
**Does the SEC Rule the Job Creation Roost?
Squaring SEC Rulemaking with the JOBS Act’s Relaxation of
the Prohibition Against General Solicitation and Advertising**

“[I]f an entrepreneur can’t get a loan from a bank or backing from investors, it’s almost impossible to get their businesses off the ground. . . . I called on Congress to remove a number of barriers that were preventing aspiring entrepreneurs from getting funding.

. . . .

. . . [F]or start-ups and small businesses, this bill is a potential game changer. . . . [S]tart-ups and small business will now have access to a big, new pool of potential investors [O]rdinary Americans will be able to go online and invest in entrepreneurs that they believe in.

Of course, to make sure Americans don’t get taken advantage of, the websites where folks will go to fund all these start-ups and small businesses will be subject to rigorous oversight. The SEC is going to play an important role in implementing this bill.”¹

I. INTRODUCTION

As of April 2012, 12.5 million Americans were unemployed and the domestic economy remained stagnant.² While the U.S. economy struggles to pull itself out of a recession, perhaps taking a lesson from history, Congress has focused on small-business job creation as a means of stimulating the economy.³

1. Press Release, The White House, Remarks by the President at JOBS Act Bill Signing (Apr. 5, 2012), <http://www.whitehouse.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing>.

2. See *The Employment Situation—April 2012*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/news.release/archives/empst_05042012.pdf (last visited Feb. 9, 2014) (compiling official unemployment statistics and illustrating low growth rate of U.S. economy). The 2008 recession is the logical scapegoat for the anemic state of the American economy in 2012. See 158 CONG. REC. H1234-36 (daily ed. Mar. 7, 2012) (statement of Rep. Spencer Bachus) (blaming slow economic growth on recession and lack of small-business hiring); Press Release, *supra* note 1 (“[W]e’re still recovering from one of the worst recessions in our history”). The National Bureau of Economic Research defines a recession as “a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in production, employment, real income, and other indicators.” *Determination of the December 2007 Peak in Economic Activity*, NAT’L BUREAU ECON. RES. 1 (Apr. 13, 2010), <http://www.nber.org/dec2008.pdf>.

3. See 158 CONG. REC. H1234-36 (daily ed. Mar. 7, 2012) (statement of Rep. Spencer Bachus)

The latest congressional scheme deregulates the capital markets to permit emerging growth companies (EGCs) greater access to investment funding, thereby fostering small-business growth, and ultimately creating more U.S. jobs in the process.⁴ Specifically, in 2012, Congress enacted the Jumpstart Our Business Startups Act (JOBS Act) to carry out its economic policy objectives.⁵

Opening the capital markets to EGCs, however, comes at a cost—namely the potential defrauding of investors.⁶ Prior to the JOBS Act, start-up businesses were prohibited from undertaking general solicitation and advertising—certain types of investment marketing techniques—to recruit investor funding.⁷ Nevertheless, a faction of legal scholars and small-business advocates has apparently succeeded in persuading Congress that the prohibition causes more economic harm than good.⁸ Additionally, in the legislation, Congress dictated that the Securities and Exchange Commission (SEC) will play a pivotal role in implementing the JOBS Act’s regulatory reforms.⁹

(asserting small-business job growth drives U.S. economy). In characterizing the 2012 economic climate in the United States, House Representative Spencer Bachus stated, “We’ve not recovered from this recession as quickly as we have from past recessions, and the reason is that we have not gotten the job growth that we had hoped The difference in this recovery [is] small companies not hiring.” *Id.* Likewise, after the onset of the Great Depression in the 1930s, President Franklin D. Roosevelt shepherded legislation through Congress that emphasized job creation as the catalyst for generating economic recovery. *See generally* CHARLES A. BEARD & GEORGE H. E. SMITH, *THE FUTURE COMES: A STUDY OF THE NEW DEAL* (1933) (recounting 1930s New Deal legislation).

4. *See* 158 CONG. REC. H1234-36 (daily ed. Mar. 7, 2012) (statement of Rep. Spencer Bachus) (favoring removal of bureaucratic barriers preventing entrepreneurial access to capital); *id.* at H1237 (statement of Rep. Jeb Hensarling) (urging abolition of costly burdens associated with using equity capital markets); *id.* at H1238 (statement of Rep. Benjamin Quayle) (stressing importance of replacing “outdated compliance requirements” to foster small-business growth).

5. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.) (“An Act to increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”). The JOBS Act defines an EGC as, “an issuer [of securities] that had total annual gross revenues of less than \$1,000,000,000 . . . during its most recently completed fiscal year.” Jumpstart Our Business Startups Act § 101(b)(2).

6. *See* C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1, 5–7 (2004) (examining costs of government regulation); Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. SMALL & EMERGING BUS. L. 57, 58–59 (1998) (asserting regulatory reform of capital markets results in increased risk to investors); Press Release, *supra* note 1 (acknowledging investors’ vulnerability following allowance of general solicitation and advertising).

7. *See infra* Part II.A.3 (explaining former Regulation D prohibition and detailing consequences of prohibition against general solicitation).

8. *See* Stuart R. Cohn, *Securities Markets for Small Issuers: The Barrier of Federal Solicitation and Advertising Prohibitions*, 38 U. FLA. L. REV. 1, 4 (1986) (criticizing SEC’s antisolicitation rules); Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 EMORY L.J. 67, 70 (1989) (disfavoring prohibition against general solicitation); William K. Sjostrom, Jr., *Relaxing the Ban: It’s Time To Allow General Solicitation and Advertising in Exempt Offerings*, 32 FLA. ST. U. L. REV. 1, 50 (2004) (viewing prohibition against general solicitation as antiquated and arguing for reform); *see also* 158 CONG. REC. H1234-36 (daily ed. Mar. 7, 2012) (statement of Rep. Spencer Bachus) (taking position favoring relaxation of prohibition against general solicitation).

