

DUAL-TRACK BIAS

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ABSTRACT

Since the JOBS Act of 2012 made it easier to start the IPO process, startups have increasingly pursued a “dual-track” exit strategy, simultaneously preparing for both an IPO and an acquisition. But, contrary to the JOBS Act’s goals, startups have been exploiting this new advantage predominantly to enhance acquisition exits rather than IPOs.

This Article presents the first systematic legal and economic analysis of dual-tracking. I show how dual-tracking pushes firms from IPOs and towards acquisitions and identify the key institutional mechanisms driving this result. First, securities law and transactional practice create significant informational advantages for prospective acquirers over prospective IPO investors in a dual-track process. Auction theory predicts that these informational asymmetries would produce the imbalanced outcomes that have been observed. Second, investment banks who serve dual roles (as both underwriter and M&A advisor) for dual-tracking firms have private incentives to steer clients toward acquisitions.

Policymakers who want to “make IPOs great again” will not succeed by making IPOs more attractive; they must make IPOs more attractive relative to acquisitions.

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TABLE OF CONTENTS

INTRODUCTION	112
I. DUAL-TRACK DISTORTION.....	118
A. <i>The JOBS Act Favors Acquisitions over IPOs</i>	120
1. <i>Testing the Waters</i>	121
2. <i>Confidential Filing</i>	122
B. <i>Dual-Tracking Favors Acquisitions over IPOs</i>	127
II. INSTITUTIONAL BIAS IN DUAL-TRACK EXITS.....	134
A. <i>Asymmetric Information</i>	136
1. <i>The One-Way Mirror: Asymmetric Information About Competing Bidders</i>	136
2. <i>The Due Diligence Gap: Asymmetric Information About the Target</i>	141
3. <i>These Informational Asymmetries Bias Dual-Track Exits in Favor of Acquisitions</i>	144
B. <i>Asymmetric Compensation: Banker Bias</i>	148
III. LESSONS FOR SECURITIES REGULATION.....	153
A. <i>How <u>Not</u> to “Make IPOs Great Again”</i>	153
B. <i>Redressing the Information Asymmetry?</i>	158
CONCLUSION.....	159

INTRODUCTION

After nearly a decade as a private company, food-delivery startup Postmates was finally ready to go public.

Everything was falling into place. Postmates’ lead underwriter, J.P. Morgan, helped it confidentially file a registration statement with the SEC, “test the waters” with prospective IPO investors, and set a price range for the offering.¹

But the IPO never happened. At the last minute, J.P. Morgan steered Postmates to a different exit. Instead of going public, Postmates was acquired by Uber for a price at the top end of the IPO price range.² Advised by J.P. Morgan, Postmates’ board apparently came to believe the Uber deal offered “superior value to Postmates stockholders” as well as “greater certainty of capital.”³

1. Uber Techs., Inc., Consent Solicitation Statement of Postmates Inc. and Prospectus of Uber Technologies, Inc. (Form 424(b)(3)), at 64–74 (Nov. 18, 2020).

2. *Id.* at 64, 67–74.

3. *Id.* at 69, 74.

The Postmates story is becoming increasingly common. Startups now often pursue a “dual-track” exit strategy, simultaneously exploring a potential IPO and acquisition. Once rare, this strategy has become commonplace since the JOBS Act of 2012, which allowed firms to “test the waters” with prospective IPO investors and to file initial registration statements confidentially. By making it easier to initiate the IPO process, these reforms also enabled startups to explore multiple potential exits at the same time.⁴

On the surface, dual-tracking may seem equally likely to enhance exits on both sides of the track. But that’s not the reality.

Practitioners overwhelmingly indicate that dual-tracking enhances acquisition exits *only*. And empirical financial research confirms this. Moreover, new research also shows that the key JOBS Act IPO process reforms that launched the dual-tracking trend (test-the-waters and confidential filing) follow the same pattern: Although these reforms were intended to revitalize IPOs, they appear to have done the opposite, enhancing startup acquisitions and undercutting IPOs.⁵

This is a puzzle. At first glance, giving startups more information and leverage in the exit process seems like it should bolster exits on both sides of the tracks. But, in practice, startups have been predominantly exploiting this advantage to enhance only acquisitions, not IPOs. What explains this?

Resolving this puzzle is not merely a matter of academic curiosity. Congress is on the brink of doubling down on the same reform strategy. In December 2025, the U.S. House of Representatives passed on a strongly bipartisan basis the INVEST Act, which would codify expansions of the same JOBS Act IPO process reforms (confidential filing and test-the-waters).⁶ Congress is trying to revitalize IPOs, but the evidence suggests that the result here will be exactly the opposite—further locking in an already dominant advantage for M&A over IPOs.

The stakes are significant. The shift from IPO to acquisition as the leading exit strategy for entrepreneurial startups amounts to a profound economic transformation with potential implications for innovation, competition, investor protection, and employment.⁷ So it is no surprise that the goal of revitalizing IPOs is one of the few remaining areas of consensus

4. *Infra* Section I.B.

5. *Infra* Section I.B.

6. INVEST Act of 2025, H.R. 3383, 119th Cong. § 303(a)–(b) (as passed by House, Dec. 11, 2025). The bill passed with support from all 215 Republicans and 87 out of 210 Democrats. In committee, the confidential filing piece passed fifty to one, and test-the-waters passed forty-eight to two. See H.R. REP. NO. 119-121, at 5 (2025); H.R. REP. NO. 119-116, at 6 (2025).

7. *Infra* Section I.

in an increasingly polarized securities regulation policy environment.⁸ Understanding *why* the JOBS Act's IPO process reforms backfired and what kinds of reforms would *actually* help is a matter of importance.

And yet, despite its urgency and importance, the rise of dual-tracking has not gotten the attention it deserves. Only a single SEC statement or release of any type even mentions dual-tracking and then only in passing.⁹ Legal scholars have similarly ignored the phenomenon, with only an exceedingly small number of law review articles even *mentioning* dual-tracking and doing so without any sustained analysis.¹⁰ None of the leading casebooks or treatises on securities regulation mention dual-tracking in their discussions of the IPO process.¹¹ Mergers and acquisitions authorities are similarly

8. *Infra* Part I.

9. See Statement of John Coates, Acting Dir., Div. of Corp. Fin., U.S. SEC, *SPACs, IPOs and Liability Risk Under the Securities Laws* (Apr. 8, 2021), <https://www.sec.gov/newsroom/speeches-statements/spacs-ipos-liability-risk-under-securities-laws> [<https://perma.cc/ES3L-2AFR>] (noting the recent rise of “dual-track IPO/M&A processes”). The annual reports from SEC's Office of Small Business Capital Formation provide an extensive overview of trends in startup exit activity but consistently fail to acknowledge dual-tracking. *E.g.*, OFF. OF THE ADVOC. FOR SMALL BUS. CAP. FORMATION, U.S. SEC, STAFF REPORT: FISCAL YEAR 2025 [hereinafter 2025 STAFF REPORT]; OFF. OF THE ADVOC. FOR SMALL BUS. CAP. FORMATION, U.S. SEC, ANNUAL REPORT: FISCAL YEAR 2024; OFF. OF THE ADVOC. FOR SMALL BUS. CAP. FORMATION, U.S. SEC, ANNUAL REPORT: FISCAL YEAR 2023; OFF. OF THE ADVOC. FOR SMALL BUS. CAP. FORMATION, U.S. SEC, ANNUAL REPORT: FISCAL YEAR 2022. Some practitioners have flagged the dual-tracking trend at SEC meetings. *E.g.*, *Meeting of the Small and Emerging Cos. Advisory Comm. of the U.S. SEC* 166 ll. 5–6 (Feb. 15, 2017), <https://www.sec.gov/info/smallbus/acsec/acsec-transcript-021517.pdf> [<https://perma.cc/HV68-BDL3>] (statement of James A. Hutchinson, Partner, Goodwin Procter LLP); *Roundtable on Decimalization, U.S. SEC* 32 l. 25 to 33 l. 9 (Feb. 5, 2013), <https://www.sec.gov/news/otherwebcasts/2013/decimalization-transcript-020513.txt> [<https://perma.cc/VFE4-BANQ>] (statement of Jeffrey M. Solomon, CEO, Cowen & Co.).

10. See, e.g., Sven Riethmueller, *11th Hour Option Discounting: The Significance of IPO Prognostications in Fixing Equity Compensation*, 76 UC LAW J. 409, 441 (2025) (noting, in passing, that the JOBS Act's IPO process reforms facilitate dual-track exits); Brandon Mordue, *The Revlon Divergence: Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 531, 575 (2018) (raising, but not resolving, the question of how *Corwin* cleansing would apply in the context of a dual-track exit); Shachar Nir, *One Duty to All: The Fiduciary Duty of Impartiality and Stockholders' Conflict of Interest*, 16 HASTINGS BUS. L.J. 1, 27 (2020) (discussing, in the wake of *Trados*, some potential conflicts that may arise between different classes of shareholders in a private company pursuing a dual-track exit, without analyzing the mechanics or practical details of that process).

11. For casebooks providing a lengthy discussion of economics, institutions, and transactional processes involved in IPOs, but failing to note dual-tracking, see STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* 489–506 (6th ed. 2024); JOHN C. COFFEE, JR., HILLARY A. SALE & CHARLES K. WHITEHEAD, *SECURITIES REGULATION: CASES AND MATERIALS* 71–96 (15th ed. 2024); JAMES D. COX, DONALD C. LANGEVOORT, ANN M. LIPTON & PATRICK M. CORRIGAN, *SECURITIES REGULATION: CASES AND MATERIALS* 107–223 (11th ed. 2025); THOMAS LEE HAZEN, *SECURITIES REGULATION: CASES AND MATERIALS* 105–24 (10th ed. 2020). For treatises, see 1 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 651–787 (7th ed. 2023) (discussing extensively a variety of offering processes but failing to mention dual-tracking); 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES LAW HANDBOOK* §§ 5.1–5, 50–76 (2025 ed.) (discussing extensively the IPO process and JOBS Act but failing to mention dual-tracking).

silent on the topic.¹² This gap in the literature is all the more glaring given that practically every leading law firm in the United States has been heavily marketing dual-track exits to their clients for years,¹³ as have investment

12. For casebooks providing extensive discussions of law, institutions, actors, economics, negotiations, and processes involved in all aspects of contemporary M&A that omit any reference to dual-tracking, see CLAIRE A. HILL, BRIAN JM QUINN & STEVEN DAVIDOFF SOLOMON, *MERGERS AND ACQUISITIONS: LAW, THEORY, AND PRACTICE* (3d ed. 2023); JEFFREY J. HAAS & DALE A. OESTERLE, *THE LAW OF MERGERS AND ACQUISITIONS* (6th ed. 2025); ROBERT B. THOMPSON, *MERGERS AND ACQUISITIONS: LAW AND FINANCE* (5th ed. 2026). For treatises on mergers and acquisitions that do not mention dual-tracking, see *CORPORATE ACQUISITIONS, MERGERS, AND DIVESTITURES* (2025-4 ed.); SIMON M. LORNE & JOY MARLENE BRYAN, *ACQUISITIONS & MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS* (Nov. 2025 ed.); ELEANOR M. FOX & BYRON E. FOX, *CORPORATE ACQUISITIONS AND MERGERS* (2025).

13. See, e.g., GUNDERSON DETTMER, *DUAL TRACK PROCESS (M&A/IPO) FAQs* (2025), <https://www.gunder.com/a/web/kk5Z2e1uDMiC2ZGStGj64r/a4qE44/dual-track-process-february2025.pdf> [https://perma.cc/8BVG-4TTC]; *IPO Insights: Dual Track Process*, ORRICK, HERRINGTON & SUTCLIFFE LLP (Sept. 29, 2023), <https://www.orrick.com/en/Insights/2018/06/Dual-Track-Process> [https://perma.cc/GHD5-NRF8]; Kevin Cooper, Richard Segal & Polina Demina, *Dual-Track Processes: How to Turbocharge Your Exit*, COOLEY LLP (Mar. 30, 2026), <https://cooley.com/2026/03/30/dual-track-processes-how-to-turbocharge-your-exit-2/> [https://perma.cc/7L5T-2GU7]; Kristian A. Werling, Todd R. Kornfeld & Richard Bass, *Dual Track Reboot: Five Key Considerations for Supercharging Your Life Science Company Exit*, McDERMOTT WILL & SCHULTE (Apr. 17, 2024), <https://www.mcdermottlaw.com/insights/five-key-considerations-for-supercharging-your-life-science-company-exit/> [https://perma.cc/J4W5-JV4D]; STUART GELFOND, ANDREW COLOSIMO, MICHAEL PSATHAS & LILY DESMOND, *GETTING ON TRACK WITH A MULTI-TRACK PROCESS* (2012), <https://www.lexology.com/library/detail.aspx?g=1c6b1927-b14e-494e-af4e-a867a9688242> (click “View Original”) [https://perma.cc/2FW6-GS5Y] (Fried Frank); Jeffrey D. Karpf & James E. Langston, *Dual-Track M&A/IPO Gain Popularity in Health Care Sector*, CLEARY GOTTlieb STEEN & HAMILTON LLP (Dec. 16, 2015), <https://www.clearymawatch.com/2015/12/dual-track-maipo-gain-popularity-in-health-care-sector/> [https://perma.cc/GA23-AFC4]; GIBSON DUNN, *EXECUTING A SUCCESSFUL DUAL TRACK PROCESS* (2025), <https://www.gibsondunn.com/wp-content/uploads/2025/03/EXECUTING-A-SUCCESSFUL-DUAL-TRACK-PROCESS.pdf> [https://perma.cc/5FCW-K45V]; WILMER CUTLER PICKERING HALE AND DORR LLP, *2013 M&A REPORT 4–5* (2013) https://www.wilmerhale.com/-/media/files/wilmerhale_shared_content/files/editorial/publication/2013-wilmerhale-ma-report.pdf [https://perma.cc/GTK8-RWH5]; Paul S. Bird, Jonathan E. Levitsky & Sue Meng, *Is Dual Track the New Normal?*, DEBEVOISE & PLIMPTON PRIV. EQUITY REP., Fall 2010, at 1, <https://www.debevoise.com/-/media/files/insights/publications/2010/12/the-private-equity-report/files/view-private-equity-report/fileattachment/pereportfall2010.pdf> [https://perma.cc/K3RA-GYHZ]; George R. Bason, Jr., *The JOBS Act: Implications for Private Company Acquisitions and M&A Professionals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 2, 2012), <https://corpgov.law.harvard.edu/2012/05/02/the-jobs-act-implications-for-private-company-acquisition-s-and-ma-professionals/> [https://perma.cc/NZH2-G9DU] (Davis Polk & Wardwell LLP); Thomas Holden, *Dual-Track IPOs*, ROPES & GRAY LLP (May 1, 2017), <https://www.ropesgray.com/en/insights/alerts/2017/05/video-dual-track-ipos> [https://perma.cc/QEL8-LL9B]; ALEXANDER F. COHEN ET AL., LATHAM & WATKINS LLP, *THE JOBS ACT AFTER ONE YEAR: A REVIEW OF THE NEW IPO PLAYBOOK* 8 (2013), <https://www.sec.gov/info/smallbus/acsec/acsec-091713-lathamreport-slides.pdf> [https://perma.cc/7ZHX-BJG5]; Colin J. Diamond, Joshua Kiernan & Brady Mickelsen, *Navigating a Dual-Track IPO/M&A Process*, LEXLOGY (June 2, 2011), <https://www.lexology.com/library/detail.aspx?g=fef91acb-0cfb-4415-b008-ab5fe26114f4> [https://perma.cc/DBS9-LYWM] (White & Case LLP); WINSTON & STRAWN LLP, *PLAYING THE DUAL TRACK* (May 22, 2024), <https://www.winston.com/a/web/qn6nsb1xSPfNTvDsoLDCaX/playing-the-dual-track-ws-presentation-final-web.pdf> [https://perma.cc/JCD5-V4KT]; William Aitken-Davies et al., *The Evolving Dual Track: Preserving Exit Optionality for PE Sponsors*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Sept. 10, 2024),

banks¹⁴ and accounting/consulting firms.¹⁵

This paper offers the first systematic legal and economic analysis of dual-tracking. While many commentators have debated the shift from IPO to acquisition, this Article is the first to identify dual-tracking as a contributing factor for this trend. I collect evidence that the JOBS Act's IPO process reforms and the dual-tracking strategy they accelerated have enhanced acquisition but not IPO exits and point to the institutional mechanisms that explain why this is happening.

First, there are informational asymmetries hard-wired into the dual-tracking process that favor acquisition bidders over IPO bidders. Securities regulation allows prospective acquirers to observe information about the IPO process but does not allow IPO investors to observe anything about the acquisition process. And prospective acquirers have access to more robust due diligence information about the target than prospective IPO investors.¹⁶

The economic field of auction theory explains why these informational advantages lead to the acquisition-favored results that have been observed. For prospective IPO investors, the prospect of a better-informed acquisition bidder lurking in the shadows exacerbates the "winner's curse" and "market for lemons" and leads them to "shade" their bids downward. For prospective

<https://www.paulweiss.com/insights/client-memos/the-evolving-dual-track-preserving-exit-optionality-for-pe-sponsors> [https://perma.cc/U49C-J8PB]; Danny Tricot, Justin Lau & Leesha Curtis, *Key Considerations for Private Equity Sponsors Aiming to Take Portfolio Companies Public*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Jan. 13, 2026), <https://www.skadden.com/insights/publications/2026/2026-insights/transactional/key-considerations-for-private-equity-sponsors> [https://perma.cc/88RZ-G3EZ]; *IPOs - Attractive Exit Alternative for Financial Sponsors*, DECHERT LLP (May 7, 2015), <https://www.dechert.com/knowledge/onpoint/2015/5/ipos-attractive-exit-alternative-for-financial-sponsors.html> [https://perma.cc/QE2A-9ULA].

