known about Uber except what the company chooses to report to the media. Uber's impact on local economies becomes even more apparent when looking at a particular market, such as Chicago.[112] In Chicago

[102] *Id.* at 12. A disclosure-based regime also means that the SEC does not need to engage in the much more time-consuming evaluation of the merits of the securities. *See* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 418 (2003).

[103] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 92 (1914).

[104] Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html?_r=0 [https://perma.cc/PWU6-3MLT].

[105] Alyson Shontell, *Uber Is Generating a Staggering Amount of Revenue*, BUS. INSIDER (Nov. 15, 2014, 10:33 AM), http://www.businessinsider.com/uber-revenue-projection-in-2015-2014-11 [https://perma.cc/XUM5-7HER].

[106] Isaac & Singer, *supra* note 104. *But see infra* notes 293–300 and accompanying text (discussing the difficulty of evaluating unicorns' revenue and operations).

[107] Alison Griswold, *In Search of Uber's Unicorn*, SLATE (Oct. 27, 2014, 4:29 PM), http://www.slate.com/articles/business/moneybox/2014/10/uber_driver_salary_the_ride_sharing_company_says_its_drivers_make_great.1.html [https://perma.cc/2M2S-BUU2]; *see infra* notes 286–321 and accompanying text (providing different numbers for Uber).

[108] Isaac & Singer, *supra* note 104. In contrast, there are approximately 13,000 yellow cabs in New York City. Matt Flegenheimer & Emma G. Fitzsimmons, *City Hall and Uber Clash in Struggle Over New York Streets*, N.Y. TIMES (July 16, 2015), http://www.nytimes.com/2015/07/17/nyregion/city-hall-and-uber-clash-in-struggle-over-new-york-streets.html?_r=0 [https://perma.cc/7D3N-5ARC].

[109] Maya Kosoff & Nathan McAlone, *Where Are They Now: Meet 12 of Uber's First Employees—Three of Them Are Now Billionaires*, BUS. INSIDER (June 4, 2015, 5:35 PM), http://www.businessinsider.com/ubers-first-employees-2015-6?op=1 [https://perma.cc/R2DE-3YEU].

[110] Shontell, *supra* note 105.

[111] *See id.*

[112] *See* Andrew MacDonald, *UberDATA: Uber's Economic Impact on the City of Chicago*, UBER NEWSROOM (Mar. 12, 2014), http://newsroom.uber.com/chicago/2014/03/uberdata-ubers-economic-impact-on-the-city-of-chicago/ [https://perma.cc/SJS8-GMHB].

in 2013, Uber had 25,000 rides, was associated with 1049 new jobs, and had a total gross impact of over $46 million on the city's economy.[113]

Unicorns like Uber also demonstrate the inadequacy of other regulatory frameworks outside the securities realm. Recently, the California Labor Commissioner's Office ruled that an Uber driver was an employee and not an independent contractor, as Uber claims.[114] If Uber's appeal is unsuccessful, this would mean increased revenue for social security, healthcare, and other benefits for Uber drivers in California, and the unresolved question of whether Uber drivers should be classified as employees or independent contractors could have implications for Uber drivers in other states.[115] It also leads to larger policy questions regarding how different worker classifications affect low-wage workers, not only among unicorns.

A study done by Arun Sundararajan of New York University Stern School of Business and research scientist Samuel Fraiberger analyzed two years of data from a car-share company, Getaround, and found that

> peer-to-peer markets improve consumer welfare. These increases in surplus grow consistently with the fraction of the population who have access to the marketplace, and with the level of marketplace liquidity, or the fraction of supply and demand requests that are fulfilled. Predicted consumer surplus gains in the automobile industry are substantial, ranging from 0.8% to 6.6%, which corresponds to billions of dollars of value creation.[116]

Additionally, below-median-income consumers have a higher demand for Uber-type services than above-median-income consumers, which suggests "fairly dramatic shifts away from automobile ownership as the popularity and efficiency of such marketplaces grows."[117] In short, Uber is changing the transportation behavior of below-median-income consumers.

Airbnb is another example of a unicorn's effect on local economies and highlights the need for increased disclosure. In 2010, Airbnb booked 100,000

---

[113] *See id.*

[114] *See* Isaac & Singer, *supra* note 104.

[115] *See id.* In addition to their outsized impact on economies, unicorns may upend social and cultural norms. *See* Jonathan V. Hall & Allan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 3 (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), http://arks.princeton.edu/ark:/88435/dsp010z708z67d [https://perma.cc/C9FD-7B58] (analyzing the impact Uber has on the changing notions of work with respect to hours, flexibility, and participants in the sharing economy).

[116] Samuel Fraiberger & Arun Sundarajan, *Peer-to-Peer Rental Markets in the Sharing Economy* 4 (N.Y. Univ. Stern Sch. of Bus. Research Paper, 2015), http://ssrn.com/abstract=2574337 [https://perma.cc/927J-9PTY].

[117] *Id.* at 27.

nights in the month of January;[118] that number has skyrocketed to over 500,000 guests per night in May 2015,[119] "making them comparable in inventory and transaction volume to the world's largest hotel brands."[120] According to a Barclays research report, "Airbnb offers more rooms than many of the largest hotel groups in the world—Hilton, InterContinental and Marriott—which each maintain just under 700,000 rooms."[121] The report further states that "Airbnb currently represents as much as 17.2% of hotel room supply in New York, 11.9% in Paris, and 10.4% in London . . . and those percentages are projected to increase."[122] In fact, it may triple its number of bookings and have 129 million room-nights available per year by the end of 2016; at this rate, Airbnb could outpace the largest hotel companies in just a few years.[123]

It would be unthinkable to have little to no information on a large hotel chain like Hyatt (which Airbnb has surpassed in valuation),[124] but that is exactly the predicament we find ourselves in with Airbnb because disclosure mechanisms have not been recalibrated to address the veil of secrecy that currently exists. Between 2012 and 2013, 400,000 Airbnb guests visited New York City and "spent $632 million, supporting 4,580 jobs."[125] Although most hotels in New York are located in midtown Manhattan, eighty-two percent of Airbnb's accommodations were located across other parts of New York City, thereby dispersing the economic benefits across the city.[126]

Despite its successes, however, Airbnb must address the question of how certain laws, such as housing and taxation, apply to them.[127] In another exam-

---

[118] M.G. Siegler, *Airbnb Tucked in Nearly 800% Growth in 2010; Caps off the Year with a Slick Video*, TECHCRUNCH (Jan. 6, 2011), http://techcrunch.com/2011/01/06/airbnb-2010/ [https://perma.cc/LX8L-K84B].

[119] Alexia Tsotsis, *Airbnb Hopes to Have Almost a Million Stays a Night by Summer*, TECHCRUNCH (May 27, 2015), http://techcrunch.com/2015/05/27/airbnb-hopes-to-have-almost-a-million-stays-a-night-by-summer/ [https://perma.cc/HYE3-S87T]. The company expects this number to reach 800,000 in the summer of 2015. *Id.*

[120] Fraiberger & Sundarajan, *supra* note 116, at 2–3.

[121] Zainab Mudallal, *Airbnb Will Soon Be Booking More Rooms Than the World's Largest Hotel Chains*, QUARTZ (Jan. 20, 2015), http://qz.com/329735/airbnb-will-soon-be-booking-more-rooms-than-the-worlds-largest-hotel-chains/ [https://perma.cc/W5LA-H5RQ]. Unlike its hotel counterparts, however, Airbnb does not own its rooms and the rooms are not available year-round. *See id.*

[122] *Id.*

[123] *See id.*

[124] Ankit Ajmera, *Airbnb Valued at $13 Billion as It Discusses Employee Stock Sale—WSJ*, REUTERS (Oct. 23, 2014, 9:19 PM), http://www.reuters.com/article/2014/10/24/airbnb-financing-idUSL3N0SI7M120141024 [https://perma.cc/RZM7-2WMT].

[125] Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 104–05 (2015).

[126] *See id.* at 105.

[127] *See id.* at 109; *see also* Zak Stone, *Living and Dying on Airbnb*, MATTER (Nov. 8, 2015), https://medium.com/matter/living-and-dying-on-airbnb-6bff8d600c04 [https://perma.cc/KA8K-SEWH] ("Staying with a stranger or inviting one into your home is an inherently dicey proposition. Hotel rooms are standardized for safety, monitored by staff, and often quite expensive. Airbnb rentals, on

ple, between June 2011 and May 2012, Airbnb generated $56 million in economic activity in San Francisco and supported 430 jobs.[128] On average, Airbnb guests stayed longer than they would in a hotel (and spent more because of the money they saved on accommodations).[129] They also visited more neighborhoods compared to hotel guests (6.2 out of 18 neighborhoods for Airbnb guests and 4.2 for hotel guests).[130] Airbnb did not affect hotel occupancy rates adversely, either.[131] Therefore, the businesses supplying accommodations benefitted overall. As a point of contrast, a Boston University study on Airbnb and its impact on the Texas hotel industry found that Airbnb had a slight impact on lower-priced hotels and those hotels not focused on business travelers.[132] The affected hotels, however, decreased prices, benefiting all consumers.[133] In the end, Airbnb users enjoy decreased prices and increased variety in types of accommodations, and Airbnb hosts have the opportunity to earn extra income.[134]

Unicorns can spur economic development in another way, as well; their sheer size and demand for the services they provide create a need for infrastructure and services that assist these companies, influencing the growth of businesses in other industries. For example, there is a growing cadre of startups in the on-demand infrastructure and services space that help to provide background checks, route and vehicle optimization, logistics, and the like for unicorns such as Uber and Airbnb.[135]

---

the other hand, are unregulated, eclectic, and affordable, and the safety standards are only slowly materializing.”). Even when regulations are proposed, they may be defeated given the deep pockets of Airbnb. For example, Proposition F in San Francisco, which would have put a limit on the number of nights a host would be allowed to rent out his or her property and imposed fines of up to $1000 per night for violations, was defeated. Elizabeth Weise, *San Francisco to Vote on Measure to Allow Neighbors to Sue Over Airbnb*, USA TODAY (Nov. 3, 2015, 2:35 PM), http://www.usatoday.com/story/tech/2015/10/29/san-francisco-airbnb-proposition-f-regulation-sharing-economy-rentals-short-term/74631024/ [https://perma.cc/N476-ZQAR]; *see also* Mollie Reilly, *San Francisco Votes Down Tough Airbnb Regulations*, HUFFINGTON POST (Nov. 4, 2015, 1:41 AM), http://www.huffingtonpost.com/entry/airbnb-san-francisco-vote_us_5637d49ae4b027f9b969ac7c [https://perma.cc/T92G-U5NF]. Airbnb spent over $8 million on this effort. *See* Reilly, *supra*.

[128] HR&A ADVISORS, INC., AIRBNB ECONOMIC IMPACTS IN SAN FRANCISCO AND ITS NEIGHBORHOODS, FINDINGS REPORT PREVIEW 35 (2012), http://www.deperslijst.com/persbericht/econ_impact_Final_Report_1_.pdf [https://perma.cc/8F6V-FQD5].

[129] *Id.* at 34.

[130] *Id.* at 41.

[131] *Id.* at 43.

[132] Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 22–25 (Boston Univ. Sch. of Mgmt. Research Paper No. 2013-16, 2016), http://ssrn.com/abstract=2366898 [https://perma.cc/KTD6-3HGN].

[133] *See id.* at 27.

[134] *Id.*

[135] *See Pickaxes and Shovels: 35 Startups Providing Infrastructure for the On-Demand Boom*, CB INSIGHTS (July 14, 2015), https://www.cbinsights.com/blog/infrastructure-for-on-demand-startups/ [https://perma.cc/67UR-95QC].

Recent media coverage also highlights the extent to which employees have been harmed when unicorns fail to be transparent.[136] One has to look no further than what happened when Good Technology was acquired by Blackberry in late 2015—many employees felt blindsided when they found that their shares were worthless.[137] In the recent IPO of Square, the company was valued at less than its valuation as a private company; this was arguably not the hoped-for outcome.[138] Investors were protected due to the ratchet they had negotiated during the last round of equity financing; the ratchet "guaranteed a 20 percent premium on their investment . . . meaning Square had to issue more shares to those investors, further devaluing the stock owned by employees."[139] One journalist has observed:

> Today's information scarcity means each new shred of bad news makes us rightly wonder which other startups are hiding dysfunction. The lack of transparency is a problem for startup investors, and it's a problem for the companies doing business with startups. But it's really a problem for startup employees. They often don't know much more than we do about the health of the companies they work

---

[136] Sarah Frier & Adam Satariano, *Big IPO, Tiny Payout for Many Startup Workers*, BLOOMBERG BUS. (Dec. 22, 2015, 3:22 PM), http://www.bloomberg.com/news/articles/2015-12-17/big-ipo-tiny-payout-for-many-startup-workers [https://perma.cc/3TSX-R2C4]. One report explains, "Many executives, early investors, and even later investors are able to cash out before the rank and file, or bargain for guarantees that help ensure a bonanza . . . . Ordinary employees are typically without meaningful financial protections or even a clear sense of what their equity stakes mean . . . ." *Id.*; *see also* Sarah Frier & Adam Satariano, *Square Employees Find Some of Their Stock Options Under Water*, BLOOMBERG BUS. (Nov. 19, 2015, 4:44 PM) [hereinafter *Square Employees*], http://www.bloomberg.com/news/articles/2015-11-19/square-employees-find-some-of-their-stock-options-under-water?utm_campaign=sniply&utm_medium=sniply&utm_source=sniply [https://perma.cc/3YSH-SV3Z] (discussing the Square IPO and how Square's employees did not get the windfall they expected).

[137] Katie Benner, *When a Unicorn Start-up Stumbles, Its Employees Get Hurt*, N.Y. TIMES (Dec. 23, 2015), http://www.nytimes.com/2015/12/27/technology/when-a-unicorn-start-up-stumbles-its-employees-get-hurt.html?_r=0 [https://perma.cc/38FT-FTV2] (giving examples of how employees were unaware of the true financial situation of their company and were affected by taxes levied by the Internal Revenue Service when their shares were considered valuable assets). As one reporter stated,

> What Good [Technology]'s employees experienced is an example of who loses out when a company backed by venture capital goes south. While plenty of people—including founders, top executives and investors—are involved in the rise of a start-up, those hit the hardest during a company's fall are the rank-and-file employees.

Id. Good Technology common stock was worth $0.44 (or 10% of what it was worth the prior year); the preferred stock was worth seven times as much in the acquisition. Paul Sawers, *After Good Technology's $425M Fire Sale to BlackBerry, a Shareholder Offers His Windfall to Colleagues Who Lost Out*, VENTUREBEAT (Jan. 11, 2016, 5:55 AM), http://venturebeat.com/2016/01/11/after-good-technologys-425m-fire-sale-to-blackberry-an-entrepreneur-offers-his-windfall-to-colleagues-who-lost-out/ [https://perma.cc/HH7J-BH9V].

[138] *See Square Employees*, *supra* note 136.

[139] *Id.* (noting that late stage investors require "ratchets" which essentially gives these investors more downside protection if the company performs poorly).