9. *See* Jumpstart Our Business Startups Act § 201(a) (mandating SEC revise its rules and issue new ones); Press Release, *supra* note 1 (noting importance of SEC’s role in JOBS Act legislation).

The SEC is tasked, *inter alia*, with promulgating rules to protect investors, which includes remediating fraud in connection with the purchase and sale of securities.¹⁰ Complicating matters, the JOBS Act requires the SEC to relax the prohibition against general solicitation—a rule it promulgated to prevent the defrauding of investors—while simultaneously instituting new rules to achieve the same fraud deterrence under a relaxed regulatory system in which general solicitation is permitted.¹¹ The great discretion the SEC is afforded presents a potential impasse for an EGC challenging the SEC’s rulemaking authority under the JOBS Act if that authority was to arguably conflict with Congress’s intent in enacting it.¹² Because Congress’s scheme is designed around promoting capital formation through deregulation to incite small-business job creation, the SEC’s regulatory function, particularly in creating new rules, could influence the JOBS Act’s success in economic terms.¹³

This Note will proceed as follows: Part II.A traces the evolution of securities regulation law in the United States up to today’s capital raising procedures, focusing on the legal requirements start-up businesses, like EGCs, must adhere to when pursuing investment capital.¹⁴ Next, Part II.B studies the JOBS Act and its purported purpose insofar as affording EGCs with greater access to the capital markets.¹⁵ Part II.C examines the significant role the SEC will play in both providing these businesses with improved access to capital as the JOBS Act directs, and protecting those who invest in them from fraud.¹⁶ Finally, Part III questions the SEC’s discretion under its rulemaking function, and illuminates an inefficiency the JOBS Act creates as a form of government regulation: because the SEC is tasked with facilitating conflicting regulations regarding general solicitation, it may be immune from a putative challenge to part of its post-JOBS Act authority.¹⁷ The implications of the SEC’s broad discretion with respect to the rules it promulgates are significant in terms of the legacy of the JOBS Act—that is, its effectiveness in creating American jobs—and, inferentially, whether it can be considered an economically beneficial form of government regulation.¹⁸

10. See 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES LAW HANDBOOK* § 1:1, at 3 (2012 ed.) (describing SEC’s responsibilities as administration and enforcement of federal securities laws).

11. See Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (2012) (codified at 15 U.S.C. § 77d(b) (2012)) (ordering SEC to lift general-solicitation prohibition, but permitting it to determine verification criteria).

12. See *infra* text accompanying notes 142–44 (questioning whether SEC’s post-JOBS Act dichotomous functionality imparts immunity to it).

13. See *infra* text accompanying notes 146–48 (framing analysis of JOBS Act’s success through questioning its effectiveness in creating jobs).

14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See *infra* Part II.C.

17. See *infra* Part III.A.

18. See *infra* Part III.B.

II. HISTORY

A. *The Securities Regulation Landscape*

The field of securities regulation lies at the intersection of law and economics.¹⁹ While the notion of efficient, self-regulating capital markets is a central tenet of free-market economic theory, for pragmatic reasons, government regulatory intervention is often necessary to ensure proper market functionality.²⁰ Accordingly, Congress does not shy away from enacting legislation regulating the U.S. capital markets to carry out its economic policy objectives.²¹ Moreover, Congress often justifies favoring small businesses through such legislation based on the proposition that encouraging these ventures is beneficial to the domestic economy.²² In assessing the economic effectiveness of the legislation, the government would be viewed as properly intervening where there is agreement that the benefits from such intervention outweigh the costs.²³

19. See Harry M. Trebing, *Government Regulation and Modern Capitalism*, 3 J. ECON. ISSUES 87, 87 (1969) (observing government regulation commonplace in modern economies). Congress statutorily defined the term “security” as “any note, stock, . . . bond, . . . investment contract, . . . option, . . . or warrant or right to subscribe to or purchase, any of the foregoing.” 15 U.S.C. § 77b(a)(1) (2012); see THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 1.1[1], at 9 (6th ed. 2009) (“Securities are the instruments through which business enterprises . . . raise a substantial portion of the funds that are used to finance new capital.”). The term “regulation” connotes “control of an economic area through orders directed to named or specific enterprises by an administrative agency with limited delegated authority.” Lee Loevinger, *Regulation and Competition as Alternatives*, 11 ANTITRUST BULL. 101, 105 (1966).

20. See Jeffrey E. Sohl, *The U.S. Angel and Venture Capital Market: Recent Trends and Developments*, J. PRIVATE EQUITY, Spring 2003, at 7, 14 (explaining financial theory’s assumption of efficient capital markets); Trebing, *supra* note 19, at 88 (suggesting government regulation necessary where community and market interests conflict). Generally speaking, there are often legitimate benefits derived from government regulation. See Bradford, *supra* note 6, at 15–16 (providing examples where government regulation produces positive economic result).

21. See generally, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.) (improving accountability and transparency in financial system to promote market stability); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 and 18 U.S.C.) (attempting to reduce fallout in financial markets stemming from corporate accounting scandals); Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275 (1980) (codified as amended in scattered sections of 15 U.S.C.) (facilitating small-businesses capital formation); Investment Company Act of 1940, ch. 686, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 80a-1 to 80a-64 (2012)) (protecting public from fraud via disclosure requirements for investment companies).

22. See George L. Priest, *Small Business, Economic Growth, and the Huffman Conjecture*, 7 J. SMALL & EMERGING BUS. L. 1, 2 (2003) (identifying three popular arguments claiming small businesses generate economic growth); see also C. Steven Bradford, *Securities Regulation and Small Business: Rule 504 and the Case for an Unconditional Exemption*, 5 J. SMALL & EMERGING BUS. L. 1, 2 (2001) (citing statistics regarding importance of small businesses to U.S. economy). But see Bradford, *supra* note 6, at 15-17 (arguing regulation justified only when benefits it yields outweigh costs it exacts).

23. See Trebing, *supra* note 19, at 89–90 (implying government regulation promoting general welfare considered efficient).