14. See, e.g., MELISSA SMITH & JOHN CHINA, J.P. MORGAN, *THE INNOVATION ECONOMY OUTLOOK* 12 (2024), <https://www.jpmorgan.com/content/dam/jpmorgan/documents/cb/insights/outlook/economic-outlook/cb-q1-2024-ie-outlook-report.pdf> [https://perma.cc/E25W-ATFQ]; Rich Handler & Brian Friedman, *What We at Jefferies Have Learned from Living with Covid for Four Months*, JEFFERIES INSIGHTS, July 2020, https://www.jefferies.com/wp-content/uploads/files/Insights/JefferiesInsights_july2020.pdf [https://perma.cc/E983-AUCH]; Tatiana Bautzer & Ateev Bhandari, *Morgan Stanley Beats Profit Estimates on Dealmaking Windfall*, REUTERS (Jan. 15, 2026), <https://www.reuters.com/business/finance/morgan-stanley-profit-jumps-investment-banking-revival-2026-01-15/> [https://perma.cc/S7BP-BCEK] (quoting Morgan Stanley CFO); Bailey Lipschultz & Anthony Hughes, *US IPO Market Heats Up as AI, Crypto Firms Accelerate Plans*, BLOOMBERG L. (Aug. 20, 2025, at 06:00 CT), <https://news.bloomberglaw.com/international-trade/summer-us-ipo-thrills-set-stage-for-crypto-and-ai-led-september> [https://perma.cc/BMD5-DSXB] (quoting Barclays banker).

15. See, e.g., BOS. CONSULTING GRP., *SUCCESSFUL IPOs, SPIN-OFFS, AND DUAL TRACKS* (2021), <https://media-publications.bcg.com/flash/PDF/IPO.pdf> [https://perma.cc/48Q4-VTG6]; SHARI MAGER, REBECCA BROKMEIER, NAVEEN RIKHY, TETYANA YAMSHCHIKOVA & ANJELA DEROSA, KPMG LLP, *HOW PRIVATE COMPANIES CAN PLAN FOR AN EXIT IN A DOWNTURN 2* (2023), <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/how-private-companies-plan-exit-downturn.pdf> [https://perma.cc/Y2FV-AWCT]; PwC, *GUIDE TO EXECUTING A SUCCESSFUL IPO* 12–13 (2018), <https://www.pwc.com/sg/en/publications/assets/executing-a-successful-ipo.pdf> [https://perma.cc/5YEG-5GJH].

16. *Infra* Section II.A.

acquirers, by contrast, the informational advantage leads them to bid more aggressively. The result, theory predicts, would be higher prices for acquisitions and lower prices for IPOs—precisely what practitioners and empiricists have observed.¹⁷

Second, many dual-tracking firms use the same investment bank in a dual role, as both the lead underwriter for the prospective IPO and as M&A advisor for the prospective acquisition. But banks in this dual role may have incentives to favor the acquisition opportunities over the IPO. The expected compensation for a bank is likely better for an acquisition than an IPO. And the expected costs and risks of the transaction may be lower on the acquisition side. These agency costs are baked into the dual-advisory relationship and may further contribute to the acquisition bias of dual-tracking firms.¹⁸

For policymakers, the lesson should be clear: doubling down on JOBS Act-style IPO process reforms will not revitalize the IPO market. Those reforms lower the costs of initiating an IPO process but, in doing so, have effectively turned that process into a stalking horse for the acquisition market. To revitalize IPOs, policymakers need a new approach: making IPOs attractive *relative* to acquisitions. At a minimum, policymakers need to avoid reforms that further amplify acquisitions' competitive advantages over IPOs. If policymakers want to "make IPOs great again,"¹⁹ they need to find ways to help IPOs beat the competition.²⁰

One promising avenue for reform would be to make the IPO process faster and more determinate by amending SEC Rule 430A to allow IPO issuers to decouple pricing from the staff review process. SEC staff review injects extensive delays and uncertainty into the IPO timeline. For a startup facing exit pressure, these factors can move the needle. Cutting back on staff review could mitigate the speed and certainty advantage that the M&A process currently has over the IPO process.²¹

This paper proceeds in three parts. Part I diagnoses the dual-track distortion, showing how the JOBS Act's IPO process reforms, and the dual-tracking strategy they instigated, have improved acquisition exits for startups at the expense of IPOs. Part II identifies the hidden institutional mechanisms in law and transactional practice responsible for injecting this

17. *Infra* Section II.A.3.

18. *Infra* Section II.B.

19. See Niko Gallogly, *Can Paul Atkins 'Make IPOs Great Again'?*, N.Y. TIMES (Nov. 1, 2025) <https://www.nytimes.com/2025/11/01/business/dealbook/paul-atkins-ipos.html> [<https://perma.cc/PBS3-UFNM>].

20. *Infra* Section III.A.

21. *Infra* Section III.A.

bias into the dual-track process. Part III offers lessons from this for securities regulation.

I. DUAL-TRACK DISTORTION

When a startup goes “public,” it obtains regulatory authorization to list securities on a stock exchange (like the NASDAQ or NYSE) and, in exchange, takes on a host of heightened regulatory obligations.²² In recent decades, fewer startups have taken this deal. Instead of conducting an initial public offering (IPO) and continuing on as an independent firm, startups seeking capital for growth or liquidity have increasingly chosen to simply sell out to a larger operating company.²³ One study shows that the entire U.S. “listing gap” that has opened since the 1990s would be erased if all public company acquisitions of private startups were reclassified as public listings.²⁴ Another study shows that the rise of acquisitions explains more of the decline than other factors, such as increased private equity activity.²⁵

22. See *Initial Public Offerings (IPOs)*, U.S. SEC (Mar. 17, 2026), <https://www.sec.gov/data-research/statistics-data-visualizations/initial-public-offerings-ipos> [<https://perma.cc/2FC4-L7MY>].

23. See 2025 STAFF REPORT, *supra* note 9, at 41, 48, 50–51. One notable exception: “Unicorns” (startups valued at \$1 billion or more) continue to prefer IPOs to acquisitions. Daria Davydova, Rüdiger Fahlenbrach, Leandro Sanz & René M. Stulz, *The Unicorn Puzzle* (Nat’l Bureau of Econ. Rsch., Working Paper No. 30604, 2022), https://www.nber.org/system/files/working_papers/w30604/revisions/w30604.rev1.pdf [<https://perma.cc/C6DH-VGQM>]; Keith C. Brown & Kenneth W. Wiles, *The Growing Blessing of Unicorns: The Changing Nature of the Market for Privately Funded Companies*, J. APPLIED CORP. FIN., Summer 2020, at 52; Abraham J.B. Cable, *Time Enough for Counting: A Unicorn Retrospective*, 39 YALE J. ON REGUL. BULL. 23 (2021); ADRIENNA HUFFMAN, ABE CABLE, SHUYI DENG & MONET LEE, THE UNICORN INITIATIVE – EXITS (2022), https://www.brattle.com/wp-content/uploads/2022/04/2022-03-31__Unicorn-Initiative-Final-Report.pdf [<https://perma.cc/5BDM-SKWU>].

24. B. Espen Eckbo & Markus Lithell, *Merger-Driven Listing Dynamics*, 60 J. FIN. & QUANTITATIVE ANALYSIS 209 (2025).

25. Gabriele Lattanzio, William L. Megginson & Ali Sanati, *Dissecting the Listing Gap: Mergers, Private Equity, or Regulation?*, 65 J. FIN. MKTS., Oct. 2023, art. no. 100836; see also Xiaohui Gao, Jay R. Ritter & Zhongyan Zhu, *Where Have All the IPOs Gone?*, 48 J. FIN. & QUANTITATIVE ANALYSIS 1663 (2013). But see Michael Ewens & Joan Farre-Mensa, *The Deregulation of the Private Equity Markets and the Decline in IPOs*, 33 REV. FIN. STUD. 5463 (2020) (finding evidence that increased PE activity drives the declining IPO trend); Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445 (2017).

The decline of IPOs and publicly listed firms has provoked bipartisan concern among policymakers.²⁶ Elected officials,²⁷ regulators,²⁸ and influence groups²⁹ across the political spectrum have consistently warned

26. Unlike policymakers, academics have been less certain that the IPO decline represents a problem. See, e.g., Elisabeth de Fontenay & Gabriel Rauterberg, *The New Public/Private Equilibrium and the Regulation of Public Companies*, 2021 COLUM. BUS. L. REV. 1199, 1202 n.4 (“It is highly controversial as to whether this . . . actually constitutes an economic problem.”). Although the number of IPOs and public firms has declined, the size, value and profitability of those IPOs/firms have increased. Mark J. Roe & Charles C. Y. Wang, *Half the Firms, Double the Profits: Public Firms’ Transformation, 1996–2022*, 8 J.L. FIN. & ACCT. 211 (2025); Margaret M. Blair, *Are Publicly Traded Corporations Disappearing?*, 105 CORN. L. REV. 641 (2020). Whether the trend of fewer but larger and more profitable public firms constitutes a real problem is a subject of ongoing debate. On the one hand, this may represent an efficient response to changing technologies, see Gao, Ritter & Zhu, *supra* note 25; Yangyang Cheng, D. Daniel Sokol & Carmelo Cennamo, *Rethinking the Traditional M&A Motivations within the Platform Acquisitions Context*, forthcoming in THE CAMBRIDGE HANDBOOK OF THE BUSINESS, LAW, AND ECONOMICS OF DIGITAL PLATFORMS (2027); globalization, see Thomas P. Griffin, *Where Have All The IPOs Gone? Trade Liberalization and the Changing Nature of U.S. Public Corporations*, 60 J. FIN. & QUANTITATIVE ANALYSIS 974 (2025); or other changes in industrial organization. On the other hand, it may represent anticompetitive activities of incumbents, Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021); Mark A. Lemley & Matthew T. Wansley, *Coopting Disruption*, 105 B.U. L. REV. 457 (2025), or a market distortion prompted by securities regulation itself, e.g., Lattanzio, Megginson & Sanati, *supra* note 25; Francesco Bova, Miguel Minutti-Meza, Gordon Richardson & Dushyantkumar Vyas, *The Sarbanes-Oxley Act and Exit Strategies of Private Firms*, 31 CONTEMP. ACCT. RSCH. 818 (2014); Ewens & Farremensa, *supra* note 25; de Fontenay, *supra* note 25. Resolving this ultimate debate is beyond the scope of this paper. For purposes of this paper, I simply accept the bipartisan policymaking consensus that the decline of IPOs is a worrisome problem that needs solving. But see generally Alexander I. Platt & Matthew T. Wansley, *Public, Private, Acquired*, 5 U. CHI. BUS. L. REV. 349 (2026) (discussing these policy tradeoffs in more detail).

27. E.g., President Barack Obama, Remarks at the JOBS Act Bill Signing (Apr. 5, 2012) <https://obamawhitehouse.archives.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing> [<https://perma.cc/8KYB-U6YX>]; STAFF OF H. COMM. ON FIN. SERVS., 117TH CONG., TEN YEARS OF THE JUMPSTART OUR BUSINESS STARTUPS (JOBS) ACT OF 2012: HOW THE LAW SPURRED CAPITAL FORMATION, AND HOW CONGRESS CAN BUILD ON ITS SUCCESS 10 (Republican Staff Report); see also Platt & Wansley, *supra* note 26 (collecting other examples).

28. E.g., Paul S. Atkins, Chairman, U.S. SEC, Policy Statement Concerning Mandatory Arbitration and Amendments to Rule 431 of the Commission’s Rules of Practice (Sept. 17, 2025), <https://www.sec.gov/newsroom/speeches-statements/atkins-091725-open-meeting-statement-policy-statement-concerning-mandatory-arbitration-amendments-rule-431> [<https://perma.cc/VZL8-HCHR>]; Caroline A. Crenshaw, Comm’r, U.S. SEC, Remarks at Better Markets Academic Advisory Board Annual Conference: The Autobahn and Private Markets (Sept. 19, 2025), <https://www.sec.gov/newsroom/speeches-statements/crenshaw-remarks-better-markets-academic-advisory-board-annual-conference-091925> [<https://perma.cc/FMK8-FKAP>]; Allison Herren Lee, Comm’r, U.S. SEC, Going Dark: The Growth of Private Equity Markets and the Impact on Investors and the Economy (Oct. 12, 2021), <https://www.sec.gov/newsroom/speeches-statements/lee-sec-speaks-2021-10-12> [<https://perma.cc/35HU-59XY>]; Mark T. Uyeda, Comm’r, U.S. SEC, Remarks at the Florida Bar’s 41st Annual Federal Securities Institute and M&A Conference (Feb. 24, 2025), <https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-florida-bar-022425> [<https://perma.cc/6MFU-TB3Y>]; see also Platt & Wansley, *supra* note 26 (collecting many other examples).

29. E.g., U.S. CHAMBER OF COM., UNLOCKING AMERICA’S CAPITAL MARKETS: FUELING ECONOMIC GROWTH AND INNOVATION 7 (2025); THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 829–32 (Paul Dans & Steven Groves eds., 2023); BENJAMIN SCHIFFRIN,

about the negative economic consequences arising from the decline of IPOs and advocated for a variety of reforms to reverse the trend.

Some of these reforms backfired. This Part shows how key IPO process reforms (Section A) and the dual-tracking exit strategy these reforms facilitated (Section B) have both failed to reverse the decline of IPOs and, indeed, may have actually accelerated it.

A. *The JOBS Act Favors Acquisitions over IPOs*

The JOBS Act of 2012 remains the most significant legislative effort to reverse the trend from IPOs to acquisitions.³⁰ Among other reforms, the statute reduced the costs of initiating an IPO through two reforms to the IPO process³¹:

THE SEC IS KILLING IPOs (2025); Tyler Gellasch, Alexandra Thornton & Crystal Weise, *How Exemptions from Securities Laws Put Investors and the Economy at Risk*, CTR. FOR AM. PROGRESS (Mar. 22, 2023), <https://www.americanprogress.org/article/how-exemptions-from-securities-laws-put-investors-and-the-economy-at-risk/> [<https://perma.cc/AQQ5-4P2D>].

30. See Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012). Key reforms incorporated into the legislation originated in a report from an “IPO Task Force,” which emphasized the rise of acquisitions:

[T]he prevalence of IPOs versus acquisitions of emerging growth companies has undergone a stunning reversal. Acquisitions by a shrinking number of larger companies (due to the lack of IPOs) have become the primary liquidity vehicle for venture capital-backed companies as compared to IPOs. This is significant because M&A events don’t produce the same job growth as IPOs – nor do they allow investors to participate as directly in the economic growth of a stand-alone company. In fact, M&A events result in job losses in the short term as the acquiring company looks to eliminate redundant positions between the two enterprises. Subsequent job growth may occur at the acquiring company, but only over time, and only after those initial job losses are recovered.

IPO TASK FORCE, REBUILDING THE IPO ON-RAMP: PUTTING EMERGING COMPANIES AND THE JOB MARKET BACK ON THE ROAD TO GROWTH 6 (2011) (footnote omitted). On the role of the IPO Task Force in developing and driving the JOBS Act reforms, see George S. Georgiev, *The Breakdown of the Public–Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & BUS. 221, 266 n.162 (2021). For general criticisms of the legislative process that led to the JOBS Act, see *id.* at 264–66; 3 LOSS, SELIGMAN & PAREDES, *supra* note 11, at 598–602.

31. I focus on IPO *process* reforms because these are the reforms that directly enhanced dual-tracking, as explained below. However, the JOBS Act also included other sorts of IPO-related reforms, including reforms that reduced disclosure obligations on emerging growth companies, JOBS Act §§ 102–104, 126 Stat. at 308–10, codified as amended in scattered sections of 15 U.S.C. §§ 77–78; see, e.g., Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation after the JOBS Act*, 101 GEO. L.J. 337, 371–84 (2013); Colleen Honigsberg, Robert J. Jackson, Jr. & Yu-Ting Forester Wong, *Mandatory Disclosure and Individual Investors: Evidence from the JOBS Act*, 93 WASH. U. L. REV. 293 (2015), and reforms that made it easier to raise capital outside of public markets, JOBS Act §§ 201, 501, codified as amended in scattered sections of 15 U.S.C. § 77; see also 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 (2013); Matthew Wansley, *Taming Unicorns*, 97 IND. L.J. 1203, 1215 (2022).

1. *Testing the Waters*

The Securities Act of 1933 sharply restricted what prospective IPO issuers can say, to whom, and when.³² These so-called “gun-jumping” rules were understood to protect investors by preventing “hyping” or spreading information inconsistent with the tightly regulated written offering materials.³³ But these restrictions on issuer speech came at a cost: They impair issuers’ ability to gauge the market appetite for a potential offering before proceeding with the costly and time-consuming process of preparing for an IPO. The gun-jumping rules thus forced issuers to either take a blind leap (invest in the costly IPO process without certainty that it will succeed) or find a less risky path (such as a private placement or an acquisition).

Policymakers have been reconsidering this tradeoff from the very beginning of the securities regulation system.³⁴ For instance, in 1995, the SEC proposed substantially loosening these restrictions on pre-IPO discussions.³⁵ The proposal built on precedents in the Regulation A and state securities regulation contexts but proved controversial as a legal and policy matter, and was never finalized.³⁶

In the JOBS Act of 2012, Congress included a substantial loosening of the gun-jumping rules. The statute added a new Section 5(d) to the Securities Act, which allowed IPO firms to “test the waters” by communicating with potential investors “to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission”³⁷ This new freedom to engage with prospective investors ahead of an IPO was, however, subject to two key limitations. First, only “emerging growth companies” (EGCs)—defined as companies with less than \$1 billion in annual revenues—were authorized

32. See Securities Act §§ 5, 8, 15 U.S.C. §§ 77e, 77h; see also Donald C. Langevoort & Robert B. Thompson, *IPOs and the Slow Death of Section 5*, 102 KY. L.J. 891 (2014).

33. COFFEE, SALE & WHITEHEAD, *supra* note 11, at 109 (noting that the “goal” was to make “the prospectus the exclusive source of information about the issuer and the offering”); CHOI & PRITCHARD, *supra* note 11, at 519 (“The SEC actively polices efforts that may condition the market prior to the effective date of the registration statement.”). An issuer who violated the gun-jumping rules could face strict liability in an action under Securities Act § 12(a)(1). COFFEE, SALE & WHITEHEAD, *supra* note 11, at 102.

34. Langevoort & Thompson, *supra* note 32.

35. Solicitations of Interest Prior to an Initial Public Offering, 60 Fed. Reg. 35648 (proposed July 10, 1995).

36. See Jeffrey A. Brill, Note, “*Testing the Waters*”—the SEC’s Feet Go from Wet to Cold, 83 CORN. L. REV. 464 (1998). The SEC adopted related reforms loosening restrictions on gun-jumping in the 2005 Offering Reforms. See COFFEE, SALE & WHITEHEAD, *supra* note 11, at 109–12.

