Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2014

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ABSTRACT

Capital formation through private placement of securities has increased substantially since the onset of the financial crisis. Amounts raised through unregistered securities offerings have outpaced the level of capital formation through registered securities offerings during recent years, and totaled more than $2 trillion during 2014. In this analysis, we provide insights into a large segment of the unregistered securities market[2]: offerings conducted in reliance on Regulation D of the Securities Act. Using information collected from Form D filings, this study provides a detailed examination of offering characteristics, including the types of issuers, investors, and financial intermediaries that participate in the offerings. As part of the examination, we analyze the new Rule 506(c) exemption which became effective in September 2013 and allows general solicitation and general advertising, reversing almost 80 years of regulatory practice. We also provide some perspective on the state of competition and potential regulatory burden in alternate capital markets by analyzing the level of activity among the various registered and unregistered offering alternatives.

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This study was prepared for Mark Flannery, Director of DERA and Chief Economist, and is a follow-up to a 2013 study. The 2013 version provided an analysis of capital raised through unregistered offerings for the period 2009-2012. See Vladimir Ivanov and Scott Bauguess, Capital Raising in the U.S.: The Significance of Unregistered Offerings Using the Regulation D Exemption (June 2013) (the "Ivanov/Bauguess Study"), available at:http://www.sec.gov/dera/staff-papers/white-papers/1jul13_ivanov_capital-raising-in.html.
The information in this study may be particularly useful in assessing the potential need for current or future rulemaking activity. This analysis is not intended to inform the Commission about compliance with or enforcement of federal securities laws.
[2] As used throughout the study, the term "market" refers to capital markets in general, and, where discussed in the context of a specific rule, relates to the provisions of the relevant exemption or safe harbor.

1. Summary of main findings

- In 2014, there were 33,429 Regulation D offerings reported on Form D filings, accounting for more than $1.3 trillion raised.
- Issuers in non-financial industries[3] reported raising $133 billion during 2014. Among financial issuers, hedge funds reported raising $388 billion and private equity funds $316 billion, while financial issuers that are not pooled investment funds reported $375 billion.
- Foreign issuers accounted for 20% of the total amount reported sold during 2014. Most foreign issuers are firms from Canada, Cayman Islands, and Israel.
- Rule 506 accounts for 99% of the amounts reported sold through Regulation D, including 97% of capital raised below the Rule 504 or Rule 505 offering limit thresholds, suggesting that issuers continue to value the preemption of state securities laws provided for offerings conducted pursuant to Rule 506.
- Since the effectiveness of Rule 506(c) on September 23, 2013 that eliminated the ban on general solicitation, only a small proportion (2%; $33 billion) of the capital raised in Regulation D offerings was raised in offerings conducted pursuant to Rule 506(c).
- Capital raised through Regulation D offerings continues to be positively correlated with public market performance, suggesting that capital formation in the unregistered market is pro-cyclical, i.e., the strength of the unregistered market is closely tied to the health of the public market.
- Consistent with the original intent of Regulation D to target the capital formation needs of small business, the median offer size of non-financial issuers is less than $2 million.
- Approximately 301,000 investors participated in Regulation D offerings during 2014. A large majority of these investors participated in offerings by non-financial issuers. Non-accredited investors were present in only 10% of Regulation D offerings.

[3] All issuers that are not pooled investment funds (e.g., hedge funds, venture capital funds, and private equity funds) and that are not in the following Form D listed industries: commercial banking, insurance, investing, investment banking, and other banking & financial services. This group is primarily comprised of operating firms.

2. Introduction

Securities laws require that all offers and sales of securities be either registered with the Securities and Exchange Commission (SEC) under the Securities Act of 1933 or made in reliance upon an exemption from registration. When raising capital through the sale of securities to any potential investors in the public capital market (a "public" offering), the issuer must generally register the offer and sale of securities with the SEC, a process that is accompanied by extensive information production and subsequent reporting.[4] Alternatively, a company can raise capital by accessing the private capital markets through an unregistered ("private") offering in a transaction exempt from registration. This path allows issuers to avoid certain regulatory burdens and the increased oversight that comes with a public offering, with the intended effect of reducing issuance costs and the time required to raise new capital. This particularly benefits smaller firms, for whom accessing public capital markets may generally be too costly. However, because of these accommodations, private offering alternatives are generally subject to investor restrictions and/or offering limits. These investor protection provisions must be met to qualify for an exemption from registration.

The private offering market is governed by several exemptions from registration, including those under Sections 4(a)(2), 3(b) and 3(a)(11) of the Securities Act. For example, Section 3(b) is the exemptive authority for Rules 504 and Rule 505 under Regulation D, as well as Regulation A that was amended earlier this year pursuant to Title IV of the JOBS Act.[5] Other parts of the private market rely on "safe harbors": rules and regulations that set forth specific conditions that, if satisfied, ensure compliance with an exemption from registration. For example, issuers can use non-exclusive safe harbors such as Rule 506(b) of Regulation D, which is a safe harbor under Section 4(a)(2), Regulation S for offerings outside of the U.S., and Rule 144A, for the resale of restricted securities to qualified institutional buyers (QIBs). A comparative analysis of the characteristics of these and other offering exemptions and safe harbors is provided in Appendix II.

The importance of private capital markets as a source of financing in the economy is underscored by the fact that less than 0.03% of the estimated 28 million firms in the U.S. are currently exchange listed firms.[6] Moreover, there has been a steady and significant decrease in the number of public reporting companies in the U.S., particularly since the dot com crash and implementation of the Sarbanes-Oxley Act.[7] During this period, private offerings of securities have contributed significantly to capital formation in the U.S. economy, particularly for small and emerging

[4] An exception to the general rule exist in unregistered securities offerings conducted pursuant to Regulation A, an exemption from registration for securities offerings of up to $50 million annually.

[5] Among the changes in Regulation A is an increase in the amount of capital that can be raised (from $5 million to $50 million) and state securities law preemption for certain offerings.

[6] Data for 2010. *See* https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf. *Also see*, http://www.wsj.com/articles/SB10001424052702304851104579363272107177430

[7] *See* Doidge, C., A. Karolyi, and R. Stulz, 2015, *The U.S. Listing Gap*, unpublished working paper.

companies that are often considered to be the engine for creating new jobs,[8] driving innovation, and for accelerating economic growth. Hence, private capital markets provide an important financing alternative for companies that for various reasons forego financing in the public capital markets.

This study focuses on securities issuances by issuers that conduct unregistered offerings pursuant to Regulation D of the Securities Act. Regulation D comprises four rules: Rule 504, Rule 505, Rule 506(b) and Rule 506(c). The analysis updates and extends previous work by SEC staff on this topic,[9] and includes a comprehensive look at the use and effect of the introduction of Rule 506(c) under Title II of the JOBS Act, which allows an issuer to generally solicit investors and generally advertise its offering. A critical component of our analysis is the data we rely on. The data used in the study, including how we compiled our sample, is described in detail in Appendix I. As the analysis below shows, Regulation D remains a widely used regulation for conducting unregistered offerings of securities. More than $1.3 trillion was reported as sold during 2014, the highest level yet reported since Form D filings became machine readable in 2008.[10] This amount is comparable to the amount of capital raised by public equity and debt offerings combined. And as indicated in the next Section, it is likely that the reported data on Regulation D offerings underestimates the actual amount raised through offerings where the issuer intended to rely on Regulation D. Most of the $1.3 trillion was reported raised through Rule 506(b), which prohibits general solicitation and general advertising, and limits investor participation to accredited investors and up to 35 sophisticated, but non-accredited, investors. Amounts reported raised under Rule 506(c) remain a small fraction of the total (2%) of the capital reported raised pursuant to Regulation D since the rule became effective on September 23, 2013, suggesting that most issuers of unregistered securities are not yet seeking investors through general solicitation and general advertising.

Among the other findings, the majority of the capital raised in the Regulation D market in 2014 was raised by pooled investment vehicles ($1,130 billion), while non-financial issuers raised 133 billion.[11] Regulation D offerings are very popular with small businesses: there have been more than 64,000 issuances by non-financial issuers since 2009, with a median offer size of less than $2 million. Unlike public offerings, only 21% of new Regulation D offerings since 2009 report using a financial intermediary. The average commission is 5%, but it varies significantly by the size of the offering and the type of the issuer involved.

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[8] During the period 1998-2008, The United States Small Business Administration estimates show that small businesses contributed almost 50% of U.S. non-farm GDP and accounted for 55% of U.S. employment, including 66% of all net new jobs since the 1970s.
See http://usgovinfo.about.com/cs/businessfinance/a/sbatopten.htm
See also https://www.sba.gov/content/small-business-trends-impact.
[9] *See* Ivanov/Bauguess Study.
[10] Prior to 2008, filings were filed in paper making large scale extraction from tens of thousands of filings impractical.
[11] Pooled investment vehicles include hedge funds, private equity funds, venture capital funds, commodity pools, and a few other types of funds. In the paper we use the terms "pooled investment vehicles" and "funds" interchangeably. Non-financial issuers are defined as operating companies that are outside of the financial sector.

The results of our analysis take into consideration several factors that may affect an issuer's choice of offering method for issuance of unregistered securities, such as preemption of state securities laws, ability to advertise, ability of non-accredited[12] investors to participate, limits to the amount of capital that can be raised, geographical constraints, and level of required initial and ongoing disclosure to investors. These factors may affect both the level of burden (costs) incurred by an issuer to raise capital as well as the amount of protection available to investors, including, for instance, through additional oversight by state securities regulators.

While Regulation D has been in existence since 1982, other private offering issuance methods are newer, such as those arising from the JOBS Act (e.g., new Rule 506(c) effective since September 2013 and amended Regulation A effective since June 2015). We do not have enough information to determine the extent to which some of these newer exemptions from registration will affect the importance of long-standing private market rules such as Rules 504, 505 and 506(b) of Regulation D, or serve as alternatives to registered offerings.

The study is organized as follows. Section II provides an overview of the private offerings market. Section III provides an overview of capital formation in the market for Regulation D offerings. Section IV provides a detailed analysis of the characteristics of market participants in the Regulation D market.

3. The size of the private offerings market

To estimate the total size of the private offerings market, we sum the total amount of securities sold using available data[13] for each of the main private offering exemptions during the period 2009-2014, including:

[12] These are investors that do not meet the definition of an accredited investor provided under Rule 501 of Regulation D. Generally, accredited investors are institutions that have total assets of at-least $5 million or natural persons that have individual income of at least $200,000, joint income of at least $300,000, in each of the last two years and an expectation to reach the same income in the current year, or net-worth (excluding primary residence) of at-least $1 million. See Section IVb. for more information on investors in Regulation D offerings.

[13] Data on Regulation D offerings collected all Form D filings (new filings and amendments) on EDGAR from January 2009 through December 2014; Data on non-ABS Rule 144A offerings collected from Thomson Financial SDC new Issues database and the Mergent database. Data on ABS and CMBS Rule 144A offerings are collected from the Asset-Backed Alert and Commercial Mortgage Alert publications; Data for Regulation S offerings collected from Thomson Financial's SDC Platinum service; and Data collected from Thomson Financial's SDC Platinum, which uses information from underwriters, issuer websites, and issuer SEC filings to compile its Private Issues database. These include offerings under Section 4(a)(2) of the Securities Act that do not claim a Regulation D or Reg S exemption and that are without a follow-on Rule 144A sale. These numbers are accurate only to the extent that SDC is able to collect such information, and may understate actual the amount of capital raised under Section 4(a)(2) if issuers and underwriters do not make this data available.

- Regulation D
- Rule 144A (resale of unregistered securities to QIBs)
- Regulation S (offshore component of 144A offerings)
- Regulation A offerings
- Other Section 4(a)(2) private offerings

Data for some of these exemptions is more readily available than for others. For example, because issuers relying on Section 4(a)(2) are not required to file any document with the Commission, offering information available in the commercial databases likely underestimates the amount of capital raised through this exemption. Similarly, the available data on Regulation D offerings could underestimate the true amount of capital raised through such offerings. While Rule 503 of Regulation D requires the filing of a notice on Form D no later than 15 days after the first sale of securities, the filing of a Form D is not a condition to claiming a Regulation D safe harbor or exemption, and it is possible that some issuers do not file Forms D for offerings relying on Regulation D.[14]

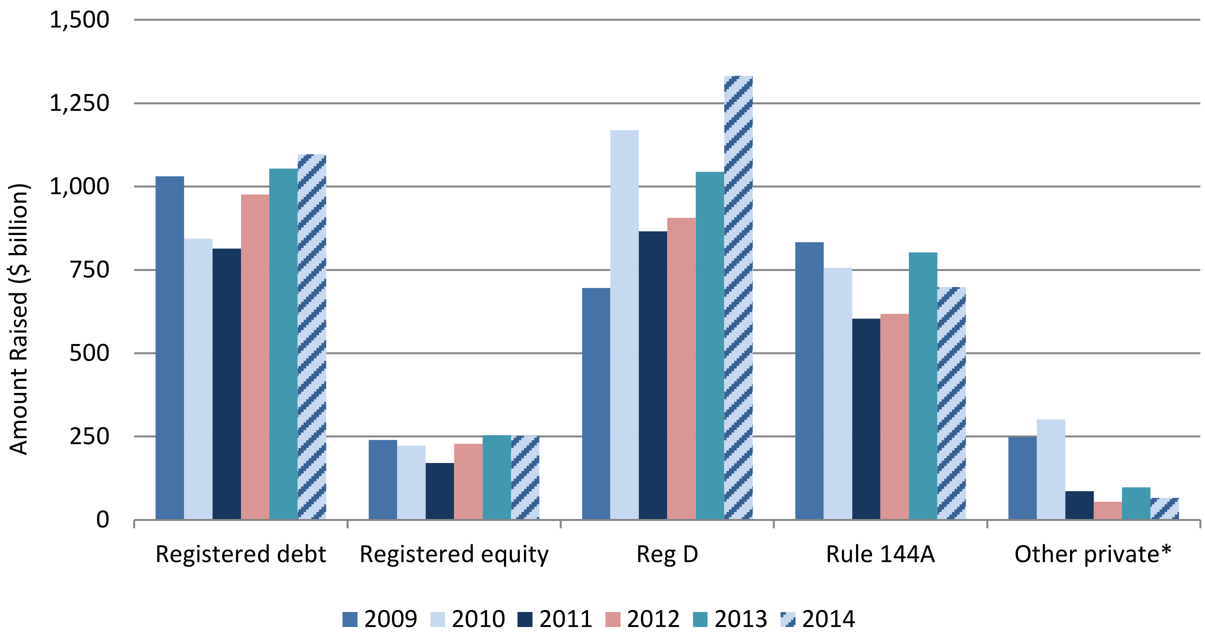
Figure 1 illustrates that the total capital raised annually in the private capital market is large both in absolute terms and when compared to the amounts raised in the public markets. In 2014, registered offerings accounted for $1.35 trillion of new capital compared to $2.1 trillion reported raised through all private offering channels. This is considerably larger than the amount of public debt (straight and convertible debt) and public equity (common and preferred) offerings over the same time.[15] Rule 144A offerings are predominantly debt offerings while Regulation D offerings are mainly equity offerings, although a non-trivial number of the latter include debt securities but the amounts are not separately reported. Within the private capital market, Regulation D and Rule 144A are the dominant offering methods. The amount of capital raised through Regulation D offerings is comparable in magnitude to, but larger than, the amount of capital raised under Rule 144A.[16]

[14] Separate analysis by DERA staff of Form D filings by funds advised by registered investment advisers and broker-dealer members of FINRA suggests that Form D filings are not made for as much as 10% of unregistered offerings eligible for relief under Regulation D.