1. *The '33 Act and the Rise of the SEC*

The Great Depression during the 1930s was primarily responsible for initiating modern federal regulation of the U.S. securities markets.²⁴ In fact, the transformation of the U.S. business climate from laissez faire economics to pervasive regulation can be attributed to the New Deal legislation of the 1930s.²⁵ Leading up to the stock market crash of October 1929 and the ensuing Great Depression, American capital markets went largely unregulated.²⁶ Following the crash, Congress made stimulating the sluggish economy its top priority, and passed the Securities Act of 1933 ('33 Act)²⁷ and the Securities Exchange Act of 1934 (Exchange Act).²⁸ Congress, however, needed to delegate the task of administering and enforcing the securities laws that it had implemented, due in large part to both the complexity of the securities markets and their fundamental importance to the economy.²⁹ Consequently, Congress created the SEC.³⁰

The SEC's mission is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."³¹ During the Great Depression, Congress was principally concerned with restoring public confidence in the capital markets, and instituted the SEC as the mechanism for doing so.³² Today, SEC enforcement of the securities laws—especially those

24. See HAZEN, *supra* note 19, § 1.2[3], at 19 (noting Congress's entry into securities-regulation arena arose out of New Deal legislation); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959) (attributing promulgation of federal securities laws to 1929 market crash); *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 9, 2014) [hereinafter *The Investor's Advocate*] (pointing to 1929 stock market crash as impetus for congressional initiatives in securities regulation).

25. See James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 308 (2000) (highlighting significance of Great Depression with respect to economic policies underlying modern securities regulation).

26. See *The Investor's Advocate*, *supra* note 24 (indicating conventional wisdom prior to Great Depression favored unregulated securities markets). Primarily, the Great Depression had the effect of "reveal[ing] the shaky foundations upon which many of the best regarded securities had rested." George J. Feldman, *The New Federal Securities Act*, 14 B.U. L. REV. 1, 2–3 (1934).

27. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2012)). The '33 Act, seeks to both protect would-be purchasers of securities by providing them "full and fair disclosure of the character of securities sold in interstate and foreign commerce," and to prevent the fraudulent sale of securities. *Id.*

28. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78pp (2012)). The Exchange Act "regulates fraud and manipulation in connection with the purchase or sale of securities, and generally regulates trading markets in securities." BLOOMENTHAL & WOLFF, *supra* note 10, § 1:10, at 10; see *The Investor's Advocate*, *supra* note 24 (identifying Congress's Depression-era economic prerogatives).

29. See Legislation, *Delegation of Power Under the Securities Exchange Act of 1934*, 36 COLUM. L. REV. 974, 975 (1936) (stressing importance of SEC due to impracticality of direct legislative regulation).

30. See 15 U.S.C. § 78d(a) (establishing SEC).

31. *The Investor's Advocate*, *supra* note 24.

32. See *id.* (discussing connection between Great Depression and establishment of SEC).

found within the '33 Act—and its associated rulemaking authority continues to influence the U.S. economy, particularly in the area of capital formation.³³

The '33 Act marked the first federal legislative attempt aimed at remediating abuses in the sale of securities.³⁴ Fundamental to the Act's regulatory framework is the notion that full disclosure of all material characteristics of securities being marketed provides sufficient investor protection because it enables investors to evaluate the merits of potential investments.³⁵ Under the '33 Act, any offer to buy or sell a security through interstate commerce is prohibited unless specified registration and prospectus delivery requirements are met.³⁶ Before considering the Act's strictures, it is important to distinguish the '33 Act's registration requirements for transacting in securities (i.e., purchasing and selling securities) from state "Blue Sky" laws, which, among other things, govern the registration requirements for the securities themselves.³⁷

An issuer's potential liability for violating the '33 Act is mainly limited in

33. *See id.* (describing mission of SEC to include facilitating capital formation).

[T]he common interest of all Americans in a growing economy that produces jobs, improves our standard of living, and protects the value of our savings means that all of the SEC's actions must be taken with an eye toward promoting the capital formation that is necessary to sustain economic growth.

....

The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it.

Id.

34. *See* J. WILLIAM HICKS, 7 EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1933 § 1:1 (2013) (tracing promulgation of federal securities law in connection with fraud remediation).

35. *See* HAZEN, *supra* note 19, § 1.2[3][A], at 20 (explaining '33 Act's core policy of investor protection). Material characteristics pertaining to an offering of securities may include, for example, a summary of the factors that significantly contribute to the offering's risk. *See* 17 C.F.R. § 229.503 (2013) (listing information offeror of securities must provide in registration statement).

36. *See* 15 U.S.C. § 77e(a)-(b) (2012) (setting forth general conditions for transacting in securities); Carl L. Bumiller, *Exemptions of Securities and Transactions Under the Federal Securities Act of 1933*, 10 U. CIN. L. REV. 125, 126 (1936) (characterizing '33 Act's registration statement filing requirements with SEC as "heart" of federal securities laws). *See generally* HAZEN, *supra* note 19, §§ 2.0-.5[8], at 66-106 (providing detailed explanation of '33 Act's registration procedures). A prospectus is a formal document that provides details about an offering of securities to the public (e.g., the price of the securities to be offered and any commissions payable to underwriters in connection with the offering). *See* 15 U.S.C. § 77b(a)(10) (2012) (defining "prospectus"); *id.* § 77j(a) (equating information required in prospectus to information required in registration statement); *id.* § 77aa (detailing information required in registration statement).