37. Securities Act § 5(d), 15 U.S.C. § 77e(d).

to take advantage.³⁸ Second, these conversations could be held only with “qualified institutional buyers” or institutions that are “accredited investors”—essentially large, sophisticated institutional investors.³⁹

The goal of the reform, according to the “IPO Task Force”—a group of practitioners and experts commissioned by the Obama administration to recommend needed IPO reforms to Congress—was to “allow companies to remove a significant amount of uncertainty regarding the feasibility of a successful IPO.”⁴⁰ The House Committee Report for the legislation similarly described this reform as a way to enable issuers “to gauge the interest in potential IPOs by permitting greater pre-filing communications to institutional and qualified investors to determine whether an IPO is likely to be successful.”⁴¹

2. Confidential Filing

Before moving ahead with an IPO, an issuer must file a “registration statement” disclosing information about its business, its financial performance, and the securities being offered.⁴² According to the statute, an issuer can move forward with the offering twenty days after making this

38. *Id.*; see also Securities Act § 2(a)(19), 15 U.S.C. § 77b(a)(19) (defining emerging growth company).

39. 17 C.F.R. §§ 230.144A & 230.501(a) (2024) (defining the terms).

40. IPO TASK FORCE, *supra* note 30, at § 2.5.1.1.

41. H.R. REP. NO. 112-406, at 7 (2012). The SEC Chair supported the general idea of the reform, which she said could “make it more likely that companies that file for IPOs can complete them,” but worried that there was no requirement that companies file these test-the-waters materials or “take responsibility” for them. Letter from Mary L. Schapiro, Chair, U.S. SEC, to Sen. Tim Johnson & Sen. Richard C. Shelby (Mar. 13, 2012), <https://ourfinancialsecurity.org/wp-content/uploads/2012/03/Schapiro-to-Johnson-Letter-3-14-12.pdf> [<https://perma.cc/VQ5J-D6NH>]. For a sample of (generally positive) academic and practitioner commentary, see, e.g., A.C. Pritchard, *Revisiting “Truth in Securities” Revisited: Abolishing IPOs and Harnessing Private Markets in the Public Good*, 36 SEATTLE U. L. REV. 999, 1018 (2013) (characterizing this reform as moving “further along the road toward complete abolition of the gun-jumping rules” a trend which “appeals to the economically minded” who recognize that “[i]f we have full disclosure, the technology to distribute that information, and an informationally efficient market” gun-jumping rules may no longer be necessary); Langevoort & Thompson, *supra* note 32, at 907 (characterizing this as a “moderate reform insofar as it limits contacts to those with presumably sophisticated institutions” that “can be seen as a form of pre-book-building, though no doubt the intention is to allow conversations with key investors as to whether the offering is worth doing in the first place”); COFFEE, SALE & WHITEHEAD, *supra* note 11, at 147 (“The goal of this provision is to enable the issuer to test the feasibility of the offering before undertaking the costs of preparing and filing a registration statement with the SEC.”); *Deregulating the Markets: The JOBS Act*, 38 DEL. J. CORP. L. 476, 492–93 (2013) (statement of Joseph H. Kaufman) (noting that the JOBS Act “really thr[e]w” gun-jumping “out of the window,” and praising this as “a terrific provision” that will give startups “more information about whether investors might be receptive” to an IPO).

42. Securities Act § 7, 15 U.S.C. § 77g; SEC Form S-1, 17 C.F.R. § 239.11 (2025), <https://www.sec.gov/files/forms-1.pdf> [<https://perma.cc/SB5W-VAWG>].

filing.⁴³ But the reality is that, upon filing, the SEC staff conducts a detailed review of the filing and engages in an extensive “comment letter” process with the issuer—asking questions and requesting amendments.⁴⁴ Only after clearing all SEC comments, a process that can take months, can the issuer move forward with the offering.⁴⁵ Meanwhile, all of the information in the registration statement (and successive amendments) would be publicly available.

As with the traditional gun-jumping rules described above, the traditional rule of making registration statements publicly accessible was understood to protect investors by giving the market an opportunity to critically assess the issuer, prospective offering, and any amendments made by the issuer along the way, with ample time to “cool off” before the offering actually was available for investment.⁴⁶ But this public disclosure came at a cost: For some prospective IPO issuers, the risk of having sensitive competitive information exposed to the world (including competitors) for months before an offering, or even before it was certain that any offering would actually be completed, represented a substantial deterrent to pursuing an IPO. Issuers faced a choice between accepting the pain of filing publicly with a risk the IPO would never happen or finding a more secretive and less risky mode of raising capital, such as an acquisition or private placement.

In the JOBS Act, Congress allowed IPO issuers to file their initial draft registration statements confidentially and engage in the initial rounds of back-and-forth with the SEC outside of public view.⁴⁷ This reform built on the SEC’s pre-existing practice of allowing foreign private issuers to file registration statements confidentially⁴⁸ and was subject to two key limitations. First, as with the test-the-waters reform discussed above, confidential filing was limited to EGCs. Second, the issuer would still have to file publicly eventually; specifically, the issuer would have to file a publicly available version of the registration statement at least twenty-one days before commencing a roadshow.⁴⁹

43. Securities Act § 8(a), 15 U.S.C. § 77h(a); see also Alexander I. Platt, *Rethinking the IPO Bureaucracy*, 22 BERKELEY BUS. L.J. 344 (2025).

44. Platt, *supra* note 43.

45. *Id.* at 346–54.

46. Alexander I. Platt, *The Administrative Origins of Mandatory Disclosure*, 49 J. CORP. L. 1143 (2024).

47. Securities Act § 6(e), 15 U.S.C. § 77f(e); see also COX ET AL., *supra* note 11, at 146.

48. Div. of Corp. Fin., *Current Issues and Rulemaking Projects: Quarterly Update*, U.S. SEC, at Part V (Mar. 31, 2001), <https://www.sec.gov/divisions/corpfin/cfcrq032001.htm#secv> [<https://perma.cc/W8LD-EJYP>].

49. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106 § 106, 126 Stat. 306, 312 (2012); see also COFFEE, SALE & WHITEHEAD, *supra* note 11, at 129–33 (providing an overview of the IPO roadshow).

The IPO Task Force that urged Congress to include this reform in the JOBS Act described it as a way to “remove . . . a significant impediment to the IPO process” and “would allow U.S. issuers to initiate a potential IPO process, even during turbulent and uncertain market conditions, without immediately disclosing competitively sensitive or otherwise confidential information.”⁵⁰ The House Committee Report similarly explained that this would allow issuers to “begin the SEC review process without publicly revealing sensitive commercial and financial information to their competitors.”⁵¹

* * *

These two IPO process reforms were intended to make the IPO process less costly and more attractive for startups. Some predicted that these reforms would yield more IPOs.⁵² Almost immediately, most eligible firms took advantage of both confidential filing⁵³ and test-the-waters.⁵⁴

50. IPO TASK FORCE, *supra* note 30, at § 2.5.3.

51. H.R. REP. NO. 112-406, at 7 (2012). The SEC Chair opposed this reform, arguing that it “would hamper the staff’s ability to provide effective reviews, since the staff benefits in its reviews from the perspectives and insights that the public provides on IPO filings,” and would also “require significant resources for staff review of offerings that companies . . . abandon before making a public filing.” Letter from Mary Schapiro, *supra* note 41, at 4. For academic and practitioner commentary, see, for instance, CHOI & PRITCHARD, *supra* note 11, at 520 (noting confidential filing is “particularly important for new IPO issuers with little public information available” since it allows them to keep proprietary information away from competitors); COFFEE, SALE & WHITEHEAD, *supra* note 11, at 146–47 (“This may protect the issuer from embarrassment if the SEC challenges its accounting or has other adverse comments that require significant revision” and “permits an emerging growth company to assess the nature and extent of disclosures it must make in a registration statement before formally deciding to file with the SEC.”); *Deregulating the Markets: The JOBS Act*, *supra* note 41, at 493–94 (statement of Joseph H. Kaufman) (describing this as “probably, long-term, . . . the best provision” of the JOBS Act, because it allows firms to avoid “sitting out there for a very long period of time” with “information that competitors are interested in” before the IPO is even certain to move forward); Langevoort & Thompson, *supra* note 32, at 906 (describing this reform as “controversial”).

52. E.g., Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 73 (2021) (“One way to make IPOs more attractive is to simply increase the information available to those seeking to go public. A new rule adopted by the SEC does just that, allowing larger tech firms to ‘test-the-waters’ of an IPO before committing to it publicly, reducing the risk of doing so. That seems like a step in the right direction.”); Usha Rodrigues, *The Effect of the JOBS Act on Underwriting Spreads*, 102 KY. L.J. 925, 931–33 (2014) (predicting that confidential filing and test-the-waters would reduce the costs of going public).

53. E.g., Michael Dambra, Laura Casares Field & Matthew T. Gustafson, *The JOBS Act and IPO Volume: Evidence that Disclosure Costs Affect the IPO Decision*, 116 J. FIN. ECON. 121, 136 (2015) (finding 90 percent of post-JOBS Act EGC IPOs used confidential filing); Mengyao Cheng, *The JOBS Act and IPO Issuance Rate*, 42 J. ACCT. & PUB. POL’Y 1, issue no. 5, Sept.–Oct. 2023, art. no 107120, at 8 tbls. 1 & 2 (finding 74 percent of completed post-JOBS Act EGC IPOs use confidential filing); see also H.R. REP. NO. 112-406, at 10 (noting widespread adoption).

54. Michele Dathan & Yan Xiong, Too Much (Early) Information? The Option to Test the Waters Before Going Public 25 (May 9, 2025) (unpublished manuscript), <https://papers.ssrn.com/sol3/>

And, in the years since the JOBS Act was enacted, policymakers have repeatedly sought to expand these reforms. In 2015, Congress expanded confidential filing by shortening the period of public filing from twenty-one days to fifteen days prior to the roadshow.⁵⁵ In 2017, the SEC expanded confidential filing to non-EGC issuers.⁵⁶ In 2019, the SEC expanded test-the-waters to non-EGC issuers.⁵⁷ Advocacy groups have continued to promote the expansion of these IPO process reforms.⁵⁸ And, most recently in December 2025, the House passed, on a bipartisan basis, legislation that would codify the SEC's regulatory expansions into statutory law.⁵⁹

These efforts are misguided. A substantial body of empirical research now indicates the JOBS Act's IPO process reforms failed to reverse the decline of IPOs and pushed startups towards acquisitions.

On the acquisition side, a 2022 study by Chu, Liu, and Zhang looks at public company acquisitions of U.S. public, U.S. private, and foreign targets between 2010 and 2013, and finds a significant increase in valuation in the post-JOBS period for U.S. private targets only. They find the effect is concentrated among the subset of U.S. private targets who would *not* have qualified for JOBS Act-style flexibility prior to that and conclude that by "making IPO[s] easier," the JOBS Act also "increases private firms' bargaining power in the M&A market."⁶⁰

Similarly, a working paper by Aswani, Gupta, Hasan, and Saunders studies acquisitions of public, private EGC, and private non-EGC targets from 1990 through 2016 and finds a significant increase in valuation under the JOBS Act only for the private EGC targets. Like Chu, Liu, and Zhang,

papers.cfm?abstract_id=4078355 [https://perma.cc/5XZY-P9T3] (finding that more than 90 percent of EGC IPOs from 2012 to 2019 "include language in their IPO documentation that they or their underwriters may have tested the waters").

55. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 71001, 129 Stat. 1312, 1783 (2015).

56. Press Release, U.S. SEC, SEC's Division of Corporation Finance Expands Popular JOBS Act Benefit to All Companies (June 29, 2017), <https://www.sec.gov/newsroom/press-releases/2017-121> [https://perma.cc/3LFF-6DEU].

57. Press Release, U.S. SEC, SEC Adopts New Rule to Allow All Issuers to "Test-the-Waters" (Sept. 26, 2019), <https://www.sec.gov/newsroom/press-releases/2019-188> [https://perma.cc/9B2W-WZCL].

58. U.S. CHAMBER OF COMMERCE, *supra* note 29, at 3 (urging Congress to "[c]odify into law the ability of all issuers to submit draft registration statements confidentially to the SEC and test the waters with investors prior to an IPO"); *see, e.g.*, CTR. FOR CAP. MKTS. COMPETITIVENESS ET AL., EXPANDING THE ON-RAMP: RECOMMENDATIONS TO HELP MORE COMPANIES GO AND STAY PUBLIC 10–11 (Spring 2018) (joint report of many industry groups, including American Securities Association, National Venture Capital Association, Equity Dealers of America, Center for Capital Markets Competitiveness, Biotechnology Innovation Organization, TechNet, Securities Industry and Financial Markets Association, and NASDAQ, urging Congress to expand test-the-waters reform).

59. INVEST Act of 2025, H.R. 3383, 119th Cong. (as passed by House, Dec. 11, 2025).

60. Yongqiang Chu, Ming Liu & Shu Zhang, *The JOBS Act and Mergers and Acquisitions*, 72 J. CORP. FIN., Feb. 2022, art. no. 102153, at 3.

the authors conclude that “the JOBS Act, which aims to improve IPO activities by lowering the cost of going public also incentivizes target firms to be acquired by improving their bargaining positions in the M&A market” which “perhaps muted the overall objective of the JOBS [A]ct to increase the EGC IPO activity.”⁶¹

A study by Boeh and Dunbar looks at IPO filers between 1998 and 2017 who withdraw before completing the deal and finds that the JOBS Act significantly increases the likelihood of post-withdrawal acquisition. The authors conclude that, under the JOBS Act, the “true goal” of an IPO filing for many issuers is merely to “establish value to support M&A.”⁶²

Finally, a working paper by Dathan and Xiong examines U.S. and UK private firm exits from 2001 to 2019 and finds that, under the JOBS Act, EGC-qualified U.S. firms become more likely to choose an acquisition over an IPO exit. The authors trace this specifically to the JOBS Act’s “test-the-waters” reform.⁶³

On the IPO side, studies find that the JOBS Act’s IPO process reform provisions *reduced* the price that startups get in the IPO market (relative to the market price shortly after public market trading begins)—precisely the opposite of what reformers would have hoped for.

A study by Barth, Landsman, and Taylor looks at IPOs of 376 EGC-qualified firms between 2009 and 2013 and finds that the post-JOBS Act firms have significantly greater underpricing and that this effect is concentrated among firms who take advantage of JOBS Act provisions, including confidential filing. The study also looks at the 62 non-EGC-qualified IPOs during this period and finds *no* increase in underpricing for these firms in the post-JOBS Act period. The authors interpret this as evidence that the JOBS Act increased information asymmetry for IPO investors and therefore increased the need for underwriters to compensate those investors for the additional risk.⁶⁴

61. Jitendra Aswani, Sudip Gupta, Iftekhhar Hasan & Anthony Saunders, The Impact of JOBS Act on M&As (July 28, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512491 [<https://perma.cc/8EYA-MVNQ>]. *But see* Chu, Liu & Zhang, *supra* note 60 (criticizing Aswani et al. because they rely, in part, on a comparison between EGC and non-EGC acquisition targets, but “the number of non-EGC private targets (annual sales greater than \$1 billion) is extremely limited, which greatly reduces the power of the test”).

62. Kevin K. Boeh & Craig G. Dunbar, *Raising Capital After IPO Withdrawal*, 69 J. CORP. FIN., Aug. 2021, art. no. 102020, at 16.

63. Dathan & Xiong, *supra* note 54. One early study found evidence to the contrary, *see* Dambra, Field & Gustafson, *supra* note 53, at 143, but this study was based on a significantly shorter sample period of JOBS Act IPOs, ending in March 2014.

64. Mary E. Barth, Wayne R. Landsman & Daniel J. Taylor, *The JOBS Act and Information Uncertainty in IPO Firms*, ACCT. REV., Nov. 2017, at 25.

A study by Agarwal, Gupta, and Israelsen similarly examines around 400 IPOs of EGC-qualified issuers between 2010 and mid-2014 and finds that the post-JOBS Act firms have significantly greater underpricing and finds that the effect is driven in part by a firm's election to file confidentially.⁶⁵

Similarly, a study by Chaplinsky, Hanley, and Moon examines over 1,000 IPOs of EGC-qualified issuers between 2003 and mid-year 2015 and finds evidence that underpricing increases under the JOBS Act.⁶⁶

And the working paper by Dathan and Xiong discussed above looks at a large sample of private-company transactions (including private capital, M&A, and IPO) between 2001 and 2019 and finds evidence that the introduction of the test-the-waters reform increased IPO underpricing.⁶⁷

In sum, empirical researchers have found that the JOBS Act's IPO process reforms have bolstered acquisition prices and undercut IPO prices. Instead of revitalizing the IPO on-ramp, these reforms appear to have expanded the IPO off-ramp—steering more issuers away from IPOs and toward acquisitions.

These reforms give issuers more information and more bargaining leverage in the exit process. The puzzle is: Why do these issuers predominantly exploit this advantage to achieve more favorable *acquisitions*, not more favorable IPOs?

B. Dual-Tracking Favors Acquisitions over IPOs

Startups who simultaneously explore IPO and acquisition are pursuing a “dual-track” exit. Many practitioners and financial journalists have observed that dual-tracking was jumpstarted by the JOBS Act IPO process reforms discussed above,⁶⁸ although this was certainly not the intended or

65. Sumit Agarwal, Sudip Gupta & Ryan D. Israelsen, *Public and Private Information: Firm Disclosure, SEC Letters, and the JOBS Act*, 12 Q.J. FIN., issue no. 3, Sept. 2022, art. no. 2250006.

66. Susan Chaplinsky, Kathleen Weiss Hanley & S. Katie Moon, *The JOBS Act and the Costs of Going Public*, 55 J. ACCT. RSCH. 795 (2017).