> for. Or worse, their CEOs sell them on the gospel of "crushing it" even as the wheels fall off.[140]

In the midst of the unicorn craze, some mutual funds, such as Fidelity, marked down their investments in well-known startups (that also happen to be unicorns); the list included Dropbox, Snapchat, and Zenefits, among others.[141] This was an unwelcome surprise to the companies and venture capitalists that were accustomed to controlling the narrative regarding such companies.[142] In response, venture capitalists said that

> stamping a value every quarter on a company such as Snapchat, which still periodically reinvents its business model, doesn't make sense. Two backers of the recently devalued companies . . . say startups may now be more reluctant to take money from mutual fund companies. [Matt] McIlwain [of Madrona Venture Group] blames them for driving up valuations in the first place by overpaying for access to hot deals.[143]

As the foregoing examples demonstrate, the current disclosure regime is woefully inadequate. Much of the information provided above came after many hours of sifting through numerous sources. Put simply, unicorns are too big to regulate under the current regulatory framework. Companies that have reached unicorn status are so big and their impact on investors, employees, and local economies so broad that they merit new disclosure requirements based on market valuation. Under the current securities regulation regime, these companies are not subject to any minimum disclosure requirements, and in the aggre-

---

[140] Erin Griffith, *Private Startups "Crush It." Public Companies Get Crushed*, FORTUNE (Feb. 6, 2016, 11:36 AM), http://fortune.com/2016/02/05/startup-ipo-uber/ [https://perma.cc/8F8B-B9HH] (noting that some startups, such as Pinterest, are being more transparent).

[141] Dan Primack, *Why Fidelity's Markdowns Could Rock the Startup and VC Worlds*, FORTUNE (Nov. 13, 2015, 2:14 PM), http://fortune.com/2015/11/13/why-fidelitys-markdowns-could-rock-the-startup-and-vc-worlds/ [https://perma.cc/W5PP-SGWB]. Fidelity, T. Rowe Price, and The Hartford are among those mutual fund managers that have marked down the stock of their private investments. Dan Primack, *Beyond Fidelity: Even More Mutual Fund Markdowns of Tech Startups*, FORTUNE (Nov. 17, 2015, 4:53 PM), http://fortune.com/2015/11/17/mutual-fund-markdowns-startups/ [https://perma.cc/T5SH-VMBC].

[142] Sarah Frier & Dina Bass, *Silicon Valley's Hottest Startups Get a Taste of Going Public Without the IPO*, BLOOMBERG BUS. (Nov. 18, 2015, 1:39 PM), http://www.bloomberg.com/news/articles/2015-11-18/silicon-valley-s-hottest-startups-get-an-unexpected-taste-of-going-public-without-the-ipo [https://perma.cc/2FTT-JJDH].

[143] *Id.* Max Wolff, Chief Economist at Manhattan Venture Partners, stated: "It's become de rigueur for companies to double in value because 12 months have passed and they found new investors. If that doesn't trip your alarm bells, then your alarm bells have failed . . . . The companies are overvalued. They shouldn't kill the messenger." *Id.*

gate they are employing thousands of people and are valued at almost half a trillion dollars.[144]

Such obligations will create some amount of operational burden on these companies, but in balancing the importance of disclosure for stockholders, employees, and other parties, disclosure is warranted; especially because unicorns are raising hundreds of millions of dollars—more than some companies raise when they go public. Enhanced disclosure can take several forms: (1) providing more information on the Form D; (2) making the restated certificates of incorporation more easily attainable; (3) having a plain English version of the key terms of the certificate of incorporation available; and (4) providing periodic financial information similar to what companies would need to provide for unaccredited investors in a private placement.

A. The Current State of Affairs

Under section 3 of the National Venture Capital Association's ("NVCA") Model Investors' Rights Agreement, a company is required to provide major investors with year-end, quarterly, and monthly financial statements,[145] as well as budgets and business plans. There may also be a "catch-all" provision that provides that major investors may request information "relating to the financial condition, business, prospects, or corporate affairs of the Company."[146] It is important to note that only those falling under the definition of "major investors" are entitled to such information rights. This definition is based on ownership of a threshold amount of preferred stock on an as-converted to common stock basis that would be high enough to include even a venture capital firm with minimal holdings, without subjecting the company to onerous disclosure

---

[144] As of March 16, 2016, the total valuation is $550 billion. *See Unicorn List*, *supra* note 1; *cf.* William D. Cohan, *Good Luck Getting Out!*, FORTUNE, Feb. 1, 2016, at 56 (listing 173 unicorns worth $585 billion).

[145] *See* MODEL IRA, *supra* note 87, at 20. For year-end financial statements, this may include audited balance sheets, statements of income and cash flows, and statements of stockholders' equity. For quarterly and monthly financial statements, it would include unaudited balance sheets, statements of income and cash flows, and possibly statements of stockholders' equity.

[146] *Id.* at 22. As observed in a footnote to the Investors' Rights Agreement's "Information and Observer Rights" section,

> Some investors request that the Company provide information relating to material litigation, regulatory matters, material defaults under credit facilities, and other material events and occurrences. Note, however, that if the investing entity is entitled to a Board seat, there is little need (at least for that particular investor) to impose these additional reporting obligations on the Company.

Id. at 22 n.34. The theory behind this idea is that, as a board member, the investor would already have access to this type of information because these topics would undoubtedly be discussed in board meetings.

requirements.[147] Unsurprisingly, the contractual definition of the type of information required for major investors is much broader than what is required under the securities laws.[148] This stems from the notion that venture capitalists are not passive investors, but instead play active roles in developing the company. Some investors may even negotiate board observer rights, allowing them to sit in on board meetings in a nonvoting capacity and entitling them to more information, such as notices, minutes, consents, and other materials that a company provides to its directors.[149]

Although unicorns will include these standard provisions regarding information rights and board observer rights for the benefit of their major investors, greater transparency is warranted for all stockholders. In the case of a public company, any individual can obtain detailed information about the company, including financial statements, on the SEC's website.[150] Public companies are required to file quarterly (Form 10-Q)[151] and annual (Form 10-K)[152] reports with the SEC. If material events occur in between regular reports, a public company must report such events on a Form 8-K.[153] Unicorns are not subject to these requirements, with most information about such companies therefore remaining undisclosed. Even well-known venture capitalists are voicing their concerns about this lack of disclosure. Ben Horowitz of Andreessen Horowitz, one of the top-tier venture capital firms, described the late-stage market as "completely unregulated" and called the limited nature of disclosure by high-valuation private companies "scary."[154] Another venture capitalist, Josh Burwick, managing partner at Sand Hill East Ventures, wrote:

---

[147] *Id.* at 20 n.31 ("The share-ownership minimum for receiving financial information is negotiable, but is often set at the holdings of the smallest venture capital investor. It should be set high enough to avoid burdensome disclosure requirements on the Company, but low enough to provide investors with information if they really need it.").

[148] *See supra* notes 145–146 and accompanying text.

[149] Of course, the right to observe is tempered by certain restrictions. For example, the company can withhold information or exclude an observer from portions of meetings to the extent that his or her presence would adversely affect attorney-client privilege between the company and its counsel or lead to the disclosure of trade secrets or a conflict of interest, or if the board observer is a competitor to the company. The parameters of board observer rights would be set forth in an investors' rights agreement. *See, e.g.*, MODEL IRA, *supra* note 87, at 22–23 (discussing disclosure).

[150] *See EDGAR: Search Tools*, *supra* note 98.

[151] *See Form 10-Q*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/forms/form10-q.pdf [https://perma.cc/2SEF-EVHA].

[152] *See Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/forms/form10-k.pdf [https://perma.cc/V9Z6-TY3Z].

[153] *See Form 8-K, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/forms/form8-k.pdf [https://perma.cc/J534-V28R].

[154] Maureen Farrell, *Slack's Story Justifies Sky-High Tech Valuations, Ben Horowitz Says*, WALL STREET J.: MONEY BEAT (Apr. 29, 2015, 10:33 AM), http://blogs.wsj.com/moneybeat/2015/04/29/slacks-story-justifies-sky-high-tech-valuations-ben-horowitz-says/ [https://perma.cc/U38J-NW2B].

> Public companies are being held to a higher standard than their private company peers, which has always been the case, but now that valuations are comparable it no longer makes sense. It's as if the private companies have "tested out" of the due diligence of their peers and are being held to an honor system to divulge metrics as they see fit.[155]

There are those in the legal academy who argue that increased disclosure, in and of itself, is not sufficient in the complex world in which we live.[156] On the other end of the spectrum, too much disclosure can cause information overload.[157] Scholars have offered a number of strategies to address some of the disclosure issues, such as a consumer-protection approach that focuses on the behavioral implications of disclosure.[158] Others propose a tiered system of dis-

---

[155] Josh Burwick, *Should Private Cos. with Large Valuations Have to Disclose Metrics?*, PITCHBOOK DATA, INC. (May 12, 2015), http://blog.pitchbook.com/should-private-cos-with-large-valuations-have-to-disclose-metrics/ [https://perma.cc/MUY4-YCMX].

[156] Steven Schwarcz argues that, "[F]ull disclosure of structured transactions does not, as a practical matter, provide investors in the originator's securities with sufficient opportunity to evaluate the merits of an investment. Moreover, most investors do not have the ability to evaluate structured transactions." Schwarcz, *supra* note 101, at 12. Similarly, Steven Davidoff and Claire Hill assert that

> disclosure is too often a convenient path for policymakers and many others looking to take action and hold onto comforting beliefs in the face of a bad outcome. Disclosure's limits reveal yet again the need for a better understanding of the relationship between information processing and decisionmaking and more broadly, for a more nuanced view of human nature that can better inform policy decisions.

Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 604 (2013); *see also* Tamar Frankel, *The Failure of Investor Protection by Disclosure*, 81 U. CIN. L. REV. 421, 423 (2012) ("[D]isclosure about securities and transactions in securities must relate not to the nature of the securities, but to the reliability of the intermediaries and the innovators that produce these securities—whoever produces them."); Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1068 (using principles of behavioral psychology to argue that disclosure is inadequate as a default remedy).

[157] Troy Paredes argues:

> Two things are needed for the federal securities laws, or any disclosure-based regulatory regime, to be effective. The first is straightforward: information has to be disclosed. The second is equally straightforward, but often overlooked. That is, the users of the information—for example, investors, securities analysts, brokers, and money managers—need to use the disclosed information effectively.

Paredes, *supra* note 102, at 418. Paredes further notes that information overload can negatively impact decisionmaking. *See id.* at 419.

[158] Henry Hu examines depictions of the risk-return characteristics of asset-backed securities and proposes "a disclosure paradigm that relies on both the intermediary depiction model [the model used by the SEC, in which corporations act as an 'intermediary' in transmitting a depiction of the objective reality to investors] and the pure information model [in which investors directly access the objective reality]." Henry T.C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1610 (2012); *see also* Joseph A. Franco, *A Consumer Protection Approach to Mutual Fund Disclosure and the Limits of Simplification*, 15 STAN. J.L. BUS. & FIN. 1, 9 (2009) ("A consumer-protection orientation to disclosure, by emphasizing the behavioral

closure for companies.[159] There are also scholars who propose fixes to the information asymmetry in the disclosure regime.[160] The present proposal of enhanced disclosure for the unicorn dilemma, detailed below, does not claim to be a panacea. Rather, it is a starting point for a larger discussion about the *type* and *quality* of information that should be disclosed, the *presentation* of that disclosure, and the *manner* in which it is disclosed.

B. Recommended Disclosures for Unicorns

This Article now turns to the question of what type of metrics unicorns should divulge. There are good reasons for a private company to remain in stealth mode, such as the need to develop new products that will revolutionize the particular ways we have done things (e.g., Uber's disruption of the taxi industry) before bringing the product to market. At the point where valuations of private companies are as large or larger than most public companies, however, the company has already amassed a great deal of capital and is essentially not regulated by anyone, save for its major investors and its board. In fact, in many cases, the founders of the company exercise significant control.[161]

As this Article points out in Part I above, the terms of private investments—which may inflate the reported valuations of unicorns—are often undisclosed.[162] Unfortunately, unlike the major investors, both stockholders and

---

implications of disclosure, provides definite and concrete policy guidance in the design of mutual fund disclosure that differs from the SEC's prospectus-centric approach.").

[159] *See* Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules That Require Firms to Make Periodic Disclosures*, 88 IND. L.J. 151, 156 (2013) (arguing for three categories of federal periodic disclosure requirements); *see also* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 342 (2013) (suggesting a two-tier system for disclosure obligations under contemporary securities regulation to "ease the costs associated with transition from private to public company": one for smaller companies and the other "reserved for companies with a larger societal footprint"). *But cf.* Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 CARDOZO L. REV. 531, 533 (2012) (arguing for a "lifecycle" approach in regulating the secondary markets).

[160] *See, e.g.*, Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. PA. L. REV. 179, 182–83 (2012) (examining various information issues in the context of secondary markets and suggesting minimum information requirements as well as looking at accredited investor status from a threshold perspective); Usha Rodrigues, *Securities Laws' Dirty Little Secret*, 81 FORDHAM L. REV. 3389, 3427–34 (2013) (looking at the secondary markets and contrasting the access of wealthy investors versus the "little guy" in such markets, and proposing access to the private markets through mutual fund investment).

[161] *See infra* note 229 and accompanying text (discussing the fact that some unicorns have two classes of common stock, one of which is entitled to ten votes for each share held by the holder of such common stock—typically, the Class B common stock).

[162] One report states:

> [T]he reported valuations of many unicorns have been inflated by the terms of the private investments that set those valuations before any initial public offerings of stock—often with little or no disclosure of those terms. Increasingly, venture investors say, late-stage financing terms include extra protections, like a discount to the price of any

employees of the unicorns (who may or may not be stockholders depending on whether they have exercised their options) remain in the dark about such terms. Likewise, they do not understand the often-complex restated certificate of incorporation because it is neither readily accessible nor easily understood. To remedy this problem, the SEC should require unicorns to post their restated certificate of incorporation on both the SEC website and the unicorn's website. In addition, unicorns should be required to highlight the key terms of the restated certificate of incorporation on the Form D filings in layperson's language and provide relevant information about the company (such as the number of employees).

Lastly, the financial information that generally is only available to major investors should be made available to all stockholders and employees via the unicorn's website. These statements should be furnished on a regular basis, perhaps quarterly. Although major investors (who are always accredited investors) already receive the benefit of additional financial information as part of the contractual arrangement in the investors' rights agreement,[163] the unaccredited investors and accredited investors who do not fall under the definition of "Major Investor" (all of whom are typically smaller equity holders in the issuer) do not have access to this type of information. Both of these groups of investors should have better visibility into the financial state of the company. In particular, this information may be important to rank-and-file employees who become stockholders in the company as their shares vest.

This Article recommends that companies be required to comply with the hybrid disclosure requirements within ninety days of closing a financing valued at $1 billion or more, because ninety days is typically the amount of time allotted for closings that take place after the initial closing. If the valuation falls below the $1 billion threshold in a later round, then the hybrid disclosure would no longer apply. Although there may be additional costs associated with an additional disclosure regime, it would be minimal because most companies are already compiling the relevant information. For example, as mentioned previously, financial statements are already prepared on a quarterly basis for major investors. Summarizing the terms of the certificates of incorporation may be more time consuming, but most of the key terms are available in the term sheet. Although some may argue that hybrid disclosure may lead companies to reposition themselves to avoid new disclosure requirements, given the high premium placed on billion-dollar valuations, that seems unlikely. In fact,

---

> eventual initial offering, a minimum return on investment or extra shares if the company later raises money at a lower valuation.