37. *See* Landis, *supra* note 24, at 32 (recognizing significance of distinguishing registration of offerings from registering securities in conceptualizing '33 Act's scope). Blue Sky laws are state-specific rules that include the requisite conditions a security must adhere to before it can be issued or sold. *See* John C. Doerfer, *The Federal Securities Act of 1933*, 18 MARQ. L. REV. 147, 148-49 (1934) (reviewing types of state Blue Sky laws).

two ways.³⁸ First, the provisions of the '33 Act are not applicable unless there is a link between an aspect of the transaction and the use of channels of interstate commerce, such as where an issuer attempts to sell securities by mass mailing marketing literature to prospective purchasers across the United States.³⁹ The second limitation follows from the '33 Act's bifurcated regulatory scheme for the offering and sale of securities, that is, the offer and sale must either be registered with the SEC or subject to a registration exemption.⁴⁰ If the offeror is able to prove that one of the exemptions covers the offering in question, then the '33 Act's registration and prospectus delivery requirements do not apply to the transaction.⁴¹ Therefore, under the '33 Act, an offering of securities can only belong to one of three categories: registered, exempt, or illegal.⁴²

2. Private Placements and Exempt Offerings in the EGC Capital-Raising Process

Sections 3 and 4 of the '33 Act authorize two principal statutory-based exemptions from registration for offerings of securities.⁴³ Section 3 permits the SEC to exempt issuances of securities with a total value less than five million dollars.⁴⁴ Under section 4's safe harbor provision, an issuer's transaction that does not involve a public offering may also be exempted.⁴⁵

38. See HICKS, *supra* note 34 (providing overview of '33 Act's construction).

39. See SEC v. Freeman, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,361, ¶ 93,242 (N.D. Ill. Mar. 3, 1978) (discussing interstate commerce requirement and prohibitions of '33 Act).

40. Compare 15 U.S.C. § 77c (classifying exempted securities), and 15 U.S.C. § 77d (exempting specific securities transactions), with § 77e (prohibiting use of channels of interstate commerce for transactions involving nonexempt securities). Under the '33 Act, an "offer" includes, "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." § 77b(a)(3).

41. See HICKS, *supra* note 34, § 1:8 (explaining operation of '33 Act registration exemptions).

42. See HAZEN, *supra* note 19, § 4.1[1], at 155 (setting forth different characterizations of offerings under '33 Act).

43. See 15 U.S.C. § 77c (listing categories of securities exempt from registration); § 77d (describing transactions meriting registration exemption). Fundamentally, "exempt transactions affect persons who are in no way connected with the distribution of securities." Bumiller, *supra* note 36, at 155-56. Furthermore, the burden of proof is placed on the party seeking to benefit from the exemption. See SEC v. Sunbeam Gold Mines Co., 95 F.2d 699, 702 (9th Cir. 1938).

44. See 15 U.S.C. § 77c(b)(1) (creating SEC's small-issue exemption authority).

45. See 15 U.S.C. § 77d(a)(2) (exempting transactions in which no public offering involved). Although the term "public offering" is not defined in the '33 Act, conceptually, "a public offering is a method of raising capital," in which, a company "sells a portion of itself in the form of common stock in exchange for cash," and the cash "comes without restrictions as to use, does not have to be repaid and does not bear interest." William K. Sjostrom, Jr., *Going Public Through an Internet Direct Public Offering: A Sensible Alternative for Small Companies?*, 53 FLA. L. REV. 529, 572 (2001). A public offering involves "[t]he sale of equity shares or other financial instruments by an organization to the public in order to raise funds for business expansion and investment." *Public Offering*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/publicoffering.asp> (last visited Feb. 9, 2014). In the landmark case of *SEC v. Ralston Purina Co.*, the Supreme Court distinguished a private offering of securities from a public one. See 346 U.S. 119, 124-25 (1953) (considering '33 Act's purpose in interpreting private offering exemption). Justice Clark announced that "the applicability of [the

Regulation D, comprised of rules 501 through 508, and codified pursuant to sections 3 and 4 of the '33 Act, is particularly relevant to EGCs because it provides certain issuers with limited offering exemptions from the registration and prospectus delivery requirements that are otherwise necessary under section 5.⁴⁶ The SEC promulgated Regulation D after evaluating the effects of its rules on the ability of small businesses to raise capital, and accordingly, the issuers that Regulation D applies to include small businesses, like EGCs.⁴⁷ Regulation D's purpose is "to simplify and clarify existing exemptions, to expand their availability, and to achieve uniformity between federal and state exemptions in order to facilitate capital formation consistent with the protection of investors."⁴⁸ Rule 502 of Regulation D dictates the general conditions that must be met to qualify for a registration exemption.⁴⁹ Rules 504 and 505 set forth two Regulation D exemptions.⁵⁰ Rule 506 contains a third—"private placement"—exemption.⁵¹

Under Rule 506, sales of securities to accredited investors are exempt from SEC registration provided that they are nonpublic, and that issuers take reasonable precautions to avoid public resale.⁵² As an EGC progresses through

private offering exemption] should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'" *Id.* at 125.

46. See 17 C.F.R. §§ 230.501–.508 (2013) (setting forth registration safe harbors for small offerings and private placements); J. WILLIAM HICKS, LIMITED OFFERING EXEMPTIONS: REGULATION D § 1:1 (2012) (highlighting utility of limited offering exemptions for small businesses). Regulation D encapsulates the rules governing the limited offering and sale of securities without registration under the '33 Act. See § 230.500 (setting forth use of Regulation D).

47. See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 9415, Exchange Act Release No. 69,959, Investment Company Act Release No. 3624, 78 Fed. Reg. 44,771, 44,772 n.16 (July 24, 2013) (codified at 17 C.F.R. § 230.506 (2013)) [hereinafter Eliminating the Prohibition] (reviewing Regulation D's history in light of small-business capital formation).

48. Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389, 24 SEC Docket 1166, 1166 (Mar. 8, 1982).

49. See 17 C.F.R. § 230.502. The applicable conditions for an exemption under Rule 502 include: the integration of sales made pursuant to the same Regulation D offering, information requirements, limitations on the manner of the offering, and limitations on resale. See *id.*

50. See 17 C.F.R. §§ 230.504–.505 (establishing limited offering exemptions). Rule 504 provides an exemption for limited sales of securities not exceeding one million dollars. See *id.* 230.504. Similarly, under Rule 505 limited offers and sales of securities not exceeding five million dollars are exempted from registration. See § 230.505. Both Rule 504 and Rule 505 are examples of the implementation of section 3 of the '33 Act, which permits exemptions of issuances under five million dollars. See 15 U.S.C. § 77c(b) (2012).