[15] Data for registered debt and equity offerings from Thomson Financial's SDC Platinum.

[16] By its terms, Rule 144A is available solely for resale transactions. However, market participants use it to facilitate capital-raising by issuers by means of a two-step process, in which the first step is a primary offering on an exempt basis to one or more financial intermediaries, and the second step is a resale to "qualified institutional buyers" in reliance on Rule 144A.

Figure 1. Aggregate capital raised in 2009-2014 by offering method ($billions)



* Other private includes Regulation S offerings, Section 4(a)(2) offerings, and Regulation A offerings.

Table 1 estimates the size of the private and public markets in terms of number of offerings per year. As the table shows, offerings in the private market occur with a significantly higher frequency compared to public market issuances. Regulation D offerings occur with far greater frequency than any other offering method surveyed, indicating that the accumulation of capital raised through Regulation D occurs by way of much smaller offering denominations than other methods. This finding is consistent with Regulation D being the primary tool for capital raising by smaller entities. In contrast, Rule 144A offerings are larger in dollar terms, reflecting its use by larger issuers.

Table 1. Number of offerings by type of offering and year

	Public Offerings		**Private Offerings**		
Year	Public equity	Public debt	Regulation D	Rule 144A	Other private*
2009	942	1,445	18,295	1,240	942
2010	1,072	1,930	25,993	1,607	930
2011	863	1,465	27,336	1,148	960
2012	954	1,473	28,184	1,302	531
2013	1,250	1,510	30,429	1,602	841
2014	1,176	1,576	33,429	1,534	674

*Includes offerings conducted under Regulation S, Regulation A and Section 4(a)(2).

4. The Regulation D market

Regulation D was promulgated in 1982 to provide a unified scheme for exempting certain capital offerings from registration requirements. It was designed to simplify existing rules and regulations to facilitate capital formation, particularly for small businesses, consistent with the protection of investors. At its inception, the Regulation D market was comprised of three rules: Rule 504, Rule 505, and Rule 506.

Rule 506 was amended pursuant to Title II of the 2012 JOBS Act, which directed the Commission to permit general solicitation and general advertising in Rule 506 offerings.[17] New Rule 506(c) became effective on September 23, 2013 and allows for general solicitation and advertising in Rule 506 offerings as long as all purchasers are accredited investors and issuers take reasonable steps to verify that such purchasers are accredited investors.[18] Rule 506, as it existed before the adoption of Rule 506(c), was preserved and re-designated as Rule 506(b).

The tables and figures in this section provide a broad overview of capital formation in the Regulation D capital market and its various exemptions. The information in this section, as well as the following Section IV, that provides a detailed analysis of the characteristics of Regulation D market participants is based on information reported in Forms D and D/A filed by issuers of such offerings.

4.1. Capital raised in Regulation D market

Analysis of issuer self-reported data through electronic Form D filings in Table 2 reveals that the number of unregistered offerings and corresponding amounts raised have been increasing over the years 2009-2014.[19]

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[17] Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

[18] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415 (July 10, 2013) [78 FR 44771 (July 24, 2013)] ("Rule 506(c) Adopting Release"). General solicitation had not been allowed for Rule 506 offerings since its enactment in 1982 as a non-exclusive safe harbor under Section 4(a)(2) of the Securities Act of 1933.

[20] Separate analysis by DERA staff of Form D filings by funds advised by registered investment advisers and broker-dealer members of FINRA suggests that Form D filings are not made for as much as 10% of unregistered offerings eligible for relief under Regulation D.

Table 2. Capital raised through Regulation D and Regulation D/A (amended) offerings*

Year	Regulation D filings (number)	Regulation D/A filings (number)	Total amount sold ($ Billions)	Mean amount sold ($ millions)	Median amount sold* ($ millions)
2009	13,764	7,077	595	36	1.5
2010	17,581	11,864	1,025	26	1.4
2011	18,174	12,536	863	28	1.5
2012	18,187	13,284	903	27	1.5
2013	19,846	14,533	1,029	24	1.5
2014	22,004	15,254	1,332	24	1.5

*Mean and median amount sold based on initial (new) Form D filings only. Total amount sold includes additional amounts raised and reported in amended filings, recorded at the time of the amendment.

These estimates are based on the reported "total amount sold" at the time of the original filing – required within 15 days of the first sale – as well as any additional capital raised and reported in amended filings. The data likely underreport the actual amount sold due to two factors. First, because electronic filings were phased-in through the end of March 2009, paper filings in the first quarter of 2009 are not captured in the analysis. Underreporting could occur in all years because Regulation D filings can be made prior to the completion of the offering, and amendments to reflect additional amounts sold generally are not required if the offering is completed within one year and the amount sold does not exceed the original offering size by more than 10%. Second, as previously described, Rule 503 requires the filing of a notice on Form D, but filing a Form D is not a condition to claiming a Regulation D safe harbor or exemption. Hence, it is possible that some issuers do not file a Form D for offerings relying on Regulation D.[20] Finally, some funds appear to report, in their annual amendments, net asset values for total amount sold under the offering. Net asset values could reflect fund performance as well as new investment into, and redemptions from, the fund. Based on Form D data, it is not possible to distinguish between the two impacts.

4.2. Cyclicality

It is a well-documented empirical fact that public capital markets are cyclical and the cyclicality appears to be driven by the business cycle, investor sentiment, and time-varying information asymmetry.[21] However, there is little empirical evidence on the cyclicality of capital raised through

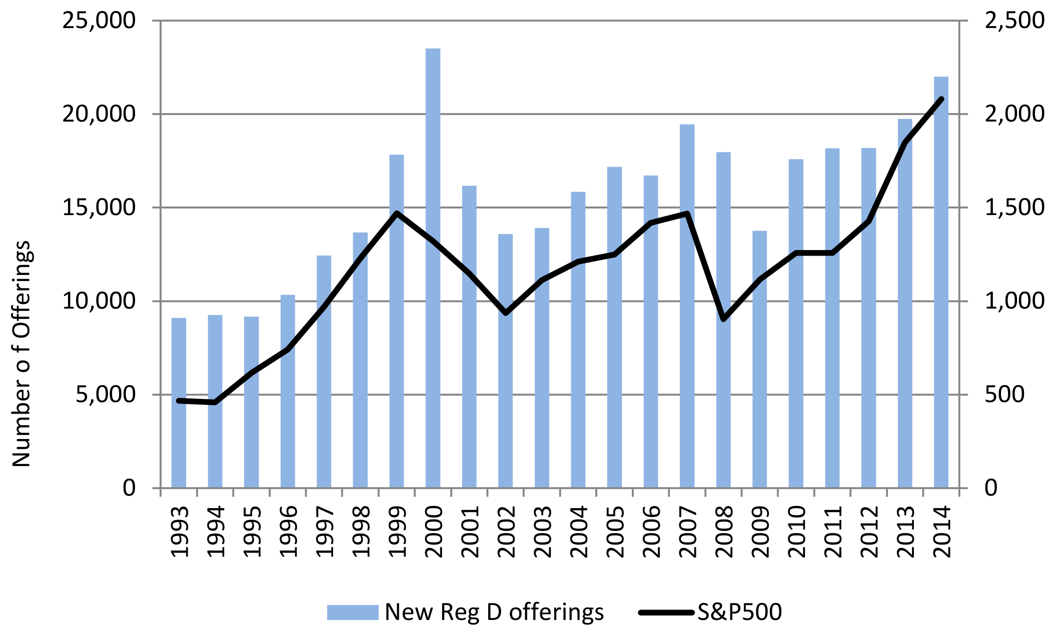
[20] Separate analysis by DERA staff of Form D filings by funds advised by registered investment advisers and broker-dealer members of FINRA suggests that Form D filings are not made for as much as 10% of unregistered offerings eligible for relief under Regulation D.

[21] *See* Ivanov, I. and C. Lewis, *The Determinants of Market-Wide Issue Cycles for Initial Public Offerings*, Journal of Corporate Finance, December 2008; Lowry, M., *Why Does IPO Volume Fluctuate So Much?*, Journal of Financial

private offering markets, and in particular, whether issuers rely more on private markets when public markets are under distress (e.g., during recessions).

Figure 4 shows Regulation D offering activity based on the number of offerings by calendar year, relative to the S&P 500 index, for the period 1993-2014 . These numbers correspond to all new (non-amended) Form D filings on the EDGAR filing system. While the data does not indicate the aggregate amount raised through these offerings, Table 2 shows that offering sizes, on average, are fairly constant over the most recent five years, suggesting that the year-to-year changes in the number of offerings may also track changes in the amounts sold.

Figure 2. Number of Regulation D offerings: 1993-2014



The time series of offering activity shows that subsequent to an increase in new Regulation D offerings during the early 2000s, there was a decline in 2008 that worsened in 2009 consistent with the onset of the financial crisis. More broadly, there is a strong, positive correlation of the incidence of new Regulation D offerings with the economic condition of the public market. In particular, the level of Regulation D offering activity closely follows the level of the S&P 500 index (correlation of 85% during 1993-2014). There were peaks in the number of Regulation D offerings in 2000 and 2007, consistent with heightened stock market valuations. Since the resolution of the recent financial crisis, the past 5 years have seen a considerable increase in Regulation D offering activity, in line with the increases in the S&P 500 index (correlation of 89% during 2009-2014).

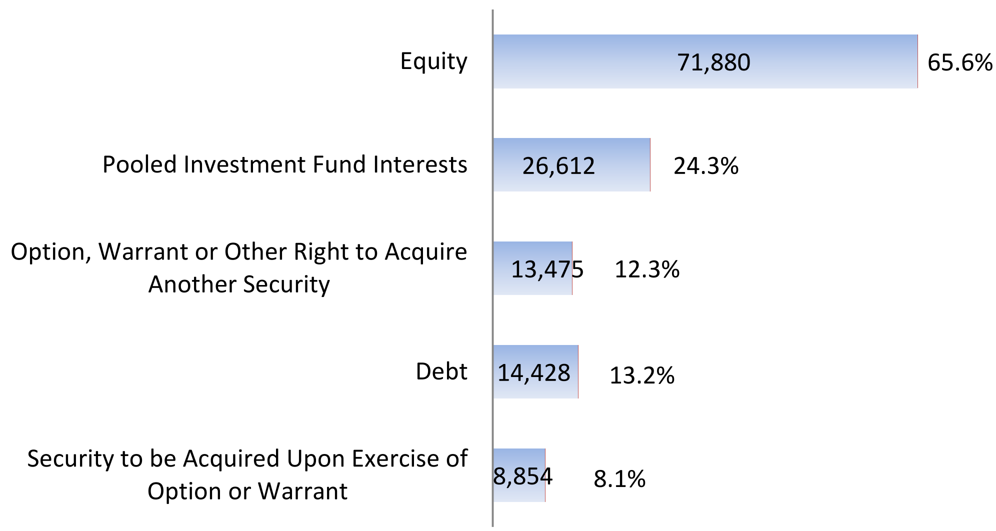
Economics, January 2003; and Choe,H. , R. Masulis and V. Nanda: *Common Stock Offerings Across the Business Cycle: Theory and Evidence*, Journal of Empirical Finance, June 1993.

Hence, private offerings in the Regulation D market appear to be pro-cyclical, suggesting that the health of the private capital market is closely tied to that of the public capital market.

4.3. Offering Security Type

The importance of the Regulation D market is magnified when considering that approximately two-thirds of Regulation D offerings represent new equity capital (Figure 3), unlike public capital markets where the majority of capital raised in new offerings is related to fixed maturity debt. Equity is a more permanent source of capital than debt, and thus its issuance is more likely to reflect new investment as opposed to debt, which is often used to refinance of existing debt. Put differently, to the extent that debt offerings are attributed to the "rolling over" of existing debt due to an expiring term or refinancing due to a change in interest rate environment, such transactions do not reflect the financing of new investment.[22] In addition, a larger fraction of non-financial issuers rely on Regulation D for raising capital compared to the Rule 144A market, where the vast majority of issuers are financial institutions and over 99% of securities are debt securities.

Figure 3. Number and percent of Regulation D offerings by type of security issued: 2009-2014 [23]



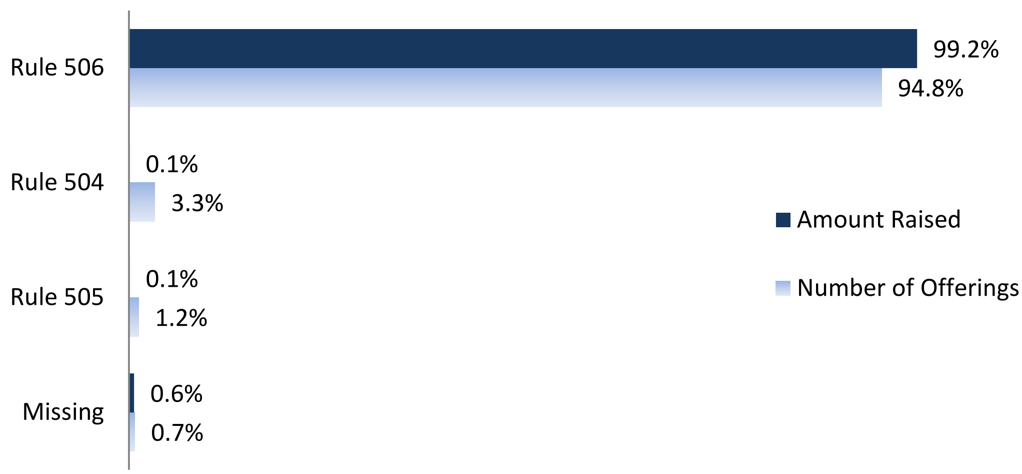
4.4. Prevalence of Rule 506

[22] It is possible that equity issuances in Regulation D offerings reflect deleveraging – conversion of debt to equity, which may not reflect new investment.

[23] There are 135,249 issues referenced, which is greater than the total 109,451 new issues in Table 2. This is due to multiple securities listed in the same filing.