Randall Smith, *Protections for Late Investors Can Inflate Start-up Valuations*, N.Y. TIMES: DEALBOOK (June 7, 2015), http://www.nytimes.com/2015/06/08/business/dealbook/protections-for-late-investors-can-inflate-start-up-valuations.html?mwrsm=Email [https://perma.cc/U7NE-W4YX].

[163] *See supra* notes 87–91 and accompanying text (discussing an Investors' Rights Agreement).

hybrid disclosures may result in companies going public earlier and foregoing the mega-funding rounds described in Part IV below.[164]

In 1964, Congress added section 12(g)(1) to the Securities Exchange Act of 1934 (the "Exchange Act") "[t]o extend to investors in certain over-the-counter securities the same protection now afforded to those in listed securities by providing that the issuers of certain securities now traded over the counter shall be subject to the same requirements that now apply to issuers of securities listed on an exchange."[165] Prior to the 2012 amendment of section 12(g) of the Exchange Act, a company was required to register a class of equity securities with the SEC within 120 days after the end of its fiscal year if, on the last day of the company's fiscal year, there were 500 or more recordholders of such class of securities and the company had assets totaling more than $10 million.[166] Title V of the JOBS Act amended section 12(g)(1)(A) of the Exchange Act and kept the total assets requirement the same ($10 million), but provided that a company would become subject to Exchange Act requirements within 120 days after the last day of its first fiscal year where it met the asset threshold and had a class of equity securities (other than exempted securities) held of record by either: (i) 2000 persons or (ii) 500 persons who are not accredited investors.[167]

Under the newly revised section 12(g), private companies will not unintentionally go public (as was the case for Google). Therefore, we are faced with a conundrum: the disclosures currently required of private companies are inadequate for unicorns, but the disclosures required of public companies are too burdensome. To resolve this issue, a hybrid approach is necessary to fill the information gap and give unicorns the increased attention that they merit in light of their enormous impact. To this end, this Article suggests that once a company reaches a valuation of $1 billion or more it should be subject to the enhanced disclosure requirements detailed above. The narrative that accompanies financial disclosures would demystify a unicorn's strategy and inform stockholders of the attendant risks and benefits of entering different markets and their impact on local economies. Otherwise, we are left in a world where the experience of employees at Square and Good Technology will remain commonplace.

---

[164] *See infra* notes 322–323 and accompanying text (discussing mega-funding rounds).

[165] H.R. REP. NO. 88-1418, at 1 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3013, 3027.

[166] 15 U.S.C. § 78*l* (g)(1)(A)–(B) (2006). In 2004, Google filed a Form 10 and a Form S-1 for its IPO because it had exceeded the asset and stockholder threshold set forth in section 12(g) of the Exchange Act. *See* William K. Sjostrom, Jr., *Questioning the 500 Equity Holders Trigger*, 1 HARV. BUS. L. REV. ONLINE 43, 44 (2011), http://hblr.org/?p=1028 [https://perma.cc/7WR3-MUF3].

[167] 15 U.S.C. § 78*l* (g)(1)(A) (2012). Note that pursuant to the Code of Federal Regulations, "held of record" does not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from the registration requirements under section 5 of the Securities Act of 1933. *See* 17 C.F.R. § 240.12h-1(a) (2015).

III. FIVE CASE STUDIES OF UNICORNS

Part III examines five private companies—Airbnb, Dropbox, Pinterest, Snapchat, and Uber—that have reached, and in fact surpassed, unicorn status.[168] These companies are all household names, even among those who are not familiar with the technology industry. Each of these companies illustrates the startling dearth of information required of private companies in Form D filings and the information and power asymmetry that exists between major stockholders—who are typically the lead investors in a particular round of financing—and all other stockholders.[169] Although anyone can obtain a corporation's certificate of incorporation from the Secretary of State of Delaware,[170] there is a fee,[171] and the certificate of incorporation does not include significant information about the company. This Article argues that Form D should be revised to include more specific information about board composition, the

---

[168] *See infra* notes 174–321 and accompanying text.

[169] Fenwick & West LLP recently analyzed the terms of thirty-seven U.S.-based venture-backed companies that achieved unicorn status in the twelve months ending March 31, 2015; none of the companies analyzed were named. The report stated its findings as follows:

- Investors received terms that provided a fair amount of downside protection for their investment, especially in the event of an acquisition, but relatively few upside benefits.
- These terms could result in a divergence in interest between early and late stage investors at the time of a liquidity event.
- A significant percentage of the highest valuation unicorns had dual class common stock which provided founders/management and in some cases other shareholders with super voting rights.
- Attaining a unicorn valuation appears to be a goal of promising companies raising money, as 35% of the companies we analyzed had valuations in the $1–1.1 billion dollar range, indicating that the companies may have negotiated specifically to attain the unicorn level.

BARRY J. KRAMER & NICOLE HARPER, FENWICK & WEST LLP, THE TERMS BEHIND THE UNICORN VALUATIONS AS OF MARCH 31, 2015, at 1 (2015), https://www.fenwick.com/FenwickDocuments/The-Terms-Behind-The-Unicorn-Valuations.pdf [https://perma.cc/QPG4-TNJM] [hereinafter MARCH 2015 TERMS]. A subsequent study completed over a nine-month period ending December 31, 2015, yielded similar results. The main difference noted by the study was the increase in unicorn financings, despite the shorter duration. *See* BARRY J. KRAMER ET AL., FENWICK & WEST LLP, THE TERMS BEHIND UNICORN VALUATIONS AS OF DECEMBER 31, 2015, at 1 (2016), https://www.fenwick.com/FenwickDocuments/The-Terms-Behind-the-Unicorn-Valuations-As-of-December-31-2015.pdf [https://perma.cc/M225-BKEE]. A significant amount of the activity, however, occurred at the beginning, with a marked decline in the fourth quarter coupled with significantly more investor-friendly terms, such as increases in senior liquidation preferences, IPO protection terms (such as downside protection and premium on the unicorn price), and upside benefits. The per-share price for unicorn financings was fifty-seven times higher than such company's per-share price for its Series A financing. MARCH 2015 TERMS, *supra*, at 1–2.

[170] This information is specific to the State of Delaware, due to the fact that Delaware is a common state of incorporation, known for its well-defined corporate law and efficiency. *See* FELD & MENDELSON, *supra* note 3, at 170.

[171] As an example, the author paid a copy fee for the Airbnb Restated Certificate of Incorporation in the amount of $62, plus an additional $20 to expedite processing, for a total of $82.

original share purchase price, protective provisions, voting arrangements, and the like in layperson's terms.[172] Furthermore, the revised Form D should be coupled with periodic financial information and both should be included on the unicorn's website.[173]

A. Airbnb

1. Overview of Airbnb

Airbnb is a home-sharing company that was incorporated in 2008 in the State of Delaware.[174] In a few short years it has gone from just another startup to media darling.[175] In 2015, the company was valued at $25.5 billion.[176] Anonymous sources have told *The Wall Street Journal* that Airbnb informed investors that it is on course to exceed $900 million in revenue in 2015[177] (up from $850 million as predicted earlier).[178] In 2013, it earned one-third of that

---

[172] *See infra* note 321 and accompanying text (suggesting revisions to Form D requirements).

[173] In the event that a unicorn relies on section 4(a)(2) instead of Regulation D, then the information required on a Form D (of which section 4(a)(2) does not have an equivalent) should be required of a company relying on such section. This Article argues that the information should be made available on the company's website. *See* 15 U.S.C. § 77d (2012); *supra* notes 161–167 and accompanying text.

[174] The company was formerly called Airbed & Breakfast, Inc. *See* Airbnb, Inc., Notice of Exempt Offering of Securities (Form D) (Dec. 7, 2015) [hereinafter Airbnb Form D], http://www.sec.gov/Archives/edgar/data/1559720/000116840415000029/xslFormDX01/primary_doc.xml [https://perma.cc/5PRX-U4EQ]. Like the other unicorns discussed in Part III, Airbnb continues to innovate. It recently unveiled a price suggestion engine to help homeowners decide how much they should charge per night for a stay in their home. *See* Ellen Huet, *How Airbnb Uses Big Data and Machine Learning to Guide Hosts to the Perfect Price*, FORBES (June 5, 2015, 10:00 AM), https://web.archive.org/web/20160214153055/http://www.forbes.com/sites/ellenhuet/2015/06/05/how-airbnb-uses-big-data-and-machine-learning-to-guide-hosts-to-the-perfect-price/#3064370a379e.

[175] Just as Uber has disrupted the transportation industry, Airbnb has disrupted the vacation rental market:

> Over the past few years, the sharing economy has matured from a fringe movement into a legitimate economic force, with companies like Airbnb and Uber the constant subject of IPO rumors. . . . No less an authority than *New York Times* columnist Thomas Friedman has declared this the age of the sharing economy, which is "producing both new entrepreneurs and a new concept of ownership."

Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014, 6:30 AM), http://www.wired.com/2014/04/trust-in-the-share-economy/ [https://perma.cc/G88V-NYTN].

[176] Sara Ashley O'Brien, *'Crazy Money'—Airbnb Valued at Over $25 Billion*, CNN MONEY (June 27, 2015, 6:59 PM), http://money.cnn.com/2015/06/27/technology/airbnb-funding-valuation-update/ [https://perma.cc/NT83-NBVU].

[177] Telis Demos, *Airbnb Raises $1.5 Billion in One of Largest Private Placements*, WALL STREET J. (June 26, 2015, 9:01 PM), http://www.wsj.com/articles/airbnb-raises-1-5-billion-in-one-of-largest-private-placements-1435363506 [https://perma.cc/ZCL2-BZ2N].

[178] Jillian D'Onfro, *Airbnb Reportedly Is Raising Another $1 Billion*, INC. (June 18, 2015), http://www.inc.com/business-insider/airbnb-closing-new-round-of-valuation.html [https://perma.cc/EA63-62MH].

amount—$250 million.[179] Airbnb further claims that by 2020, its annual revenue will be $10 billion and that, by then, it will be profitable.[180] Yet, for the time being, "the company is burning cash to expand, and forecasts an operating loss of about $150 million [for 2015]."[181] Airbnb reportedly has 600 employees.[182]

If Airbnb were a public company, the information above regarding revenue, operating loss, and number of employees would be readily available to the public and verified by the company's accountants. Because the information reported above came from scouring the Internet and was not supported by actual financial statements, however, the accuracy of the numbers cannot be ascertained.

2. Airbnb Form D

In a recent Form D filing, Airbnb reported that it was relying on Rule 506(c) of Regulation D for the offering and had 115 investors, none of whom were unaccredited.[183] The amount of the offering and the total amount of securities sold was nearly $1.5 billion.[184] As is the case with most companies when filing Form D, Airbnb declined to disclose its size (i.e., revenue). As evidenced by Airbnb's Form D, the information it requires is very limited and therefore does not provide helpful data points for minority stockholders who lack access to the type of information major investors typically receive.

3. Airbnb Restated Certificate of Incorporation

Airbnb's Restated Certificate of Incorporation ("Airbnb Restated Certificate") provides insight into the control dynamics among the company and its investors and founders.[185] It also illustrates the power asymmetry between the major investors and smaller stockholders. Airbnb authorized 658,000,000 shares of Common Stock, of which half were designated as Class A Common Stock and the other half as Class B Common Stock.[186] Airbnb also authorized

---

[179] *See* Demos, *supra* note 177.

[180] *See id.*

[181] Rolfe Winkler & Douglas MacMillan, *The Secret Math of Airbnb's $24 Billion Valuation*, WALL STREET J. (June 17, 2015, 3:15 PM), http://www.wsj.com/articles/the-secret-math-of-airbnbs-24-billion-valuation-1434568517 [https://perma.cc/7YTC-JZGW].

[182] *See Airbnb*, WORLD ECON. F., http://reports.weforum.org/technology-pioneers-2014/company-profiles/airbnb/ [https://perma.cc/2XAS-MJC4]. Note that the site does not state the date on which the employee number was ascertained.

[183] Airbnb Form D, *supra* note 174; *see supra* notes 19–44 and accompanying text (discussing exempt offerings).

[184] Airbnb Form D, *supra* note 174.

[185] *See* Airbnb, Inc., Restated Certificate of Incorporation (July 13, 2015) [hereinafter Airbnb Restated COI] (on file with author).

[186] *See id.* at 1.

114,053,168 shares of Preferred Stock, which are designated as Series Seed Preferred Stock, Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock, Series C Preferred Stock, Series D Preferred Stock, and Series E Preferred Stock.[187] Under the Airbnb Restated Certificate, each holder of Class A Common Stock is entitled to one vote for each share of Class A Common Stock, and each holder of Class B Common Stock is entitled to ten votes for each share of Class B Common Stock.[188]

Before any payment may be made to the holders of Common Stock, the holders of Preferred Stock have a liquidation preference: the greater of (1) their respective original issue price, plus any dividends declared but unpaid, or (2) the amount per share that would be payable if all shares of Preferred Stock had been converted into Common Stock under the "Right to Convert" provision in the Airbnb Restated Certificate immediately prior to such liquidation, dissolution, or winding up or Deemed Liquidation Event (as defined in the Airbnb Restated Certificate).[189] The holders of shares of Common Stock will then get their pro rata shares of the remaining assets.[190] Essentially, this means that unless minority stockholders were holders of Preferred Stock, their liquidation preference would be paid after the holders of Preferred Stock (and only if there was anything remaining).

Regarding the election of directors, the holders of Airbnb Series Seed Preferred Stock are entitled to elect one director, the holders of Series B and B-1 Preferred Stock are entitled to elect one director; the holders of Common Stock are entitled to elect three directors; and the holders of Common Stock and every other class or series of voting stock, including the Preferred Stock, are entitled to elect the balance of the total number of directors of Airbnb on an as-

---

[187] *Id.* at 1–2. Airbnb's Preferred Stock is divided as follows: (1) 31,827,492 shares of Series Seed Preferred Stock, with an original issue price of $0.01932292 per share; (2) 17,197,416 shares of Series A Preferred Stock at $0.41866667 per share; (3) 17,351,343 shares of Series B Preferred Stock at $6.62483333 per share; (4) 951,840 shares of Series B-1 Preferred Stock at $2.20828 per share; (5) 16,960,077 shares of Series C Preferred Stock at $11.7924 per share; (6) 12,765,000 shares of Series D Preferred Stock at $40.71303333 per share; and (7) 17,000,000 shares of Series E Preferred Stock at $93.0944 per share. *See id.* at 1–2, 5.