51. See 17 C.F.R. § 230.506 (covering registration exemption for limited offers without regard to dollar value of offering); Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 151 (2010) (noting basic operation and conditions of private placement exemption). Rule 506 implements the safe harbor provision found in section 4 of the '33 Act. See 15 U.S.C. § 77d(a)(2).

52. See Johnson, *supra* note 51, at 169 (explaining operation of Rule 506). If a purchaser does not meet the accredited-investor requirements, the Rule 506 exemption is not lost provided that the purchaser "has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description." 17 C.F.R. § 230.506(b)(2)(ii); see C. Steven Bradford,

the four principal categories of procuring investment capital—seed financing, start-up financing, early-stage financing, and later-stage financing—eventually the venture must turn to outside investors (either through a public offering or private placement) to raise the capital necessary to maintain business operations.⁵³ Among the Regulation D prerequisites, the “accredited investor” requirement—found in Rule 501—serves as an initial limitation on from whom EGCs can solicit funding, while still qualifying for a Rule 506 exemption.⁵⁴ The party investing in the EGC must fall within at least one of eight statutorily prescribed investor categories in order to satisfy the accredited-investor requirement, or the issuer must “reasonably believe” the investor meets one of the enumerated categories.⁵⁵ Furthermore, an EGC may maintain Rule 506’s private-placement exemption provided the total number of unaccredited investors in the offering does not exceed thirty-five.⁵⁶ Despite the accredited-investor requirement, EGCs generally utilize Rule 506 private placements to finance their growth mostly because their alternative (executing a public offering) is an expensive and complex endeavor.⁵⁷

Crowdfunding and the Federal Securities Laws, 2012 COLUM. BUS. L. REV. 1, 45 & n.221 (noting “sophistication” requirement as alternative to accredited-investor qualification).

53. See Sjostrom, *supra* note 8, at 5–7 (describing EGC financing path); Jeffrey E. Sohl, *The Early-Stage Equity Market in the USA*, 1 VENTURE CAPITAL 101, 106–09 (1999) (explaining stages in EGC capital raising process).

54. See HAZEN, *supra* note 19, § 4.20[2], at 187 (explaining effect of accredited-investor requirement on Regulation D exemptions).

55. See 17 C.F.R. § 230.501(a) (2013) (setting forth investor classifications qualifying as accredited). The accredited-investor categories under the Rule 501 definition are generally comprised of “wealthy and/or financially sophisticated investors such as banks, insurance companies, tax-exempt organizations, directors and executive officers of the issuer, and natural persons who have considerable net worth or large annual incomes.” HAZEN, *supra* note 19, § 4.20[2], at 187. Angel investors—affluent individuals versed in entrepreneurship and possessing a high degree of business savvy—are crucial to EGCs in their pursuit of investment capital, and, by implication, to the EGC’s overall success because angel investors not only provide the necessary capital, but also generally qualify as accredited investors. See Sjostrom, *supra* note 8, at 5 (“The primary source of equity capital at the start-up and early stages comes from angel investors.”). With respect to an unaccredited investor in a Rule 506 offering, the investor must possess (or the issuer must reasonably believe immediately before the sale that the investor possesses) “such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment.” 17 C.F.R. § 230.506(b)(2)(ii) (2013).

56. See § 230.506(b)(2)(i); *In re Orchards Vill. Invs., LLC*, No. 09-30893-rldll, 2010 WL 143706, at *16 (Bankr. D. Or. Jan. 8, 2010) (recognizing registration exemption for private placement offerings with up to thirty-five unaccredited investors).

57. See Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC’s Continuing Failure To Address Small Business Financing Concerns*, 4 N.Y.U. J. L. & BUS. 1, 7–10 (2007) (discussing impracticalities of EGCs executing public offering and indicating common practice of pursuing registration exemption); Fisch, *supra* note 6, at 58 (detailing traditional factors restricting access of small-business entrepreneurs to capital); Jeffrey J. Hass, *Small Issue Public Offerings Conducted over the Internet: Are They “Suitable” for the Retail Investor?*, 72 S. CAL. L. REV. 67, 75 (1998) (indicating cost of executing public offering prohibitive for “most small business issuers”); Sjostrom, *supra* note 45, at 575–77 (explaining cost of public offering in light of associated expenses and fees). Generally, to make a public offering, a company retains an underwriter. See Sjostrom, *supra* note 45, at 530 (noting necessity of retaining underwriter in executing public offering). The ‘33 Act defines an underwriter as

3. Regulation D and the Pre-JOBS Act Prohibition Against General Solicitation and Advertising

To qualify for a Rule 506 private-placement exemption, an EGC must meet the conditions set forth under Rule 502.⁵⁸ Rule 502 prohibits: “[a]ny advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and [a]ny seminar or meeting whose attendees have been invited by any general solicitation or general advertising”⁵⁹ In particular, Regulation D’s pre-JOBS Act prohibition against general solicitation and advertising directly resulted in the placement of a restriction on the breadth of the capital pool that EGCs could draw from when seeking to execute a private placement.⁶⁰ Neither the ‘33 Act nor Regulation D, however, define what constitutes “general solicitation” or “general advertising.”⁶¹ Instead, the SEC employed a case-by-case approach and provided interpretive guidance primarily through “no-action” letters.⁶²

From the perspective of a cash-starved EGC, the SEC’s no-action letters and occasional judicial opinions are instructive, and historically, a business venture would have been wise to pay close attention to those letters and opinions during the capital raising process.⁶³ The SEC also emphasized the importance of the relationship between the offeror and the offeree in regard to the general solicitation question.⁶⁴ Generally, where there is “a preexisting, substantive relationship between the solicitor and the potential investor,” a communication

any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking

15 U.S.C. § 77b(a)(11) (2012).

58. See 17 C.F.R. § 230.506(b)(1) (requiring offerings to satisfy all conditions of § 230.502 to qualify for § 230.506 exemption).