67. Dathan & Xiong, *supra* note 54. Even-Tov, Patatoukas, and Youn challenge the earlier papers finding that the JOBS Act increased IPO underpricing, examining ninety-five non-EGC-qualified IPOs during the same period, and find no evidence of a unique increase in IPO underpricing for EGC-qualified firms under the JOBS Act. The authors suggest that the increased underpricing identified by prior studies has been mistakenly attributed to the JOBS Act but was, in fact, simply due to changes in the market during this period. Omri Even-Tov, Panos N. Patatoukas & Young S. Yoon, *The JOBS Act Did Not Raise IPO Underpricing*, 11 CRITICAL FIN. REV. 431 (2022). But Dathan and Xiong show that their non-result “is eliminated by including industry fixed effects and eliminating from the analysis IPOs that are filed between December 1, 2011 and June 30, 2012” which “would not have been able to use the JOBS Act provisions, especially the ability to test the waters.” Dathan & Xiong, *supra* note 54, at 28.

68. Corrie Driebusch, *Behind the Scenes, the IPO Playbook is Changing*, WALL ST. J. (Mar. 25, 2022, at 17:32 ET), <https://www.wsj.com/finance/stocks/behind-the-scenes-the-ipo-playbook-is-changing-11648200600> [https://perma.cc/Y5ND-3Z8Z] (quoting practitioner stating that dual-tracking

expected consequence of that legislation. One leading startup firm advises that “every late-stage private company should be operating . . . [a] dual track approach[.]”⁶⁹

The test-the-waters reform encouraged dual-tracking by giving startups easier access to valuable market information from prospective IPO investors. As discussed above, traditionally startups faced stringent “gun-jumping” rules that restricted their ability to gauge the interest of prospective IPO investors without incurring substantial costs and following extensive regulatory formalities. Under the JOBS Act, startups can initiate these information-gathering conversations without first investing substantially in the extensive burdens of the IPO process.

The hope was that enabling more firms to *start* the IPO process would lead to more *completed* IPOs, as startups used the information from these test-the-waters conversations to develop their IPO execution strategy. But this hope proved to be misguided. The expectation that startups would use the test-the-waters information exclusively to develop IPO plans was incorrect.

Instead, startups and their advisors quickly realized that test-the-waters meetings opened up a valuable new source of deal-relevant information from highly credible market actors about how the company was being valued—information that could be used not only for developing a prospective IPO, but also to evaluate and negotiate a prospective acquisition as well. By giving startups access to new information from the IPO market,

is now happening “about a quarter of the time”); Michael Greene, *Sale or IPO? Some Companies Take the Dual Route*, BLOOMBERG L. (Nov. 13, 2016, at 23:00 CT), <https://news.bloomberglaw.com/securities-law/sale-or-ipo-some-companies-take-the-dual-route> [<https://perma.cc/Q5EJ-7HMU>] (“[D]ata suggests that more companies may be pursuing a dual-track process than in the recent past.”); MAGER ET AL., *supra* note 15, at 4 (describing dual-track as a “trend” developing in “the last several years”); WILMER CUTLER PICKERING HALE AND DORR LLP, *supra* note 13 (“Anecdotal evidence suggests that dual-track efforts are becoming more common”); Karpf & Langston, *supra* note 13 (“The dual-track process has been growing in popularity among health care companies” and is now “a common strategy”); *IPO Insights: Dual Track Process*, *supra* note 13 (noting that dual-tracking has “gained currency as a possible exit strategy amongst fast-growing, venture backed technology companies”); Statement of John Coates, *supra* note 9 (noting the recent rise of “dual-track IPO/M&A processes”); GELFOND ET AL., *supra* note 13 (calling dual-tracking “increasingly utilized”).

For some references to dual-tracking prior to the JOBS Act, see Christopher Elliott, *Turbulent IPO Market Produces A Spate of ‘11th-Hour’ Buy-Outs*, ASIAN WALL ST. J., Oct. 27, 1992, at 14 (noting five IPO filers had exited via acquisition before completing the IPO and quoting a practitioner speculating that these firms may be “opting for a dual track strategy”); Ann Grimes, *Many Start-Ups Opt for ‘Dual Tracking’ IPO or Outright Sale*, WALL ST. J., July 23, 2004, at M4 (quoting practitioner identifying “a significant uptick in dual-tracking activity”); Jeffrey J. Reuer & Roberto Ragozzino, *Using IPOs to Prove Value of M&A Targets*, FIN. TIMES, Oct. 5, 2006, at 10 (“[D]ual tracking has become increasingly frequent”).

69. GUNDERSON DETTMER, *supra* note 13 (emphasis added).

the test-the-waters reform unintentionally empowered startups to use that information to pursue non-IPO exits as well.⁷⁰

Similarly, confidential filing encouraged dual-tracking by making it easier for firms to initiate the IPO process. As discussed above, traditionally startups incurred substantial costs by *publicly* filing a registration statement, exposing potentially sensitive competitive information to the marketplace for weeks and months before it was certain whether an IPO would even be allowed to move forward. Now, under confidential filing, startups can quietly file their registration statements with the SEC and work through any issues with SEC staff out of the public eye.

The hope was that, by eliminating the short-term publicity risk, confidential filing would enable more firms to start the IPO process, and this, in turn, would lead to more firms completing that process. But, again, this hope proved to be misguided. The expectation that startups would use the information and leverage gathered from confidential filing process exclusively to pursue an eventual IPO proved incorrect.

Startups and their advisors quickly realized that they could use the confidential registration filing and SEC staff comments to entice prospective *acquirers* as well. Prior to the JOBS Act, a startup would only have been able to leverage an IPO filing if they had incurred the substantial costs and risks of making that filing in the first place, which would have meant making it *publicly* visible—something many startups would have been unwilling to do. Now, under the JOBS Act, those barriers have been eliminated, and so startups can file confidentially and get the benefit of confidential SEC staff review and then share those filings and comments with prospective acquirers.⁷¹

70. E.g., Maria Lokshin, *PE-Backed Firms Pursuing IPO and M&A Could Have New Advantage With JOBS Act*, BLOOMBERG L. (Aug. 2, 2012, at 23:00 CT), <https://news.bloomberglaw.com/securities-law/pe-backed-firms-pursuing-ipo-and-m-a-could-have-new-advantage-with-jobs-act> [https://perma.cc/RA35-TXGK] (“By being able to . . . go out and talk with qualified buyers . . . I do think you’re going to have a lot more dual-track processes.” (quoting Andrea Auerbach, Cambridge Associates LLC)); Werling, Kornfeld & Bass, *supra* note 13 (noting that the JOBS Act “has made the dual-track process more attractive” and emphasizing importance of test-the-waters meetings); Cooper, Segal & Demina, *supra* note 13 (advising that dual-tracking firms “can and should take the opportunity to assess market receptivity by taking advantage of confidential meetings with investors—dubbed ‘testing-the-waters’ meetings in the US”); Bason, *supra* note 13 (encouraging dual-tracking firms to take advantage of “relaxation of restrictions on ‘test the waters’ pre-marketing” which “provides an additional way to conduct a market check for a company that has an acquisition offer in hand – or for that matter, even one in the midst of price negotiations”).

71. *IPOs - Attractive Exit Alternative For Financial Sponsors*, *supra* note 13 (“[C]onfidential filing . . . is particularly attractive to financial sponsors, as it permits them to undertake a discrete ‘dual tracking’ exit process”); ADAM E. FLEISHER & SOPHIE GRAIS, *GOING PUBLIC: A GUIDE TO U.S. IPOs FOR FOUNDERS, OFFICERS, DIRECTORS AND OTHER MARKET PARTICIPANTS* 9 (2020) (“The ability to file and correspond confidentially with the SEC is particularly valuable in a dual-track process.”);

In theory, dual-tracking could be neutral between IPO and acquisition. Bringing more options and more information to the issuer at the point of negotiating an exit should, theoretically, enable them to extract more value, regardless of what exit they choose.

But that does not appear to be the dual-track system we have. Instead, dual-tracking seems to enhance acquisition exits only.

There is consistent empirical evidence that dual-tracking increases the valuation in acquisitions. A study by Brau, Sutton, and Hatch looks at acquisitions of private firms from 1995 to 2004 and finds that the subset of these firms who were acquired after filing for an IPO (but not completing it) earned a significant valuation premium.⁷² Drawing on auction theory, the authors suggest the dual-track strategy invites more bidders to the auction who, in turn, tend to bid up the firm price.⁷³ And, drawing on economics of information asymmetry, the authors suggest that the IPO filing process operates as a signal of firm quality and validation which reduces the information asymmetry between firm and acquirer, leading to higher valuations.⁷⁴

Similarly, a study by Mantecon and Thistle looks at acquisitions of private targets between 1996 and 2008 and finds that the subset of those targets who were acquired after filing for an IPO but before withdrawing or completing it earned a substantial premium over both (1) targets who were acquired after filing and withdrawing an IPO and (2) targets who never filed

COHEN ET AL., *supra* note 13, at 8 (“[A]n EGC that is engaged in a dual-track M&A process may want potential bidders to be aware of its IPO while benefitting from nonpublic SEC review of its draft registration statement.”); Riethmueller, *supra* note 10, at 441 (“By initiating ‘a confidential registration statement, the EGC sends potential acquirers a clear signal that the target company is ready and willing to pursue this strategic alternative, and hence, practically introducing a background “bidder” for the company.”); Lokshin, *supra* note 70 (quoting Ryan Maieron of Latham & Watkins, who notes that a company could use the confidential process “to create some ambiguity around how serious the company is in pursuing the IPO versus the sale” and could say to prospective acquirers “well, we’re in confidential submission with the SEC right now, and that’s a viable alternative to selling the company if the price and the sales process isn’t suitable for the seller”); Peter Fogel, *Dual-Track Exit Strategy Highlighted in Neiman Marcus Deal*, PITCHBOOK (Sept. 9, 2013), <https://pitchbook.com/news/articles/dual-track-exit-strategy-highlighted-in-neiman-marcus-deal> [<https://perma.cc/9WCE-YG9E>] (tracing the dual-tracking trend to confidential filing); Bason, *supra* note 13 (“The ability to file confidentially creates another sort of optionality for a company undertaking a dual-track process, in that it can now conduct both sides of the process outside the public eye. The ability to tell a prospective buyer that the IPO process is already reasonably far along is a powerful tool, and being able to surprise a buyer with a registration statement that has already been through multiple rounds of SEC review will give targets a greater degree of control in dual-track negotiations.”); GELFOND ET AL., *supra* note 13 (“Even when a confidential filing is utilized, a potential buyer is often made aware of the IPO process and provided with a draft of the company’s registration statement.”).

72. James C. Brau, Ninon K. Sutton & Nile W. Hatch, *Dual-Track Versus Single-Track Sell-Outs: An Empirical Analysis of Competing Harvest Strategies*, 25 J. BUS. VENTURING 389 (2010).

73. *Id.*

74. *Id.*

for an IPO at all. The authors conclude from this that the dual-track process increases targets' "bargaining power during the takeover negotiations" which lasts only as long as the target retains "the option to go public when they were acquired."⁷⁵

And, a study by Lian and Wang looks at acquisitions from 1984 to 2009 of "pure" private firms (private firms that had filed and withdrawn IPOs prior to acquisition) and private firms that filed for an IPO but had not yet completed or withdrawn by the time of acquisition and finds that the last group earns a substantial and significant valuation premium over the other groups. The authors infer that this last group is pursuing a "dual-track" exit strategy and provide evidence that the strategy works to bolster the acquisition premium for these firms.⁷⁶

These studies uniformly indicate that dual-tracking increases acquisition valuations by giving issuers greater leverage in the exit process. But if dual-tracking startups have greater leverage, we would expect to see that translate into higher valuations on the IPO track as well.

There is no evidence that is the case.⁷⁷ And practitioner commentary suggests dual-tracking *only* helps on the acquisition side. Consider the following excerpts from statements by leading practitioners (in law, banking and accounting) on the subject:

- The "IPO track can act as a 'stalking horse' in eliciting M&A buyers," driving the "M&A valuation higher, particularly with strategic buyers."⁷⁸ (Cooley)
- Dual-tracking firms use "the potential of an IPO as leverage when dealing with a buyer to drive a higher valuation or better legal terms."⁷⁹ (Gunderson Dettmer)
- "[A]n IPO process can . . . serve as a valuable tool to increase the target company's leverage in an auction sale process and

75. Tomas Mantecon & Paul D. Thistle, *The IPO Market as a Screening Device and the Going Public Decision: Evidence from Acquisitions of Privately and Publicly Held Firms*, 37 REV. QUANTITATIVE FIN. ACCT. 325, 326 (2011).

76. Qin Lian & Qiming Wang, *Acquisition Valuations of Withdrawn IPOs: When IPO Plans Turn into Mergers*, 36 J. BANKING & FIN. 1424 (2012).

77. Arguably, insofar as dual-tracking is correlated with the JOBS Act, the studies above finding that IPO underpricing increases under the JOBS Act could indicate some indirect link between dual-tracking and IPO underpricing. *Supra* Section I.A (collecting studies). I am aware of no direct study of the effects of dual-tracking on IPO pricing; perhaps this is due to some data challenges: While it is possible to observe firms who publicly filed IPOs and then withdrew to pursue an acquisition, it is not possible to observe firms who did the opposite (considered a merger and then elected to complete the IPO), since merger discussions are often confidential.

78. Cooper, Segal & Demina, *supra* note 13.

79. GUNDERSON DETTMER, *supra* note 13.

potentially motivate bidders to expand the multiple they are willing to pay.”⁸⁰ (Orrick)

- “A robust IPO alternative can provide both a very realistic exit as well as strong competitive tension for the M&A process.”⁸¹ (Jefferies)
- “An IPO process can provide the company with leverage over potential acquirors in a sale process, as an IPO provides increased market exposure and pressures potential acquirors not only to outbid other potential acquirors but also an IPO valuation” and “adds a degree of time pressure to the potential acquirors in a sale process, because potential acquirors may view their window of opportunity closing as the company nears the end of an IPO process.”⁸² (Clifford Chance)
- “[D]ual tracking . . . can be a useful tactic for the seller to attract even more interest from potential acquirers.”⁸³ (KPMG)
- “Perhaps most importantly, the threat of an IPO may cause an interested party to increase its bid or accelerate the transaction rather than lose the acquisition to the public market” since the “IPO process effectively provides a competitive bid to compete with the most likely buyer(s).”⁸⁴ (Fried Frank)
- The prospect of an IPO “provides a deadline for potential acquirors, creating a greater sense of urgency to sign up a deal before the target goes public.”⁸⁵ (Cleary Gottlieb)

Many other similar statements are set out in the footnote.⁸⁶

80. *IPO Insights: Dual Track Process*, *supra* note 13.

81. Handler & Friedman, *supra* note 14, at 7.

82. Chang-Do Gong, Kathleen Werner, Marina Safanova & Kimara Davis, *Dual-Track IPO and Sale Process*, LEXISNEXIS: PRACTICE NOTES (Nov. 17, 2025), <https://plus.lexis.com/api/permalink/a04321a6-7fe5-412f-a714-11d2d089cc5f/?context=1530671> [<https://perma.cc/Q9AX-HD56>] (Clifford Chance).

83. MAGER ET AL., *supra* note 15, at 2.

84. GELFOND ET AL., *supra* note 13.

85. Karpf & Langston, *supra* note 13.

86. GIBSON DUNN, *supra* note 13 (noting that dual tracking can create “[h]igher negotiating leverage with potential buyers”); WILMER CUTLER PICKERING HALE AND DORR LLP, *supra* note 13, at 4–5 (“In addition to preserving flexibility when a company is uncertain whether to pursue an IPO or sale, a dual track can serve as a strategy to maximize the price received when a sale is preferred to, or more likely than, an IPO.”); Bird, Levitsky & Meng, *supra* note 13, at 1 (“If the IPO valuation seems likely to be the most attractive, that option is there,” while “if a private sale is ultimately pursued, the additional competitive pressure of a viable IPO process can drive bidders to put more money on the

The elite practitioner consensus is that dual-tracking transforms the IPO process into a valuable tool to improve acquisition outcomes but does not similarly increase IPO outcomes. The sole IPO-related benefit that issuers derive from dual-tracking, according to practitioners, is that the acquisition process can provide a “market check” on the IPO price.⁸⁷ There is no leveraging of the M&A process to improve IPO outcomes. A 2006 *Financial Times* piece summed it up: “[C]orporate development staff and advisers need to *add IPOs to their M&A toolkits*.”⁸⁸

This dynamic appears to have played out in the Postmates’ scenario outlined at the top of this paper. Postmates apparently leveraged the confidential filing, testing-the-waters meetings, and other aspects of the IPO process to extract a superior acquisition offer from Uber.⁸⁹ One commentator explained: “Having viable options outside of selling to Uber means Postmates has more pricing leverage.”⁹⁰

A similar story unfolded around the 2017 exit of business software firm AppDynamics. On the eve of its planned IPO, tech behemoth Cisco swept

table.”); Bason, *supra* note 13 (“The ability to tell a prospective buyer that the IPO process is already reasonably far along is a powerful tool . . .”); BERKELEY CTR. FOR L. & BUS., *Innovative Exit Strategies in Private Equity in 2026 | 2025 Fall Forum Pre-Event Webinar Series*, at 29:40–30:00 (YouTube, Dec. 8, 2025), <https://www.youtube.com/watch?v=NB1jBONNhws> (statement of Joe Palombo, FGS Global) (describing trend of dual-track processes and stating “I wonder to what extent any of the IPO track is actually real versus leverage to get trade buyers and strategies to actually jump”). A textbook by two experienced investment bankers similarly describes dual-tracking as primarily valuable for the acquisition side:

Ideally, both paths should be equally viable and compelling for the company. . . . In practice, however, a dual track is often used as a tool to increase competitive tension for an M&A sale process. The threat of an IPO forces potential buyers to compete with the company’s option to go public as well as one another. This tactic is often used to get a specific buyer or buyer(s) to move aggressively to pre-empt the IPO, similar to a negotiated sale to avoid an auction.

JOSHUA ROSENBAUM & JOSHUA PEARL, *INVESTMENT BANKING: VALUATION, LBOs, M&A, AND IPOs* 425 (3rd ed. 2021).

87. *E.g.*, Holden, *supra* note 13 (“A dual-track process . . . provides a kind-of market check on the IPO valuation process . . .”); Bason, *supra* note 13 (“[T]he EGC’s advisers can engage in pre-marketing to qualified institutional buyers and accredited investors, which provides an additional way to conduct a market check for a company that has an acquisition offer in hand—or for that matter, even one in the midst of price negotiations.”); FLEISHER & GRAIS, *supra* note 71 (“The IPO process gives the sponsor an approximate valuation of the company that it can compare to bids from potential acquirers.”).