[188] *See id.* at 2. Interestingly, the Airbnb Restated Certificate also provides that each outstanding share of Class B Common Stock will automatically convert into one share of Class A Common Stock upon the earlier of the vote or written consent of the holders of at least a majority of the outstanding shares of Class B Common Stock at the time of such vote and upon the twentieth anniversary of the consummation of an IPO. *Id.* at 3. This type of voting structure is similar to the dual-voting structure that has become popular among companies that go public. *See e.g.*, Steven Davidoff Solomon, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES: DEALBOOK (Apr. 13, 2012, 9:17 AM), http://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/?_r=0 [https://perma.cc/PU6C-ATGV] (listing Google and Facebook as examples). Under this structure, the founders retain a significant degree of control because they are typically the largest holders of common stock in a company.

[189] *See* Airbnb Restated COI, *supra* note 185, at 5.

[190] *See id.*

converted to Class B Common Stock basis ("Remaining Directors").[191] The voting structure indicates that the majority holders of each of the Series Preferred Stock, Series B and Series B-1 Preferred Stock, and Common Stock have greater influence than the rank-and-file holders of Preferred Stock because they can choose the members of the board and, as a result, have access to more information than a smaller stockholder of Preferred Stock. The Remaining Directors are voted on an as-converted to Class B Common Stock basis, which means that each holder gets ten votes for each share of stock that he or she holds. Put differently, the founders of Airbnb, who undoubtedly have the largest holdings of Class B Common Stock, control the Common Stock seats and have a significant voice in electing the Remaining Directors. The minority stockholders therefore effectively have no voice in determining board composition.

As one might expect, there are extensive Preferred Stock protective provisions as well, both on a class basis and series preferred basis.[192] For each series of Preferred Stock, with the exception of Series B and Series B-1 Preferred Stock (which vote together) and Series D Preferred Stock (which requires that 66 and 2/3% of the then outstanding shares of Series D Preferred Stock must consent), a majority of the then-outstanding shares of each particular Series Preferred must consent before the rights, preferences, privileges, and restrictions of that particular Series Preferred are altered, changed, or waived.[193] Minority stockholders would only get the benefit of the protective provisions if they were holders of Preferred Stock, and even then, the major investors would control major decisions.

The Airbnb Restated Certificate also sets forth that at the time of conversion, each share of Preferred Stock will convert into Class B Common Stock, which in turn gives its holders greater voting rights—ten votes for each share of Class B Common Stock.[194] The mandatory conversion will occur upon ei-

---

[191] *See id.* at 7. In the case of each Series Preferred director, as long as 50% of the shares of Preferred Stock originally issued remain outstanding, that particular Series Preferred will retain the right to elect a director exclusively and vote as a separate class. *See id.*

[192] *See id.* at 8–11.

[193] *See id.* The Airbnb Restated Certificate, however, makes clear that the authorization or issuance of any existing or new series of Preferred Stock by Airbnb would not be deemed to be an adverse alteration of, change in, or waiving of the rights, preferences, privileges, or restrictions of that particular Series Preferred. *See id.* (specifying the class protective provisions and the protective provisions of each of the Series Preferred stock and stating that at least 50% of the shares of each Series Preferred originally issued under the applicable stock purchase agreement (except in the case of Series B and Series B-1 Preferred Stock which can meet the 50% threshold together) must remain outstanding in order for such Series Preferred's protective provisions to remain in place). In the case of every Series Preferred except for the Series D Preferred Stock that requires a 66 and 2/3% vote, a majority vote is required if the rights, preferences, privileges, or restrictions of such Series Preferred is altered, changed, or waived. *See id.*

[194] *See id.* at 24.

ther (1) the closing of the sale of shares of Common Stock to the public in a firm-commitment underwritten public offering, which would result, at a minimum, in $75 million of gross proceeds to Airbnb, or (2) the date and time, or the occurrence of an event, as consented to by the holders of at least a majority of the then-outstanding shares of Preferred Stock.[195] Put differently, the major investors would determine when the company would go public. Although minority stockholders could have life events—such as buying their first home and having their first child—that would affect their decision whether to take the company public (if they actually had a choice), major investors have no such constraints. Major investors can theoretically wait to go public (and achieve liquidity) at a much later date if it behooves them to do so.

Interestingly, shares of Series D Preferred Stock held as of the original issue date that were converted into Class B Common Stock pursuant to a Series D Conversion Agreement are not subject to antidilution adjustments.[196] This would give the holders of Series D Preferred Stock greater voting rights, but not superior rights, preferences, and privileges in other instances, such as liquidation preference. If a minority stockholder had invested in the Series D Preferred Stock round of financing, he or she would now have more votes, but would lose the rights, preferences, and privileges of holders of Preferred Stock.

Pursuant to the preferred stock protective provisions under the class protective provisions section, holders of the majority of the then-outstanding shares of Preferred Stock must consent separately and together as a class on an as-converted-to-the-appropriate-class-of-Common-Stock basis in the event Airbnb redeems or repurchases any shares of Common Stock.[197] This in itself is not unusual, because holders of Preferred Stock want to have the right to carefully control the capitalization of the company. What is atypical, however, is that this provision is not triggered as long as the aggregate amount of the

[195] *See id.* Upon a mandatory conversion, all outstanding shares of Preferred Stock would convert into shares of Class B Common Stock; however, the election of holders of a majority of the outstanding shares of Series B Preferred Stock is required to automatically convert the outstanding shares of Series B Preferred Stock in connection with any Deemed Liquidation Event (as defined in the Airbnb Restated Certificate) in which holders of Series B Preferred Stock received (or would be reasonably expected to receive at the time of such conversion), an amount per share less than the Series B Preferred Stock Liquidation Amount. The same principle applies to the Series C Preferred Stock and Series D Preferred Stock, except that in the case of the latter, the vote would need to be at least 66 and 2/3%. *See id.* at 24–25. In the case of Series E Preferred Stock, a majority of the outstanding shares of Series E Preferred Stock would be required to convert the outstanding shares of Series E Preferred Stock in connection with not only any Deemed Liquidation Event in which holders of Series E Preferred Stock receive at the closing of such transaction an amount per share less than the application Liquidation Amount (as defined in Airbnb Restated Certificate) of the Series E Preferred Stock, but also any equity financing of Airbnb in which the pre-financing valuation of the Company in such financing is $8,000,000,000 or more. *See id.*

[196] *See id.* at 15. In contrast, there is a special antidilution adjustment for Series C Preferred Stock. *See id.* at 22–24.

[197] *See id.* at 8–9.

repurchase does not exceed $100 million per calendar year.[198] This provision has implications for employees who hold options or who are already stockholders, because it means that Airbnb could choose to repurchase up to $100 million worth of employee options or shares without triggering the protective provision. Typically, such repurchases are done at a much lower value than the current value of the stock.[199] This could have negative repercussions for the employees of unicorns, particularly if such employees foresee the stock increasing in value.

Under the terms of the antidilution carveouts, the board vote must include either the Series Seed Director or Series B Director to: (1) increase the number of shares reserved under any equity plan; and (2) approve shares of common stock, options, or convertible securities issued (i) to banks, equipment lessors, or financial institutions in connection with a debt financing or equipment leasing transaction, and (ii) in connection with sponsored research, collaboration, technology license, development, OEM [original equipment manufacturing], marketing, or other similar agreements or strategic partnerships.[200] Accordingly, the major holders of Series Seed Preferred Stock or Series B Preferred Stock have a higher degree of influence than the holders of Series A Preferred Stock, Series C Preferred Stock, Series D Preferred Stock, and Series E Preferred Stock who do not have designated board members other than as part of a larger voting block of Common Stock and Preferred Stock, voting together. This particular section demonstrates the key roles the Series Seed Director and Series B Director play in the company decision-making process, because their votes are required in key matters affecting the company, including the size of the option pool. Minority stockholders and employees would most likely not be aware of this fact.

Certain educated guesses can be made about the major stockholders of the company, such as the fact that the holders of Series Seed Preferred Stock and Series B Preferred Stock most likely have a major investor in each of those Series Preferred that controls a majority of the shares of the outstanding Series Seed Preferred Stock and Series B Preferred Stock, respectively. Furthermore,

---

[198] *See id*. at 8. The shares repurchased refer to outstanding shares of common stock or options to purchase shares of Common Stock from employees or other service providers in connection with an employee liquidity or such similar program (as approved by the Board, or shares of Preferred Stock). The rest of the section on class protective provisions is fairly standard and requires a vote of the Preferred Stock if there is an increase or decrease of the authorized number of shares of Common Stock or Preferred Stock having a new class or series of equity securities having rights, preferences or privileges senior to or on parity with any series of Preferred Stock, declaring or paying any dividend, changing the authorized number of Board members, liquidating Airbnb, or amending, altering, restating, waiving, or repealing any provision of the Restated Certificate that would adversely change the rights, preferences, and privileges of the Preferred Stock. *See id.* at 8–9.

[199] *See infra* notes 136–140 and accompanying text (discussing employee stock options).

[200] *See* Airbnb Restated COI, *supra* note 185, at 14–15.

these major investors have significant information rights via the Amended and Restated Investors' Rights Agreement in their capacity as board members. This example highlights the fact that the minority stockholders have very little influence, if any, about the direction of the company, because there are voting provisions that benefit the major stockholders when certain actions are taken by Airbnb. Additionally, because the minority stockholders lack the same access to information that major stockholders have, they do not have any visibility into what is happening with the company. Lastly, based on the repurchase provision in the antidilution carveouts, one can surmise that Airbnb anticipates addressing employee liquidity issues through a repurchase program that does not trigger antidilution.

B. Dropbox

1. Overview of Dropbox

Dropbox was incorporated in 2007 in the State of Delaware.[201] It touts itself as a secure file sharing and cloud storage solution with an emphasis on providing these services for businesses.[202] Since its inception, "it has added 300 million new users across 200 countries"[203] and was valued at $10 billion more than two years ago.[204] Any information about the number of Dropbox users or employees can only be gleaned from news reports. And like the numbers reported for Airbnb, they cannot be verified. In one article from April 2015, Dropbox reportedly had "over 1,200 employees—from about 500 a year ago—working on a platform used by more than 300 million users world-

[201] *See* Dropbox, Inc., Notice of Exempt Offering of Securities (Form D) (Feb. 19, 2014) [hereinafter Dropbox Form D], http://www.sec.gov/Archives/edgar/data/1467623/000146762314000002/xslFormDX01/primary_doc.xml [https://perma.cc/DKR3-H4UX]. Dropbox was originally known as Evenflow, Inc. *Id.*

[202] *See Dropbox Business*, DROPBOX, https://www.dropbox.com/business [https://perma.cc/H4CT-7KBP]. Note that the homepage does not reference cloud storage, but just storage. *See id.* Dropbox is now making inroads in the collaborative note-taking space as well. *See* Sarah Perez, *Dropbox's Collaborative Note-Taking Service, Dropbox Notes, Heads into Beta Testing*, TECHCRUNCH (Apr. 23, 2015), http://techcrunch.com/2015/04/23/dropboxs-collaborative-note-taking-service-dropbox-notes-heads-into-beta-testing/#.j6lqea:YCWc [https://perma.cc/QSC8-3SDM].

[203] Eugene Kim, *The Clock Is Ticking for Dropbox, Valued at $10 Billion More Than a Year Ago*, BUS. INSIDER (May 20, 2015, 7:44 PM), http://www.businessinsider.com/the-clock-is-ticking-for-dropbox-2015-4 [https://perma.cc/LJ85-DADG].

[204] *See id.* Despite its successes, however, there are indications that the company is struggling. *See id.*

wide."[205] In 2014, Dropbox was also rumored to have had revenue in the range of $300 million to $400 million; in 2013 it was said to be $200 million.[206]

2. Dropbox Form D

In its most recent Form D filing, filed on February 24, 2014, Dropbox reported that seventy-two investors have invested in the offering, none of whom were unaccredited investors.[207] The federal exemption Dropbox relied on was Rule 506(b) and the total offering amount was $450 million.[208] Dropbox declined to disclose its revenue range.[209]

3. Dropbox Amended and Restated Certificate of Incorporation

Similar to Airbnb, Dropbox has three classes of stock: Class A Common Stock, Class B Common Stock, and Preferred Stock.[210] Under the Dropbox Restated Certificate of Incorporation ("Dropbox Restated Certificate"), Dropbox authorized a total of 1,526,661,381 shares of its capital stock, of which 700,000,000 shares are Class A Common Stock, 600,000,000 shares are Class B Common Stock, and 226,661,381 shares are Preferred Stock.[211] There are four series of Preferred Stock: Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock, and Series C Preferred Stock.[212]

In the event of any liquidation, dissolution, or winding up of Dropbox, the holders of each share of Preferred Stock then outstanding are entitled to be paid their respective original issue price per share (or pro rata amount if the full amount is not available) prior to the holders of Class A and Class B Common Stock. After the holders of Preferred Stock are paid their liquidation preference, the holders of Class A and Class B Common Stock will receive the remainder based on their respective pro rata share.[213] As is customary, the

[205] Eugene Kim, *Why Dropbox Only Expects Its Employees to Hit 70% of Their Goals*, BUS. INSIDER (Apr. 16, 2015, 8:17 PM), http://www.businessinsider.com/how-dropbox-motivates-employees-2015-4 [https://perma.cc/CZ4V-26SD].

[206] *The Dropbox Valuation Is Irrational*, CB INSIGHTS (Sept. 1, 2015), https://www.cbinsights.com/blog/dropbox-valuation-bubble/ [https://perma.cc/FHM8-FF7C].

[207] Dropbox Form D, *supra* note 201.

[208] *Id*. Dropbox also hired Allen & Company LLC and the Goldman Sachs Group to help facilitate the deal, paying $8,125,000 in sales commissions. *See id.*

[209] *See id.*

[210] *See* Dropbox, Inc., Restated Certificate of Incorporation, exhibit 1, at 2 (Jan. 29, 2014) [hereinafter Dropbox Restated COI] (on file with author).

[211] *See id.*

[212] The Preferred Stock is designated as follows: (1) 95,810,910 shares of Series A Preferred Stock with an original issue price of $0.06263 per share; (2) 78,023,640 shares of Series A-1 Preferred Stock with an original issue price of $0.01605; (3) 29,268,103 shares of Series B Preferred Stock with an original issue price of $9.0491; and (4) 23,558,728 of Series C Preferred Stock with an original issue price of $19.1012 per share. *See id.* at 2–3.

[213] *See id.* at 5–6.

deemed liquidation event is defined in the Dropbox Restated Certificate, unless otherwise approved by the vote of each of the following: (1) the holders of at least two-thirds of voting power of Preferred Stock then outstanding, as a separate class; (2) the holders of at least seventy percent in voting power of the shares of Series B Preferred Stock then outstanding, as a separate series; and (3) the holders of a majority in voting power of the shares of Series C Preferred Stock then outstanding, as a separate series.[214] In the case of Series B Preferred Stock and Series C Preferred Stock, a majority of the shares of each such series originally issued must remain outstanding for such vote to be valid.[215] If minority stockholders are holders of Preferred Stock, they have the superior liquidation preference given to such holders; however, it is unlikely that they have a say in the decision-making process when such liquidation event occurs.