59. 17 C.F.R. § 230.502(c) (2013).

60. See Sjostrom, *supra* note 8, at 15 (contending under former prohibition on general solicitation and advertising small businesses “doomed to fail”); *infra* Part II.B.1 (discussing issuers’ ability to generally solicit after JOBS Act).

61. See *id.* at 13 (lamenting lack of instructive definition of general solicitation or advertising).

62. See *id.* at 14 (recognizing SEC has provided ad hoc definition of general solicitation). A no-action letter is an informal channel for a prospective offeror to solicit SEC advice regarding a particular proposed offering. See Procedures Utilized by the Division of Corporate Finance for Rendering Informal Advice, Securities Act Release No. 6253, 1980 WL 25632, at *5 n.2 (Oct. 28, 1980) (explaining process for seeking informal SEC opinion on issuer’s compliance with securities laws). The SEC advises the recipient as to either the likelihood of it bringing suit if the offering takes place or taking no action, after it reviews the proposed transaction. See *id.*

63. See Cohn & Yadley, *supra* note 57, at 36 (“There is no greater impediment to the ability of small companies to raise capital under the securities laws than the SEC rules against general solicitation and advertising.”).

64. See Sjostrom, *supra* note 8, at 13 (discussing SEC’s focus on preexisting relationship between issuer and purchaser in addressing general-solicitation inquiry).

from the solicitor to the investor is unlikely to be deemed a general solicitation or advertisement.⁶⁵ The rationale behind the prohibition against general solicitation and advertising is that if the disclosure requirements associated with registering a public offering are able to be circumvented via a Rule 506 private-placement exemption, investors should occupy a position of trust with the issuer whereby the issuer's use of such methods of solicitation would be unnecessary in the first place.⁶⁶ If an issuer ran afoul of Regulation D, in order for the SEC to prevail on a claim that the company had unlawfully engaged in general solicitation or advertising in violation of section 5 of the '33 Act, it must prove the following three elements: first, that the company, either directly or indirectly, sold or offered to sell securities; second, that it did not file a registration statement regarding the securities in question; and third, that the offer or sale involved means of interstate commerce.⁶⁷

The SEC views the analysis of the application of former Rule 502(c) to an unregistered offering of securities as divisible into two inquiries:

First, is the communication in question a general solicitation or general advertisement? Second, if it is, is it being used by the issuer or by someone on the issuer's behalf to offer or sell the securities? If either question can be answered in the negative, then the issuer will not be in violation of Rule 502(c).⁶⁸

Within the first SEC inquiry, one form of general solicitation under Regulation D is "cold calling"—a marketing tool for reaching a large investor base.⁶⁹

65. *Id.* According to the SEC, a relationship is preexisting if it is established prior to the solicitation for the particular offering. See Robert T. Willis, Jr., SEC No-Action Letter, 1988 WL 233597, at *1 (Jan. 18, 1988). Likewise, a relationship is sufficiently substantive if it would "enable the issuer (or a person acting on its behalf) to be aware of the financial circumstances or sophistication of the persons with whom the relationship exists or that otherwise are of some substance and duration." Mineral Lands Research & Mktg. Corp., SEC No-Action Letter, 1985 WL 55694, at *1 (Dec. 4, 1985). *But see* David B. H. Martin, Jr. & L. Keith Parsons, *The Preexisting Relationship Doctrine Under Regulation D: A Rule Without Reason?*, 45 WASH. & LEE L. REV. 1031, 1044 (1988) (criticizing SEC's preexisting-relationship requirement as "prerequisite to avoiding general solicitation").

66. See Marina Petrova, Note, *Capital Formation for Internet Companies: Why Facebook Stayed Private for So Long and What That Means for Investors*, 12 J. BUS. & SEC. L. 305, 314 (2012) (insinuating ban on general solicitation yields private-placement investors better able to handle investment risk); Karina Sigar, Comment, *Fret No More: Inapplicability of Crowdfunding Concerns in the Internet Age and the JOBS Act's Safeguards*, 64 ADMIN L. REV. 473, 487-88 (2012) (identifying rationale behind ban on general solicitation).

67. See SEC v. Universal Express, Inc., 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007) (identifying three prima facie elements to proving violation of section 5 of '33 Act). Indeed, a violation of section 5 of the '33 Act carries serious penalties, which would likely spell disaster for an EGC. See 15 U.S.C. § 77l(a) (2012) (rendering issuer liable to investor for violating section 5 in amount of consideration paid); 15 U.S.C. § 77t(d)(1) (2012) (permitting SEC to recover civil penalties in event of issuer's violation of '33 Act).

68. Interpretive Release on Regulation D, Securities Act Release No. 6455, 1983 SEC LEXIS 2288, at *45 (Mar. 3, 1983).

69. See SEC v. Tecumseh Holdings Corp., No. 03 Civ. 5490(SAS), 2009 U.S. Dist. LEXIS 119869, at

Additionally, advertising by mail, by e-mail, or on the Internet may also vitiate Regulation D exemption status.⁷⁰ Merely using the Internet, however, as a means to reach investors does not necessarily constitute general solicitation or advertising, at least where the targeted investors are accredited.⁷¹

In the ordinary course, under the second SEC inquiry outlined above, an issuer's employees may not generally solicit investors in the context of a private placement.⁷² More problematic interpretive issues arise, however, when unrelated third parties communicate with investors on behalf of issuers.⁷³ The SEC considered this scenario in a February 1983 no-action letter to the Tax Investment Information Corporation.⁷⁴ While acknowledging that Regulation

*13 (S.D.N.Y. Dec. 22, 2009) (“[A] nationwide cold-calling campaign constitutes a form of general solicitation for purposes of Rule 502(c)”); *Johnston v. Bumba*, 764 F. Supp. 1263, 1275 (N.D. Ill. 1991) (considering evidence of cold calling as indicative of offering being conducted using general solicitation). Cold calling is defined as “a technique whereby a salesperson contacts individuals who have not previously expressed an interest in the products or services that are being offered In finance, cold calling can refer to a method by which brokers obtain new business by making unsolicited calls to potential clients.” *Cold Calling*, INVESTOPEEDIA, <http://www.investopedia.com/terms/c/coldcalling.asp> (last visited Feb. 9, 2014).