88. Reuer & Ragozzino, *supra* note 68 (emphasis added). It wasn’t always that way: Earlier discussions of dual-tracking characterized the M&A as a “backup” in case the IPO didn’t work out. Elliott, *supra* note 68; *IPO Insights: Dual Track Process*, *supra* note 13 (“While traditionally the M&A sale process has been seen as a back stop in case an IPO process is not successful, that perception has been fading . . .”).

89. *Supra* Introduction.

90. Alex Wilhelm, *As Uber Hunts for A Deal, Can Postmates Leverage an IPO?*, TECHCRUNCH (June 30, 2020, at 06:11 PT), <https://techcrunch.com/2020/06/30/as-uber-hunts-for-a-deal-can-postmates-leverage-an-ipo/> [<https://perma.cc/HKZ4-82QV>].

in with a superior acquisition offer.⁹¹ According to some observers, having a viable IPO “locked and loaded” helped AppDynamics extract more favorable price and terms from Cisco since it “had nothing to lose.”⁹² And survey data firm Qualtrics was just wrapping up its roadshow when it agreed to sell out to SAP *above* the high end of its IPO price range.⁹³ The SAP CEO subsequently acknowledged that Qualtrics’ IPO process increased the price SAP had to pay.⁹⁴

Dual-tracking creates option value and additional bargaining leverage for startups, but practitioners and empiricists find that this leverage seems to create value for startups only on the acquisition side, not the IPO side. What explains this? The next Part offers some answers.

II. INSTITUTIONAL BIAS IN DUAL-TRACK EXITS

In this Part, I identify institutional mechanisms behind the puzzling results outlined above. Startups are using the additional information and bargaining leverage given to them by dual-tracking and the JOBS Act’s IPO process reforms predominantly to enhance acquisition exits, rather than IPO exits, due to structural features that bias the process in favor of acquisitions and against IPOs.

First, there is a set of built-in informational asymmetries between acquisition bidders and IPO bidders created by securities regulation and

91. Ari Levy, *Cisco Buys Tech IPO Candidate AppDynamics for \$3.7 Billion*, CNBC (Jan. 25, 2017, at 09:30 ET), <https://www.cnbc.com/2017/01/24/cisco-buys-tech-ipo-candidate-appdynamics-for-37-billion.html> [https://perma.cc/8LWU-R8XB].

92. Erin Griffith, *How the Last Minute, \$3.7 Billion AppDynamics Deal Went Down*, FORTUNE (Jan. 25, 2017), <https://fortune.com/2017/01/25/appdynamics-ipo-cisco/> [https://perma.cc/CW4Z-J97N]; see also Dominic Fracassa, *No IPO for AppDynamics as Cisco Buys It for \$3.7 Billion*, SFGATE (Jan. 24, 2017, at 18:41 PT), <https://www.sfgate.com/business/article/Cisco-buys-AppDynamics-for-3-7-billion-10881396.php> [https://perma.cc/9B4U-FPS4] (quoting Cisco executive as saying that AppDynamics’ prospective IPO “create[d] another dynamic that we needed to make a decision around”).

93. Catherine Shu, *SAP Agrees to Buy Qualtrics for \$8B in Cash, Just Before the Survey Software Company’s IPO*, TECHCRUNCH (Nov. 11, 2018, at 19:40 PT), <https://techcrunch.com/2018/11/11/sap-agrees-to-buy-qualtrics-for-8b-in-cash-just-before-the-survey-software-companys-ipo/> [https://perma.cc/MN6C-TE48]; Alex Sherman, *SAP is Acquiring Survey Software Maker Qualtrics for \$8 Billion*, CNBC (Nov. 12, 2018, at 09:58 ET), <https://www.cnbc.com/2018/11/11/sap-is-buying-qualtrics-sources-say.html> [https://perma.cc/U3A4-XJ4S]; Renaissance Cap., *SAP Acquires Qualtrics for \$8 Billion Three Days Ahead of Pricing*, NASDAQ (Nov. 12, 2018, at 07:18 ET), <https://www.nasdaq.com/articles/sap-acquires-qualtrics-8-billion-three-days-ahead-pricing-2018-11-12> [https://perma.cc/RKF3-FXC5].

94. Julie Bort, *Meet the CEO Who Once Turned Down a \$500 Million Offer for His Startup – and Just Sold It for \$8 Billion*, BUS. INSIDER (Nov. 12, 2018, at 14:41 CT), <https://www.businessinsider.com/qualtrics-ceo-interview-bill-mcdermott-sap-2018-11> [https://perma.cc/EE3K-WH39] (noting that the SAP CEO “says he knew he wanted to buy Qualtrics, even as the impending IPO meant that the price was only going to go up”).

transactional practice that bias dual-tracking firms towards acquisitions and away from IPOs.

Second, the investment banks who often serve in dual roles as both M&A advisor and lead underwriter for dual-tracking issuers have some incentives to steer clients towards the acquisition exit.

Table 1 summarizes these mechanisms:

TABLE 1: MECHANISMS OF DUAL-TRACK BIAS

	IPO Track	Acquisition Track
Bidder access to info re: other bidders	IPO bidders only	IPO bidders & acquisition bidders
Bidder access to info re: target	S-1	S-1 & due diligence
Expected bid	Reduced	Increased
Financial advisor incentives	Lower fees & higher execution risk	Higher fees & lower execution risk

In this Part, I discuss each of these institutional features in turn and show how they skew dual-tracking firms away from IPOs and towards acquisitions.

The claim is that the *dual-track process itself* shapes exit outcomes, holding all other variables constant. There are many other firm-, industry-, and economy-level variables that drive a firm's ex ante preference between IPO and acquisition.⁹⁵ For instance, some founders may prefer an IPO to preserve their control over the firm, while others may prefer an acquisition for a "beach money" exit;⁹⁶ some firms may lean away from acquisitions during periods of more intense antitrust scrutiny;⁹⁷ and firms may make IPO decisions based on whether the IPO market is "hot" or "cold."⁹⁸ But whatever a particular firm's ex ante preferences, the *dual-track process itself* seems to push them away from IPO and towards acquisition. That is the

95. See generally Gao, Ritter & Zhu, *supra* note 25; Cheng, Sokol & Cennamo, *supra* note 26; Griffin, *supra* note 26; Lattanzio, Megginson & Sanati, *supra* note 25; James C. Brau, Bill Francis & Ninon Kohers, *The Choice of IPO Versus Takeover: Empirical Evidence*, 76 J. BUS. 583 (2003); Nihat Aktas, Christian Andres & Ali Ozdakak, *The Interplay of IPO and M&A Markets*, in OXFORD HANDBOOK OF IPOs 201 (Douglas Cumming & Sofia Johan eds., 2018).

96. E.g., Matthew Wansley, *Beach Money Exits*, 45 J. CORP. L. 151 (2019).

97. E.g., Brian J. Broughman, Matthew T. Wansley & Samuel N. Weinstein, *No Exit*, 100 N.Y.U. L. REV. 1481 (2025).

98. E.g., Boeh & Dunbar, *supra* note 62.

finding that emerges from the research and analysis discussed in the previous Part, and it is the goal in this Part to identify the institutional mechanisms driving this transactional process effect.

A. Asymmetric Information

The first institutional mechanism that drives dual-tracking firms away from IPOs and towards acquisition is information advantage for prospective acquirers over prospective IPO investors. There are two distinct forms of this. First, securities regulation creates an informational advantage for prospective acquirers over prospective IPO investors regarding the bidding process. By operation of law, prospective acquirers can and do learn about the IPO process, but prospective IPO investors do not learn about the acquisition process. Second, normal transactional practice leads to acquirers holding more complete due diligence information about the target than prospective IPO investors.

Using insights from the economic field of auction theory, I show how these informational asymmetries would be expected to produce the kinds of lopsided results in dual-track outcomes that have been observed.

1. The One-Way Mirror: Asymmetric Information About Competing Bidders

Securities regulation enables prospective acquirers to learn about prospective IPO investors, but not vice versa. IPO investors are in front of a one-way mirror, and acquirers are behind it.

a. Communications About M&A Process with IPO Investors

No Affirmative Obligation to Disclose. IPO firms are under no affirmative obligation to disclose preliminary acquisition negotiations in the registration statement.⁹⁹

There is no line item in the IPO filing that requires disclosure of preliminary merger negotiations. Item 16 of Form S-1 requires disclosure of “material contracts,”¹⁰⁰ but *pre-merger* negotiations are not yet “contracts.” Item 11(e) requires financial disclosure regarding any

99. Cooper et al., *supra* note 13 (“Opting for an IPO would not require an issuer to disclose the fact of the parallel (abandoned) M&A process . . .”); GELFOND ET AL., *supra* note 13 (“[I]nformation about the trade sale process itself need not be disclosed in a registration statement . . .”); WILMER CUTLER PICKERING HALE AND DORR LLP, *supra* note 13, at 4–5 (“Absent a leak, the sale process usually need not be publicly disclosed . . .”).

100. 17 C.F.R. § 229.601 (2025).

“probable” transactions that would be material to investors,¹⁰¹ but the SEC’s own reporting manual clarifies that this rule applies only to acquisitions *by* the registrant.¹⁰² The closest case is Item 11(h), which incorporates Item 303 of Regulation S-K and requires disclosure of “known trends or uncertainties” that may have a “material” effect on the issuer’s liquidity or operations or any “reasonably likely material changes in the mix and relative costs” of the firm’s capital resources.¹⁰³

Preliminary merger negotiations may qualify as “material.” In *Basic Inc. v. Levinson*, the Supreme Court held that the materiality of preliminary merger negotiations depends, in part, on the probability that the transaction will be completed.¹⁰⁴ This is a fact-specific inquiry that requires looking to “indicia of interest in the transaction at the highest corporate levels,” such as “board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries.”¹⁰⁵ Subsequent courts applying this test have looked at the existence (or lack thereof) of concrete offers as one important factor.¹⁰⁶

But in the context of dual-track firms, the probability of an acquisition occurring after an IPO is (arguably) effectively zero for practical purposes. For dual-tracking firms, the IPO and acquisition are being considered as strategic *alternatives*. So, if the IPO moves forward, the acquisition will not. And if the acquisition does move forward, that means the IPO will not, which makes the disclosure issue moot.

Further, one year after *Basic*, the SEC issued guidance that Item 303 did not impose any duty to disclose “preliminary merger negotiations.”¹⁰⁷ The SEC emphasized the policy consideration that requiring disclosure might jeopardize completion of the transaction.¹⁰⁸

So, even if some preliminary acquisition negotiations might rise to the level of materiality, dual-tracking firms likely do not have an affirmative duty to disclose them in an S-1.

101. 17 C.F.R. § 210.11-01 (2025).

102. DIV. OF CORP. FIN., U.S. SEC. FINANCIAL REPORTING MANUAL 2905.2 (2025) (“The S-X Acquisition Rules apply to an acquisition of a business by the registrant . . .”).

103. 17 C.F.R. § 229.303 (2025).

104. 485 U.S. 224 (1988).

105. *Id.* at 239.

106. *Emps.’ Ret. Sys. v. Williams Cos.*, 889 F.3d 1153, 1169 (10th Cir. 2018); *Jackvony v. RIHT Fin. Corp.*, 873 F.2d 411, 415 (1st Cir. 1989); *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 615 (4th Cir. 1999).

107. Management’s Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release Nos. 33-6835, 34-26831, Investment Company Act Release No. 16961, Financial Reporting Release No. 36, 54 Fed. Reg. 22427, 22435 (May 18, 1989).

108. *Id.* at 22436 (“[W]here disclosure is not otherwise required, and has not otherwise been made, the MD&A need not contain a discussion of the impact of such negotiations where, in the registrant’s view, inclusion of such information would jeopardize completion of the transaction.”).

Selective Disclosure Prohibited. However, if the IPO firm makes selective disclosures about the preliminary merger negotiations to some prospective IPO investors, the information may become material and subject to disclosure.

IPO firms may consider sharing information about the ongoing M&A process with prospective IPO investors during “test-the-waters” meetings. As discussed above, traditionally, communications between IPO firms and prospective investors were tightly constrained under Sections 5(b) and (c) of the Securities Act. However, the JOBS Act¹⁰⁹ and related regulations¹¹⁰ loosened these restrictions and authorized issuers (and their agents) to communicate with prospective IPO investors “to determine whether such investors might have an interest in a contemplated securities offering” before or after filing a registration statement. Under the rules, these communications do not have to be filed with the SEC or disclosed more broadly with all investors. Information about an ongoing acquisition process could theoretically be shared during one of these conversations.

However, once this type of information has been shared with some prospective IPO investors, it may trigger an obligation to disclose in the registration statement as well. If an issuer fails to do this, it may be subject to liability under the anti-fraud provisions of the securities laws.

The issuer’s choice to provide information about preliminary negotiations to a prospective IPO investor is, itself, evidence of that information’s materiality.¹¹¹ Moreover, although it is still true that the IPO and acquisition are strategic alternatives, the issuer’s choice to disclose preliminary negotiations to prospective IPO investors makes that information *part* of the IPO process; the information at this point is not about an alternative—it is being used to inform the IPO pricing and process itself.

Moreover, the SEC requires that test-the-waters communications “must not conflict with material information in the related registration statement.”¹¹² Sharing information about a prospective acquisition with some prospective IPO investors as a way to shore up interest and price for the offering might reasonably be understood to conflict with a registration statement that is silent as to the existence of those negotiations. The SEC emphasized that firms faced liability for securities fraud if a test-the-waters

109. Securities Act § 5(d), 15 U.S.C. § 77e(d).

110. 17 C.F.R. § 230.163B (2025).

111. *E.g.*, In re Facebook, Inc. IPO Sec. & Derivative Litig., 986 F. Supp. 2d 487, 512–13 (S.D.N.Y. 2013).

112. Solicitation of Interest Prior to a Registered Public Offering, Securities Act Release No. 33-10699, 84 Fed. Reg. 53011, 53013 (Dec. 3, 2019).

communication “materially conflicts with the information in a registration statement,” though there have not yet been any cases on this.

Finally, the SEC’s Item 303 guidance that there is no affirmative obligation to disclose preliminary negotiations was contingent on the lack of any *selective* disclosure of that information. Once disclosure of preliminary negotiations “has otherwise been made by or on behalf of the registrant,” the SEC has opined that “the interests in avoiding premature disclosure no longer exist” and “the negotiations would be subject to the same disclosure standards under Item 303 as any other known trend, demand, commitment, event or uncertainty.”¹¹³

In sum, securities regulation forces dual-tracking issuers to choose between keeping the preliminary merger negotiations secret or disclosing them to everyone. Practically speaking, this is no choice at all. Disclosing preliminary merger negotiations to everyone would short-circuit the entire acquisition process.¹¹⁴ Effectively, then, the law impedes a dual-tracking issuer from sharing information about a prospective acquisition with prospective IPO investors.

This point is reflected in practitioners’ commentary. As noted above, practitioners advise that issuers contemplating an acquisition may use testing-the-waters conversations as a “market check” but did not suggest that this provided an opportunity to leverage the acquisition process to extract more favorable IPO terms.¹¹⁵

The bottom line is that securities regulation creates a significant obstacle for dual-tracking firms looking to leverage acquisition negotiations to improve outcomes on the IPO side.

b. Communication with M&A Bidders about the IPO process

By contrast, securities law poses no obstacle to sharing information about the IPO process with prospective acquirers. Issuers can and do avoid triggering any risk of securities regulation liability for making selective disclosures to prospective acquirers by entering confidentiality and standstill agreements with those acquirers. Standstill agreements ensure that, in the event the IPO moves forward, the prospective acquirer will not acquire shares.¹¹⁶ Confidentiality ensures that, in the event the IPO moves

113. Management’s Discussion and Analysis of Financial Condition and Results of Operations, 54 Fed. Reg. at 22436.

114. *Cf. id.* (acknowledging that an acquisition might be “jeopardized” by disclosure of preliminary negotiations).

115. Bason, *supra* note 13.

116. See HILL ET AL., *supra* note 12, at 326–40 (providing overview of standstill agreements in M&A practice).

forward, the prospective acquirer will not share this information with anyone who will be trading those shares.¹¹⁷ Together, these agreements operate to insulate issuers (and prospective acquirers) from any potential securities liability in this context.

Practitioners agree with this analysis. Fried Frank explains that “if a potential bidder was privy to information that was not provided in the registration statement then the bidder may be restricted by securities laws from trading stock of the new public company after the IPO” but “this issue is alleviated by adopting a standstill provision in the confidentiality agreement related to the sale process which prohibits such bidder from purchasing shares in the IPO process.”¹¹⁸ Cooley emphasizes that dual-tracking issuers can leverage the IPO process to “drive the M&A valuation higher, particularly with strategic buyers,” but must “obtain non-disclosure agreements from prospective M&A counterparties” and otherwise ensure confidentiality.¹¹⁹ Cleary similarly emphasizes the need for dual-tracking firms to get potential acquirers to “sign nondisclosure agreements” and to be clear in any meetings with potential acquirers that the information they are sharing is “being provided in connection with a sale of the company and not part of the IPO process.”¹²⁰

The JOBS Act expanded the types of IPO-related information that an issuer can share with prospective acquirers. First, the ability to engage in preliminary “test-the-waters” conversations with prospective IPO investors allows issuers to gather intelligence and even potentially rough pricing information that they can and do turn around and use as bargaining leverage with prospective acquirers. Second, confidential filing of registration statements allows an issuer to file a draft registration statement, get multiple rounds of comments from the SEC, and then share the revised registration statement with a prospective acquirer before anyone else can see it.

Again, practitioners agree. Fried Frank writes, “Even when a confidential filing is utilized, a potential buyer is often made aware of the IPO process and provided with a draft of the company’s registration statement.”¹²¹ Davis Polk states that “being able to surprise a buyer with a registration statement that has already been through multiple rounds of SEC

117. See *id.* at 314–26 (providing overview of confidentiality agreements in M&A practice); HAAS & OESTERLE, *supra* note 12, at 350–53 (same).