Consistent with previous findings,[24] Rule 506 continues to be the predominant capital market for private offerings under Regulation D. Securities issued under Rule 506 are considered "covered securities" pursuant to Section 18 of the Securities Act, and are thus exempt from state securities law registration and qualification requirements. Most Regulation D offerings (95% since 2009, see Figure 4) are issued under Rule 506. Rule 506 offerings accounted for more than 99% of the reported capital raised through Regulation D offerings since 2009. Even among Regulation D offerings under $5 million in size, for which Rule 505 offerings are possible, Rule 506 accounts for almost 97% of the capital raised. [25] Similarly, for offerings under $1 million by non-fund issuers, for which Rule 504 offerings are possible, Rule 506 accounts for approximately 91% of the capital raised. Unlike 506 offerings, Rule 504 and Rule 505 offerings are subject to state registration laws, suggesting that the more restrictive provisions of Rule 506 are less important than state securities law preemption (e.g., Rule 506(b) limits the participation of non-accredited investors to 35 per offering, prohibits general solicitation, and the securities issued in Rule 506 offerings are restricted securities, whereas Rule 504 allows for an unlimited number of non-accredited investors and may, under certain circumstances, permit general solicitation and result in the issuance of unrestricted securities).[26]

Figure 4. Fraction of offerings and amount raised by Regulation D Exemption: 2009-2014



4.4.1. The new Rule 506(c) market

From September 23, 2013 to December 31, 2014, a total of 1,911 issuers initiated 2,117 new Rule 506(c) offerings (Table 3). During this period, based on initial Form D filings, almost $24.2 billion was reported raised. An additional $8.3 billion was reported raised in amendments to initial filings,

[24] See Ivanov/Bauguess Study
[25] *See* section IIId(ii) for Regulation D offerings by exemption and offering size.
[26] *See* discussion of Rules 504, 505, and 506 or Regulation D at http://www.sec.gov/answers/regd.htm

some of which were originally initiated as Rule 506(b) offerings. During the same period, there were 24,500 new Rule 506(b) offerings that reported to raise $821.3 billion in their initial Form D filings, and an incremental amount of $699 billion was reported to be raised in amendments filed. On a relative basis, issuances claiming the new Rule 506(c) exemption have accounted for only 2.1% of the reported capital raised pursuant to Rule 506 since becoming effective in September 2014.

While the underlying motivation for permitting general solicitation was to boost capital formation through increased accessibility of certain issuers to accredited investors, the vast majority of Regulation D issuers continue to raise capital through rule 506(b) offerings. The novelty of the 506(c) provisions after decades on non-permissibility of general solicitation in Regulation D offerings may be one reason why Rule 506(b) continues to dominate the Regulation D market. In particular, issuers with pre-existing sources of financing and/or intermediation channels may not yet have a need for the new flexibility. Other issuers may become more comfortable with market practices as they develop over time, including among other things, certainty over what constitutes general solicitation.[27] There may also be concerns about the added burden or appropriate levels of verification of the accredited investor status of all purchasers,[28] for which efficient market solutions may develop over time.

Regulatory uncertainty has also been identified as a possible explanation for the relatively low level of the Rule 506(c) offerings.[29] For example, certain pooled investment funds that need to comply with Commodity Futures Trading Commission (CFTC) regulations continued to be subject to CFTC's prohibition on advertising after September 23, 2013 (and at least until September 2014), and therefore could not utilize Rule 506(c).[30] Further, the Commission's proposed amendments to Regulation D and Form D at the time Rule 506(c) was adopted have elicited widely divergent views from commenters and remain outstanding.[31]

Additional analysis in Table 3 shows that the average amount reported sold in an initial Rule 506(c) offering ($13 million) is much smaller than the average amount reported sold in a Rule 506(b) offering ($26 million). The lower amounts reported to be raised at the date of initial filing may be

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[27] *See*, for example Keith Higgins, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission, Remarks before the 2014 Angel Capital Association Conference (Mar 28, 2014) available at: (http://www.sec.gov/News/Speech/Detail/Speech/1370541320533. *See* also comments of Jean Peters, Board member, Angel Capital Association, at the 33rd Securities & Exchange Commission Government-Business Forum on Small Business Capital Formation, November 20 2014.

[28] *See* comments of Jean Peters, Board member, Angel Capital Association, at the 33rd Securities & Exchange Commission Government-Business Forum on Small Business Capital Formation, November 20 2014.

[29] *See*, for example, https://dealflow.com/whitepapers/Dealflow_White_Paper_Q3_2014.pdf

[30] *See*, http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-116.pdf

[31] In a 2013 keynote address, Director of the Division of Corporation Keith Higgins discussed the so-called "overhang" effect of the 2013 proposals on use of the new Rule 506(c) exemption. *See* Keith Higgins, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission, Remarks before the 2014 Angel Capital Association Conference (Mar 28, 2014) available at http://www.sec.gov/News/Speech/Detail/Speech/1370541320533.

the result of issuers with anticipated difficulties raising capital in a timely manner choosing the Rule 506(c) market so that they have an ability to advertise or generally solicit their offering to a broader audience of potential investors. It is possible that some sophisticated investors may perceive the election of the 506(c) exemption as a signal that issuers anticipate difficulties in raising sufficient capital and consequently consider it a less attractive offering, which could also dissuade issuers from utilizing the new exemption for their financing needs.

Table 3. Capital raised through Rule 506(c) and Rule 506(b) offerings: September 23, 2013 - December 31, 2014

Exemption	Form D Filings	Number of Amendment Filings	Total amount sold ($ billions)	Mean amount sold ($ millions)	Median amount sold ($ millions)	Median offer size ($ millions)
506(c)	2,117	822	$33	$13	$0.7	$2.4
506(b)	24,500	17,370	$1520	$26	$1.6	$2.2
All 506	26,617	18,192	$1553	$25	$1.5	$2.3
Regulation D**	27,710	18,350	$1555	$24	$1.4	$2.0

* Total amount sold includes incremental amounts reported to be raised in amended filings (Form D/As). Mean and median amounts sold based on initial (new) Form D filings only. Median offer size is based on offerings that report their amount of offering.

** Includes all four exemptive rules: Rules 504, 505, 506(b) and 506(c).

Consistent with the somewhat limited uptake of new Rule 506(c), there has not been significant migration of existing issuer capital raising activity from Rule 506(b) to Rule 506(c). In particular, only a small number of offerings switched from relying on Rule 506(b) to Rule 506(c). Since September 23, 2013 to December 31, 2014, approximately 398 continuing Regulation D offerings switched their exemption to Rule 506(c).[32] These "switched" offerings have reported incremental raisings of $12 billion. There has been a similar movement in the number of "repeat" issuers that have switched their offering types from Rule 506(b) to Rule 506(c): 447 new Rule 506(c) offerings were initiated by issuers that had a prior Regulation D offering. These issuers have reported capital raisings of $16.7 billion.

The movement out of the traditional Rule 506(b) market is not associated with a decline in the overall capital formation in the Rule 506(b) market relative to previous years. Table 4 below shows that there was an increase in the number of Rule 506(b) in 2014 to almost 19,600 new Rule 506(b) offerings compared to approximately 18,400 new Rule 506(b) offerings in 2013 and 17,300 in 2012. In contrast, there has been a decline in new Rule 504 offerings, which permits issuers to advertise their offerings, while requiring registration at the state level. However, the decline in Rule 504 offerings has continued from prior years, and therefore may not be entirely due to the emergence of the Rule 506(c) capital market.

[32] As per the transition guidance in the Rule 506(c) Adopting Release, only offerings initiated prior to September 23, 2013 can rely on the transition guidance to switch their exemption to Rule 506(c).

Table 4. Number of new offerings in Regulation D markets

Exemption	2011	2012	2013	2014
Rule 504	721	632	599	544
Rule 505	207	227	229	289
Rule 506(b)	17,199	17,262	18,407	19,560
Rule 506(c)	--	--	506	1,611

4.4.2. Regulation D Offerings by Offering Method and Size

Rule 506 is the dominant offering method even among those offering sizes that are eligible for Rules 504 and 505 (Table 5). Almost 30% of all Rule 506 offerings and 36% of Rule 506 offerings by non-funds since 2009 were for less than $1 million and therefore may have qualified for the Rule 504 exemption based on offering size, but issuers elected to claim the Rule 506 exemption. An additional 30% of all Rule 506 offerings and 35% of Rule 506 offerings by non-fund issuers were for between $1 million and $5 million and therefore could have claimed a Rule 505 exemption based on offering size. The same picture is evident when considering amount of capital raised (Figure 6). This evidence suggests that the preemption of state securities law registration and qualification requirements in Rule 506 offerings has greater value to issuers than the unique features of Rule 504 or Rule 505 offerings.

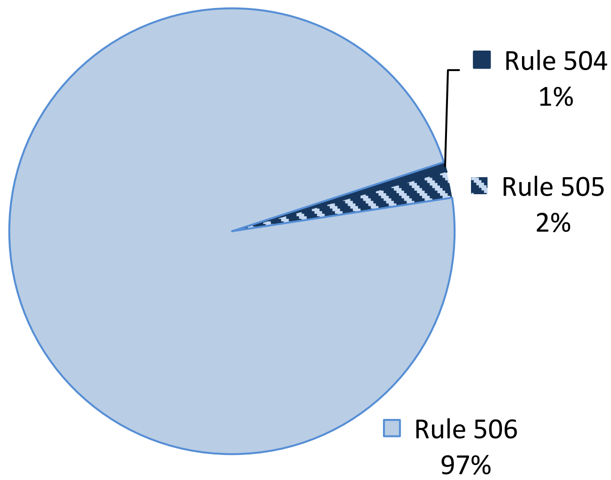
With the adoption of Rule 506(c), there is even greater incentive for issuers to use Rule 506. As the second part of Table 5 shows, Rule 506(c), though dwarfed by Rule 506(b), was used more often than Rule 505. While there were a greater number of Rule 504 offerings than Rule 506(c) offerings under $1 million, the downward trajectory in number of new Rule 504 offerings indicates that, under the current scheme of Regulation D rules, Rule 506 will dominate Rule 504 and 505 in the near future. It will also be interesting to see what fraction of these Regulation D issuers will offer securities pursuant to Title IV (the revised Regulation A exemption) of the JOBS Act, which also preempts state securities laws in certain circumstances, and pursuant to regulations eventually adopted pursuant to Title III of the JOBS Act, which contemplates the preemption of state securities laws.

Table 5. Number of New Regulation D offerings, by size and offering method*

	Offering size				
	≤ $1 million	$1-2.5 million	$2.5-5 million	$5-50 million	>$50 million
<u>All Issuers, 2009-2014</u>					
Rule 504	3,719	--	--	--	--
Rule 505	525	450	393	--	--
Rule 506	30,461	16,109	13,857	27,380	12,103
<u>Non-Fund Issuers, 2009-2014</u>					
Rule 504	3,643	--	--	--	--
Rule 505	501	432	342	--	--
Rule 506	27,694	14,374	11,903	19,089	2,822
<u>Non-Fund Issuers, September 23, 2013 – December 2014</u>					
Rule 504	701	--	--	--	--
Rule 505	159	82	91	--	--
Rule 506(b)	6,526	2,658	3,509	4,276	605
Rule 506(c)	588	196	335	419	89

*Considers only new offerings and excludes offerings with amount sold reported as $0 or missing on Form D.

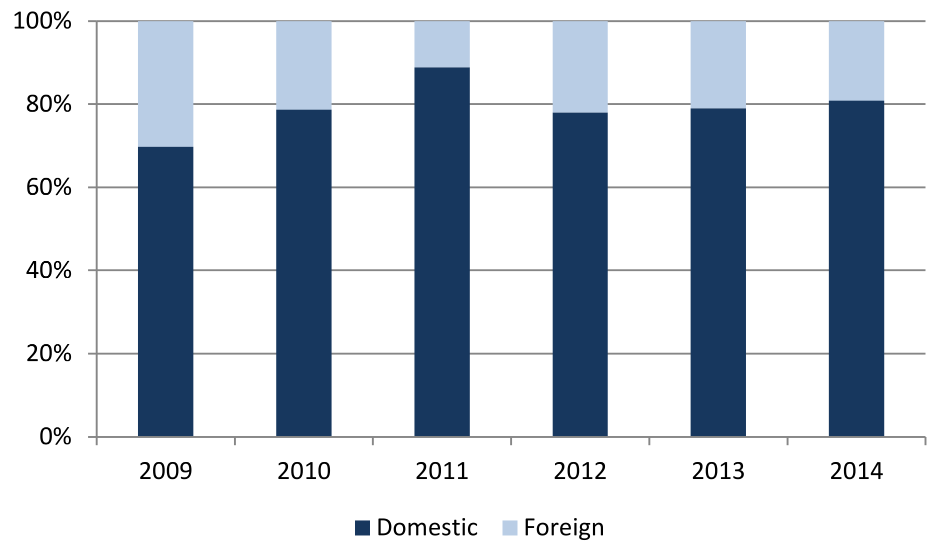
Figure 6. Fraction of capital raised by exemption in new Regulation D offerings of up to $5 million: 2009-2014


Rule 504
1%
Rule 505
2%
Rule 506
97%

4.5. Foreign firms and Exchange Act reporting firms in Regulation D market

The intent of Regulation D and the JOBS Act has been to promote capital formation for small and emerging firms in the U.S., which by and large tend to be private firms.[33] However, foreign firms or public firms in the U.S. are not excluded from using Regulation D. Over the period from 2009 to 2014, foreign issuers account for approximately 20% of all capital raised by Regulation D offerings, although this fraction varies over time (Figure 6). Participation was lowest in 2011 and highest in 2009 (the height of the financial crisis).

Figure 6. Percent of capital raised in U.S. by domestic and foreign issuers in Regulation D offerings



Issuers that file periodic reports with the Commission under the Securities Exchange Act of 1934 often conduct private offerings. [34] It is interesting to note that these firms choose to raise capital in a private market, even though they have access to the more liquid and larger public market. Some reasons why public firms could be issuing securities privately could include asymmetric information between managers and investors and market timing. A number of academic studies[35] have shown that private investors are likely to have better information for reasons like being directly involved

[33] *See* Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251]. Also see, *See* Rule 506(c) Adopting Release.

[34] We identified reporting companies as those that filed on Forms 10-K, 20-F, or 40-F during the analysis period.

[35] *See* for example, Armando Gomes and Gordon Phillips, "*Why do public firms issue private and public securities*", Journal of Financial Intermediation, 21 (2012); Hsuan-Chi Chen, Na Dai and John D. Schatzberg, "*The choice of equity selling mechanisms: PIPES vs SEOs*", The Journal of Corporate Finance, 16 (2010); or Susan Chaplinsky and David Haushalter, "*Financing under extreme risk: contract terms and returns to private investments in public equity*", The Review of Financial Studies, (2010).

in the due diligence process or having signed non-disclosure agreements, which would mitigate, to some extent, the issue of asymmetric information, and thereby improve the informational efficiency of the private capital market. At the same time, issuers can avoid the higher costs associated with public disclosure, thereby lowering the cost of raising capital through unregistered offerings. Additionally, a large proportion of investors in Rule 506 offerings are accredited investors who are considered to be more sophisticated investors that are willing and able to take more risk. Over the six-year analysis period, 13% of Regulation D non-fund offerings were conducted by Exchange Act reporting companies. In addition, about 3% of non-fund offerings were by issuers that subsequently registered an offering with the Commission by filing a Form S-1. For these issuers, a Regulation D offering was a precursor to going public.