Similar to Airbnb, the Dropbox Restated Certificate states that each holder of shares of Class A Common Stock is entitled to one vote for each share of such stock; in the case of Class B Common Stock, the holder of Class B Common Stock is entitled to ten votes for each share of such stock. Unlike Airbnb, however, Dropbox states that each share of Preferred Stock is entitled to ten votes for each share of Class B Common Stock into which the shares of Preferred Stock could be converted.[216] The founders of Dropbox likely hold the Class B Common Stock, as it has superior voting rights to Class A Common Stock, which is most likely held by rank-and-file employees. Therefore, employees will have minimal influence on any actions that require a vote, given the founders' voting power.

Dropbox has authorized a five-member board of directors and the number of directors cannot be altered without the consent of the holders of at least a majority of the then-outstanding shares of (1) Preferred Stock, voting as a separate class; and (2) Class A Common Stock and Class B Common Stock, voting as a separate class.[217] The holders of Preferred Stock, voting as a separate class, are entitled to elect one director (the "Dropbox Preferred Director") and the holders of Class A Common Stock and Class B Common Stock are entitled to elect the remaining four.[218] Again, because the holders of Class B Common Stock have ten votes for every share of such stock that they hold, they are effectively the stockholders who elect the remaining four directors.

---

[214] *See id.* at 6.
[215] *See id.*
[216] *See id.* at 8.
[217] *See id.* at 9.
[218] *See id.* The Board election assumes that at least 45,000,000 shares of Preferred Stock are outstanding (as may be adjusted for additional stock splits, combinations, stock dividends, recapitalizations, reclassifications, and the like).

The class protective provisions specify that Dropbox must obtain the approval of a majority in voting power of the then-outstanding shares of Preferred Stock, voting as a single class, under certain circumstances.[219] This Article focuses on the protective provisions regarding any redemption or repurchase of Class A Common Stock or Class B Common Stock. Not only does any redemption or repurchase of these classes require a majority vote of the then-outstanding shares of Preferred Stock, it also requires a seventy percent vote of the then-outstanding Series B Preferred Stock and a majority vote of the then-outstanding Series C Preferred Stock.[220] One of the less common provisions in the Dropbox Restated Certificate provides that Dropbox cannot effect a Liquidation Event (as defined in the Restated Certificate) in which each holder of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock, or Series C Preferred Stock receives less than two times such holder's original issue price per share without the approval of a majority of the then-outstanding shares of Preferred Stock.[221] Additionally, there are specific, separate protective provisions for Series B Preferred Stock and Series C Preferred Stock so long as a majority of the shares of these series originally issued remains outstanding, respectively.[222] In the case of the Series B Preferred Stock, the approval of the holders of at least seventy percent in voting power of the then-outstanding shares of Series B Preferred Stock, voting together as a single class, is required for certain actions to take place;[223] in the case of the Series C Preferred Stock, approval of the holders of at least a majority in voting power of the then-outstanding shares of Series C Preferred Stock, voting together as a single class, is required.[224] The specific threshold levels of votes for the protective provisions are undoubtedly carefully calibrated to prevent

[219] Most of the class protective provisions are fairly standard. For example, Dropbox must obtain the approval of a majority of interest of the Preferred Stock then outstanding before it amends the Dropbox Restated Certificate or bylaws in a way that materially and adversely affects the rights, preferences, privileges, or restrictions of the Preferred Stock. *See id.* at 22.

[220] The redemption or repurchase excludes the repurchase by Dropbox of shares of Class A Common Stock or Class B Common Stock held by employees, officers, and others performing services for Dropbox or a subsidiary that are subject to restricted stock purchase agreements, stock option exercise agreements, vesting agreements, or similar agreements under which Dropbox has the option to repurchase such shares at cost, upon the occurrence of certain events (e.g., termination of employment or services); or at a price pursuant to Dropbox's exercise of right of first refusal to repurchase such shares ("Permitted Repurchases") in the case of the Preferred Stock vote and "redemptions or repurchases (i) that are Permitted Repurchases or (ii) pursuant to [Dropbox's] rights of first refusal," in the case of the Series B Preferred Stock and Series C Preferred Stock votes. *Id.* at 22–23. Note that the definition of Permitted Repurchases covers Dropbox's exercise of a right of first refusal to purchase such shares although the right of first refusal is not specified as it is in the similar provision for the respective votes of the Series B Preferred Stock and Series C Preferred Stock. *See id.* at 3.

[221] *See id.* at 22.

[222] *See id.* at 22–23.

[223] *See id.* at 22.

[224] *See id.* at 23.

minority stockholders from having any influence over the decision-making process.

The Dropbox Restated Certificate also specifies certain antidilution carveouts.[225] In the event that any shares of Class A Common Stock, Class B Common Stock, or Preferred Stock[226] issued or issuable after the applicable original issue date are approved by the board of directors, which includes the Dropbox Preferred Director, and are also approved by the holders of at least seventy percent in voting power of the then-outstanding shares of Series B Preferred Stock and a majority in voting power of then-outstanding shares of Series C Preferred Stock, such shares will not trigger the antidilution adjustment.[227] Furthermore, each such approval must specifically state that such shares shall be excluded from the definition of "Additional Shares" (which would ordinarily trigger the antidilution adjustment).

The holders of at least a majority in voting power of the shares of Preferred Stock as a class or series of Preferred Stock then outstanding may waive any of the rights, powers, preferences, and other terms of either the Preferred Stock as a class or such series of Preferred Stock, provided that the holders of two-thirds in voting power of the Preferred Stock then outstanding is required when any rights of the holders of Preferred Stock are waived; seventy percent in voting power of the Series B Preferred Stock then outstanding is required when any rights of the Series B Preferred Stock are waived; and a majority in voting power of the Series C Preferred Stock then outstanding is required when any of the rights of the holders of Series C Preferred Stock are waived.[228]

It is clear, based on the information provided in the Dropbox Restated Certificate, that the holders of Class A Common Stock, Class B Common Stock, Series B Preferred Stock, and Series C Preferred Stock are the important players in Dropbox. The Class A Common Stock and Class B Common Stock are most likely held by employees of the company and the founders, respectively.[229] The fact that the threshold level of separate approvals for the holders of Series B Preferred Stock and Series C Preferred Stock are seventy percent of the then-outstanding shares of Series B Preferred Stock and a majority of the Series C Preferred Stock indicates that the majority stockholder(s)

---

[225] *See id.* at 13–15 (enumerating the antidilution carveouts under art. V, section 6.8(b)).

[226] *See id.* at 15 (specifying in art. V, section 6.8(b)(i)(K), that options or warrants or rights to acquire Class A Common Stock, Class B Common Stock, or Preferred Stock are also included in the antidilution carveouts).

[227] *See* Dropbox Restated COI, *supra* note 210, at 15.

[228] *See id.* at 24.

[229] The author makes this conclusion based on her own practice experience. Startups grant options to purchase common stock to their employees to entice them with the possibility of a huge upside when the company goes public. As the Class B Common Stock has ten votes for every one share, it is almost certainly held by the founders of Dropbox so that they can exert greater control over decisions that affect the future of Dropbox.

most likely hold those respective amounts. Although the holders of Series A Preferred Stock and Series A-1 Preferred Stock do not have the right to block votes, as the Series B Preferred Stock and Series C Preferred Stock do, they still have some leverage because their vote is needed to effect any of the actions enumerated in the protective provisions. This has repercussions for the Amended and Restated Investors' Rights Agreement; depending on who the investors are, there is a strong possibility that only the Dropbox Preferred Director and perhaps a board observer designee of Series C Preferred Stock have access to detailed information regarding the financials of Dropbox. Furthermore, the stringent repurchase provisions requiring three different types of votes ensure that employees are unlikely to be able to sell their shares on the secondary market.

C. Pinterest

1. Overview of Pinterest

Pinterest was originally incorporated in 2008 in the State of Delaware under the name Cold Brew Labs Inc.[230] Pinterest began as a place to store images, but now aims to "become the search engine for discovery, or the place to go to when users are looking for new ideas."[231] Users of the service compile "pins" (photos and links that bookmark various sources) on personal, online "boards" dedicated to their interests.[232] Since the site's launch in 2010, the total number of pins has passed thirty billion.[233] Pinterest recently struck ad deals with General Mills, Kraft, Lululemon, and Gap.[234] In its last round of funding, the company was valued at $11 billion—more than twice its previous round.[235] Unlike Airbnb and Dropbox, reports of rumored revenue could not be found. The only relevant number that could be located was the number of employees, which was reportedly over 500.[236]

---

[230] *See* Pinterest, Inc., Eleventh Amended and Restated Certificate of Incorporation (Feb. 27, 2015) [hereinafter Pinterest Restated COI] (on file with author).

[231] Yoree Koh, *Pinterest Valued at $11 Billion After Latest Funding*, WALL STREET J. (Mar. 16, 2015, 5:31 PM), http://www.wsj.com/articles/pinterest-raises-367-million-at-11-billion-valuation-1426538379 [https://perma.cc/8T6F-SXDN].

[232] *What's Pinterest?*, PINTEREST, https://web.archive.org/web/20150910044755/https://business.pinterest.com/en/whats-pinterest.

[233] Douglas MacMillan, *Pinterest Is Now Valued at $5 Billion, Despite Little Revenue*, WALL STREET. J.: DIGITS (May 15, 2014, 7:23 PM), http://blogs.wsj.com/digits/2014/05/15/pinterest-is-now-valued-at-5-billion-despite-almost-no-revenue/ [https://perma.cc/36FR-EYBJ].

[234] *See id*. Each of these companies paid for up to three- to six-month commitments at a price of $1–2 million. *Id.*

[235] *See* Koh, *supra* note 231.

[236] *Press*, PINTEREST, https://about.pinterest.com/en/press [https://perma.cc/98PW-U4FB]. A thorough Internet search was done to attempt to find relevant financial information.

2. Pinterest Form D

In its most recent Form D filing, filed on March 16, 2015, Pinterest reported that fifteen investors participated in the offering, none of whom were unaccredited investors.[237] This figure, however, only reflects the number of investors in the offering—there is no information about who these investors are, nor is there any indication of how much each of them invested.

The federal exemption Pinterest relied on was Rule 506(b) and the total offering amount was $577,916,906, of which $367,099,927 was sold in the initial closing.[238] Pinterest declined to disclose its revenue range.[239]

3. Pinterest Amended and Restated Certificate of Incorporation

Pinterest's Eleventh Amended and Restated Certificate of Incorporation ("Pinterest Restated Certificate") was filed with the Delaware Secretary of State on February 27, 2015.[240] It authorized 340,000,000 shares of Common Stock and 181,556,318 shares of Preferred Stock.[241] The Preferred Stock is respectively designated as Seed 1 Preferred Stock, Seed 2 Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, Series F Preferred Stock, and Series G Preferred Stock.[242] Unlike Airbnb and Dropbox, Pinterest does not have two classes of Common Stock; however, it does have significantly more series of Preferred Stock, with two seed rounds and eight preferred stock financing rounds.[243]

The holders of Series B Preferred Stock are entitled to elect one director of Pinterest (the "Pinterest Series B Director"), exclusively and as a separate

---

[237] Pinterest, Inc., Notice of Exempt Offering of Securities (Form D) (Mar. 16, 2015), http://www.sec.gov/Archives/edgar/data/1506293/000150629315000001/xslFormDX01/primary_doc.xml [https://perma.cc/6NUC-JYRB].

[238] *See id.*

[239] *See id.*

[240] Pinterest Restated COI, *supra* note 230, at 1.

[241] *See id.* exhibit A, at 1.

[242] The Preferred Stock is designated as follows with the following original issue prices: (1) 24,645,000 shares of Seed 1 Preferred Stock at $0.02 per share; (2) 19,713,850 shares of Seed 2 Preferred Stock at $0.0454 per share; (3) 2,852,500 Series A-1 Preferred Stock at $0.1928 per share; (4) 36,963,415 shares of Series A-2 Preferred Stock at $0.28328 per share; (5) 22,663,350 shares of Series B Preferred Stock at $1.195966 per share; (6) 12,855,850 shares of Series C Preferred Stock at $7.77856 per share; (7) 18,502,932 shares of Series D Preferred Stock at $10.8091 per share; (8) 15,484,454 shares of Series E Preferred Stock at $14.5307 per share; (9) 11,774,967 shares of Series F Preferred Stock at $16.98518 per share; and (10) 16,100,000 shares of Series G Preferred Stock at $35.89546 per share. *See id.* at 1–3.

[243] *See id.* at 1.

series.[244] Likewise, the holders of Series A-1 and A-2 Preferred Stock, voting together, exclusively and as a separate class and on an as-converted basis, are entitled to elect one director (the "Pinterest Series A Director").[245] The holders of Common Stock are entitled to elect two directors (the "Pinterest Common Directors"), exclusively and as a separate class.[246] The holders of the Common Stock and Preferred Stock vote on the balance of the total number of directors, together as a single class and on an as-converted basis.[247] Based on the Preferred Stock protective provisions, the authorized number of directors is four.[248] Individually, minority stockholders do not have enough votes to impact the outcome for the Pinterest Common Directors in any meaningful way. Additionally, they will not have access to information that board members receive in their capacity as such.

One of the unusual provisions in the Pinterest Restated Certificate is the fact that Ben Silbermann, the President and CEO, is entitled to three votes in his capacity as a member of the Board of Directors (the "Special Director Vote"), but such right is not applicable to matters relating to his compensation.[249] Furthermore, if the two Pinterest Common Director seats are occupied, Mr. Silbermann's Special Director Vote is reduced to two votes.[250] Although there is only one class of Common Stock, as one of the co-founders of Pinterest, Mr. Silbermann exercises a significant degree of influence over Pinterest through the Special Director Vote.[251] It would be important for investors in Pinterest to have access to this information to accurately understand the power dynamics within the company and the degree of the CEO's influence.

Under the Preferred Stock protective provisions, the approval of sixty percent of then-outstanding shares of Preferred Stock, voting together as a single class on an as-converted basis, is required under certain enumerated circumstances.[252] Unlike Airbnb and Dropbox, Pinterest's class protective provisions regarding the purchase, redemption, payment, or declaration of any divi-

---

[244] *Id.* at 7. At least 11,331,675 shares of Series B Preferred Stock, subject to adjustment in the event of any stock dividend, stock split, combination or the like, must remain outstanding in order to retain the right to elect the Pinterest Series B Director. *See id.*

[245] *See id.* At least 19,907,955 shares of Series A-1 Preferred Stock and/or Series A-2 Preferred Stock, subject to adjustment in the event of any stock dividend, stock split, combination or the like, must remain outstanding in order to retain the right to elect the Pinterest Series A Director. *See id.*

[246] *See* Pinterest Restated COI, *supra* note 230, exhibit A, at 7.

[247] *See id.*

[248] *See id.* at 8. Having an even number of board members is unusual as companies typically want an odd number in the event of a tie; that being said, the Special Director Vote would effectively make it an odd vote. *See id.* at 7–8.

[249] *See id.*

[250] *See id.* at 8.

[251] *See* Nicholas Carlson, *Pinterest CEO: Here's How We Became the Web's Next Big Thing (DECK)*, BUS. INSIDER (Apr. 24, 2012, 8:53 PM), http://www.businessinsider.com/pinterest-founding-story-2012-4 [https://perma.cc/9E9J-TDL2] (describing Ben Silbermann's role in founding Pinterest).