118. GELFOND ET AL., *supra* note 13.

119. Cooper, Segal & Demina, *supra* note 13; GELFOND ET AL., *supra* note 13 (“[M]aterials directed at potential acquirers relating solely to the trade sale process are not likely to be considered offers due to their content and audience – simply put, bidders in a sale process are unlikely to be IPO investors.”).

120. Karpf & Langston, *supra* note 13.

121. GELFOND ET AL., *supra* note 13.

review will give targets a greater degree of control in dual-track negotiations” and that dual-tracking issuers can conduct testing-the-waters conversations while engaging in price negotiations with a prospective acquirer.¹²² Latham notes that dual-tracking issuers can “gain a strategic advantage” by alerting potential bidders of its IPO “while benefitting from nonpublic SEC review of its draft registration statement.”¹²³

Others emphasize the value of being able to show prospective acquirers that the registration statement has already been vetted by the SEC, whether or not confidential filing is used. Debevoise writes that an IPO that has “advanced to a point that SEC comments have been received on a Form S-1, can provide a potential buyer of a private company with significant insights into the company’s business and the risks it faces that may not otherwise be readily available.”¹²⁴ Another practitioner explained that, in the wake of Sarbanes-Oxley, prospective acquirers were particularly interested in private firms who have “cleared the accounting and internal controls by SEC registration.”¹²⁵

Securities regulation has an asymmetric effect on dual-tracking bidders. It imposes a significant barrier to prospective IPO investors learning about prospective acquisition bidders, but not vice versa. That is one informational asymmetry. The next Section discusses a different one.

2. *The Due Diligence Gap: Asymmetric Information About the Target*

A second potential source of informational advantage for prospective acquirers over prospective IPO investors comes from different levels of access to information about the target itself.

Both an IPO and a sale involve a “due diligence” investigation of the target company. For the IPO, the due diligence process is conducted by the underwriters and is calibrated to ensure that the statements in the securities offering documents are accurate and complete.¹²⁶ Under the Securities Act of 1933, underwriters face virtually strict liability for any material

122. Bason, *supra* note 13.

123. COHEN ET AL., *supra* note 13, at 8.

124. Bird, Levitsky & Meng, *supra* note 13, at 21.

125. Grimes, *supra* note 68 (quoting Lawrence T. Yanowitch, M&A attorney with Shaw Pitman LLP).

126. See CRAIG S. CHAPMAN & RICHARD S. BASS, TOP 10 PRACTICE TIPS BY EXPERTS: DUE DILIGENCE FOR SECURITIES OFFERINGS (2017), https://www.sidley.com/-/media/publications/lpatop-10-tipsdue-diligence-for-securities-offeringsfinal.pdf?3Frev=a352ac3d50ce460c8e9f0332f4a1c565&sc_lang=en [https://perma.cc/3A8T-T7DT].

misstatements or omissions in these documents¹²⁷ but can escape liability by showing that they conducted an adequate due diligence process.¹²⁸

For the acquisition, the due diligence process is conducted by the acquirer and is primarily calibrated to assess the target and to discover any issues or risks that may affect the deal, the value of the company, or its performance after the deal closes.¹²⁹

There is a substantial overlap between these two due diligence processes. Practitioners emphasize the potential cost savings from coordinating the due diligence processes for both IPO and acquisition tracks.¹³⁰

And yet, the two processes are not identical. Some practitioners say acquisition due diligence is *more extensive* than the underwriter due diligence,¹³¹ but all seem to agree that the two processes are distinct and focus on different sorts of issues.¹³² Underwriter due diligence ahead of an IPO is more oriented towards looking for “material” issues that may give rise to liability, while acquirers are more interested in a broader range of performance and operating issues, which can be incorporated and dealt with in the transaction in various ways.

The informational asymmetry arises here from the fact that prospective acquirers may get to observe *both* types of due diligence, while prospective IPO investors only observe one.

127. Securities Act § 11(a)(5), 15 U.S.C. § 77k(a)(5).

128. *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968); *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004); *see also* Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1638–40 (2010) (describing the high bar of the due diligence defense). For an empirical study that raises questions about the realistic prospects of underwriter liability, *see* Emily Strauss, *IPO Gatekeeper Liability*, 81 BUS. LAW. (forthcoming 2026).

129. *See* HILL, QUINN & SOLOMON, *supra* note 12, at 345–52 (providing overview of the due diligence process in M&A).

130. Bird, Levitsky & Meng, *supra* note 13, at 20 (“[T]he electronic data room prepared for private buyer diligence will generally suffice for underwriter diligence as well.”); GELFOND ET AL., *supra* note 13, at 1 (“[A] dual-track process provides many benefits, including . . . overlap in diligence materials . . . , fostering efficient use of resources.”); GUNDERSON DETTMER, *supra* note 13, at 2 (“The legal requirements for an IPO, particularly financial data, are complementary to those involved in the M&A process. That makes some aspects of the process, especially with regard to due diligence, more cost-effective.”); Gong et al., *supra* note 82 (“As both underwriters and potential acquirors will want to review similar documents in their due diligence investigation, one way to increase efficiency is to identify and aggregate such documents to be uploaded to one data room used by both underwriters and potential acquirors.”); *IPO Insights: Dual Track Process*, *supra* note 13 (“While the time and complexity of a dual-track process is greater than either an IPO or M&A exit alone, one area where there may be significant synergies is the due diligence process.”).

131. Karpf & Langston, *supra* note 13 (“Typically, an acquiror would conduct more extensive due diligence than an underwriter, and, as a result, an M&A data room will contain more documents than an IPO data room. For that reason, companies can start with the M&A data room and pare it back for IPO due diligence.”).

132. *E.g.*, GELFOND ET AL., *supra* note 13, at 2 (“[P]rospective buyers in the sale will gain access to different company materials . . . than those parties involved in the IPO”); *IPO Insights: Dual Track Process*, *supra* note 13.

The underwriter due diligence is reflected in the preliminary IPO filing (either an S-1 or DRS). This filing reflects months of due diligence work by the underwriter as well as the target's own outside counsel. In addition to the information disclosed in the document, the existence of the document itself constitutes a valuable certification—reflecting a kind of “seal of approval” that the underwriter and counsel have done an investigation and determined there are no material misstatements or omissions.

This is the due diligence information that IPO investors have access to. IPO investors see the offering document and see the underwriter “seal of approval” and take comfort in the fact that the underwriter would face liability under Section 11 if they failed to conduct adequate due diligence.

Dual-track firms often share this filing with prospective acquirers in order to provide valuable reassurance about the absence of material issues.¹³³ As one leading firm explains:

Particularly when faced with auction pressure to live with a contract that contains limited representations and warranties, the Form S-1 can provide a helpful supplement to the confirmation of buyer's due diligence provided through the sale agreement, particularly if—as is often the case when the IPO process is sufficiently advanced—the seller gives a representation in the sale agreement as to the absence of material misstatements and omissions in the preliminary Form S-1. Bidders may also be able to take some practical comfort from the knowledge that the company's outside counsel have done the diligence work necessary to be ready if called upon to give legal opinions and a negative assurance letter to the underwriters.¹³⁴

And so, prospective acquirers have access to two forms of due diligence: their own due diligence process and the due diligence conducted by underwriters (and target counsel) in the shadow of the securities laws.

By contrast, prospective IPO investors do not get access to the due diligence process conducted by prospective acquirers. All they have is the IPO underwriter due diligence.

The result is a second layer of informational asymmetry. Prospective acquirers get two sorts of due diligence information, whereas IPO investors only get one.¹³⁵

133. *E.g.*, Bason, *supra* note 13 (“[M]aking . . . IPO filings fully visible to prospective acquirors . . . could . . . facilitate the process by making their diligence easier.”).

134. Bird, Levitsky & Meng, *supra* note 13, at 21.

135. In addition to having access to better information about the target, acquirers may be better positioned to correctly evaluate that information due to industry expertise. *See* Onur Bayar & Thomas J.

3. *These Informational Asymmetries Bias Dual-Track Exits in Favor of Acquisitions*

These informational asymmetries embedded in the dual-track process help explain why startups overwhelmingly use dual-tracking to enhance acquisition outcomes rather than IPO outcomes. To explain this, I draw on the economics of information¹³⁶ and auction theory.¹³⁷

Startups seeking an exit via IPO or acquisition confront a potential “market for lemons” problem¹³⁸: The pool of potential sellers includes both high-quality firms (“cherries”) and low-quality firms (“lemons”),¹³⁹ but prospective bidders cannot reliably distinguish the two.¹⁴⁰ Startups may have no track record of profitable operations and are selling mainly based on their potential, which is inherently hard to assess. Seemingly promising innovations can fail in final stages of development, fail to obtain regulatory approval, or face unexpected commercial obstacles.¹⁴¹ Insiders have a leg up over prospective acquirers and IPO investors in assessing the future prospects.¹⁴² In this market, sellers know a lot about the quality of the item, while buyers know much less.¹⁴³

Chemmanur, *IPOs Versus Acquisitions and the Valuation Premium Puzzle: A Theory of Exit Choice by Entrepreneurs and Venture Capitalists*, 46 J. FIN. & QUANTITATIVE ANALYSIS 1755, 1782 (2011) (presenting a model in which “potential acquirers have industry and product market expertise and can value the private firm better than IPO market investors”).

136. For an accessible introduction to the field see NOBEL PRIZE ECON. COMM., *MARKETS WITH ASYMMETRIC INFORMATION* (2001), <https://www.kva.se/app/uploads/2001/10/globalassets-priser-nobel-2001-scibackeken01.pdf> [<https://perma.cc/77J5-7TMF>].

137. For accessible surveys, see PAUL KLEMPERER, *AUCTIONS: THEORY AND PRACTICE* 9–51 (2004); THE COMM. FOR THE PRIZE IN ECON. SCIS. IN MEMORY OF ALFRED NOBEL, *IMPROVEMENTS TO AUCTION THEORY AND INVENTIONS OF NEW AUCTION FORMATS* (2020) [hereinafter *IMPROVEMENTS TO AUCTION THEORY*], <https://www.nobelprize.org/uploads/2020/09/advanced-economicsciencesprize2020.pdf> [<https://perma.cc/WXK4-L696>]. For some prior applications to the topics of securities regulation and corporate transactions, see Albert H. Choi, *Deal Protection Devices*, 88 U. CHI. L. REV. 757 (2021); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650 (2002); Peter Cramton & Alan Schwartz, *Using Auction Theory to Inform Takeover Regulation*, 7 J.L. ECON. & ORG. 27 (1991).

138. See generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

139. Compare, e.g., Donald Langevoort & Hillary A. Sale, *Corporate Adolescence: Why Did “We” Not Work?*, 99 TEX. L. REV. 1347 (2021) (discussing WeWork, a big-time lemon that many believed was a cherry), with, e.g., Alexander I. Platt, *Unicorniphobia*, 13 HARV. BUS. L. REV. 115, 162–79 (2023) (discussing Moderna, a big-time cherry that many believed was a lemon).

140. Joseph Bankman & Ronald J. Gilson, *Why Start-ups?*, 51 STAN. L. REV. 289, 295–97 (1999).

141. See generally Elizabeth Pollman, *Startup Failure*, 73 DUKE L.J. 327 (2023).

142. E.g., Bankman & Gilson, *supra* note 140.

143. See MICHAEL KLAUSNER & GUHAN SUBRAMANIAN, *DEALS: THE ECONOMIC STRUCTURE OF BUSINESS TRANSACTIONS* 22 (2024).

This informational asymmetry tempts sellers to pass off lemons as cherries. A seller with a lemon can try to get cherry prices since buyers cannot tell the difference.¹⁴⁴ This is the risk of “adverse selection.”

Buyers understanding that there is some risk the cherry they think they are buying may, in fact, be a lemon respond by reducing the prices they are willing to pay.¹⁴⁵ Buyers “shade” their bids so that, if they *do* end up with a lemon, they won’t have overpaid *that* much, resulting in lower prices across the board.¹⁴⁶

As if that weren’t bad enough, a startup seeking an exit faces another, related challenge that also reduces the price buyers are willing to pay: the “winner’s curse.”¹⁴⁷ In an auction where the quality of the item being sold is uncertain and the seller is soliciting bids from multiple potential buyers, a winning buyer must have agreed to pay more than all other bidders were willing to pay.¹⁴⁸ This means that the buyer’s valuation of the target exceeds everyone else’s.¹⁴⁹ This, in turn, indicates that the buyer may have overpaid—that he just paid cherry prices for what everyone else understands to be a lemon. Just like the “market for lemons,” rational buyers would respond to the winner’s curse by shading their bids to mitigate the risk of overpaying.¹⁵⁰

Both the market for lemons and the winner’s curse lead to the same result: Rational buyers shade their bids. But, while sellers of low-quality (lemon) startups may be happy to take this deal, sellers of high-quality

144. Akerlof, *supra* note 138, at 488 (“[T]here is incentive for sellers to market poor quality merchandise since the returns for good quality accrue mainly to the entire group . . .”).

145. See, e.g., KLAUSNER & SUBRAMANIAN, *supra* note 143, at 21 (“Unable to know the quality of a used car, the buyer implicitly discounts its value to account for the probability that it is of poor quality.”); MAXWELL L. STEARNS, TODD J. ZYWICKI & THOMAS J. MICELI, *LAW AND ECONOMICS: PRIVATE AND PUBLIC* 159 (2018) (“Because buyers lack specific information about particular used cars put up for sale, they will view all cars as being of ‘average’ quality.”).

146. STEARNS, ZYWICKI & MICELI, *supra* note 145, at 159.

147. KLEMPERER, *supra* note 137, at 14. For a theoretical introduction and overview of foundational literature, see IMPROVEMENTS TO AUCTION THEORY, *supra* note 137. For some of those early foundational theoretical contributions see Robert B. Wilson, *Competitive Bidding with Disparate Information*, 15 MGMT. SCI. 446 (1969); Robert Wilson, *A Bidding Model of Perfect Competition*, 44 REV. ECON. STUD. 511 (1977); Paul R. Milgrom & Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 ECONOMETRICA 1089 (1982). For some early empirical work, see E.C. Capen, R.V. Clapp & W.M. Campbell, *Competitive Bidding in High-Risk Situations*, 23 J. PETROLEUM TECH. 641 (1971). For behavioral studies showing that people do not rationally shade bids when facing winner’s curse, see RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 50–62 (1991).

148. KLEMPERER, *supra* note 137, at 14.

149. *Id.*

150. *Id.*

(cherry) startups are not.¹⁵¹ These sellers know that their firm is worth more than buyers are willing to pay. Cherry sellers can either accept the discounted price, refuse to sell, or find a strategy to convince buyers that their startup is, indeed, a cherry.

One such strategy is to obtain some additional information certifying that the startup is indeed high-quality.¹⁵² Information about how rival expert bidders are valuing the target can perform this function, providing reassurance that the company is, indeed, of high quality.¹⁵³ Startup sellers may partially overcome the price-depressing effects of the “market for lemons” and the “winner’s curse” by sharing information with buyers about other independent and expert bidders’ interest.

This is the basic logic of dual-tracking. A seller can achieve a higher price by bringing IPO and acquirer bidders together and playing them off one another. Each bidder is reassured by the discovery of others willing to pay cherry prices for the target.

But that is not the way dual-tracking actually works. The real dual-tracking system creates two asymmetrically informed classes of bidders: IPO bidders can only see their own bids and the due diligence information reflected in the S-1; acquisition bidders can see their own bids as well as those of IPO bidders and can see the S-1 as well as their own private due diligence information on the target.¹⁵⁴ Further, an IPO bidder does not know whether the acquisition bidder is present in any given case.

For the acquisition bidder, getting access to information about expert IPO bidders’ interest in the startup provides a form of certification and reassurance, enabling them to increase their price with confidence that what they are bidding on is indeed a cherry with no winner’s curse.¹⁵⁵

151. STEARNS, ZYWICKI & MICELI, *supra* note 145, at 159 (noting that the reduced prices “will tend to cause owners of high quality cars to withdraw them from the market where they would otherwise be undervalued,” leaving behind a market dominated increasingly by lemons); KLAUSNER & SUBRAMANIAN, *supra* note 143, at 21 (noting that the reduced prices that buyers are willing to offer in the face of information asymmetry leads sellers of high quality cars to keep them rather than sell them at deflated prices).

152. Akerlof, *supra* note 138, at 499–500 (discussing various “institutions” that counteract the effects of quality uncertainty, including professional licensing which “carries some certification” indicating the quality of the services); KLAUSNER & SUBRAMANIAN, *supra* note 143, at 33–35 (discussing how various forms of “third-party assurance” can help solve the challenges of information asymmetries in business deals and, relatedly, how competitive bidding in an auction setting can serve the same function).

153. IMPROVEMENTS TO AUCTION THEORY, *supra* note 137, at 9–10.

154. *Supra* Section II.A.1–2.

155. *E.g.*, KLEMPERER, *supra* note 137, at 23 (“If one player has a small advantage, . . . that player will bid a little more aggressively. This strengthens the opponent’s ‘winner’s curse’ (since winning against a more aggressive competitor is worse news about the actual value of a common value object), so the opponent will bid a little less aggressively in an ascending auction, so the first player’s winner’s curse is reduced and she can bid a little more aggressively still, and so on.”).

But, for the IPO bidder, this informational asymmetry makes the lemons and winner's curse problems even worse.¹⁵⁶ Now, the IPO investor knows that the only way he could win is by paying more than the acquisition bidder. Because the acquisition bidder in this case is better informed than the IPO bidder, the "winning" IPO bidder is even more likely to have just bought a lemon. If it was really a cherry, the IPO investor knows that the acquisition bidder would not have let him win. Under these conditions, the IPO investor has a powerful incentive to shade bids—or even to refrain from bidding altogether.¹⁵⁷

This price-depressing effect on the IPO side is consistent with Kevin Rock's influential model of IPO underpricing.¹⁵⁸ Rock posits that some IPO investors are better informed than others about the value of the target firm; that well-informed investors only bid for high-quality targets, while uninformed investors bid indiscriminately; and that this creates a winner's curse problem for the uninformed investors. When the target is high-quality, the uninformed will be crowded out by better-informed investors. When the target is low quality, the uninformed will "win"—but wish they hadn't. Facing an unwinnable game, these uninformed investors would be tempted to walk away from the market altogether. Rock posits that participation of uninformed investors is essential to the IPO market and interprets the practice of IPO underpricing as a strategy to ensure continued participation by these investors.¹⁵⁹

But, in the dual-tracking context, the bid-suppressing effect on the uninformed IPO investors is limited by the uncertainty regarding the presence of the acquisition bidder. Although dual-tracking has become popular, it is not universal. Accordingly, the IPO investors do not know in

156. *E.g., id.*; see also Andrew McClellan, *Knowing Your Opponents: Information Disclosure and Auction Design*, 140 GAMES & ECON. BEHAV. 173, 174 (2023) ("The presence of an expert, when disclosed, leads to an exacerbated winner's curse for non-expert bidders."); see also, *e.g.*, Kenneth Hendricks & Robert H. Porter, *An Empirical Study of an Auction with Asymmetric Information*, 78 AM. ECON. REV. 865 (1988).