70. See *Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 726 (Minn. 2008) (indicating offering of unregistered securities via e-mail, mail, or Internet advertisement do not merit exemption); Eliminating the Prohibition, *supra* note 47, at 44,773 (“[T]he [SEC] has confirmed that other uses of publicly available media, such as unrestricted websites, also constitute general solicitation and general advertising.”); see also Use of Electronic Media, Securities Act Release No. 7856, Exchange Act Release No. 42,728, Investment Company Act Release No. 24,426, 65 Fed. Reg. 25,843, 25,851 (May 4, 2000) (detailing SEC’s concerns with online public offerings); Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7233, Exchange Act Release No. 36,345, Investment Company Act Release No. 21,399, 60 Fed. Reg. 53,458, 53,463–64 (Oct. 13, 1995) (indicating placing offering materials online violates ban on general solicitation and advertising). The SEC offers the following example of an impermissible use of electronic media:

Company XYZ wants to raise \$5 million by selling its common stock in a private placement pursuant to . . . Rule 506 The Company places its offering materials on its Internet Web site, which requires various information from a person attempting to access the materials to be provided to the Company prior to displaying the offering materials.

The placing of the offering materials on the Internet would not be consistent with the prohibition against general solicitation or advertising

Use of Electronic Media for Delivery Purposes, *supra*, at 53,463–64.

71. See IPONET, SEC No-Action Letter, 1996 WL 431821, at *1 (July 26, 1996).

The qualification of accredited or sophisticated investors in the manner described and the posting of a notice of a private offering in a password-protected page of IPONET accessible only to IPONET members who have qualified as accredited investors would not involve any form of “general solicitation” or “general advertising” within the meaning of Rule 502(c) of Securities Act Regulation D.

Id. But see Interpretive Release on Regulation D, *supra* note 68, at *47 (“The mere fact that a solicitation is directed only to accredited investors will not mean that the solicitation is in compliance with Rule 502(c).”).

72. See Sjoström, *supra* note 8, at 14 (describing situation in which issuer or issuer’s agent solicits investors).

73. See *id.* (observing complexity arising from intermediary dealing with investor on behalf of issuer).

74. See Tax Investment Info. Corp., SEC No-Action Letter, 1983 WL 29834, at *1 (Feb. 7, 1983)

D does not directly prohibit publications analyzing private placements in which the publishers were unrelated to the issuers and independent of the offerings being analyzed, the SEC “refused to agree that such a publication would be permitted under Regulation D because of its susceptibility [sic] to use by participants in an offering.”⁷⁵

B. The JOBS Act

Even before Congress set about abrogating the Regulation D prohibition on general solicitation and advertising, the SEC had previously acknowledged some of the prohibition’s negative effects.⁷⁶ Additionally, the SEC had, at times, set forth new rules designed to mitigate the often harsh effects of the ban in certain cases.⁷⁷ What is more, following Congress’s passage of the National Securities Markets Improvement Act of 1996, the SEC was actually granted the authority to permit general solicitation and advertising, but declined to exercise it.⁷⁸

(finding proposed offering would not constitute general solicitation); *see also* Interpretive Release on Regulation D, *supra* note 68, at *46–47 (discussing basis of SEC’s position in Tax Investment Letter).

75. Interpretive Release on Regulation D, *supra* note 68, at *47; *see* Hall Dadeland Towers Assocs. v. Hardeman, 736 F. Supp. 1422, 1434-36 (N.D. Tex. 1990) (finding issuer liable based on general solicitation practices of issuer’s sales agent).

76. *See* Exemption for Certain California Limited Issues, Securities Act Release No. 7185, 60 Fed. Reg. 35,638, 35,641 (July 10, 1995) [hereinafter Exemption for California Issues] (“The inability to reach out broadly to find possible qualified investors for Regulation D exempt offerings hampers the utility of the exemption and may raise the costs to companies of trying to do these exempt offerings.”); *see also* Stuart R. Cohn, *The Impact of Securities Laws on Developing Companies: Would the Wright Brothers Have Gotten Off the Ground?*, 3 J. SMALL & EMERGING BUS. L. 315, 360 (1999) (noting general-solicitation ban limits person-to-person conduct thereby restricting smaller companies’ access to investors).

77. *See, e.g.*, 17 C.F.R. § 230.1001 (2013) (permitting limited general solicitation in form of “general announcement” under California law); 17 C.F.R. § 230.135c(a) (2013) (allowing issuer to notify public when it “proposes to make, is making or has made an offering of securities not registered or required to be registered under the [‘33] Act”); 17 C.F.R. § 230.135e(a) (2013) (providing safe harbor for foreign investors).

78. *See* National Securities Markets Improvement Act of 1996 (NSMIA) § 105(b), 15 U.S.C. § 78mm (2012) (allowing SEC to exempt any transaction when necessary). The NSMIA adds section 28 to the ‘33 Act, which states:

The [SEC], by rule or regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation issued thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

Id. Although the SEC relied on section 28 four times to adopt new rules, none of these rules addressed the Regulation D prohibition against general solicitation and advertising. *See* Amendments to Investment Company Advertising Rules, Securities Act Release No. 8294, Exchange Act Release No. 48,558, Investment Company Act Release No. 26,195, 2003 SEC LEXIS 2315, at *11 & n.15 (Sept. 29, 2003) (failing to address ban on general solicitation); Exemption for Standardized Options from Provisions of the Securities Act of 1933 and from the Registration Requirements of the Securities Exchange Act of 1934, Securities Act Release No. 8171, Exchange Act Release No. 47,082, 2002 SEC LEXIS 3298, at *11–12 (Dec. 23, 2002) (declining to permit general solicitation); Regulation of Takeovers and Security Holder Communications, Securities Act No.