5. Regulation D market participants

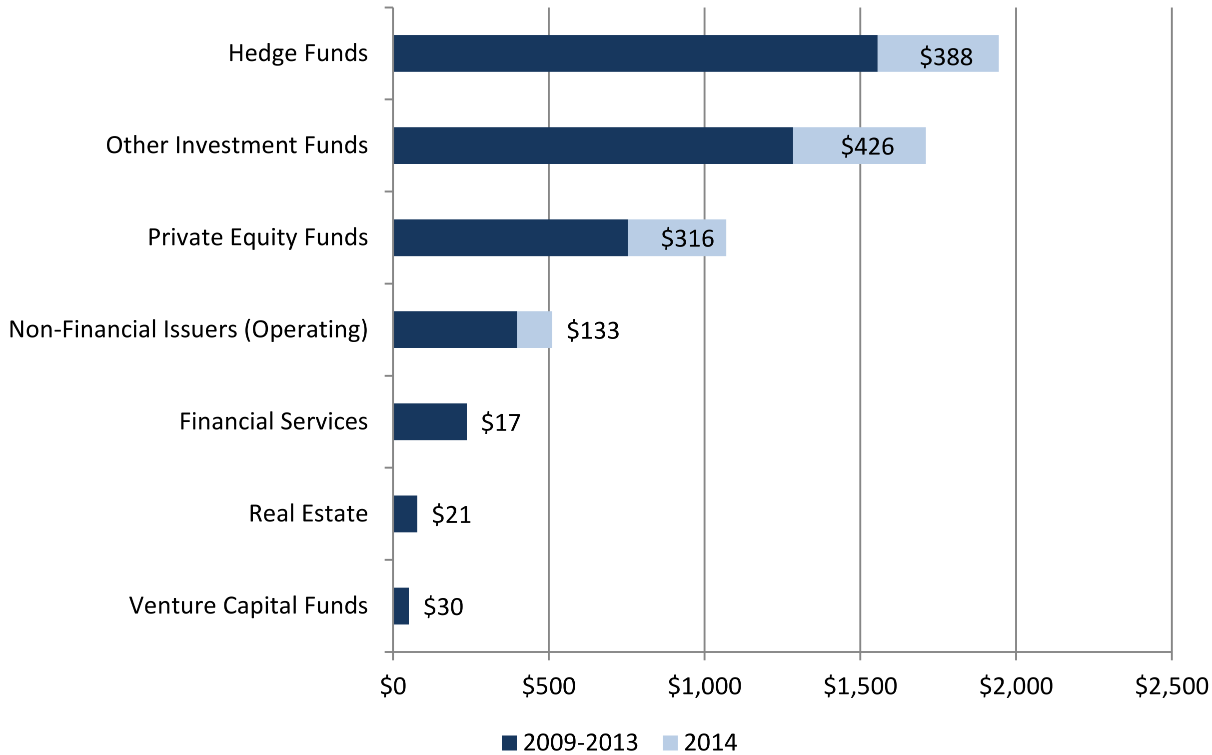
5.1. Issuers of securities under Regulation D

5.1.1. Capital formation and offering activity by issuer type

The largest issuers in the Regulation D capital market, by amount sold, are pooled investment funds that are classified in Form D filings as hedge funds, venture capital funds, private equity funds, and other pooled investment funds. The predominant entities among other pooled investment funds are registered investment companies and commodity pools.[36] Since the inception of the electronic Form D filings in 2009, pooled investment funds have accounted for $4.8 trillion of new capital raised through Regulation D offerings and reported on Form D (Figure 8), compared to $905 billion raised by non-funds. Hedge funds are the largest fund issuer, and raised almost $1.9 trillion of new capital, of which $388 billion was raised in 2014. Non-financial issuers, typically private operating companies, raised $531 billion during the six-year period, of which $133 billion was raised in 2014. Financial services, including banking and insurance, accounted for $261 billion raised during the six-year period.

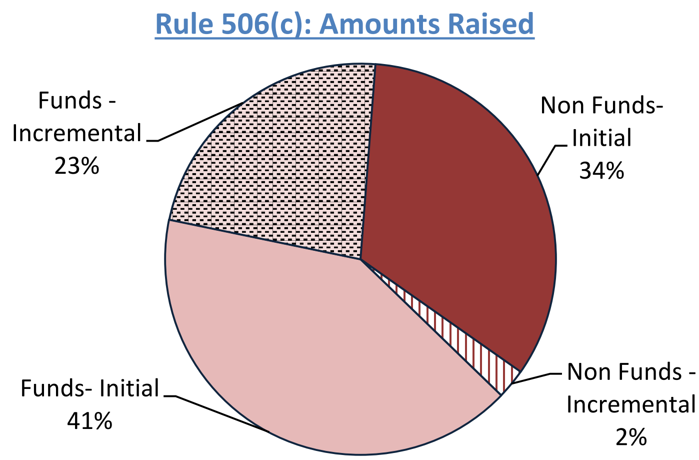
[36] Registered investment companies are entities such as mutual funds that issue securities to investors, hold pools of securities and other assets and are registered with the Commission under the Investment Company Act. Commodity pools are investment trusts, syndicates, or similar enterprises that are operated for the purpose of trading commodity futures.

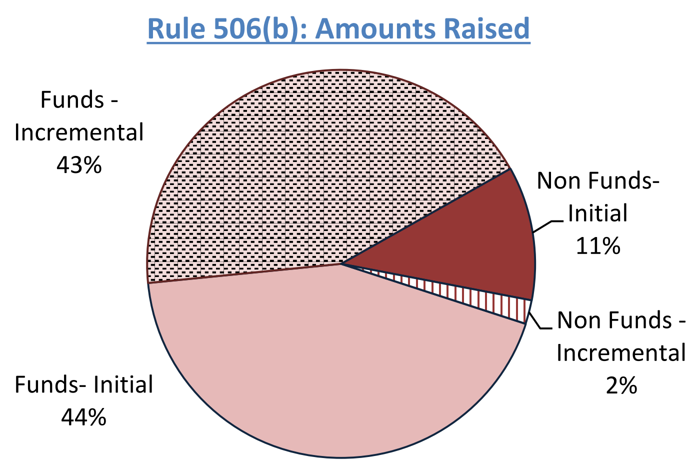
Figure 8. Aggregate capital raised (amount sold) during the period 2009-2014 by issuer type ($billions)



The share of capital raised by non-fund issuers (operating firms, financial firms and real estate firms) is smaller than the share of fund issuers in Rule 506(c) as well as the Rule 506(b) market. However, relative to the Rule 506(b) market, capital raised in Rule 506(c) offerings by non-fund issuers formed a larger proportion. During the last quarter of 2013 and the year 2014, non-fund offerings raised 45% of capital reported to be raised in initial filings for Rule 506(c) offerings. In comparison, only 20% of capital raised in Rule 506(b) market was reported to be raised by non-fund issuers. The share of non-fund issuers declines when incremental amounts reported in amendments are included. The proportion of capital raised by non-fund issuers decreases from 45% to 36% (Figure 9) in the Rule 506(c) market, compared with 12% in the Rule 506(b) market.

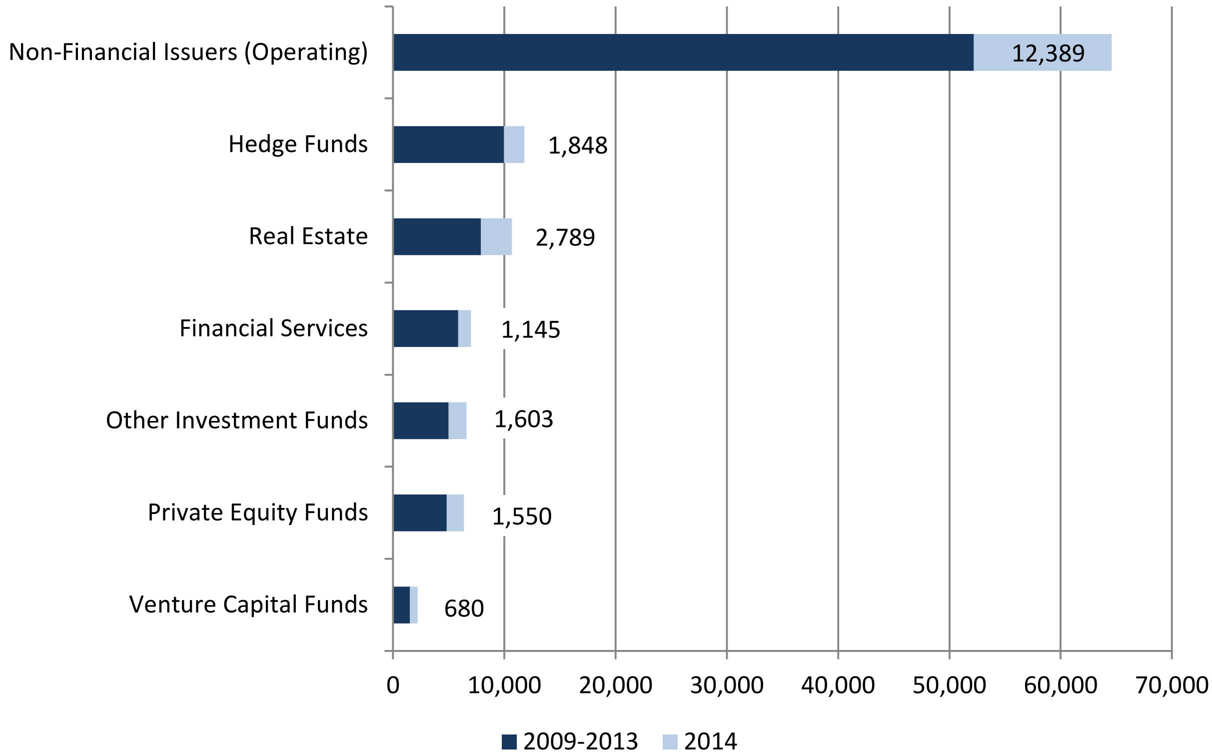
Figure 9. Amounts raised by fund and non-fund issuers in Rule 506 market: September 23, 2013 - December 31, 2014





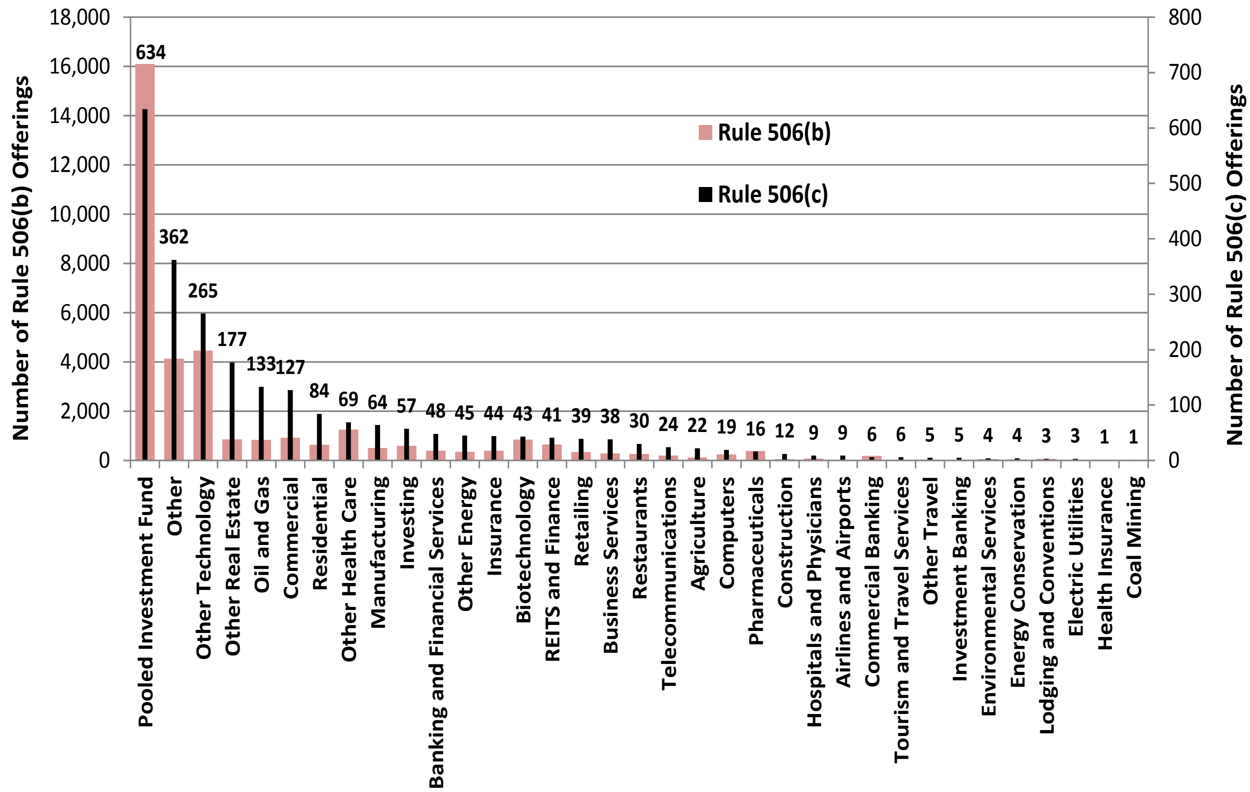
Although non-financial issuers raised substantially less than fund issuers in the aggregate Regulation D market, they account for the majority (60%) of all new offerings and Form D filings (Figure 10).

Figure 10. Number of initial (new) offerings during the period 2009-2014 by issuer type



Offerings by non-fund issuers have so far, also constituted a larger proportion of the Rule 506(c) market, relative to Rule 506(b) market. Non-fund issuers initiated almost three-fourth of new offerings in both Rule 506(b) and Rule 506(c) market. Analyzing all offerings, i.e. new and those continuing from previous years, non-fund issuances are almost 75% of all Rule 506(c) offerings but only 54% of all Rule 506(b) offerings. Most of the non-fund advertised offerings are from 'Other', 'Other Technology', 'Other Real Estate', 'Oil and Gas', and 'Commercial' industries (Figure 11).

Figure 11. Number of New Offerings by Industry: September 23, 2013 - December 31, 2014



Among Rule 506(c) issuers that are pooled investment fund, other investment funds are the most dominant issuers in terms of number of new offerings (Table 6). This is in contrast to hedge funds being the most active fund issuers in the Rule 506(b) market. But if offerings that switched from other Regulation exemptions are considered, hedge funds have the largest number of fund offerings in the Rule 506(c) market. As the Rule 506(c) matures, it remains to be seen if fund offerings and capital raisings, relative to non-fund offerings and Rule 506(b) offerings, will increase in future years.

Table 6. Amount sold by Rule 506(c) fund issuers: September 23, 2013 - December 31, 2014[37]

	Number of New Offerings		Number of Switched Offerings*	Amount sold ($ billions)**		Median amount sold** ($ millions)	
	506(c)	506(b)	506(c)	506(c)	506(b)	506(c)	506(b)
Hedge Funds	109	2,227	130	7.9	436	4.9	11.4
Private Equity Funds	81	1,901	9	4.7	402	10.0	31.0
Venture Capital Funds	77	739	13	2.5	35	0.6	3.0
Other Investment Funds	169	1,761	80	7.9	459	0.8	6.8
Non-Funds	1,681	17,872	166	11.7	189	0.6	1.0

* These are offerings that switched from reliance on Rule 504, 505 or 506(b) to Rule 506(c).
** Amount sold includes amount reported in Form D and Form D/A filings. Median amounts are calculated based on non-zero amounts reported in Form D.