157. KLEMPERER, *supra* note 137, at 23.

158. See Kevin Rock, *Why New Issues Are Underpriced*, 15 J. FIN. ECON. 187 (1986); see also Carlos Berdejó, *Going Public After the JOBS Act*, 76 OHIO ST. L.J. 1, 13 (2015) (describing this as the "most prominent model" of IPO underpricing); Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2538 n.78 (1997) (noting that "particular attention" has been paid to this model and that it has "received considerable empirical support").

159. See, *e.g.*, Alexander Ljungqvist, *IPO Underpricing*, in 1 HANDBOOK OF EMPIRICAL CORPORATE FINANCE 375, 384–89 (2007). But see, *e.g.*, Patrick M. Corrigan, *The Seller's Curse and the Underwriter's Pricing Pivot: A Behavioral Theory of IPO Pricing*, 13 VA. L. & BUS. REV. 335, 365–67 (2019) (explaining the theory and noting its limits); Danielle A. Chaim, Adi Libson & Yevgeny Mugerma, *The Price of Power: The Big Three and IPO Underpricing*, 51 J. CORP. L. 315 (2025) (same); Patrick M. Corrigan, *Does an Initial Public Offering (IPO) Issuer's Securities and Exchange Commission Registration Fee Calculation Method Predict Pricing Revisions and IPO Underpricing?*, 19 J. EMPIRICAL LEGAL STUD. 1114, 1117 (2022) (presenting evidence inconsistent with Rock's theory).

any case whether they are bidding against an informed acquisition bidder. This means the IPO investor still has a realistic hope of buying a cherry and therefore will continue to participate in the auction.¹⁶⁰

Further, the IPO investor's incentive to shade bids in the face of this information asymmetry provides its own limit. The IPO investor's bids are, themselves, a key source of the acquisition bidder's informational advantage. As the IPO investor shades his bids to protect himself from the lemons/winner's curse, the bids become less useful to the acquisition bidders, diminishing their informational advantage and, accordingly, also diminishing the IPO bidder's incentive to shade bids.

A final important limit on the IPO investor's disincentive to bid comes from documented behavioral biases that lead to systematic departures from rational bidding strategy. Substantial evidence shows that bidders in many domains, including in the market for private companies, fail to shade bids to the extent they should in light of the winner's curse.¹⁶¹

Under these conditions, the potential information asymmetry that exists in dual-track exits would be expected to generate higher prices on the acquisition side and lower prices on the IPO side. This is consistent with both the empirical evidence and practitioner accounts discussed above.

In sum, one reason the JOBS Act's IPO process reforms and the dual-tracking strategy they instigated have failed to revitalize IPOs is because of structural informational advantages that put prospective acquirers in a position to "win" any auction in which they compete against IPO bidders.

B. Asymmetric Compensation: Banker Bias

Investment banks are at the center of both IPO and acquisition processes.

An IPO typically includes multiple investment banks serving as underwriting syndicate. Typically, one or two banks serve as lead underwriters, taking the main responsibility for marketing the offering to prospective investors, negotiating the price, and effecting the transaction, and a number of other banks are included in the syndicate and receive a smaller allotment of shares to distribute.¹⁶² These banks are compensated

160. McClellan, *supra* note 156, at 174 ("Under non-disclosure, the non-expert suffers from the winner's curse when the expert is present, but does not decrease his bids to a non-competitive level, because he believes that, with positive probability, the expert is not present.").

161. James A. Brander & Edward J. Egan, *The Winner's Curse in Acquisitions of Privately-Held Firms*, 65 Q. REV. ECON. & FIN. 249 (2017); see generally Richard H. Thaler, *The Winner's Curse*, 2 J. ECON. PERSPS. 191 (1988) (collecting evidence from lab and field studies showing that bidders fail to behave rationally in the face of the winner's curse).

162. E.g., CHOI & PRITCHARD, *supra* note 11, at 501–02; COFFEE, SALE & WHITEHEAD, *supra* note 11, at 78–81, 102; HAZEN, *supra* note 11, at 108–09.

for their efforts in two main ways. First, they are given a discount—typically 7 percent for mid-market IPOs and less for larger offerings¹⁶³—on the price of the securities that they are charged with selling. Second, they are often given a “green shoe” option—the right to buy additional shares at a discounted price.¹⁶⁴

An acquisition typically includes a single investment bank who serves as an advisor.¹⁶⁵ The bank is charged with marketing the firm to prospective acquirers and plays a key role in shaping and effectuating the transaction.¹⁶⁶ The bank is typically compensated in the form of a percentage of the total purchase price (0.5–1.0 percent) contingent on the deal closing.¹⁶⁷

In both cases, the banks are deeply involved in soliciting potential bidders, presenting information to them about the firm, fielding their questions, and negotiating potential pricing.¹⁶⁸

Dual-tracking firms often use the same investment bank as acquisition advisor and lead underwriter.¹⁶⁹ Some practitioners encourage this as a way to streamline the process.¹⁷⁰

163. E.g., Walid Y. Busaba & Felipe Restrepo, *The “7% Solution” and IPO (Under)pricing*, 144 J. FIN. ECON. 953, 954 (2022) (“[T]he spread is set at exactly 7% for the overwhelming majority of offerings between \$20 million and \$100 million but is inversely related to offer size on both sides of this range.”); JAY R. RITTER, INITIAL PUBLIC OFFERINGS: UPDATED STATISTICS 10 (2026); COFFEE, SALE & WHITEHEAD, *supra* note 11, at 71, 82; Robert J. Jackson Jr., Comm’r, U.S. SEC, The Middle-Market IPO Tax (Apr. 25, 2018), <https://www.sec.gov/newsroom/speeches-statements/jackson-middle-market-ipo-tax> [<https://perma.cc/7ULY-3PK5>] (criticizing the 7 percent spread as a “tax” on middle-market IPOs that has contributed to their decline).

164. E.g., Patrick M. Corrigan, *Footloose with Green Shoes: Can Underwriters Profit from IPO Underpricing?*, 38 YALE J. ON REGUL. 908 (2021); COX ET AL., *supra* note 11, at 121.

165. *IPO Insights: Dual Track Process*, *supra* note 13 (“There is generally only one M&A adviser . . .”); GELFOND ET AL., *supra* note 13 (“[A] trade sale usually involves a single bank . . .”); Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1098 n.116 (2016) (noting that it is the “usual course of events” for there to be a single M&A advisor).

166. Tuch, *supra* note 165, at 1085–97 (“Their fees are typically calculated as a percentage of the deal consideration, often between 0.5% and 1.0% . . .”); see generally Andrey Golubov, Dimitris Petmezas & Nikolaos G. Travlos, *When It Pays to Pay Your Investment Banker: New Evidence on the Role of Financial Advisors in M&As*, 67 J. FIN. 271 (2012) (reporting average fees between 0.5–1.0 percent).

167. Tuch, *supra* note 165, at 1097; William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 14 n.57 (2014) (“The fee is typically 1% . . .”).

168. Tuch, *supra* note 165, at 1085–97 (describing roles of M&A advisors); CHOI & PRITCHARD, *supra* note 11, at 492–495 (describing role of underwriter).

169. ROSENBAUM & PEARL, *supra* note 86, at 424 (“[L]ead banks . . . are typically the same for both the sale and IPO processes.”); *IPO Insights: Dual Track Process*, *supra* note 13 (“[M]ost companies choose a lead underwriter who can also serve as the M&A adviser.”).

170. GUNDERSON DETTMER, *supra* note 13 (encouraging dual-track firms to “to consider using the same investment banker and legal counsel for both the M&A and IPO processes”); Cooper, Segal & Demina, *supra* note 13 (“[M]ost sophisticated advisers can field teams that can advise on both processes, often with some cost savings . . .”); Werling, Kornfeld & Bass, *supra* note 13 (same).

But banks serving in this dual-advisory position may have several private incentives to steer clients towards the acquisition exit.¹⁷¹

The expected fee that an investment bank will receive from a completed acquisition is likely to be higher than what it expects to make from an IPO. Although the acquisition fee is a smaller percentage than the IPO discount, the fee is applied to a much larger amount: 100 percent of firm value as compared to 10–20 percent of firm equity that is typically offered in an IPO. And the lead underwriter's expected compensation is further reduced by the fact that it only gets *part* of the allocation, with the bulk going to the many other firms who participate in selling the offering as members of the underwriting syndicate.¹⁷²

Second, the costs, risks, and compliance obligations on the bank of completing the final steps of an IPO selling process may be greater than those involved in completing the final steps of the acquisition process, although this is debatable. First, there is significant execution risk in an IPO. In a firm commitment offering, underwriters actually take ownership of the securities and then turn around and sell them to investors.¹⁷³ This means that underwriters' compensation in an IPO depends on actually selling the securities to investors and doing so at a price above what the underwriter paid the issuer for those securities. If the price drops before the underwriter has sold its full allocation, an underwriter may have trouble selling part of its allotment or may be forced to sell at a loss, reducing its compensation.¹⁷⁴

171. For general discussions of investment bank conflicts of interest, see Bratton & Wachter, *supra* note 167, at 20–25; Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 HARV. L. REV. 1215, 1253–57 (2020); Andrew Tuch, *Investment Banking: Immediate Challenges and Future Directions*, COM. L.Q., Dec. 2006–Feb. 2007, at 37; Tuch, *supra* note 165, at 1089–93; HILL, QUINN & SOLOMON, *supra* note 12, at 292–304.

172. COFFEE, SALE & WHITEHEAD, *supra* note 11, at 81 (“Anywhere from ten to a hundred firms could be members of the underwriting group in any given issue.”). One securities regulation casebook provides this stylized example to illustrate the breakdown:

[L]et us assume that the issue is to be sold to the public for \$10, with \$9 going to the issuer. The gross spread is \$1. On that basis, the compensation might be sliced up as follows: First, the lead underwriter will receive a management fee of 20 cents per share to compensate it for managing the offering and “running the books.” The next slice will be a fee of about 30 cents per share, referred to as the “gross underwriting fee.” This fee compensates the underwriting group for their expenses, . . . as well as for the use of capital and assuming the risk of underwriting. The remaining 50 cents goes to the underwriter or selling group member that actually sells the stock for its marketing work.

Id. at 82.

173. *Id.* at 77–82.

174. *E.g.*, COX ET AL., *supra* note 11, at 111 (“The risks of a firm commitment underwriting include being left with a sticky issue—an offering for which investor interest is so weak that the underwriters require a much longer time to sell the entire issue than expected or, worse, they cannot sell the entire amount.”). For instance, in one example where Morgan Stanley was serving in a dual role as both lead underwriter for a prospective IPO and financial advisor for a prospective acquisition, it steered

Then there is regulatory and liability risk for the bank. An entire regulatory system has been developed to constrain post-IPO trading activities, including activities of underwriters.¹⁷⁵ Similarly, an entire regulatory architecture exists to constrain what underwriters can do regarding analyst reports on the securities they are marketing.¹⁷⁶ And the Securities Act imposes stringent liability on underwriters involved in IPOs that involve material misstatements or omissions.¹⁷⁷

By comparison, the completion of an acquisition process is likely to be a relatively straightforward administrative matter for the bank. There is more limited exposure to the sort of market risk of a stock price drop or market reaction tanking the compensation for the bank; the deal closes and the money is transferred.¹⁷⁸ While acquisitions do often lead to shareholder litigation, M&A advisors involved face minimal liability exposure from these cases.¹⁷⁹

its startup client to choose the latter in part because of the “execution risk related to an IPO.” Illumina, Inc. & GRAIL, Inc., Consent Solicitation Statement of GRAIL, Inc. and Prospectus of Illumina, Inc. (Form 424(b)(3)), at 159 (Feb. 9, 2021), <https://www.sec.gov/Archives/edgar/data/1110803/000119312521034540/d801214d424b3.htm> [<https://perma.cc/8G3X-AG24>].

175. CHOI & PRITCHARD, *supra* note 11, at 559–64.

176. COFFEE, SALE & WHITEHEAD, *supra* note 11, at 91–96. Recently, the SEC has been unwinding some of these rules. Termination of Undertakings in Global Research Analyst Settlement, Litigation Release No. 26434 (Dec. 5, 2025), <https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26434> [<https://perma.cc/2VDU-YJU3>]; see also Mark T. Uyeda, Comm’r, U.S. SEC, Statement on the Global Research Analyst Settlement (Dec. 5, 2025), <https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-global-research-analyst-settlement-120525> [<https://perma.cc/B9T8-UWYA>].

177. COFFEE, SALE & WHITEHEAD, *supra* note 11, at 72 (noting that “underwriters face liability for even negligent errors”); Andrew F. Tuch & Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 IOWA L. REV. 303, 313–16 (2022). But see Strauss, *supra* note 128.

178. For instance, the board of directors of one dual-tracking firm explained that it ultimately chose to go with the acquisition rather than the IPO in part to avoid “potential execution risks associated with an initial public offering.” Zimmer Holdings, Inc., Registration Statement (Form S-4), at 63 (Aug. 26, 2014), <https://www.sec.gov/Archives/edgar/data/1136869/000119312514321969/d766338ds4.htm> [<https://perma.cc/3RJ4-57TX>].

179. See generally Andrew F. Tuch, *M&A Advisor Misconduct: A Wrong Without a Remedy?*, 45 DEL. J. CORP. L. 177 (2021).

TABLE 2: ASYMMETRIC INCENTIVES FOR DUAL-ROLE INVESTMENT BANKS

	IPO	Acquisition
Fee Percentage	5–7%	1%
Fee Basis	10–20% of firm value (the <i>float</i>)	100% of firm value
Fee Exclusivity	Diluted by syndicate	Concentrated
Execution Risk	High	Low
Liability/Regulatory Risk	High	Low

To be sure, there are some countervailing forces here. For instance, an underwriter may prefer an IPO because of the prospect of future business from the client.¹⁸⁰ And the startup's counsel may favor an IPO for similar reasons. Some acquisitions, during some periods, may present greater deal-completion risk than IPOs because of the prospect of intervention by regulators such as antitrust authorities.¹⁸¹ Further, recent research has challenged the assumption that underwriters face a realistic threat of securities litigation.¹⁸²

And yet the prospect of investment banks putting a thumb on the scale in a dual-track process in favor of acquisitions is realistic enough that many leading law firms have warned about it in client alerts and other statements. Debevoise and Plimpton warns that "M&A financial advisors and securities underwriters in a dual-track process will have differing financial incentives, and these may cause each of them to seek to push the process in one direction or another."¹⁸³ WilmerHale similarly has warned that "the economic outcomes may be different for financial advisors on a sale transaction than for underwriters in an IPO—especially if there are fewer M&A advisors than IPO underwriters to share the fees—which may give the selected party or parties an incentive to steer the process one way or the

180. COX ET AL., *supra* note 11, at 116 ("[U]nderwriting has the added benefit of establishing a relationship between the issuer and investment banker that leads to additional consulting and financial services by the investment banker."). On the other hand, an acquisition can also lead to future work, and a sell-side advisor may "act with a view to obtaining or maintaining a lucrative advisory relationship with the managers of the merger's surviving company." Bratton & Wachter, *supra* note 167, at 21.

181. See generally Broughman, Wansley & Weinstein, *supra* note 97; e.g., Cooper, Segal & Demina, *supra* note 13 ("An M&A process can be much shorter [than an IPO], but can be equally sensitive to external processes, such as competition or regulatory clearances.").

182. Strauss, *supra* note 128.

183. Bird, Levitsky & Meng, *supra* note 13, at 21.

other.”¹⁸⁴ McDermott Will & Schulte advises that dual-tracking firms can make the IPO a “more credible ‘stalking horse’” by retaining separate financial advisors for the two tracks, implying that using the same bank for both signals a lack of seriousness about the IPO option.¹⁸⁵ And Fried Frank suggests that, due to the “different economic incentives” for banks on the two tracks, it is “helpful” to have “at least one lead bank which is not involved in the trade sale process on the IPO team,” to ensure that the firm receives truly “independent” advice.”¹⁸⁶

Indeed, a boutique investment bank had some success winning M&A advisor business from larger banks by persuading dual-tracking firms that banks serving in dual roles “won’t focus on the stock offering properly if they are distracted by the possibility of more-lucrative M&A.”¹⁸⁷

Notably, the potential conflict-of-interest issue for banks serving in dual-advisory roles is not constrained by law. An investment bank that puts its own interest in maximizing fees ahead of the interests of the client is unlikely to face private liability for breach of the fiduciary duty of loyalty from the company or its shareholders. Even assuming banks owed fiduciary duties, the company’s decision to knowingly agree to a fee arrangement with the bank that gave it these asymmetric incentives would be a difficult fact to overcome in any litigation, and there are additional procedural hurdles for any shareholder litigation in this context.¹⁸⁸ Enforcement against M&A advisors by the SEC and FINRA is also extremely rare, even for more egregious conduct.¹⁸⁹

In sum, another contributing factor behind dual-tracking firms’ tendency to skew towards acquisitions is the misaligned incentives of investment banks who serve in dual roles for these firms.

III. LESSONS FOR SECURITIES REGULATION

A. How *Not* to “Make IPOs Great Again”

For decades, there has been persistent bipartisan political interest in revitalizing IPOs. Back in 2012, President Obama praised the JOBS Act as a “big deal” because it would “make it easier” for businesses to go public.¹⁹⁰

184. WILMER CUTLER PICKERING HALE AND DORR LLP, *supra* note 13, at 4–5.

185. Werling, Kornfeld & Bass, *supra* note 13.

186. GELFOND ET AL., *supra* note 13.

187. Sarah McBride & Liana Baker, *Wall Street Giants Battle a Secret Deal Whisperer on Tech IPOs*, BLOOMBERG L. (June 10, 2019, at 08:49 CT), <https://www.bloomberg.com/news/articles/2019-06-10/wall-street-giants-battle-a-secret-deal-whisperer-on-tech-ipos> [<https://perma.cc/87SD-4DMU>].