[252] Pinterest Restated COI, *supra* note 230, exhibit A, at 8.

dend or distribution on any shares of capital stock of Pinterest excludes the "repurchases of stock from former employees, officers, directors, consultants or other persons who performed services for [Pinterest] . . . in connection with the cessation of such employment or service, at the lower of the original purchase price or the then-current fair market value thereof" pursuant to board approval.[253] The Series D Preferred Stock, Series E Preferred Stock, Series F Preferred Stock, and Series G Preferred Stock also have separate series protective provisions.[254]

In the case of each of the aforementioned series of Preferred Stock, as long as approximately twenty-five percent of the originally issued shares of each series remains outstanding, Pinterest cannot take any action to: (1) amend the Pinterest Restated Certificate or bylaws which would alter the rights, preferences, powers, or special rights of the particular series of Preferred Stock without similarly affecting the entire class of Preferred Stock; or (2) issue or obligate itself to issue more than the number of that series of Preferred Stock specified in the Restated Certificate as the authorized number for that series of Preferred Stock.[255] As in the vast majority of venture capital financings, the voting thresholds are drafted in such a way that the control of the Preferred Stock, voting as a class, or a particular series of Preferred Stock, voting as a separate series, remains in the hands of the major investors. Again, having this kind of information available in a Form D would be helpful in giving different types of stockholders a clearer picture of the voting structure of the organization and whether voting blocks are possible.

The Pinterest Restated Certificate also provides for mandatory conversion of Preferred Stock to Common Stock in the event of either (1) the closing of the sale of shares of Common Stock to the public in a firm commitment underwritten public offering amounting to at least $50 million of gross proceeds to Pinterest (the "Pinterest Qualified IPO"); or (2) such date, time, or particular event specified by the holders of at least sixty percent of the the-outstanding shares of Preferred Stock, voting together as a single class on an as-converted basis.[256] If, however, the mandatory conversion is a "Deemed Liquidation Event" as that term is defined in the Pinterest Restated Certificate under scenario (2) above, then Pinterest must also have the approval of the holders of the majority of Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, Series F Preferred Stock, and Series G Preferred Stock, each voting as a separate class (and not together).[257] There

[253] *See id.* at 8.
[254] *See id.* at 9–10.
[255] *See id*. The Series D Preferred Stock protective provision has a 60% threshold for its approval, whereas the Series E, F, and G Preferred Stock have a majority threshold. *See id.*
[256] *See id.* at 21–22.
[257] *See id.* at 22.

is also a redemption provision in the Pinterest Restated Certificate.[258] Both the mandatory conversion and redemption provisions illustrate yet again the power of the major investors in the event of a Deemed Liquidation Event or a redemption.

D. Snapchat

1. Overview of Snapchat

Snapchat was incorporated in 2012 in the State of Delaware.[259] Valued at $16 billion, Snapchat is a messaging app company known as a platform for "selfies" and videos that quickly disappear after the receiver has viewed them.[260] Like the other companies discussed in this Article, it continues to expand its reach.[261]

---

[258] *See id.* at 23. A redemption right gives investors the right to have their shares redeemed by a company on a particular date; in the case of Pinterest, the holders of at least 72% of the Preferred Stock, voting together as a single class on an as-converted basis, can request such redemption any time on or after February 27, 2025. *See id.*; *see also* MODEL COI, *supra* note 72, at 33 n.60 (noting that redemption provisions are not more typical of East Coast than West Coast venture capital financings).

> However, in the wake of the Delaware Chancery Court's 2009 opinion in [*In*] *re Trados Inc. S'holder Litigation*, . . . investors may be foregoing a substantial protection/benefit if they do not have the right to put their shares back to the company at a time when they may wish to seek the sale of the company.

See MODEL COI, *supra* note 72, at 33 n.60 (citing *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 39 (Del. Ch. Aug. 16, 2013)).

[259] Snapchat, Inc., Notice of Exempt Offering of Securities (Form D) (May 28, 2015) [hereinafter Snapchat Form D], http://www.sec.gov/Archives/edgar/data/1564408/000163845415000002/xslFormDX01/primary_doc.xml [https://perma.cc/3DCN-LMZE].

[260] Snapchat was valued at $16 billion during its last round of funding. *See* Leslie Picker & Sarah Frier, *Snapchat Said to Be Valued at $16 Billion in New Fundraising*, BLOOMBERG BUS. (May 29, 2015, 3:15 PM), http://www.bloomberg.com/news/articles/2015-05-29/snapchat-said-to-be-valued-at-16-billion-in-new-fundraising [https://perma.cc/PK84-DVGC]; Kyle Sanford, *Snapchat Valuation Not Disappearing*, PITCHBOOK DATA, INC. (Mar. 10, 2016), http://pitchbook.com/news/articles/snapchat-valuation-not-disappearing [https://perma.cc/LPR2-2M4W] (noting that Snapchat retained its $16-billion valuation despite reports that Fidelity had marked down its investments in the company). Users can "draw" on their photos, add captions, and decide how long their photos can remain visible to receivers. *See* Alexis C. Madrigal, *What Is Snapchat?*, THE ATLANTIC (Nov. 15, 2013), http://www.theatlantic.com/technology/archive/2013/11/what-is-snapchat/281551/ [https://perma.cc/L5HK-94NC].

[261] According to blog postings on the Snapchat website, Snapchat offers Snapcodes (allowing users to add friends to Snapchat), Snapchat Discover (allowing users to explores stories through different editorial teams), Snapcash (allowing users to use their debit cards to send money to friends' bank accounts), and Our Campus Story (allowing users to adds to stories happening on a particular college campus), to name a few. *See Introducing Discover*, SNAPCHAT BLOG (Jan. 27, 2015), http://blog.snapchat.com [https://perma.cc/V6H9-ETFQ]; *Introducing Snapcash*, SNAPCHAT BLOG (Nov. 24, 2014), http://blog.snapchat.com [https://perma.cc/V6H9-ETFQ]; *Our Campus Story*, SNAPCHAT BLOG (Oct. 17, 2014), http://blog.snapchat.com/post/100253858835/our-campus-story [https://perma.cc/K9RQ-2JBA]; *Snapcodes*, SNAPCHAT BLOG (May 4, 2015), http://blog.snapchat.com [https://perma.cc/V6H9-ETFQ]. Snapchat also just ventured into political advertising, landing its first political

According to its LinkedIn profile, Snapchat has between 51 and 200 employees.[262] As with Pinterest, information about Snapchat's revenue is not readily available, so stockholders and employees alike (unless they are major investors) have no visibility into the financial state of the company.

2. Snapchat Form D

In its most recent Form D filing, filed on May 28, 2015, Snapchat reported that thirty-five investors had invested in the offering, none of whom were unaccredited investors.[263] The federal exemption they relied on was Rule 506(b) and the total offering amount was $650 million.[264]

3. Snapchat Amended and Restated Certificate of Incorporation

Snapchat's Amended and Restated Certificate of Incorporation ("Snapchat Restated Certificate") was filed with the Delaware Secretary of State on February 13, 2015.[265] Snapchat has 1,248,729,280 shares of Common Stock, of which 730,000,000 shares are Class A Common Stock and 70,000,000 shares are Class B Common Stock.[266] The Class A Common Stock has one vote per share and the Class B Common Stock, unlike the Class B Common Stock of Airbnb and Dropbox, has no voting rights (except as required by law).[267] Under the Restated Certificate, Snapchat authorized 448,729,280 shares of Preferred Stock, which are divided into the following series: Series A Preferred Stock, Series A-1 Preferred Stock, and Series B Preferred Stock (the three of which comprise the "Snapchat Voting Preferred"); Series C Preferred Stock (which combines with the Snapchat Voting Preferred to make the "Snapchat Prior Preferred"); Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock (the three of which combine with the Snapchat Prior Preferred to make the "Snapchat Investor Preferred"); and Series FP Preferred Stock (which, together with the Snapchat Investor Preferred, makes the "Snapchat Series Preferred").[268]

---

ad with the American Action Network, an outside group with close ties to the House Republican leadership. *See* Ashley Parker, *A First for Snapchat*, N.Y. TIMES: FIRST DRAFT (June 6, 2015, 1:16 PM), http://www.nytimes.com/politics/first-draft/2015/06/06/a-first-for-snapchat/?_r=0 [https://perma.cc/955F-ZHX2].

[262] *Snapchat, Inc.*, LINKEDIN, https://www.linkedin.com/company/snapchat [https://perma.cc/S3PA-5GFM].

[263] Snapchat Form D, *supra* note 259.

[264] *Id.*

[265] *See* Snapchat, Inc., Amended and Restated Certificate of Incorporation 1 (Feb. 13, 2015) [hereinafter Snapchat Restated COI] (on file with author).

[266] *See id.*

[267] *See id.* at 16–17.

[268] *See id.* at 1–2. Snapchat's Preferred Stock is divided as follows: (1) 70,288,840 shares of Series A Preferred Stock, with the original issue price of $0.208515 per share; (2) 35,741,260 shares of

Unlike the other private companies that are discussed in this Part, the original issue price of Snapchat's Preferred Stock has fluctuated significantly.[269] This has implications for stockholders, as the holders of preferred stock will get an antidilution adjustment so that they are made whole when the price per share decreases in subsequent rounds of financings.

The voting rights are atypical in that the holders of Series FP Preferred Stock are entitled to the number of votes equal to ten times the number of shares of Class A Common Stock into which such shares of Series FP Preferred Stock could be converted.[270] Furthermore, if the vote or approval of Snapchat's Preferred Stock is required by law, then the Snapchat Series Preferred shall vote together as a class on an as-converted basis.[271] In addition to the protective provisions for the Snapchat Voting Preferred, each series of Preferred Stock has a separate vote.[272] But other than the separate series vote that the holders of Series C Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock are entitled to under the terms of the Snapchat Restated Certificate, these specified holders of Preferred Stock will have no voting rights and are not entitled to vote on any matter.[273] It would be helpful for minority stockholders to understand the difference between Series FP Preferred Stock voting rights and the voting rights of other holders of Preferred Stock.

Furthermore, an increase in the size of the Board of Directors to more than four, unless it is to increase the size by one director for a new CEO of Snapchat, would require the vote or written consent of the holders of the majority of the outstanding Class A Common Stock, Series FP Preferred, and

Series A-1 Preferred Stock at $0.01453 per share; 40,932,220 shares of Series B Preferred Stock at $1.95445 per share; 16,000,000 shares of Series C Preferred Stock at $3.40893 per share; 5,000,000 shares of Series D Preferred Stock at $0.001 per share; 42,000,000 shares of Series E Preferred Stock at $0.001 per share; 21,000,000 shares of Series F Preferred Stock at $0.001 per share; and 217,766,960 shares of Series FP Preferred Stock at $0.000020835 per share. *See id.* at 2–3.

[269] *See id.*

[270] *See id.* at 3.

[271] *See id.* at 4.

[272] *See id.* at 4–7.

[273] *See id.* at 6–7. Under the separate series vote, as long as at least 50% of the Series C Preferred Stock remains outstanding (as adjusted for any stock dividends, combinations, splits, recapitalizations, and the like) the holders of Series C Preferred Stock are entitled to a separate series vote on (i) any amendments, alterations, or repeal of any provision of the Certificate of Incorporation that adversely alters or changes the voting or other powers of the Series C Preferred Stock different from other classes of stock with the proviso that any change to the authorized capital of Snapchat or issuing one or more series of capital stock or any other securities convertible into equity securities of Snapchat will not be deemed to affect the Series C Preferred Stock adversely, and (ii) any increase or decrease in the authorized number of shares of Series C Preferred Stock. *See id.* The holders of Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock are only allowed to vote or give their written consent only as required under section 242(b)(2) of the DGCL or as otherwise required under applicable law. *See id.* at 7.

Snapchat Voting Preferred, voting together as a single class on an as-converted basis.[274] Therefore, the size of the Snapchat board is most likely determined by the votes of the Class A Common Stock and Series FP Preferred.[275] The Voting Preferred, voting as a separate class on an as-converted basis, is entitled to elect one director and that director shall be entitled to one vote on all matters at the board meetings or in connection with any written consent.[276] The holders of Series FP Preferred Stock, voting as a separate class on an as-converted basis, are entitled to elect two directors (each, the "Series FP Director" and, together, the "Series FP Directors") and each of those directors is "entitled to that number of votes per director equal to the number of total authorized directors of the Board of Directors at the time of such vote" on all matters at the board meetings or in connection with any written consent.[277] For example, if there are four board members, then each Series FP Director would get four votes. In other words, the Series FP Directors would control the decision-making process. Lastly, the holders of Class A Common Stock, Series FP Preferred Stock, and Snapchat Voting Preferred, voting together as a single class on an as-converted basis, are entitled to elect all remaining members of the board; such director(s) would be entitled to one vote.[278]

The protective provisions for the Snapchat Voting Preferred necessitates the consent of the holders of a majority of the outstanding Snapchat Voting Preferred, voting together as a single class on an as-converted basis, in order for Snapchat to effect any redemption, repurchase, or payment of dividends with respect to Common Stock or Preferred Stock.[279] The Snapchat Restated Certificate, however, excluded from such definition:

> [the] acquisitions of capital stock pursuant to agreements under which [Snapchat] has the option to repurchase shares at no more than cost upon the occurrence of certain events, such as the termination of employment or service, [and] acquisitions of capital stock in the exercise of [Snapchat's] right of first refusal to repurchase such shares . . . [and] repurchases or dividend payments approved by the Board, including the vote of the Preferred Director, if such Preferred Director is a member of the Board at the time.[280]

---

[274] *See id.*

[275] The author deduced this by calculating the number of votes the Class A Common Stock and Series FP Preferred Stock would have voting together.

[276] *See* Snapchat Restated COI, *supra* note 265, at 7–8.

[277] *Id.* at 8.

[278] *See id.*

[279] *See id.* at 8–9.

[280] *Id.* at 5.

Regarding the liquidation preference, the holders of Snapchat Prior Preferred would be entitled to any distribution or payment upon such "Liquidation Event" (as defined in the Snapchat Restated Certificate) before any such distribution or payment is made to the Series D Preferred Stock, Series E Preferred Stock, Series F Preferred Stock, Series FP Preferred Stock, or any Common Stock.[281] Any remaining assets after the payment of the full liquidation preference of the Snapchat Prior Preferred would be distributed ratably to the holders of the Common Stock.[282] Provisions are also made for the Snapchat Series Preferred in the event of any Liquidation Event.[283]

Each share of Snapchat Series Preferred automatically converts into shares of Class A Common Stock (1)(a) for the Snapchat Investor Preferred, upon the affirmative election of the holders of the majority of the outstanding shares of Snapchat Voting Preferred, or (b) for the Series FP Preferred Stock, upon the affirmative election of the holders of the majority of the outstanding shares of Series FP Preferred Stock; or (2) for the Snapchat Investor Preferred only, upon the closing of a firmly underwritten public offering covering the offer and sale of Class A Common Stock for Snapchat, which would result in gross proceeds of at least $25 million.[284] There is also an unusual provision under the "Automatic Conversion" section of the Snapchat Restated Certificate. Any shares of Series FP Preferred purchased by an investor of Snapchat in connection with an equity financing in which it sells, at minimum, $1 million worth of a newly-created series of Preferred Stock, such shares of Series FP Preferred Stock automatically convert immediately prior to such transfer into shares of Preferred Stock sold in the equity financing described above.[285] It is important for both employees and minority stockholders to understand the implications of the board composition, liquidation preference, protective provisions, and conversion provisions described above to better comprehend the power dynamics of the board of directors, as well as their rights relative to others.