5.1.2. Average and Median Offering Size by Issuer Type

Consistent with the large number of non-financial offerings and the smaller proportion of capital raised in the Regulation D market, the median offering size for non-financial issuers is substantially lower than the median offering size for funds. In 2014, the median offer size of non-financial issuers was $1 million compared to $11 million for hedge funds, and $30 million for private equity funds (Table 7). The differences in mean offering size are even larger. This indicates a large number of small offerings by non-financial issuers, consistent with the original regulatory objective to target the capital formation needs of small businesses.[38] The summary statistics in Table 2 also indicate that a large fraction of offerings are amendments to previously filed offerings, mostly attributed to the continuation of private fund offerings discussed in more detail below. Underscoring the importance of the Regulation D market as a source of capital to smaller firms, a significant number of issuers have relied on this market over the last five years. There were 78,020 unique issuers of new Regulation D offerings over the six years under consideration. This number increases to 85,320 with the inclusion of offerings initiated prior to 2009 and continuing in 2009 and later.[39]

[37] More than 41% of Rule 506(c) fund offerings report their offering amount to be 'Indefinite' (compared to 63% of fund issuances in the Rule 506(b) market).
[38] See note 33.
[39] We identify unique issuers by SEC issued 'CIK' number. It is to be noted that though a number of fund issuers have different CIKs, a number of such fund issuers could belong to the same fund family. As a result, the number of unique issuers could be an overestimate.

Table 7. Average and median offer size for Regulation D offerings in calendar year 2014 by issuer type*

	Total Amount sought ($Billions)	Mean offer size ($Millions)	Median offer size ($Millions)	Mean number of new offerings per issuer
Hedge Funds	N/A	61	11	1.02
Private Equity Funds	N/A	156	30	1.03
Venture Capital Funds	N/A	57	2	1.01
Other Investment Funds	N/A	65	6	1.03
Financial Services	18	15	2	1.30
Real Estate	14	7	1	1.09
Non-financial Issuers	108	10	1	1.29

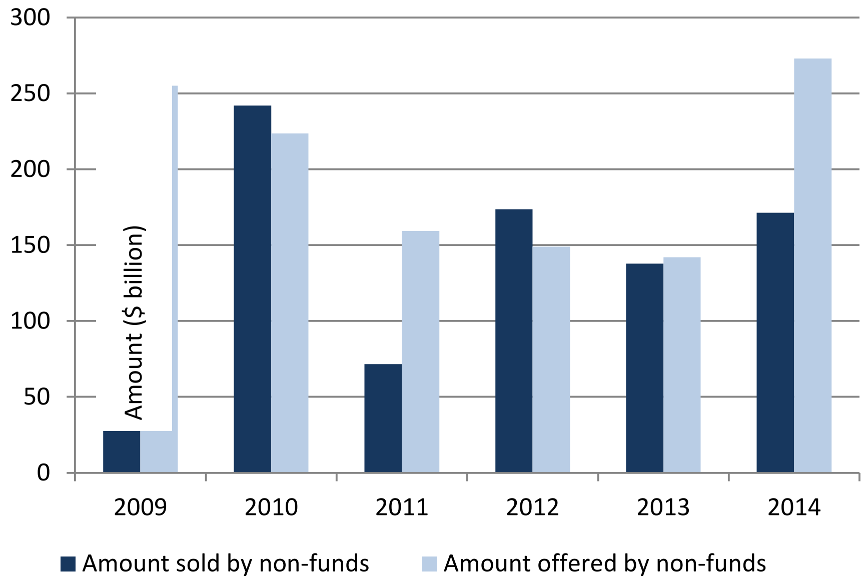
* Mean and median offer size are based on amount sold reported in initial (new) Form D filings only. Amount sought is calculated in the same way as in Figure 1.

While these estimates do not reflect the actual amount sold, we estimate in Figure 12 an upper bound for issuers reporting on Form D based on their reported "total offering amount," which for non-fund issuers represent the amount of capital sought at the time of the filing. This is the only statistic available on non-electronic Form D filings prior to 2008.[40] The statistic is less relevant for fund issuers that report to have offerings of indefinite amounts.

Figure 12 reports the amount sold for non-funds, and the additional amount offered but not sold at the time of the original filing. We exclude new original filings that indicate zero or missing amounts sold at the time of the filing and do not subsequently report any amount sold. For the years 2009 through 2014, on average, 75% of the total capital sought by non-funds was reported as sold. The amounts sold by non-fund issuers are much smaller than what they sought to raise, which suggests that either the amounts reported in Form D filings understate the full amount of capital raised in the market during the year the offering was initiated, or that some of the offerings are undersubscribed. The total offering amount could thus be best viewed as an upper bound of total capital raised among those issuers that report on Form D.

[40] *See* Electronic Filing and Revision of Form D, Release No. 33-8891 (Feb. 6, 2008) [73 FR 10592].

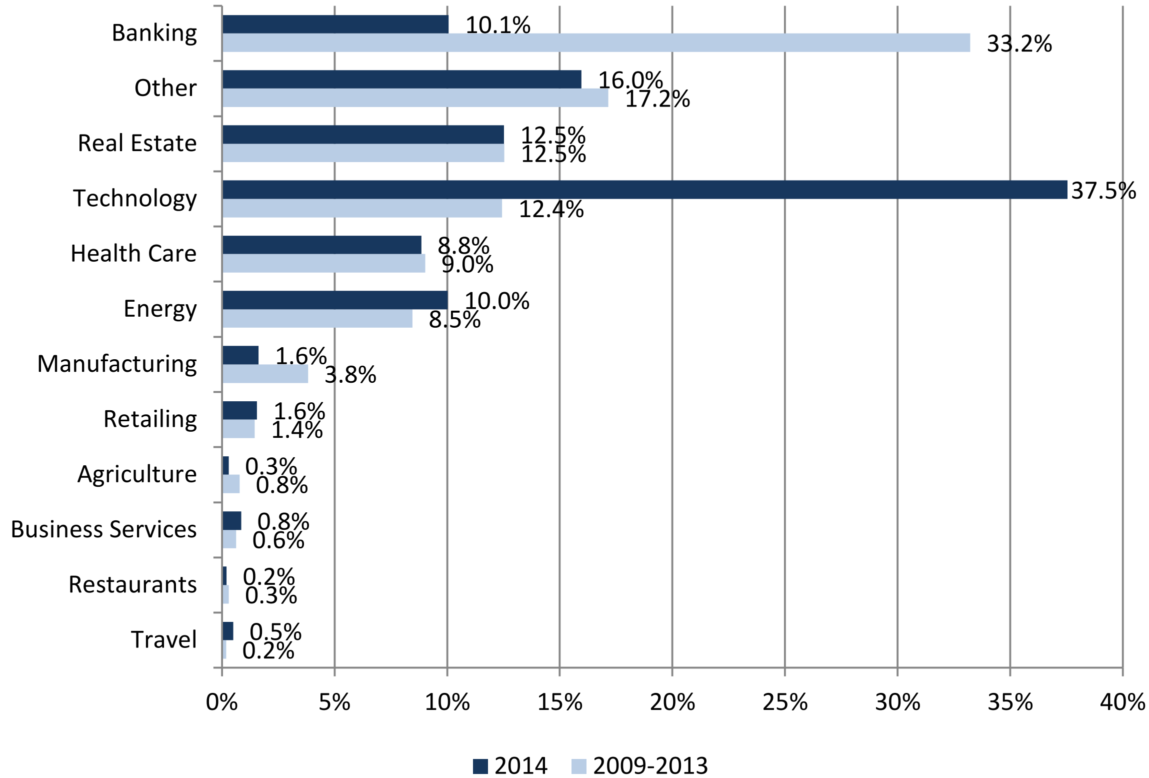
Figure 12. Total amounts offered and sold by non-funds: 2009-2014



5.1.3. Non-fund issuers

Overall, for all the exemptions under Regulation D, the largest non-fund industry group by dollar amount sold is Banking, followed by Technology, Real Estate, Health Care, and Energy (Figure 13). While the share of the Technology sector has increased considerably due to a few large offerings, at the same time the share of Banking, and Manufacturing industries in the amount sold in this market has decreased.

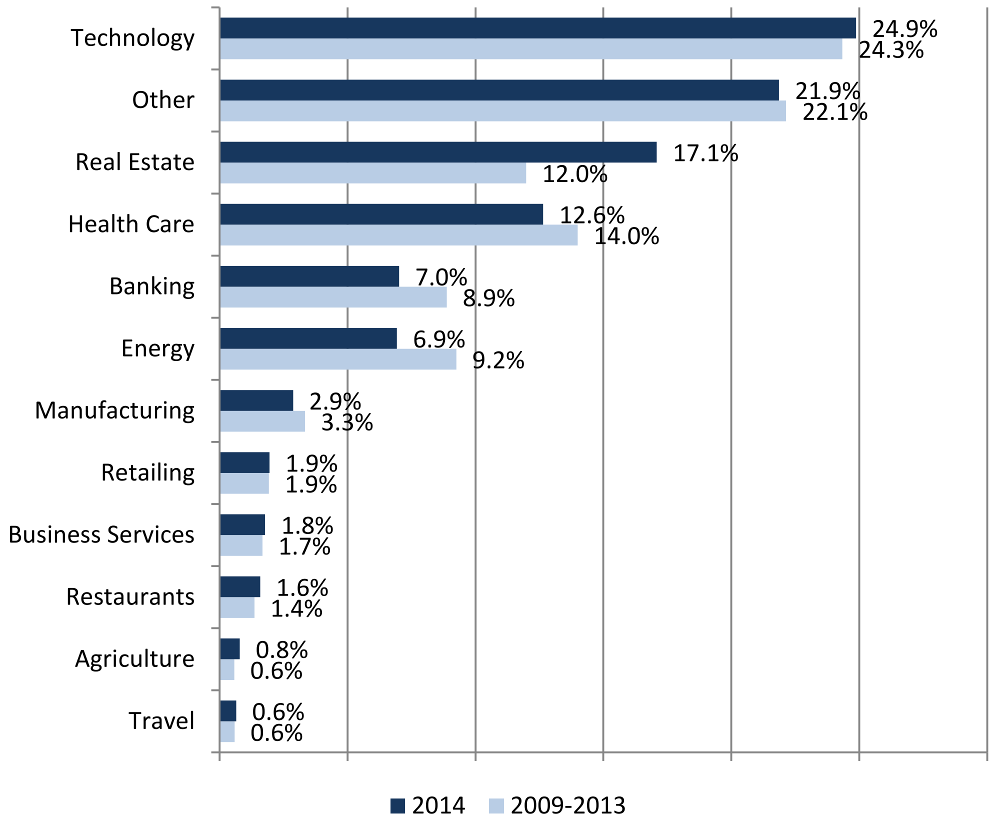
Figure 13. Most active non-fund issuers by amount sold: 2009 -2014



Similar to the overall Regulation D market, the most active industries in the Rule 506(c) market, in terms of amounts offered or raised, are the Technology industry (includes Computers, Other Technology and Biotechnology), followed by the Commercial and Other sectors. Approximately 92% of non-fund issuances in Rule 506(c) market reported their offering amount. The remaining did not report their offering amount or stated it to be 'Indefinite'. Of the ones that report offer size, 27% had raised the entire offering amount and more than 33% of all non-fund offerings had raised at-least three-quarters of their offering amount by date of initial filing. Compared to Rule 506(c) market, 40% of non-fund offerings in Rule 506(b) market had raised the entire offering amount, and almost 53% of the offerings reported raising at-least three-fourths of the total offering amount by the date of initial filing. As discussed earlier, these numbers could indicate that issuers that anticipate having difficulty in attracting related persons to subscribe to their offering are more likely to self-select to raise capital pursuant to Rule 506(c). As issuers are not required to file a Form D upon completion or termination of their offering, it is not known if their choice of an advertised unregistered offering enables issuers to successfully raise the desired amount of capital.

Issuers from the Technology industry group are the most active amongst non-fund issuers, making about 25% of all reported non-fund offerings (Figure 14) in the Regulation D market. This is not surprising, given the predominance of private investment in start-ups and small firms in this sector. There is a notable increase in the number of offerings by issuers from the Real Estate industry, while the number of offerings from the Health Care, Energy, and Banking industries has declined in compared to the period 2009-2012. The uptick in capital raising activity by the Real Estate sector in 2013 and 2014 is likely attributable to the improved outlooks for this industry which was hit the hardest during the financial crisis of 2007-2008. A large fraction of offerings (16% in 2014) do not specify an industry on Form D.

Figure 14. Most active non-fund issuers by number of offerings: 2009 -2014



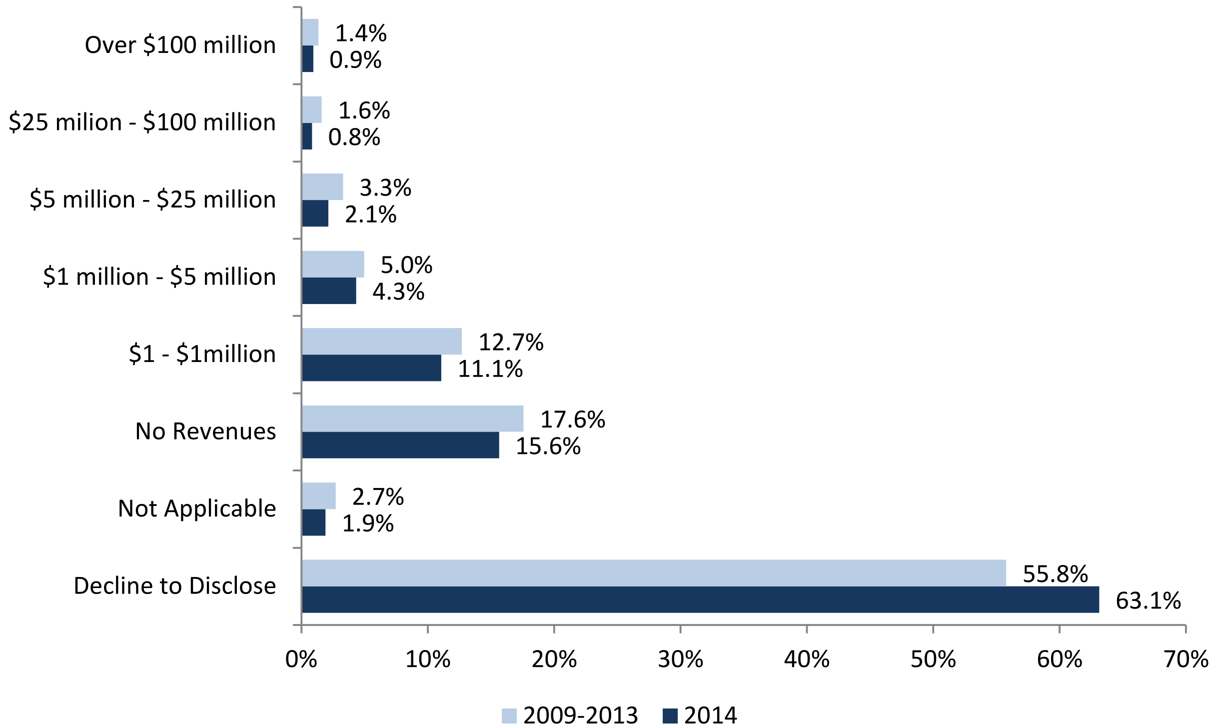
5.1.4. Issuer Size, Age and Location

Issuer revenue ranges reported in Figure 15 show that issuers of Regulation D offerings tend to be small. Although a significant number of issuers decline to disclose their revenues (63% in 2014, compared to 56% over the period 2009-2013), for those that do, most have revenues of less than $1 million. Only about 1% of all new offerings are by issuers that report more than $100 million in revenues.[41] By way of comparison, 58% of Exchange Act reporting companies with publicly traded

[41] Form D also contains information on net asset value (NAV) of hedge funds and other investment funds. Since 2009, more than three-quarters of issuers have declined to disclose NAV, but of those that do, a trend similar to revenue is reported – the largest set of issuers is in the smallest NAV categories.

equity report revenues of greater than $100 million at the end of 2013 fiscal year,[42] evidence that issuers seeking capital through Regulation D offerings are significantly smaller than the average publicly traded company.