188. Tuch, *supra* note 179.

189. *Id.*

190. Obama, *supra* note 27.

More recently, SEC Chair Paul Atkins announced his own agenda to “make IPOs great again.”¹⁹¹

Expanding the JOBS Act–style IPO process reforms (test-the-waters and confidential filing) has been persistently popular among those advocating for IPO revitalization. Those reforms had strong support when enacted in 2012 and have proven extremely popular among eligible firms.¹⁹² In the years since enactment, Congress, the SEC, and advocacy groups have doubled down on this strategy, pushing on a bipartisan basis for the expansion and codification of these reforms as a key part of the program to revitalize IPOs.¹⁹³ Most recently, as noted above, the U.S. House of Representatives passed legislation (the INVEST Act) codifying these regulatory expansions.¹⁹⁴

It’s time to rethink this approach. These reforms have not only failed to make IPOs more attractive; they seem to have done the opposite. While the JOBS Act’s IPO process reforms may empower exit-seeking startup firms by giving them additional information and bargaining leverage, these firms have predominantly used that additional information and leverage to turn away from IPOs and towards acquisitions.¹⁹⁵

If policymakers want to “make IPOs great again” by reforming the IPO process, they have to beat the competition—namely, an acquisition. **Merely making the IPO process more attractive won’t work; policymakers have to make the IPO process more attractive *relative to the acquisition process*.**

For one thing, this means that if and when the Senate Banking Committee turns to consider the INVEST Act that was just passed by the House, they should *not* blindly adopt the parts of that legislation that would codify SEC expansions of the test-the-waters and confidential filing reforms.

Instead, one promising avenue for reform for Congress or the SEC to consider would be to look at how to make the IPO process faster and more determinate. Because startup founders and VCs often face significant

191. See Paul S. Atkins, Chairman, U.S. SEC, Revitalizing America’s Markets at 250 (Dec. 2, 2025), <https://www.sec.gov/newsroom/speeches-statements/atkins-120225-revitalizing-americas-markets-250> [<https://perma.cc/V6W4-KBHV>]; Atkins, *supra* note 28; Paul S. Atkins, Chairman, U.S. SEC, Keynote Address at the John L. Weinberg Center for Corporate Governance’s 25th Anniversary Gala (Oct. 9, 2025), <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala> [<https://perma.cc/GQ9Y-45L2>].

192. *Supra* Section I.A.

193. *Supra* Section I.A.

194. *Supra* Section I.A.

195. *Supra* Section I.A.

liquidity pressure,¹⁹⁶ acquisitions may represent a comparably attractive exit strategy for startups simply because they are faster.¹⁹⁷ Empirical studies confirm that VC-backed startups facing liquidity pressure are more likely to sell out.¹⁹⁸

The SEC staff review and comment process adds an average of five months to the IPO timeline.¹⁹⁹ Although this process was an important form of investor protection back in the 1930s, today the delays and other costs injected by this process seem to far exceed any benefits to investors.²⁰⁰ Calls to rein in staff review have been proliferating among influential groups close to the SEC in recent months.²⁰¹

196. MORGAN STANLEY, LIQUIDITY TRENDS: PERSPECTIVES FROM PRIVATE COMPANY LEADERS 7 (2025), <https://advisor.morganstanley.com/the-mergner-group/documents/field/m/me/mergner-group/liquidity-trends-report-2025.pdf> [<https://perma.cc/G53K-XLGP>] (surveying 150 leaders at VC-backed private companies and finding that four out of five “are feeling pressure to facilitate a liquidity event”). One source of liquidity pressure is the fact that VC funds are typically formed for a limited period of around ten years, at the end of which they have obligations to return the money to limited partners who invest in the fund. COFFEE, SALE & WHITEHEAD, *supra* note 11, at 24. This can create a strong incentive for the VC fund manager to push for a liquidity event as the end of that timeline approaches. See Broughman, Wansley & Weinstein, *supra* note 97, at 1491. Another source of liquidity pressure comes from some founders themselves, who may be ready to exit with “beach money.” Wansley, *supra* note 96.

197. E.g., *Private Funds, Overview - IPO Exit (Pre-Transaction Considerations)*, BLOOMBERG L. (2026), <https://www.bloomberglaw.com/product/blpg/document/X3J1V380000000> [<https://perma.cc/ZJ3N-AHY7>] (“[T]he IPO process can take several months If the fund sponsor requires a quick exit from the company, an M&A transaction, which typically takes less time, may be a better option.”); Crystal Tse, *Hot IPO Market Is Tough Competition for Consumer-Hungry Buyers*, BLOOMBERG (June 30, 2021, at 10:50 PT), <https://www.bloomberg.com/news/articles/2021-06-30/hot-ipo-market-is-tough-competition-for-consumer-hungry-buyers> [<https://perma.cc/8VDN-6D9G>] (“Traditional M&A could still be in favor when sellers, particularly financial sponsors, seek cleaner, quicker exits versus the slower, dribbling sell-down of an IPO.”).

198. Ting Yao & Hugh O’Neill, *Venture Capital Exit Pressure and Venture Exit: A Board Perspective*, 43 STRATEGIC MGMT. J. 2829 (2022); Bo Bian, Yingxiang Li & Casimiro A. Nigro, *Conflicting Fiduciary Duties and Fire Sales of VC-Backed Startups* (Ctr. for Advanced Stud. on the Found. of L. & Fin., Law Fin Working Paper No. 35, 2022); Ronald W. Masulis & Rajarishi Nahata, *Venture Capital Conflicts of Interest: Evidence from Acquisitions of Venture-Backed Firms*, 46 J. FIN. & QUANTITATIVE ANALYSIS 395 (2011); see also Anup Basnet & Thomas Walker, *Acquisitions of VC-Backed Firms*, in PALGRAVE ENCYCLOPEDIA OF PRIVATE EQUITY 4 (2025); Brian Broughman & Jesse M. Fried, *Carrots and Sticks: How VCs Induce Entrepreneurial Teams to Sell Startups*, 98 CORN. L. REV. 1319 (2013).

199. Platt, *supra* note 43.

200. *Id.*; see also Platt, *supra* note 46.

201. U.S. CHAMBER OF COM., *supra* note 29 (warning that the uncertainty and delay added by SEC IPO review pushes firms away from IPOs and urging the SEC to “at minimum seek to shorten the amount of time the review process takes”); *Reexamining the IPO On-Ramp: IPO Policy Roundtable, Off. of the Advoc. for Small Bus. Cap. Formation*, U.S. SEC 14 (2025) [hereinafter *Reexamining the IPO On-Ramp*], <https://www.sec.gov/files/ipo-roundtable-transcript.pdf> [<https://perma.cc/CX2U-BA8J>] (recording expert practitioners invited to SEC roundtable complaining that SEC IPO review had become “unpredictable in terms of timing” and calling on the SEC to “streamline” this process); INV. CHOICE ADVOCS. NETWORK, SEC 2025 ACTION PLAN 3 (2025), <https://www.icanlaw.org/2025plan> [<https://perma.cc/9C7D-6A2H>] (noting that the staff “currently has unlimited discretion to delay the effectiveness of company filings,” which creates “uncertainty and potentially significant costs for

One option would be to do away with staff review altogether.²⁰² The core work of producing, inspecting, and evaluating the mandatory disclosures required by law would shift out of the government and back to market actors (issuers, underwriters, investors, analysts, lawyers)—who are likely better positioned to do this in any case. The government’s role would be limited to making disclosure rules and punishing violations, and the rest would be left to other actors in the IPO ecosystem.²⁰³ This would be a major policy change at the SEC, but one that seems in step with the agency’s recent elimination of its “no-action” review process for companies seeking to exclude shareholder proposals.²⁰⁴

A more moderate alternative would be for the SEC to adopt internal staff guidelines limiting the duration or scope of the comment letter process.²⁰⁵ The SEC has already implemented mandatory timelines for administrative enforcement proceedings and could do something similar in this domain.²⁰⁶

A more targeted way to streamline the review process while preserving investor protection would be for the SEC staff to implement a “tiered” review system for IPO filings. Under the current system, all IPO filings receive a full staff review regardless of the quality of the initial filing. By contrast, under a hypothetical “tiered” system, the staff could make an initial determination regarding whether a given filing warrants a full review, a limited review, or no review. This would allow high-quality initial filers to avoid the costs and delays associated with lengthy staff review, while preserving staff review for lower-quality filings.²⁰⁷

companies seeking to access public markets,” and proposing to “[m]andate timelines for the review and comment process” and implement “automatic effectiveness at timeline expiration for filings requiring staff approval”); see also Tom Zanki, *Time to Abolish IPO ‘Bureaucracy,’ Law Professor Says*, LAW360 (Feb. 28, 2025, at 14:07 ET), <https://www.law360.com/articles/2303539/time-to-abolish-ipo-bureaucracy-law-professor-says> [<https://perma.cc/4J22-WHFN>].

202. Platt, *supra* note 43.

203. See *id.* at 384–85 (sketching out this reform).

204. Div. of Corp. Fin., U.S. SEC, Statement Regarding the Division of Corporation Finance’s Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season (Nov. 17, 2025), <https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finance-role-exchange-act-rule-14a-8-process-current-proxy-season> [<https://perma.cc/YY2P-36JV>].

205. U.S. CHAMBER OF COM., *supra* note 29 (calling on SEC to “adopt internal policies” that “at a minimum seek to shorten the amount of time the review process takes”); INV. CHOICE ADVOCS. NETWORK, *supra* note 201, at 3 (calling on the SEC to “[m]andate timelines for the review and comment process” and implement “automatic effectiveness at timeline expiration for filings requiring staff approval”).

206. SEC Rules of Practice, 68 Fed. Reg. 35787 (June 17, 2003) (adopting mandatory timelines); see also 17 C.F.R. § 201.360(a) (2025) (current timelines); Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 4–5, 35, 39–40 (2015) (discussing evolution of mandatory timelines for administrative proceedings).

207. See U.S. SEC, *Small Business Capital Formation Advisory Committee Meeting: Deep Dive on Encouraging More IPOs*, at 1:26:44–1:28:58 (YouTube, Apr. 28, 2026) <https://www.youtube.com/watch?v=7mhmKBH1ojc> (statement of Edwin O’Connor, Partner, Goodwin Procter LLP).

Yet another approach would be to shift the control over timing of staff review from the government to the issuer.²⁰⁸ Currently, Rule 430A puts IPO issuers at the mercy of the SEC staff; even if the issuer, its advisors, investors, and everyone else believe that the third or fourth round of questions and suggested amendments are immaterial and that the delays are injecting more harm than they are worth, they are not free to move forward unless the staff is satisfied. Under the Securities Act, issuers must wait twenty days from filing a registration statement before they can move forward with the offering.²⁰⁹ Because issuers do not want to commit to a price twenty days in advance of an offering, the SEC adopted Rule 430A, which allows issuers to omit pricing information from the registration statement, but made this available only for offerings that go through the entire staff comment process.²¹⁰

The SEC could amend Rule 430A to allow all IPO issuers to withhold price information from the registration statement, regardless of whether they complete the SEC staff review process. All IPO firms would then have the flexibility to defer pricing their offering until immediately prior to sale regardless of whether they go effective via the staff review and acceleration or via the twenty-day rule that Congress originally intended for them to use. This would allow IPO firms (in consultation with their advisors, investors, and exchanges) to balance the benefit of further staff review against the costs of further delay. The SEC temporarily implemented a version of this policy during the recent government shutdown with positive results.²¹¹

Concededly, these modest reforms won't counteract all the structural forces (within securities law and otherwise) pushing startups from IPO to acquisition. But for dual-tracking firms deciding between an IPO and an acquisition, additional control over IPO timing can make a meaningful difference by enabling the firm to opportunistically target an optimal market window. In any case, these reforms are presented here to illustrate the type of IPO process reform that policymakers should be considering. Reforms need to take into account the position of the startup considering an exit and consider how to make the IPO process more attractive relative to the

208. See Platt & Wansley, *supra* note 26.

209. Securities Act § 8(a), 15 U.S.C. § 77h(a).

210. 17 C.F.R. § 230.430A (2025); COFFEE, SALE & WHITEHEAD, *supra* note 11, at 138–39.

211. See *New SEC Guidance Facilitates IPOs During the Shutdown*, DAVIS POLK (Oct. 9, 2025), <https://www.davispolk.com/insights/client-update/new-sec-guidance-facilitates-ipos-during-shutdown> [https://perma.cc/VTD3-FTUN]; David A. Bell, Ran Ben-Tzur, Amanda L. Rose, Julia Forbess & Ryan Mitteness, *SEC Allows Registration Statements to Take Effect During Government Shutdown*, FENWICK & WEST LLP (Oct. 10, 2025), <https://www.fenwick.com/insights/publications/sec-allows-registration-statements-to-take-effect-during-government-shutdown> [https://perma.cc/2667-42PG]; Platt & Wansley, *supra* note 26.

competition. Making the IPO process speedier and determinate is a promising avenue to make IPOs relatively more attractive than acquisitions, but there may be other promising avenues for reform.²¹²

Momentum appears to be building behind this avenue of reform. Leading practitioners²¹³ and market players²¹⁴ have been urging the SEC to streamline the IPO comment process in recent months. Responding to these calls, in May 2026, SEC Chair Paul Atkins invited public comments on “improving the SEC’s communication” during the IPO process.²¹⁵

B. Redressing the Information Asymmetry?

A different possible avenue for reform here would be to reduce or eliminate the informational asymmetry that currently benefits acquirers over IPO investors for dual-tracking firms. This is superficially appealing. Correcting these kinds of asymmetries is what securities regulation is equipped to do.²¹⁶ However, there are serious obstacles here.

One strategy would be to increase access to information for prospective IPO investors by eliminating the legal risk that currently prevents firms from communicating openly with these investors about the ongoing M&A process. SEC could create a regulatory safe harbor for test-the-waters communications concerning prospective acquisitions. Firms would then be allowed to share detailed information with prospective IPO investors about acquisition negotiations without ever sharing that information in the S-1. The goal would be to inspire more confidence and excitement among IPO

212. Discussion here is limited to IPO *process* reforms, but other reforms may also be helpful. And while empirical evidence shows that securities regulation *has* played an important role in contributing to the decline of IPOs over the last several decades and therefore, presumably could be reformed to contribute to a revival, there is a limit; there is undoubtedly a significant piece of the decline of IPOs that is beyond the scope of any securities regulation intervention. See Platt & Wansley, *supra* note 26.

213. U.S. SEC, *supra* note 207, at 1:20:00–1:29:58 (statement of Edwin O’Connor, Partner, Goodwin Procter LLP) (urging the SEC to overhaul the comment letter process in order to provide “more certainty on timelines” and give issuers “more opportunities to hit accessible market windows”); *Reexamining the IPO On-Ramp*, *supra* note 201, at 14 (statement of Melanie Neary, Partner, Gibson Dunn) (complaining that “the review process . . . can be in terms of timing” and urging the SEC to impose “more guaranteed timelines” to “let companies plan out really like if we want to be hitting the market in mid-June let’s back up and how do we get there and just knowing for certain.”); *id.* (statement of Brad Goldberg, Partner, Cooley LLP) (stating that “streamlining the review process” is something “worth addressing or at least looking at”).

214. For instance, NASDAQ partnered with the Chamber of Commerce in a 2025 report calling for the SEC to shorten the comment process. U.S. CHAMBER OF COM., *supra* note 29.

215. Paul S. Atkins, Chair, U.S. SEC, Remarks at the Stanford Rock Center for Corporate Governance (May 26, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-052626-remarks-stanford-rock-center-corporate-governance> [<https://perma.cc/ZKE2-XEPQ>].

216. *E.g.*, CHOI & PRITCHARD, *supra* note 11, at 22 (“The primary goal of securities regulation is to reduce outside investors’ informational disadvantage.”).

investors, raise IPO prices, and thereby make IPOs more attractive for issuers as well.

The advantage of this approach is that it preserves and actually *expands* the value of dual-tracking. Firms can continue to explore all possibilities and make an informed choice about the best option. Even more so because there will be a more informed and perhaps expanded body of bidders participating in the auction. Perhaps the result would be better overall pricing and outcomes.

A key disadvantage of this approach is that it merely shifts the informational asymmetry one step down the line. Instead of an asymmetry between prospective acquirers and prospective IPO investors, now we'd have an asymmetry between groups of IPO investors. And this asymmetry is even more fundamentally incompatible with basic tenets of the securities regulation system. An IPO that moves forward under these conditions would mean that some investors know detailed information about the firm's (now abandoned) acquisition negotiations, while others are left entirely in the dark.

Moreover, it may be that prospective acquirers would not agree to do this. Negotiations with prospective acquirers are subject to NDAs, so the acquirer would have to agree to a carve-out for sharing the information with prospective IPO investors. But an acquirer might not agree to do this.

Alternatively, the SEC could create informational symmetry by leveling *down* prospective acquirers' current informational advantage. SEC could, for instance, eliminate the exemptions that currently allow issuers to freely share information with prospective acquirers about the IPO process.

This approach solves the informational asymmetry and avoids the investor protection risks described above. But the approach would essentially eliminate dual-tracking and eliminate the benefits it has for capital formation.

CONCLUSION

Dual-tracking has become a popular exit strategy for startups in the post-JOBS Act era. But structural biases built into the dual-tracking process ultimately push these firms away from IPOs and towards acquisitions. The additional information and bargaining leverage that startups gain through the JOBS Act's IPO process reforms have been overwhelmingly used to enhance acquisitions rather than IPOs. Institutional mechanisms built into securities regulation and transactional practice help explain these results: Acquirers enjoy informational advantages over IPO investors, and

investment banks have incentives to tilt the playing field toward acquisitions.

Revitalizing the IPO market requires a new strategy. Policymakers must account for the competitive dynamics between IPOs and acquisitions. Reforms that make IPOs “easier” will not revitalize IPOs. Reforms must make IPOs more attractive *relative to acquisitions*, or they will continue to fail. Without this recalibration, efforts to “make IPOs great again” will remain aspirational.