---

[281] *See id.* at 9.
[282] *See id.*
[283] *See id.*
[284] *See id.* at 14.
[285] *See id.* Any shares of Series FP Preferred Stock transferred, other than pursuant to the equity financing, in which the Series FP Preferred Stock no longer retains voting power automatically converts, immediately prior to such transfer, into shares of Class A Common Stock. *See id.*

E. Uber

1. Overview of Uber

Uber[286] was founded in 2009 and has since roared ahead of its competitors—Lyft and Sidecar—in the so-called "sharing economy."[287] It has raised $5.5 billion to date[288] and was valued at $41 billion during its last round of financing.[289] On its website, the company describes itself as follows: "Uber's a smartphone app that connects people with cars with people looking for rides around town. Uber is the easy new way to turn your car into a cash machine and get paid weekly in fares for driving."[290] Using a software tool dubbed "God View," Uber can see all vehicles on the Uber system and can pinpoint the location of every customer looking at the app on their smartphone.[291] Investors ranging from Google Ventures to Benchmark Capital to tech luminary Jeff Bezos (through Bezos Expeditions) have invested in Uber.[292]

---

[286] *See* Andrew Ross Sorkin, *Main Street Portfolios Are Investing in Unicorns*, N.Y. TIMES: DEALBOOK (May 11, 2015), http://www.nytimes.com/2015/05/12/business/dealbook/main-street-portfolios-are-investing-in-unicorns.html?_r=0 [https://perma.cc/LA5H-6J8N] (noting that Uber is now valued at $50 billion); Maria Aspan, *Most Startups Will Never Be Unicorns—And That's Okay*, INC. (May 12, 2015), http://www.inc.com/maria-aspan/uber-and-why-most-startups-are-no-unicorns.html [https://perma.cc/H7CD-D32E] (citing the growing divide between the haves and have-nots in the startup world and touting Uber as a leader among unicorns in receiving funding).

[287] The sharing economy means "using technology to connect consumers with goods and services that would otherwise go unused." Marcus Wohlsen, *What Uber Will Do with All That Money from Google*, WIRED (Jan. 3, 2014, 6:30 AM), http://www.wired.com/2014/01/uber-travis-kalanick/ [https://perma.cc/5PKT-8DY2]. In the case of Uber, it was a way to profit from limos and cabs that would otherwise be idle:

> In San Francisco, Uber has become its own noun—you "get an Uber." But to make it a verb—to get to the point where everyone Ubers the same way they Google—the company must outperform on transportation the same way Google does on search. No less than Google itself believes Uber has this potential. In a massive funding round in August led by the search giant's venture capital arm, Uber received $258 million. The investment reportedly valued Uber at around $3.5 billion and pushed the company to the forefront of speculation about the next big tech IPO—and [Uber Co-founder and CEO Travis] Kalanick as the next great tech leader.

Id.

[288] *See Uber Has Raised Nearly as Much Funding as All Other US on-Demand Startups Combined*, CB INSIGHTS (July 7, 2015), https://www.cbinsights.com/blog/uber-bigger-entire-on-demand-economy/ [https://perma.cc/W2MW-YTN4]. To put Uber's fundraising into context, the rest of the U.S. on-demand economy has raised $5.9 billion. *See id.*

[289] Alyson Shontell, *Uber Raises $1.2 Billion at a $41 Billion Valuation, Vows to Become 'Smarter and More Humble,'* BUS. INSIDER (Dec. 4, 2014, 11:55 AM), http://www.businessinsider.com/uber-just-raised-12-billion-2014-12 [https://perma.cc/62RR-HW2K].

[290] *Apply to Drive with Uber*, UBER, https://get.uber.com/cl/search/ [https://perma.cc/Q4AD-7DYY].

[291] Wohlsen, *supra* note 287.

[292] *See id.* (stating that Google's investment arm led a $258-million financing in August 2013); *see also* Alexia Tsotsis, *Uber Gets $32M from Menlo Ventures, Jeff Bezos and Goldman Sachs*,

Uber is the poster child for unicorns. As mentioned in Part II, Uber has over 3000 employees (a more specific number is not available).[293] The most detailed look at Uber's revenue was based on a leaked internal slide deck from early 2014, which was itself based primarily on December 2013 numbers.[294] According to the slide deck, in the month of December 2013, Uber generated $18 million in revenue in San Francisco alone.[295] Although the author of the 2014 report stated that this would mean $212 million in annual revenue, such extrapolation fails to take into account seasonal fluctuations and other factors.[296] Another news article stated: "Gross revenue [for Uber] is expected to hit a run rate of $10 billion by the end of [2015]. . . . Uber's revenue *growth rate* . . . [was] about 300% [in 2014] and it [was] expected to be another 300% [in 2015]."[297] Furthermore, according to this article, the company's current revenue derives from only a few of the over 150 cities in which it operated as of November 2014.[298] Interestingly, in that same month, a different reporter from the same publication stated that Uber was in 230 cities.[299] More recently, it was reported that Uber operates in 300 cities.[300] Clearly, there is no reliable source of up-to-date information on the scope of Uber's operations. This is yet another reason why enhanced disclosure in a centralized location, such as a unicorn's website, is necessary. The disconnect between what is reality and what is myth can only be resolved by having the type of disclosure for which this Article argues.

Despite Uber's successes, however, the company is facing challenges. For example, it claims that its median driver makes $90,766 annually, but it has not

---

TECHCRUNCH (Dec. 7, 2011), http://techcrunch.com/2011/12/07/uber-announces-32-million-in-funding/ [https://perma.cc/TF79-JAQ4].

[293] Kosoff & McAlone, *supra* note 109. Note that Uber does not consider its drivers to be employees. *See* Kia Kokalitcheva, *Uber's Employment Fight Just Got More Complicated*, FORBES (Mar. 4, 2016), http://fortune.com/2016/03/04/uber-driver-unemployment/ [https://perma.cc/8TZB-Y5YC] (discussing Uber drivers' class action lawsuit against Uber asserting that Uber misclassifies drivers as independent contractors rather than employees).

[294] *See* Alyson Shontell, *LEAKED: Internal Uber Deck Reveals Staggering Revenue and Growth Metrics*, BUS. INSIDER (Nov. 20, 2014, 5:58 PM), http://www.businessinsider.com/uber-revenue-rides-drivers-and-fares-2014-11# [https://perma.cc/SNN3-8MLL].

[295] *See id.* (extrapolating that if one assumes $18 million in revenue is generated per month, then the San Francisco market would be worth $212 million). Of course, this type of extrapolation is not accurate, and the reporter was merely guessing at what the total revenue would be.

[296] *See id.* The reporter should have used the term gross revenue, as the amount does not take into account that Uber receives 20% of the transaction fees. Also $18 million times twelve months equals $216 million (not $212 million).

[297] Henry Blodget, *Now I Know Why Investors Are Going Hog Wild About Uber*, BUS. INSIDER (Nov. 13, 2014, 1:10 PM), http://www.businessinsider.com/ubers-revenue-2014-11 [https://perma.cc/VA9A-8XR5] (noting that Uber would receive 20% of the $10 billion, which would amount to $2 billion—and the rest would go to Uber's drivers).

[298] *See id.*

[299] *See* Shontell, *supra* note 289.

[300] Isaac & Singer, *supra* note 104.

been able to substantiate that number.[301] With falling fare prices and increases in Uber's commissions, drivers are increasingly disillusioned with the company and its promises:[302]

> From London to San Francisco to New York, they've banded together to protest against Uber. The rhetoric they once saw as uplifting now seems deceptive and manipulative. Slowly but surely, Uber drivers are questioning whether Uber's promises about wages and "small business" opportunities are actually aligned with reality. And in New York, the birthplace of this grass-roots labor movement, $90,766 is starting to flicker out.[303]

Furthermore, unlike the virtual services delivered by Google and Facebook, Airbnb's and Uber's services are delivered physically and locally. Accordingly, as Uber develops, it is subject to the unique regulatory, political, and cultural landscape of each individual city in which it operates.[304] Put differently, unicorns like Uber can affect entire local ecosystems—for better or worse—and still not be subject to any measures of transparency, such as making their financial information publicly available.

2. Uber Form D

In its most recent Form D, filed on May 12, 2015, Uber reported that 142 investors had invested in the offering.[305] The federal exemption they relied on was Rule 506(c) and the total offering amount was $2,803,326,002.[306]

---

[301] *See* Griswold, *supra* note 107.

[302] *See id.*

[303] *Id.*

[304] *See* William H. Janeway, *Unicorns: Why This Bubble Is Different*, FORBES (May 28, 2015, 12:31 PM), https://web.archive.org/web/20160131203453/http://www.forbes.com/sites/valleyvoices/2015/05/28/unicorns-why-this-bubble-is-different/#5ac086007ee7. One author comments:

> Consequently, as [Uber and similar services have] been learning city by city, they are subject to local ecosystems that have evolved around the provision of such services: regulatory, political, cultural. The London taxi industry is not the same as that of New York nor San Francisco. The unbounded growth rates implicit in their valuations are subject to exogenous impediments that may induce step-function revaluations of growth prospects.

Id.

[305] Uber Technologies, Inc., Notice of Exempt Offering of Securities (Form D) (May 12, 2015), http://www.sec.gov/Archives/edgar/data/1543151/000154315115000002/xslFormDX01/primary_doc.xml [https://perma.cc/4JXM-PWAR].

[306] *Id.*

3. Uber Amended and Restated Certificate of Incorporation

Uber filed its Restated Certificate of Incorporation ("Uber Restated Certificate") with the Delaware Secretary of State on May 26, 2015.[307] It authorized 2,496,670,392 shares of Common Stock, of which 1,558,693,776 was designated Class A Common Stock and 937,976,616 was designated Class B Common Stock.[308] Uber also authorized 755,051,371 shares of Preferred Stock, respectively designated as Series Seed Preferred Stock, Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock (consisting of Series C-1 Preferred Stock, Series C-2 Preferred Stock, and Series C-3 Preferred Stock), Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock.[309]

As with Airbnb and Dropbox, the holders of Class B Common Stock are entitled to ten votes per share.[310] In addition, the holders of Series Seed Preferred Stock, Series A Preferred Stock, and Series B Preferred Stock are each entitled to ten votes for each share of Class B Common Stock into which such series could then be converted.[311] In contrast, the holders of Series C Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock are entitled to one vote for each share of Class A Common Stock into which such series could then be converted.[312]

The holders of Series A Preferred Stock, voting together as a separate class on an as-converted basis, are entitled to elect one director.[313] The holders of Series C-2 Preferred Stock, voting together as a separate class on an as-converted basis, are also entitled to elect one director.[314] The holders of Class B Common Stock, voting separately as a single class, are entitled to elect six directors of Uber.[315] One of the most unusual provisions in the Uber Restated

---

[307] *See* Uber Technologies, Inc., Restated Certificate of Incorporation 1 (May 26, 2015) [hereinafter Uber Restated COI] (on file with author).

[308] *See id.*

[309] *See id.* at 1–3. The Preferred Stock is designated as follows: (1) 174,029,880 shares of Series Seed Preferred Stock with an original purchase price of $0.0090625; (2) 152,053,436 shares of Series A Preferred Stock with an original purchase price of $0.0924825 per share; (3) 123,645,856 shares of Series B Preferred Stock with an original purchase price of $0.354475 per share; (4) 76,551,280 shares of Series C-1 Preferred Stock with an original purchase price of $3.5635 per share; (5) 31,003,680 shares of Series C-2 Preferred Stock with an original purchase price of $2.8508 per share; (6) 841,864 shares of Series C-3 Preferred Stock with an original purchase price of $3.5635 per share; (7) 87,193,208 shares of Series D Preferred Stock with an original purchase price of $15.51305 per share; (8) 84,504,220 shares of Series E Preferred Stock with an original purchase price of $33.317575 per share; and (9) 25,227,947 shares of Series F Preferred Stock with an original purchase price of $39.638581 per share. *See id.*

[310] *See id.* at 26.

[311] *See id.* at 19.

[312] *See id.*

[313] *See id.*

[314] *See id.*

[315] *See id.*

Certificate states that the holders of Series Seed Preferred Stock, Series B Preferred Stock, Series C-1 Preferred Stock, Series C-3 Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, Series F Preferred Stock, and Class A Common Stock cannot vote in the election or removal of any directors.[316]

The Uber Restated Certificate further provides that each share of Preferred Stock automatically converts into shares of Class A Common Stock or Class B Common Stock in the event of a Preferred Stock Conversion Event (as defined in the Uber Restated Certificate) or an IPO of at least $30 million (net of underwriting discounts and commissions).[317]

Furthermore, although the holders of the Preferred Stock are entitled to receive their investment back prior and in preference to holders of Class A Common Stock or Class B Common Stock in the event of any liquidation, dissolution, or winding up of Uber, the Series C Preferred Stock will receive 1.25 times its respective original issue price.[318]

In addition to an extensive list of Preferred Stock protective provisions, there are also protective provisions for each series of Preferred Stock.[319] It is customary for securities repurchased from former employees, officers, directors, consultants, or other persons who performed services for Uber or any of its subsidiaries in connection with the cessation of such employment or service at the lower of the original purchase price or the then-current fair market value to be excluded from the Preferred Stock protective provision.[320] Securities repurchased by Uber as approved by Uber's board (including at least one Preferred Director so long as such director or any of his or her affiliates is not involved in such repurchase) are also excluded. Although all this information is currently available to the public, posting the Form D at an easily accessible location—such as the SEC's website or, better yet, the company's website—would provide a centralized source from which investors could draw accurate information. For example, investors could more easily reference an answer to a question in a Form D found on a unicorn's website, such as "list the board members and the number of votes he or she has," instead of searching for the answer within the often-complex Restated Certificate of Incorporation. Information such as number of employees and amount of revenue should also be easy to access. Currently, a stockholder would need to search the Internet to try find that information—often in vain.

---

[316] *See id.*

[317] *See id.* at 9. The Series C Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock have separate conversion arrangements. *See id.* at 9–12.

[318] *See id.* at 2–3.

[319] *See id.* at 20–24 (enumerating a long list of specific occurrences that would necessitate a Preferred Stock or Series Preferred vote, as applicable).

[320] This is only the case if the Board approves the repurchase, as stated in the Uber Restated Certificate. *See id.* at 20.

In conclusion, although Form D provides general information about the offering, revising it to include additional information is critical, particularly for the benefit of those who are not major investors.[321] Additionally, although the Restated Certificates of Incorporation for these companies provide detailed information about the control and power dynamics within a company, that information is not readily accessible, nor is it easily understood by a layperson without the help of legal counsel. Therefore, this Article proposes modifying the information required by Form D to provide more relevant and understandable information to employees, minority stockholders, and others. Just as the securities filings of public companies are required to be on such companies' websites, a unicorn's Form D should be available in that manner as well. In addition, periodic disclosure of financial information should also be accessible by minority stockholders who otherwise do not receive such information.