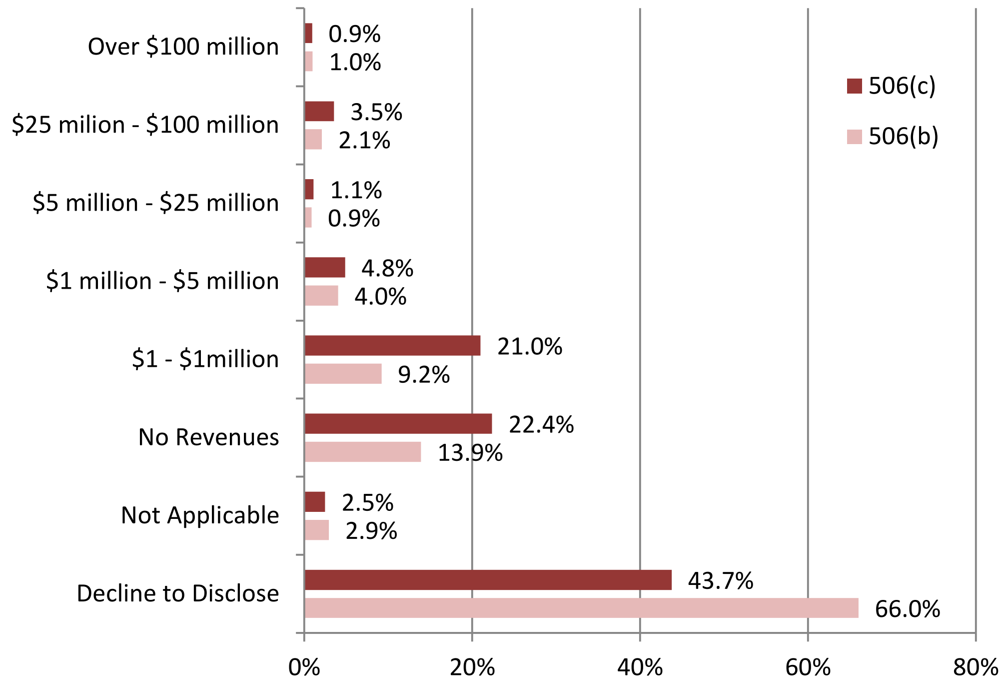
Figure 15. Distribution of non-fund issuers by reported revenue: 2009-2014



A slightly smaller proportion of Rule 506(c) issuers declined to disclose their size. Of those that did report their size, a large majority (Figure 16) were either start-up firms (no revenues) or small, early-stage firms ($1-$1million revenue range). This is similar to the composition of non-fund issuers in Rule 506(b) market. The predominance of small issuers indicates that Regulation D , and especially Rule 506(c) capital markets, are active avenues for small business capital formation, as intended by legislations that led to their creation.[43] Most fund issuers decline to disclose their size when they raise capital in the Rule 506 market. This includes issuers of 51% of all fund offerings in Rule 506(c) market and almost 86% of new offerings by funds in Rule 506(b) market during the period September 23, 2013 – December 31, 2014.

[42] Calculated based on an DERA analysis of 6,542 SEC registrants in who had a class of equity security with a reported market price reported by Standard and Poor's' Compustat database at the end of fiscal year 2013.
[43] *See* note 31.

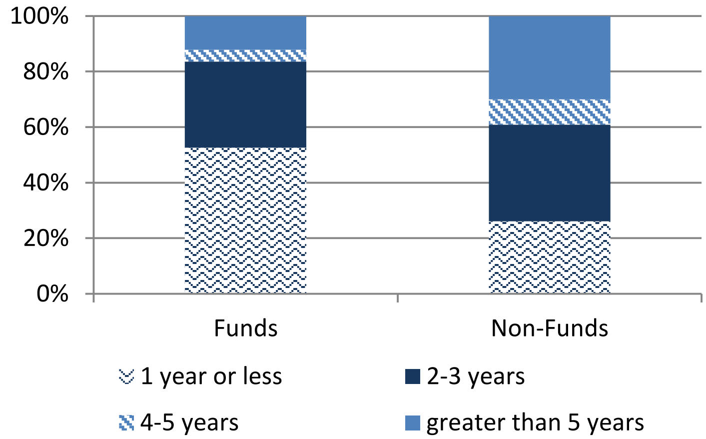
Figure 16. Size of non-fund issuers in Rule 506(c) offerings by firm revenue: September 23, 2013 - December 31, 2014



The small size of Regulation D issuers is also consistent with their younger age, as measured by years since incorporation. 67% of Regulation D issuers were incorporated for 3 years or less when they initiated their offering.[44] This includes 84% of fund issuers and 61% of non-fund issuers. Rule 506(c) issuers, are on average, even younger than Rule 506(b) issuers. 74% of Rule 506(c) issuers, including 71% of non-fund issuers, initiated an advertised offering within 2 years of incorporation.

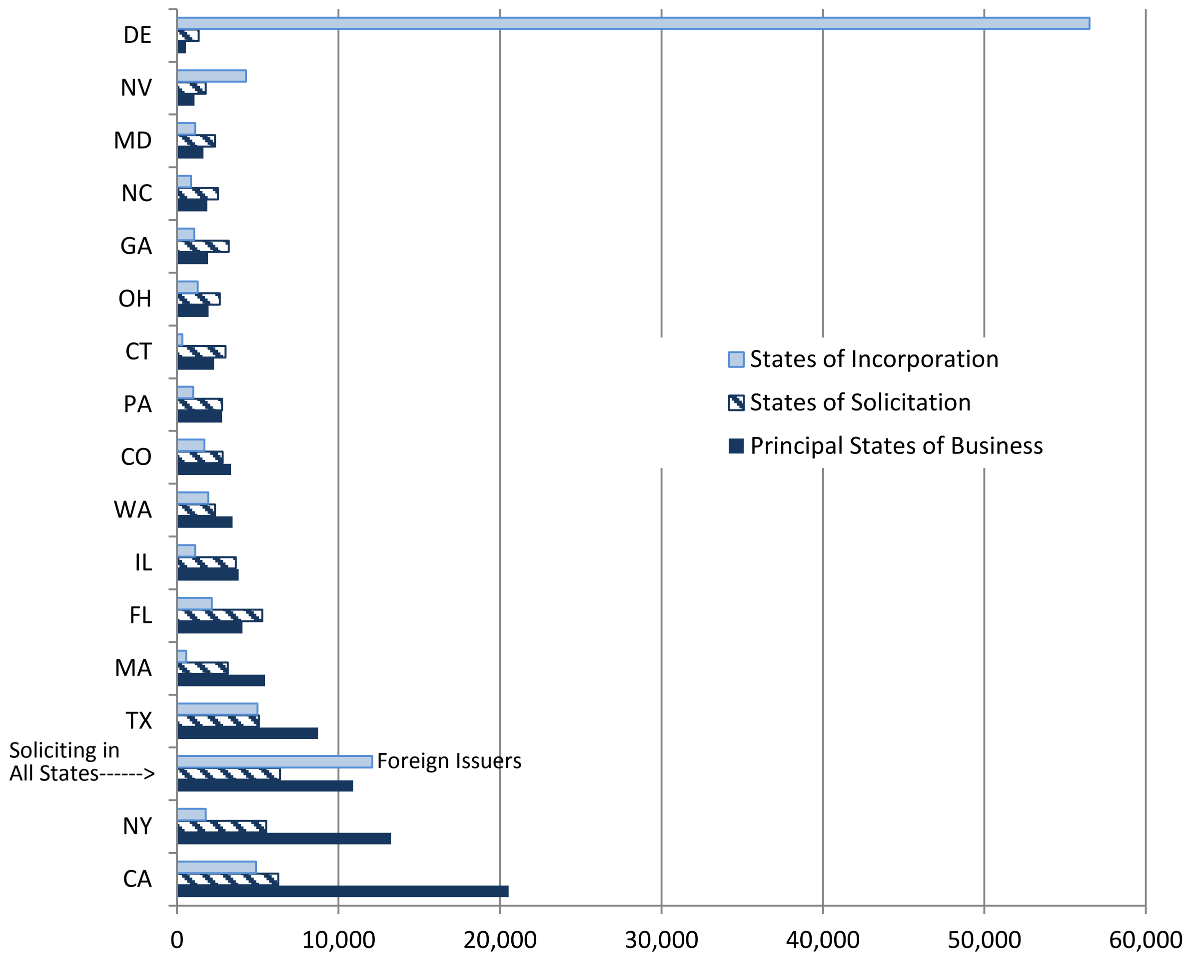
[44] This includes 0.5-1% of offerings that are yet to be formed. These filings do not report year of incorporation or indicate that they are more than 5 years old.

Figure 17. Regulation D issuer age since incorporation: 2009-2014



Most Regulation D issuers are located, in terms of principal place of business, in California and New York, even though approximately 52% are incorporated in Delaware (Figure 18). The next largest number of issuers report their principal place of business in Texas, Florida and Massachussetts. 11% of offerings were initiated by foreign incorporated firms. Of those offerings that provide information regarding states of solicitation, the largest number indicate they are soliciting investors in all U.S. states. Other major states of solicitation are similar in their ordering as the major states of issuer location.

Figure 18. Regulation D issuer state of solicitation, incorporation and primary place of business: 2009-2014



Similar to Rule 506(b) issuers, most Rule 506(c) issuers report their principal place of business in the states of California, New York, Texas, Florida and Illinois. Approximately 9% of Rule 506(c) offerings were initiated by firms that had their primary place of business outside the U.S., relative to 13% in the Rule 506(b) market during the same period. With respect to states of solicitation, approximately 10% of Rule 506(c) offerings who did report their states of solicitation, chose to solicit in all U.S. states. In terms of individual states of solicitation, California ranked number one, followed by Florida, Texas, New York and Illinois.

5.1.5. Issuer offering activity in Regulation D market

Less than a fifth of Regulation D issuers conducted multiple offerings during the 2009-2014 period (Table 8). Most fund issuers (94%) do not appear to have repeat offerings, which is not surprising given that fund offerings are often continuous in nature and tend to be open for multiple years.[45] Amongst pooled investment funds, only 6% of unique fund issuers had repeat offerings. Approximately 14% of all fund offerings initiated during 2009-2014 were repeat offerings by multiple-issuance fund issuers. Amongst non-fund issuers, almost 25% of issuers had a repeat offering during 2009-2014. Multiple-issuance non-fund issuers accounted for more than half of all non-fund offering initiated during 2009-2014. Amongst the minority of issuers that did conduct multiple offerings, the average wait time between consecutive offerings (from the initial filing date of the first offering to the initial filing date of the subsequent offering) was 8-10 months.

Table 8. Frequency of Regulation D offerings by unique issuers: 2009-2014

	Non-Fund Issuers		Fund Issuers		
Number of Offerings	Number of Issuers	Proportion of Non Fund Issuers	Number of Issuers	Proportion of Fund Issuers	All Regulation D Issuers
1	40,132	75.1%	29,948	93.9%	70,080
2	7,002	13.1%	1,603	5.0%	8,605
3	2,914	5.5%	193	0.6%	3,107
4	1,422	2.7%	74	0.2%	1,496
5	841	1.6%	23	0.1%	864
6 or more Offerings	1,123	2.1%	46	0.1%	1,169
Total: Unique Issuers	53,434		31,887		85,321

* Includes new offerings and offerings initiated prior to 2009 but continuing into years 2009 and later.

Approximately 31% of Regulation D offerings, pre-dominantly non-fund offerings, raise 100% of capital that they seek by the time they file a Form D with the Commission. Since Regulation D issuers are not required to file a Form D upon completion or termination of their offering[46], the exact duration of *all* the offerings is not known. But the approximate duration can be estimated from information provided in their filings with the Commission. One such information item requires issuers to state if they expect the duration of their offering to be less than or more than a year. During the period 2009-2014, approximately two-thirds of Regulation D issuers that are funds, 18%

[45] We identify unique issuer by their CIK. It is not uncommon that a number of funds that belong to the same family have different CIKs and are therefore identified as separate issuers. From this perspective, the data likely overestimates the number of unique fund issuers and underestimates the frequency of offerings by a family of funds.
[46] More than 87% of non-fund offerings and almost 55% of fund offerings initiated during 2009-2014 have filed only one Form D (initial and amendment).

of issuers that are financial firms, and 7% of operating firms report in their Form D filing that their offering is expected to stay open beyond a year.[47]

5.2. Investors in Regulation D offerings

Regulation D allows both accredited and non-accredited investors to participate in private offerings, with an unlimited number of non-accredited investors in Rule 504 offerings, while non-accredited investors are limited to maximum of 35 for Rule 505 and Rule 506(b) offerings. Only accredited investors can participate in Rule 506(c) offerings. Based on information collected from Form D filings, most participants are accredited. For example, in 2014, approximately 8% of new offerings included non-accredited investors (Table 9), which is lower than the average for the period 2009-2013 (10%). Offerings by financial issuers and REITs are more likely to have non-accredited investors (15% of offerings had at least one such investor during 2009-2013), while offerings by VC funds only rarely include non-accredited investors (only 1% of offerings have at least one such investor).

Aggregated Form D information also reveals more than 300,000 investors participating in Regulation D offerings in 2014, of which more than 110,000 participated in offerings by non-financial issuers, more than triple the number of investors that participated in offerings by hedge funds. However, because an investor can participate in more than one Regulation D offering, this aggregation likely overstates the actual number of unique investors, and we have no method of estimating the extent of overlap. The mean number of investors per offering (14) is significantly larger than the median (4), indicating the presence of a small number of offerings with a large number of investors. Offerings by pooled investment funds and REITs have the largest average number of investors (both accredited and non-accredited) per offering, while those by non-financial issuers have the smallest.

[47] The duration of Regulation D offerings can also be estimated by analyzing the time between initial Form D filing and the last amendment filed.[47] Analysis of fund offerings (as almost 90% of non-fund offerings do not have a subsequent amendment to the initial Form D filing) for those that were initiated during 2009-2011and had at least one amendment filing (a little more than one-half of all new fund offerings in 2009-2011), shows that approximately 80% of such Regulation D offerings extend beyond a year, and more than 40% are continuing beyond 3 years.

Table 9. Investors participating in Regulation D offerings: 2009-2014

	Total Number of Investors		Mean Investors per Offering		Median Investors per Offering		Fraction of offerings with at least one non-accredited investor	
	2009-13*	2014	2009-13	2014	2009-13	2014	2009-13	2014
Hedge Funds	38,311	29,439	19	16	3	2	7%	7%
Private Equity Funds	17,947	27,782	19	18	5	3	6%	3%
Venture Capital Funds	4,528	11,224	15	17	4	4	1%	1%
Other Investment Funds	27,085	33,175	27	21	5	6	8%	4%
Financial Services	19,641	16,653	17	15	4	4	14%	11%
Real Estate	35,982	73,399	23	26	6	8	15%	12%
Non-financial Issuers	91,608	110,062	9	9	4	4	10%	9%
All offerings	235,102	301,734	14	14	4	4	10%	8%

*2009-2013 data is annualized

Offerings involving non-accredited investors are typically smaller than those that do not involve non-accredited investors. This is evident in Table 9b below which shows that while the presence of non-accredited investors is large in Rule 505 offerings (40%), where the number of non-accredited investors is limited to 35 and offering limit is $5 million, the proportion is much higher for offerings under Rule 504 (57%) that have access to an unlimited number of non-accredited investors but have an offer limit of $1 million. Interestingly much fewer Rule 506 offerings (9%), including amongst those that have an offer size of up to $5 million, report selling or intending to sell to a non-accredited investor. The big difference between Rule 506 and other rules under Regulation D is that the former has preemption from state regulation. Thus, while issuers may prefer to raise capital under Rule 506 because of the preemption of state securities laws, non-accredited investors could be attracted more to Rules 504 and 505 markets because of the higher degree of protection they may perceive to get from state oversight. Additionally, Rule 506 provisions, unlike Rule 504 or Rule 505 provisions, require the non-accredited investors to be 'sophisticated,'[48] which could also explain the lower proportion of Rule 506 offerings that sell or intend to sell to non-accredited investors.

[48] Non-accredited investors in Rule 506(b) offerings must have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment. *See* http://www.sec.gov/answers/rule506.htm

Table 9b. Proportion of Regulation D offerings that sold or intend to sell to non-accredited investors[49]

	Rule 504	Rule 505	Rule 506(b) Offerings <=$5 million	All 506(b) offerings
2009	53%	39%	10%	10%
2010	54%	41%	9%	8%
2011	57%	43%	9%	8%
2012	58%	44%	10%	8%
2013	61%	41%	9%	8%
2014	60%	36%	8%	7%
2009-2014	57%	40%	9%	8%

Unlike Rule 506(b) offerings that allow accredited investors and up to 35 non-accredited investors, Rule 506(c) allows only accredited investors to participate in advertised offerings. Aggregated Form D information indicates that more than 5,200 investors participated in Rule 506(c) offerings since the rule's effectiveness in 2013 (Table 10). Four times as many investors participated in non-fund Rule 506(c) offerings than in fund offerings using general solicitation. The average number of investors per Rule 506(c) offering (10) is smaller than the average number of investors in a Rule 506(b) offering (14). This could be correlated with smaller amount of capital being raised, on average, in a Rule 506(c) offering, relative to a Rule 506(b) offering. But Rule 506(c) offerings by fund issuers have a similar number of investors, on average, as a Rule 506(b) fund offering. The median numbers are similarly much smaller than average number of investors in both Rule 506(c) and Rule 506(b) offerings.

Table 10. Investors in Rule 506(c) market: September 23, 2013 - December 31, 2014

	Total number of investors	**Mean investors per offering**		**Median investors per offering**	
	All new offerings	All new offerings	New offerings that report investors	All new offerings	New offerings that report investors
Rule 506(c)	20,563	10	15	2	6
Funds	7,202	17	22	5	15
Non-Funds	13,361	8	12	1	5
Rule 506(b)	343,872	14	17	4	6
Funds	114,480	17	25	3	8
Non-Funds	229,392	13	15	4	6

[49] Rule 506(c) offerings can sell only to accredited investors.

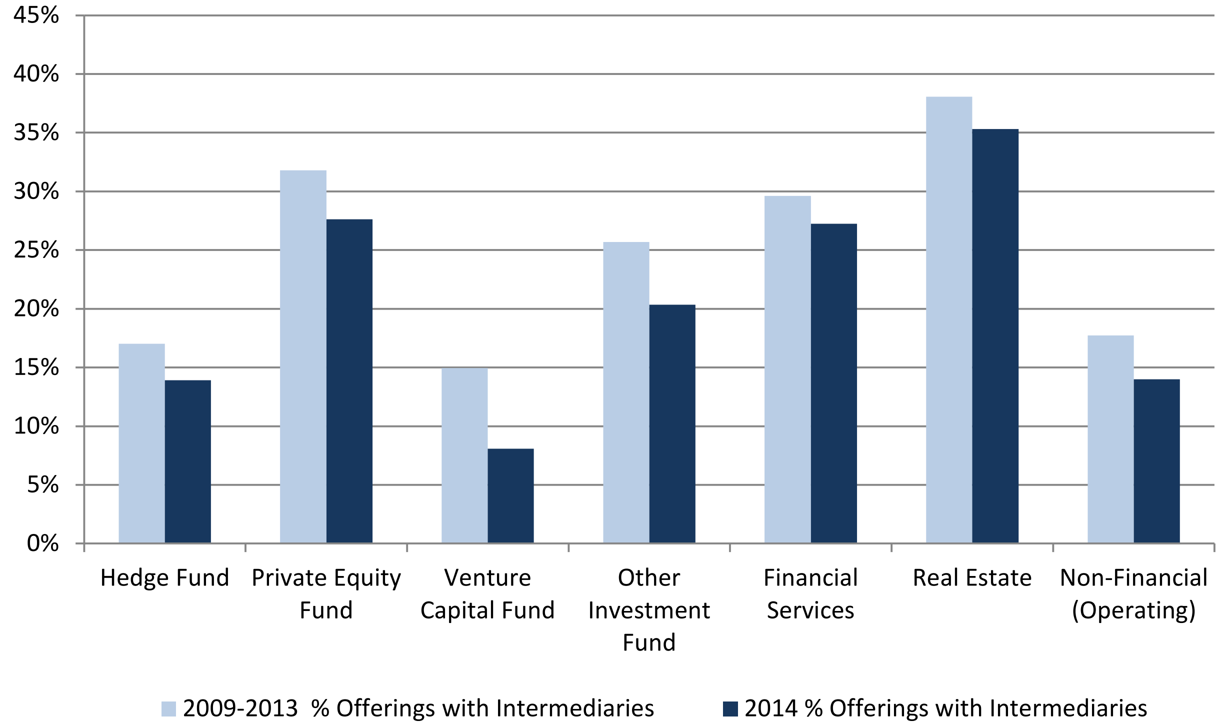
5.3. The Role of Financial Intermediaries in the Regulation D market

While financial intermediaries commonly underwrite public offerings, there is relatively little information about intermediary participation in private offerings. One possible role for an intermediary in a private offering is to help issuers locate potential investors without violating the ban on general solicitation, a constraint of the traditional Rule 506 offerings. Using a pre-existing and substantive relationship between the intermediary and potential investors is one method for the issuer to ensure that there was no general solicitation and preserve the Rule 506(b) safe harbor.

Information collected from Form D filings reveals that intermediaries are used relatively infrequently in the Regulation D market. Only about 21% of all new offerings during the period 2009-2014 use an intermediary such as a finder or broker-dealer (Figure 19a).[50] Issuers from the real estate industry are the biggest users of intermediaries (37% of all offerings during 2009-2014) while venture capital funds and non-financial issuers use intermediaries the least (13% and 17% respectively, of all offerings during 2009-2014). Most issuers experienced a decrease in the use of intermediaries in 2014 compared to the period 2009-2013. In 2014 as well, real estate issuers used significantly more intermediaries (approximately 35%) than other issuers, while venture capital funds rarely use intermediaries (8% in 2014, down from approximately 15% in 2009-2013).

[50] To identify the presence of an intermediary in an offering, we identify those offerings that report paying a commission and/or finder's fee. We also include cases where the CRD number of a recipient of sales compensation is reported on Form D, but no commission and/or finder's fee is paid as of the filing date of the form. Since the issuer could list intermediaries which *will be paid* compensation, we believe that including these cases accounts more accurately for the participation of intermediaries. When calculating the fees paid, however, we only included offerings with positive commission and/or finder's fee.

Figure 19a. Use of financial intermediaries by type of Regulation D issuer: 2009-2014



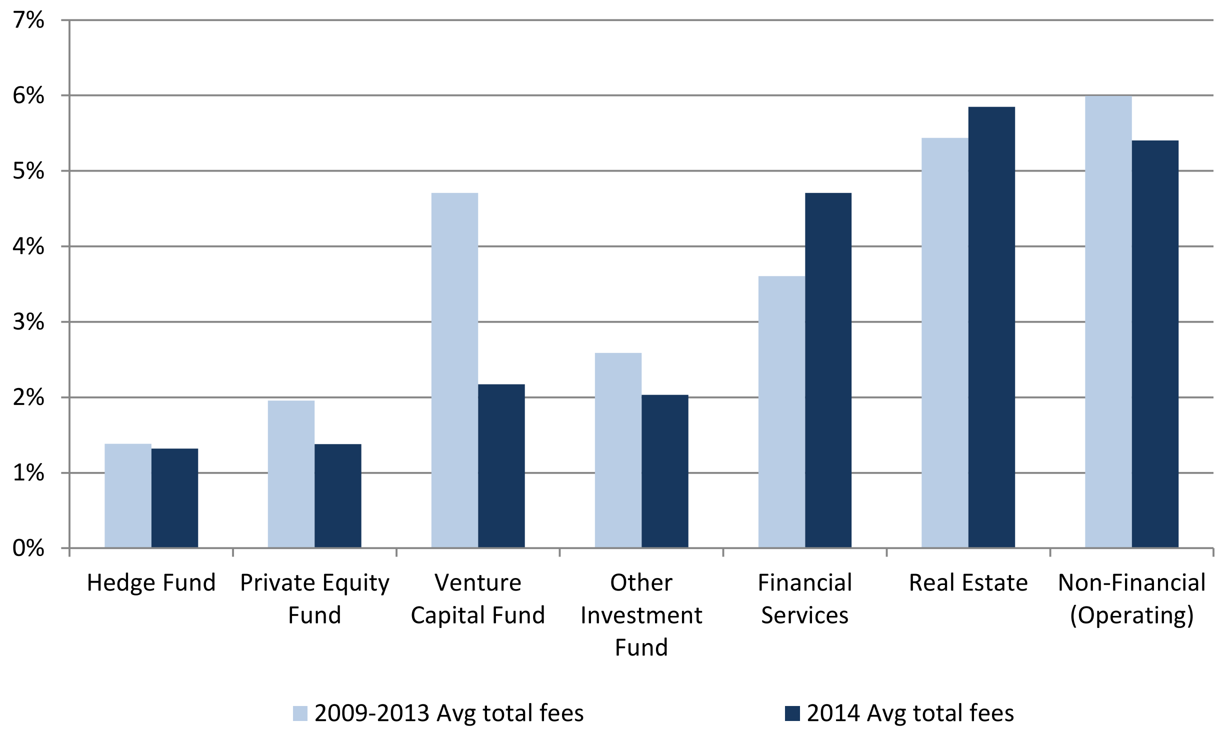
When an intermediary is used, there is significant variation in the fees across each class of issuer. We calculate the total fee for an offering as the sum of commission and finder's fees, scaled by the offering amount. Information from Form D filings reveals that total fee is smallest for pooled investment funds (with the exception of VC funds in 2009-2013) and largest for non-financial issuers (Figure 19b). Non-financial issuers paid on average about 6.0% total fee in Regulation D offerings in 2009-2014. For comparison, a company going public pays an average gross spread of 7% to its IPO underwriters[51], while a public company raising equity through a follow-on (seasoned) equity offering pays a gross spread of about 5.4%.[52] Issuers raising capital through registered bond issues pay commissions between 0.9% and 1.5% of the size of the offering.[53]

In contrast to operating firms, hedge funds raising capital through Regulation D offerings and private equity funds paid about 1.4%. It is also worth noting that pooled investment vehicles experienced a decrease in fees in 2014 compared to the 2009-2013 period, while the fees paid by real estate and financial firms increased in 2014 compared to the previous five years. The fees for non-fund issuers have been going down in the last two years. Brokers and finders are no more

[51] *See* Hsuan-Chi Chen and Jay Ritter, *The Seven Percent Solution*, Journal of Finance 55, 1105-1131 (2000).
[52] *See* Shane Corwin, *The Determinants of Underpricing for Seasoned Equity Offers*, Journal of Finance 58, 2249-2279 (2000).
[53] *See* L. Fang, *Investment Bank Reputation and the Price and Quality of Underwriting Services*, Journal of Finance 60, 2729-2761 (2005).

costly, on average, than the underwriting fees charged for public offerings,[54] so fees do not provide an obvious reason for their relatively infrequent use in unregistered offerings.

Figure 19b. Total Fees paid by type of Regulation D issuer: 2009-2014



With general solicitation available under new Rule 506(c), it is interesting to see if the role of intermediaries is different from their role in the traditional offerings under Regulation D. During the 15 month period of September 23, 2013-December 31, 2014, intermediary usage in Rule 506(c) offerings was dramatically higher amongst issuers that are operating firms and financial issuers, than similar Rule 506(b) issuers (Figure 20). Overall, Rule 506(c) offerings exhibited a higher level of intermediary usage (33% of new offerings) than Rule 506(b) offerings (17% of new offerings). The higher usage of intermediaries in Rule 506(c) offerings is not entirely surprising because issuers, and especially non-fund issuers, may be relying on outside entities, including third-party online platforms, for verification of accredited investor status, a requirement for using general solicitation.

On average, Rule 506(c) offerings also pay higher fees (5.7%) than Rule 506(b) issuers (4.7%). Figure 20 shows that operating firms paid almost 6.3% in fees in 506(c) offerings, relative to 5.3% paid by such non-fund, non-financial Rule 506(b) offerings.

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[54] *See* notes 50 and 51.