IV. Private IPOs: The Implications for Transparency and Equity

Part III highlights the need for more disclosure and details how unicorns are operating in a world of rumor and conjecture. This Part demonstrates how the problem is exacerbated by the fact that many unicorns are staying private longer despite calls for them to go public.[322] Indeed, although many private companies have raised incredibly large rounds of financing, there has been no stampede of unicorns heading for the nearest exit.[323] In fact, investors appear to be doubling down on the hottest unicorns. For example, in the case of Uber, Morgan Stanley's wealthiest clients were given the opportunity to invest in a special fund offering $475 million of new preferred stock in the company.[324]

---

[321] *See supra* notes 53–67 and accompanying text.

[322] *See, e.g.*, Biz Carson, *Fred Wilson: Uber's Travis Kalanick Is 'Wimping Out' and Needs to 'Take the G------ Company Public,'* Bus. Insider (Feb. 4, 2016, 1:39 PM), http://www.businessinsider.com/fred-wilson-criticizes-uber-ceo-travis-kalanick-for-waiting-to-ipo-2016-2 [https://perma.cc/3QDM-BNBV] (quoting a prominent venture capitalist, Fred Wilson, who commented on the dearth of tech IPOs by comparing going public to taking medicine: "[i]t doesn't taste good . . . [b]ut it makes you better"). There are signs, however, that the mega-rounds of financing allowing companies to stay private longer are cooling. *See Are Mega-Rounds Over? $100M+ Rounds Almost Cut in Half in Q4'15*, CB Insights (Jan. 20, 2016), https://www.cbinsights.com/blog/2015-startup-mega-rounds/?utm_source=CB+Insights+Newsletter&utm_campaign=10f15fb8db-GamingEcosystem_02_01_2016&utm_medium=email&utm_term=0_9dc0513989-10f15fb8db-86759461 [https://perma.cc/8HYD-QPBQ] (citing seventy-two $100-million-plus equity financings to VC-backed companies during the third quarter of 2015 compared to thirty-eight such deals in the last quarter of 2015).

[323] The high valuations of many of these private, venture-backed companies have essentially priced these companies out of the mergers and acquisitions market. By May 2014, six U.S. venture-backed technology companies had exits valued at $1 billion or more on the mergers and acquisitions front. *See Uh Oh VCs—Unicorn M&A Exit Volume Falls off a Cliff in 2015*, CB Insights (May 24, 2015), https://www.cbinsights.com/blog/unicorn-acquisitions-2015-ytd/ [https://perma.cc/PK8J-3VAY].

[324] Leslie Picker & Peter Eavis, *Deal Shows Investors Are Willing to Make a Blind Bet on Uber*, N.Y. Times (Feb. 4, 2016), http://www.nytimes.com/2016/02/05/business/dealbook/deal-shows-investors-are-willing-to-make-a-blind-bet-on-uber.html?_r=0 [https://perma.cc/64KF-H56K].

There is no financial data on Uber in the deal documents; Morgan Stanley admits "that it 'has conducted limited due diligence' . . . [and] has not 'independently verified the accuracy or completeness of such information.'"[325]

In the first three months of 2015, in the San Francisco Bay area alone, nearly $5 billion in private money was invested in 300 deals.[326] One reporter noted that during that time, "Only five companies from the region went public . . . raising less than half a billion dollars. That compares to nine IPOs in the region in last year's first quarter, raising about $1.2 billion."[327] From 2012 through 2014, on average there were thirty-six venture-backed tech IPOs per year; in 2015 there were twenty-three.[328] In short, "profitability of the typical technology company plunged into negative territory over the past couple of years."[329] Historically, IPOs or mergers and acquisitions ("M&A") of private companies that venture capitalists have funded provide the lucrative exits these investors seek for their investments. On the acquisition side, 459 venture-backed companies were acquired in 2014,[330] of which "137 had disclosed values totaling $47.5 billion—roughly three times the prior year's amount."[331] For example, Oculus VR, WhatsApp, and Nest Labs were each acquired for billions of dollars by large technology companies.[332] In 2014, 115 venture-backed

---

[325] *Id.*

[326] Cromwell Schubarth, *First Quarter IPO Scorecard: Few in Pipeline Made Their Move*, SILICON VALLEY BUS. J. (Apr. 1, 2015, 11:31 AM), https://web.archive.org/web/20150404001007/http://www.bizjournals.com/sanjose/blog/techflash/2015/04/first-quarter-ipo-scorecard-few-in-pipeline-made.html.

[327] *Id.* One author states:

> Only seven VC-backed tech companies have gone public . . . [as of June 2015], with just one more (Fitbit) currently on the pricing calendar for June. . . . Moreover, there have been only two strategic sales of VC-backed tech companies valued at over $1 billion (Lynda.com to LinkedIn and Virtustream to EMC). What good is it to have a stable of unicorns if you don't ever ride them?

Dan Primack, *Something Is Rotting Under Silicon Valley*, FORTUNE (June 10, 2015, 1:35 PM), https://fortune.com/2015/06/10/something-is-rotting-under-silicon-valley/ [https://perma.cc/BD75-WN6Z]. Fitbit went public on June 18, 2015, taking the total number of VC-backed tech companies to eight. *See* Corrie Driebusch, *Fitbit IPO Prices at $20 a Share, Above Expectations*, WALL STREET J. (June 17, 2015, 7:02 PM), http://www.wsj.com/articles/fitbit-ipo-prices-at-20-a-share-above-expectations-1434582147 [https://perma.cc/NL7E-MSD6]. If the current pace of VC-backed tech companies going public continues, the United States is on track to have the lowest number of VC-backed tech IPOs since 2009, when the United States was in the middle of the financial crisis. *See* Primack, *supra*.

[328] *See* Cohan, *supra* note 144.

[329] *Id.*

[330] *See* NVCA YEARBOOK, *supra* note 4, at 10.

[331] *Id.*

[332] Ben Zimmer, *How 'Unicorns' Became Silicon Valley Companies*, WALL STREET J. (Mar. 20, 2015, 10:26 AM), http://www.wsj.com/articles/how-unicorns-became-silicon-valley-companies-1426861606 [https://perma.cc/2JTV-W77Y]. Unicorns are "increasingly getting gobbled up by other tech firms willing to spend billions, with Facebook acquiring the messaging service WhatsApp and virtual-reality firm Oculus VR, Google acquiring household-device maker Nest Labs and Microsoft acquiring the game company Mojang." *Id.*

companies went public,[333] which "generated $121.1 billion in valuation that was generated by $13.8 billion total venture investment in those companies."[334] Corporate venture capital ("CVC"), in particular, had a banner year. According to the 2015 NVCA Yearbook, "[C]orporate venture investment dollars increased 69% in 2014 and actually increased overall share. Corporate groups deployed an estimated $5.3 billion into 766 venture rounds. That's the highest investment total by far in the post-millennium period."[335] In 2015, corporate venture groups "deployed over $7.5 billion in 905 deals to high-growth startups," hitting a fifteen-year high.[336]

A ten-year study, however, tells a less rosy picture. This study analyzed a dataset of $1-billion-plus exits (which excluded companies that were still private) from January 1, 2004, to June 30, 2014. The authors' findings were as follows:

> During this 10-year period, there have been approximately 62 venture-backed unicorns that exited via IPO or M&A for $1 billion+. There were 451 investors who backed these 62 unicorns, including 339 investments by traditional venture capital funds. Seventy-four different venture capital funds made these 339 unicorn investments. . . . Roughly just one-fourth returned an entire fund for any of their VC investors.[337]

The study concluded that "out of 339 VC investments in unicorns over the last 10 years, only 21, around 7 percent, returned an entire fund."[338] In 2015, there were seventy-two VC-backed companies that went public raising a total of $8 billion; only 18% were from the tech industry.[339] The number of IPOs and acquisitions for venture-backed companies in 2015 declined from 2014 while the

---

[333] This is the highest count of venture-backed IPOs since the 2000 bubble. *See* NVCA YEARBOOK, *supra* note 4, at 10.

[334] *Id.*

[335] *Id.* at 9.

[336] Press Release, Nat'l Venture Capital Ass'n, Corporate Venture Investment to Entrepreneurial Ecosystem Hits Fifteen Year High in 2015 (Jan. 19, 2016), http://nvca.org/pressreleases/corporate-venture-investment-to-entrepreneurial-ecosystem-hits-fifteen-year-high-in-2015/ [https://perma.cc/UN84-TT8D].

[337] John Backus & Hemant Bhardwaj, *Update: Unicorns vs. Dragons*, TECHCRUNCH (Dec. 14, 2014), http://techcrunch.com/2014/12/14/unicorns-vs-dragons/ [https://perma.cc/HHW5-G7D7].

[338] *Id.* Putting this into context, if a venture capital firm raised $100 million for one of its funds, a $5-million investment in a unicorn may lead to a return of $100 million—the size of the entire fund.

[339] *See 2015 in Review: IPO Winners and Losers*, PITCHBOOK DATA, INC. (Jan. 5, 2016), http://pitchbook.com/news/articles/2015-in-review-ipo-winners-and-losers [https://perma.cc/7MM2-HSAF] (noting that United States healthcare startups fared better than their tech counterparts).

amount of money contributed by CVCs continued to remain steady, comprising 25% of deals for the last five quarters.[340]

Although the number of venture rounds has declined, both venture valuations and capital invested continued to rise until the third quarter of 2015.[341] There has been increased momentum of the venture capital market since the economic downturn of 2009.[342] In the last quarter of 2015, however, there was a substantial decline in investment dollars for startups.[343] Furthermore, venture capital firms raised less money and closed fewer funds in 2015 than in 2014.[344] The non-existent IPO market, decline in acquisitions, and slowing of investment dollars suggest that unicorns will remain private for the foreseeable future. They will either continue to do business, raise money, hire employees, and issue stock with little to no transparency or simply become one of the so-called unicorpses and cease to exist.[345]

CONCLUSION

Unicorns still capture the imagination of the venture capital industry and media alike. But for how much longer will the large infusion of cash and optimism last? Not everyone has such a rosy take on the outlook for the unicorns—some industry insiders are predicting the demise of some subset of the species. For example, at the annual SXSW (South by Southwest) Interactive festival in Austin, Texas, one prominent venture capitalist remarked, "I do think you'll see some dead unicorns."[346] In 2015, these pessimistic voices were

---

[340] *See Corporates Are in 25% of Deals to Startups Globally, and Even More in Asia*, CB INSIGHTS (Feb. 8, 2016), https://www.cbinsights.com/blog/corporate-participation-startup-funding-2015/ [https://perma.cc/5JCW-GAZL] (citing strong overall momentum for CVCs in North America).

[341] Tom Moskal, *Top 5 Takeaways from 1H 2015 VC Valuations & Trends*, PITCHBOOK DATA, INC. (Mar. 31, 2015), http://blog.pitchbook.com/top-5-takeaways-from-1h-2015-vc-valuations-trends/ [https://perma.cc/DM8G-X9N7].

[342] *See* PITCHBOOK DATA, INC., VENTURE INDUSTRY REPORT: 4Q 2015 (2015), http://files.pitchbook.com/pdf/PitchBook_4Q2015_U.S._Venture_Industry_Report.pdf [https://perma.cc/4EGN-TFTN].

[343] *See* PITCHBOOK DATA, INC., U.S. VENTURE INDUSTRY REPORT (2016), http://files.pitchbook.com/pdf/2015%20Annual%20U.S.%20Venture%20Industry%20Reporthej.pdf [https://perma.cc/732G-5T58].

[344] Lizette Chapman, *Tech Funding Slowdown Hits Venture Capital Firms*, BLOOMBERG BUS. (Jan. 12, 2016, 3:51 PM), http://www.bloomberg.com/news/articles/2016-01-12/tech-funding-slowdown-hits-venture-capital-firms [https://perma.cc/Z8ZJ-PSW8]. Established venture capital firms raised the majority of the funds. *See id.* (stating that one venture capital firm, New Enterprise Associate, raised a record amount in its firm's history: $2.8 billion and a $350-million side vehicle).

[345] Erin Griffith, *Prediction: Unicorn Investing Will Get Ugly in 2016*, FORTUNE (Dec. 7, 2015, 10:30 AM), http://fortune.com/2015/12/07/unicorn-investing-unicorpses/ [https://perma.cc/4HAK-PSPU] (predicting that unicorn investing will turn ugly in 2016, leading to workarounds such as trading shares on the secondary markets). "Expect wild discrepancies in valuations; angry finger-pointing among investors, boards and CEOs; and maybe even some private company shareholder activism." *Id.*

[346] Zimmer, *supra* note 332.

largely drowned out by the clamor of investors looking for the next unicorn, which may not be as elusive an animal as it once was. The end of 2015, however, saw an increase in negative sentiment as evidenced by mutual fund markdowns, fewer unicorn births, and a substantial decrease in mega-round financings.[347]

The goal of this Article is not to argue that the current framework of venture capital deals does not work; in fact, on the contrary, it does work—and works quite well. It is the regulatory structure underlying these deals that needs to be addressed, particularly in the case of unicorns. In light of their enormous influence and impact, enhanced disclosure becomes necessary when private companies reach the size equivalent to or greater than public companies. For reasons of both efficiency and transparency, this additional disclosure (which would not be required of the vast majority of private companies) could be made through Form D and simply posted on the company's website. Additionally, periodic disclosure of financial information should be made available to all stockholders and employees, with key terms summarized in laypeople's terms. Providing this information to these stakeholders would be relatively simple because companies are already contractually obligated to furnish it to their major investors.

Although the restated certificates of incorporation are public documents, the Delaware Secretary of State only provides them for a fee.[348] Therefore, the restated certificates of incorporation for unicorns should be posted on the SEC's website and on unicorns' websites, and the key aspects of these restated certificates should be disclosed on the Form D in layperson's terms. If the unicorn relied on section 4(a)(2), then information similar to what it would provide to unaccredited investors should be made more broadly available, such as on the company's website. Both current and prospective investors, regardless of their stake in the private company, would then have access to more pertinent information about their current or prospective investment, much as they would in the case of a public company. And employees who are minority stockholders would have access to this same information, as well.

In the cash-rich environment in which unicorns came into being, it was easy for investors—both large and small alike—and employees to get caught up in the excitement of investing in companies that revolutionize the way that we have always done things or disrupt the status quo. Now, however, is the time to exercise some caution. Now is the time to look seriously at whether

---

[347] *See RIP Good Times? Venture Capital Funding, Unicorn Births, and Mega-Deals Plummet in Q4'15*, CB INSIGHTS (Jan. 7, 2016), https://www.cbinsights.com/blog/venture-capital-fall/ [https://perma.cc/J635-W682].

[348] In various conversations about this Article, a few suggested that media outlets should obtain copies of unicorns' restated certificates of incorporation to provide more information and better perspective about what types of deals investors strike with unicorns.

having more and better information available to the public can help both investors and employees make more informed decisions when choosing whether to ride a unicorn.