Figure 20. Role of intermediaries in Rule 506(c) market: September 23, 2013 - December 31, 2014

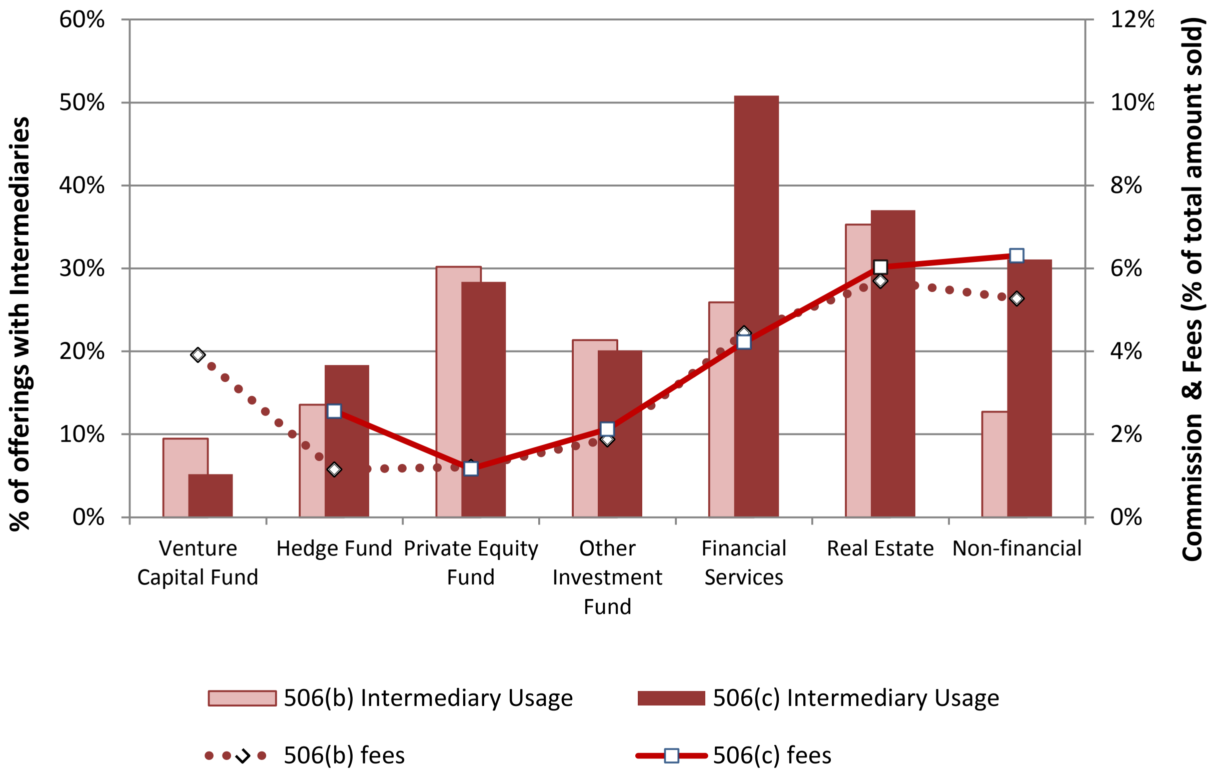


Figure 21a reports the use of financial intermediaries and fees for different offering sizes, irrespective of issuer type or exemption under Regulation D. The use of a broker or finder increases with offering size; they participate in about 17% of offerings for up to $1 million and 30% of offerings for more than $50 million. Moreover, the total fee decreases with offering size (Figure 21b). Unlike the gross spreads in registered offerings, the differences in commissions for Regulation D offerings of different sizes are large: the average commission paid by issuers doing offerings of up to $1 million (6.4% in 2014) is more than three times larger than of the average commission paid by issuers doing offerings of more than $50 million (1.9% in 2014). These results are consistent with larger deals generating scale economies for the involved intermediaries. Even so, the vast majority of the offerings are conducted without the use of a financial intermediary.

Figure 21a. Use of financial intermediaries by size of Regulation D offering: 2009-2014

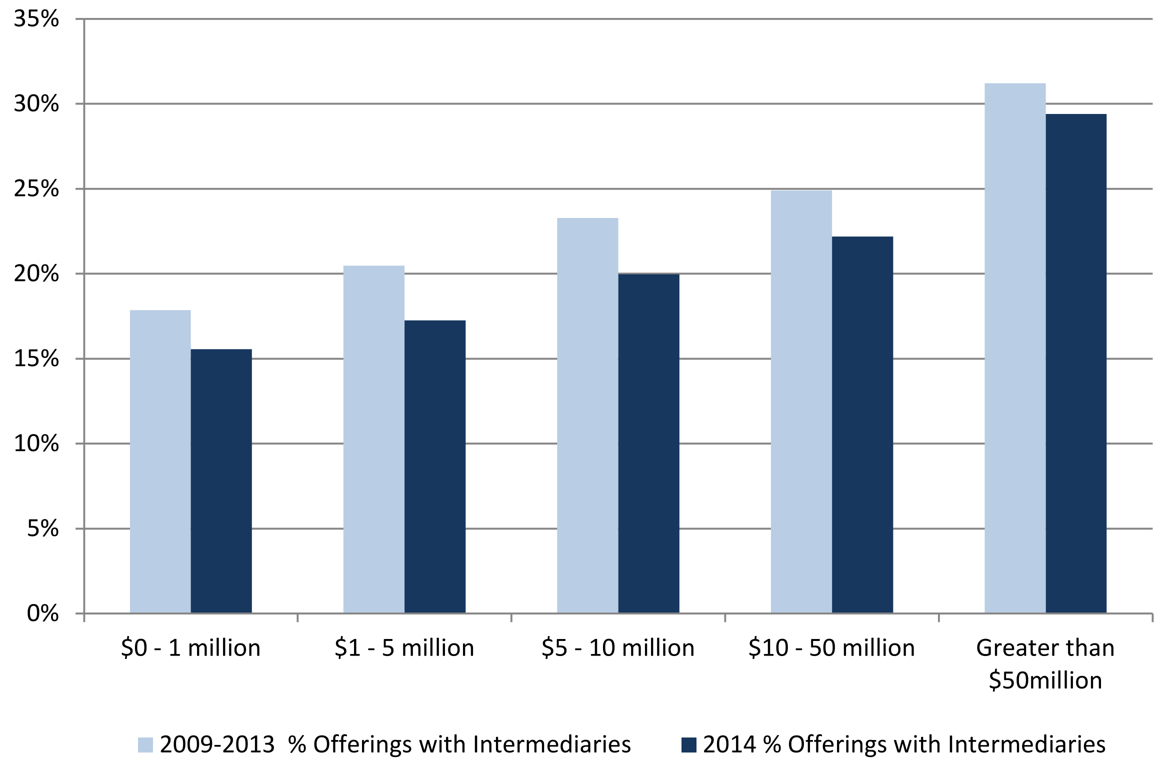
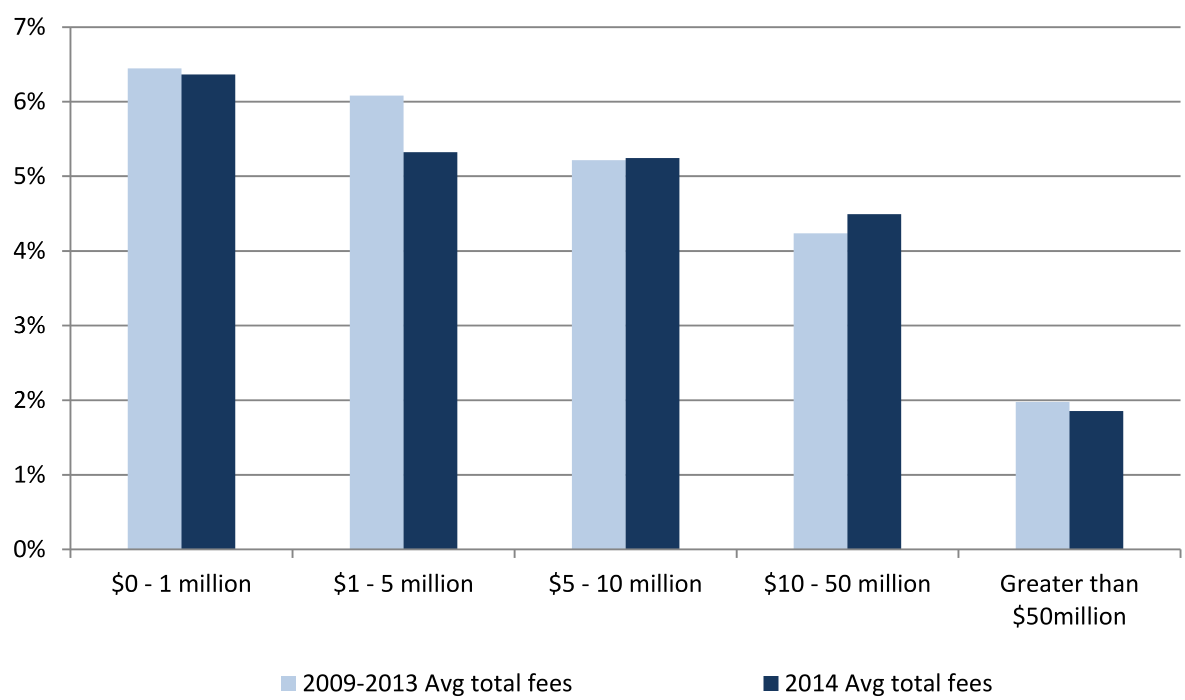


Figure 21b. Total Fees paid by size of Regulation D offering: 2009-2014



Appendix I: Data Used in Analysis

This appendix describes the procedures used to collect the Regulation D sample and the data on the other offerings. One of the original purposes of Form D, first adopted in 1982, was to collect and analyze data on issuers using Regulation D.[55] However, until 2008, issuers filed Form D on paper, making the extraction of information for large-scale statistical analysis cumbersome. In February 2008, the SEC adopted amendments to Form D that required issuers to submit their Form D filings electronically, in a structured data format.[56] As a result of these requirements, which were phased in from September 2008 through March 2009, Form D filings are now machine-readable. Using basic text parsing tools, DERA staff was able to extract the reported elements and place them in a database enabling the large-scale statistical analysis reported here.

A. Regulation D sample

We collected all Form D filings (new filings and amendments) on EDGAR starting in January 2009 through December 2014. We extracted all fields from each filing and applied the following treatments to arrive at our final sample.

- Subsequent amendments to a new filing are treated as incremental fundraising and recorded in the calendar year in which the amendment is filed. For offerings initiated prior to 2009 and continuing into future years, an issuer would have filed only Form D amendments in an electronic (machine readable) form required for this analysis. If these amendments reference a post-2008 sale date, the first filed amendment is treated as an original Form D filing as we do not have access to Form D data prior to 2009.
- The incremental amount sold between two successive filings of the same issuer is determined by taking the difference between the "total amounts sold" reported in each such filing.
- We estimate the incremental amount of capital raised and reported in amended filings for which there is no original filing in electronic form. This occurs only in 2009. The estimated incremental capital raised in these instances is based on a "haircut" of the total amount sold reported in the latest filed amendment. This percentage is the average incremental amount sold in all amendments for which there is an original filing in electronic form, calculated separately for funds and non-funds. This resulted in haircut percentages of 11% and 27%, respectively. This treatment is unnecessary for offerings starting in 2010.

[55] Release No. 33–6389 (Mar. 8, 1982); 47 Fed. Reg. 11251 (1982) (adopting Form D as a replacement for Forms 4(6), 146, 240 and 242).

[56] Release No. 33–8891 (Feb. 27, 2008); Electronic Filing and Revision of Form D, 70 Fed. Reg. 10,592 (2008) (to be codified at 17 C.F.R. pts. 230, 232 & 239).

- We separate amendments filed into two categories. The first category comprises of amendments that are filed in the same year when the offering was initiated, while the second category consists of amendments filed in the year subsequent to the year of initial offering. 'Same year' is defined as 12 months from the initial date of filing. A number of pooled investment funds appear to report, in their annual amendments, net asset values for total amount sold under the offering. Net asset values could reflect fund performance as well as new investment into, and redemptions from, the fund. Since it is not possible to distinguish between the two impacts, we present the second category of amendments (filed for offerings initiated prior to 2014) separate from the total amount raised in initial offerings. However, it is plausible that amendments filed within the same year when offerings are initiated, would reflect updates to capital raising efforts of the issuers. Therefore, we use the incremental amounts in the first set of amendments in calculating total amount raised in initial offerings.
- Foreign issuers are determined based on the information on Issuer State that they provide.
- When an issuer checks the box to claim more than one offering exemption (Rule 504, 505, or 506), for the purpose of this analysis, we assume that any issuer that checks the box for Rule 506 is in fact relying on Rule 506.

B. Other offerings

- Data on IPOs, equity offerings by seasoned issuers (EOSIs), convertible debt offerings, public debt offerings, and private offerings are taken from Securities Data Corporation's New Issues database (Thomson Financial). Data on non-ABS Rule 144A offerings are taken from Securities Data Corporation's New Issues database and Mergent database.
- Data on ABS Rule 144A offerings are taken from the Asset-Backed Alert and Commercial Mortgage Alert publications. We use non-U.S. collateral backed deals to proxy for deals done by foreign issuers.
- Public debt offerings by government, state, municipal, and quasi-governmental issuers (e.g., Fannie Mae, Freddie Mac) are excluded from the public debt sample.

Appendix II: Federal Exemptions and Safe Harbors for Unregistered Offerings by Issuers

Type of Offering	Offering Limit	General Solicitation	Issuer and Investor Requirements	Filing Requirement	Restrictions on Resale	State Securities Law Preemption
Section 3(a)(11)	None	No offerees must be resident in state	All issuers and investors must be resident in state.	None	Section 3(a)(11) does not impose resale restrictions, but state securities laws may do so. Securities Act Rule 147, a safe harbor under Section 3(a)(11), limits resales to persons residing in-state for a period of nine months after the last sale by the issuer.	No preemption. Need to comply with state laws registration requirements or rely on state exemption.
Section 4(a)(2)	None	No general solicitation or advertising.	Transactions by an issuer not involving any public offering. All investors must meet sophistication and access to information test so as not to need protection of registration.	None	Restricted securities.	No preemption. Need to comply with state law registration requirements or rely on state exemption.
Regulation A	Tier 1: $20 million with $6 million limit on secondary sales by affiliates of the issuer, within prior 12 months; Tier 2: $50 million with $15 million limit on secondary sales by affiliates of the issuer, within prior 12 months..	"Testing the waters" permitted. Sales permitted after Form 1-A qualified.	U.S. or Canadian issuers, excluding investment companies, blank-check companies, reporting companies, and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights.	File testing the waters materials and Form 1-A for Tiers 1 and 2; file annual, semi-annual, and current reports for Tier 2; file exit report for Tier 1 and to suspend or terminate reporting for Tier 2	None; freely resalable.	Tier 1: No preemption, offerings need to comply with state laws. Tier 2: Offerings have state law pre-emption.

Type of Offering	Offering Limit	General Solicitation	Issuer and Investor Requirements	Filing Requirement	Restrictions on Resale	State Securities Law Preemption
Regulation S	None	Available only for offer and sale of securities outside the United States. None of the parties can make any "directed selling efforts" in the United States.	Issuers cannot be open-end investment companies or those registered under Investment Company Act of 1940, or closed-end investment companies required to be registered, but not registered, under the 1940 Act. Can be foreign investors or U.S. investors who enter foreign markets, subject to limitations.	None	Restricted during distribution compliance period; subsequent resale transaction has to be registered under Securities Act or be exempt from registration.	No preemption. Also need to comply with registration requirements in countries/exchanges where offer is made.
Rule 504 Regulation D	$1 million within prior 12 months.	No general solicitation or advertising unless registered in a state requiring use of a substantive disclosure document or sold under state exemption for sales to accredited investors with general solicitation.	Excludes investment companies, blank-check companies, and Exchange Act reporting companies.	File Form D. Filing not a condition of the exemption.	Restricted unless registered in a state requiring use of a substantive disclosure document or sold under state exemption for sale to accredited investors with general solicitation.	No preemption. Need to comply with state law registrations requirements or rely on state exemption.

Type of Offering	Offering Limit	General Solicitation	Issuer and Investor Requirements	Filing Requirement	Restrictions on Resale	State Securities Law Preemption
Rule 505 Regulation D	$5 million within prior 12 months.	No general solicitation or advertising.	Unlimited accredited investors and 35 non-accredited investors.	File Form D. Filing not a condition of the exemption.	Restricted securities	No preemption. Need to comply with state law registration requirements or rely on state exemption.
Rule 506(b) Regulation D	None	No general solicitation or advertising	Unlimited number of accredited investors and 35 non-accredited investors that are sophisticated.	File Form D. Filing not a condition of the exemption.	Restricted securities	Yes .
Rule 506(c) Regulation D	None	General solicitation and general advertising permitted, provided that all purchasers are accredited investors and the issuer takes reasonable steps to verify accredited investor status.	All purchasers must be verified to be accredited investors. Unlimited number of accredited investors.	File Form D. Filing not a condition of the exemption.	Restricted securities	Yes.