In 2012, Congress intervened, passed the JOBS Act, and thereby formally put an end to the ban.⁷⁹ From the perspective of an EGC, and its ability to engage in general solicitation as a means of raising capital, section 201 of the JOBS Act is significant.⁸⁰ As mentioned previously, under the prior ban on general solicitation, start-ups were required to locate investors without engaging in traditional advertising methods in order to consummate a private placement under Rule 506 (unless the business had a preexisting relationship with a pool of accredited investors).⁸¹ Because investment banks inherently maintain the requisite preexisting relationships with their investment clients, start-ups generally retained these banks for the purposes of completing a private placement.⁸² The investment bank's service as a go-between, however, presents a significant expense to innately cash-strapped EGCs.⁸³ To mitigate this undesirable effect, section 201(a)(1) of the JOBS Act ordered the SEC to

7760, Exchange Act Release No. 42,055, Investment Company Act Release No. 24,107, 1999 SEC LEXIS 2291, at *33–34 & n.47 (Oct. 22, 1999) (avoiding general-solicitation question); Rule 701—Exempt Offerings Pursuant to Compensatory Arrangements, Securities Act Release No. 7645, 1999 SEC LEXIS 406, at *7–8 (Feb. 25, 1999) (making no mention of general solicitation). The SEC did, however, temporarily lift the ban on Rule 504 offerings from 1992 to 1999. See *Eliminating the Prohibition*, *supra* note 47, at 44,796.

79. See Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a)(1), 126 Stat. 306, 313 (2012) (codified at 15 U.S.C. § 77d(b) (2012)) (stipulating general solicitation and advertising may be used as means of selling securities).

80. See *id.* § 201(c)(2) (maintaining Rule 506 exemption despite general solicitation in-person or online, provided issuer complies with conditions); Nicholas S. Hodge et al., *Private Offerings Under the JOBS Act*, K&L GATES 1 (Apr. 20, 2012), http://m.klgates.com/files/Publication/020da55a-0fea-49d3-8177-01b12ae70846/Presentation/PublicationAttachment/347cc70c-cf27-4473-896a-11a1a38c524a/Private_offerings_Under_JOB_S_Act.pdf (stating JOBS Act represents significant “deregulation of private securities offerings”). Relatedly, Title III of the JOBS Act also marks a substantial modification of the federal securities laws to promote greater access to the capital markets. See Jumpstart Our Business Startups Act § 302 (permitting Internet-based capital raising). First, section 302(a) of the JOBS Act amends section 4 of the ‘33 Act to permit crowdfunding—a capital raising method whereby start-up companies target a large number of investors in the general public using the Internet, and raise a small amount of capital from each one. See § 302(a) (establishing crowdfunding exemption); Bradford, *supra* note 52, at 5 (defining crowdfunding); Sigar, *supra* note 66, at 474, 478–79 (explaining mechanics of crowdfunding as capital formation strategy). Then, section 302(b) dictates the requirements an issuer must meet to qualify for the crowdfunding exemption. See Jumpstart Our Business Startups Act § 302(b) (adding section 4A to ‘33 Act on conditions appurtenant to crowdfunding exemption). Finally, section 302(c) gives the SEC discretion in promulgating rules it deems necessary to implementing the new exemption. See § 302(c).

81. See Sjostrom, *supra* note 8, at 14–15 (explaining effect of former prohibition on general solicitation and advertising); see also *supra* note 8 (observing unfavorable treatment of ban on general solicitation among some securities law scholars).

82. See Sjostrom, *supra* note 8, at 15 (noting importance of investment banks to EGCs in executing private placement).

83. See *id.* (indicating costs of retaining investment banking firm). Pursuant to industry practice,

an investment banking firm charges a commission of up to ten percent of the gross offering proceeds plus expenses. The firm may also command common stock warrants and the contractual right to participate in future company offerings, either of which can end up being much more lucrative than the initial cash commission.

Id.

amend Rule 506 so that Rule 502(c)'s prohibition against general solicitation and advertising does not apply to offers and sales made pursuant to the Rule 506 exemption, provided that the purchasers are accredited investors and the issuer takes reasonable steps to verify such status.⁸⁴

1. Relaxing the Ban and the Accredited-Investor Requirement

While Congress has not sanctioned an unqualified right on the part of EGCs to generally solicit investors, the JOBS Act marks a significant relaxation of the former prohibition, facilitating economic benefits for EGCs and their investors.⁸⁵ In particular, EGCs are now permitted to execute private placements in nearly any reasonable fashion, including through the use of general advertising techniques (e.g., using websites or other social media platforms to target investors).⁸⁶ The principal limitation on an issuer's ability

84. See Jumpstart Our Business Startups Act § 201(a)(1) (relaxing general solicitation ban for private placements so long as offering made to accredited investors). Specifically, section 201(a)(1) of the JOBS Act states:

Not later than 90 days after the date of the enactment of this Act, the [SEC] shall revise its rules issued in [Rule 506] . . . to provide that the prohibition against general solicitation or general advertising contained in [Rule 502(c)] . . . shall not apply to offers and sales of securities made pursuant to [Rule 506], provided that all purchasers of the securities are accredited investors.

Id. Section 201(a)(2) of the JOBS Act requires the SEC to revise Rule 144A, codified at 17 C.F.R. § 230.144A, so that securities sold pursuant to the Rule "may be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer." *Id.* § 201(a)(2). Rule 144A governs the resale of securities originally issued pursuant to the Regulation D exemption, and the extent to which the party reselling the securities can do so publicly and without registering. See BLOOMENTHAL & WOLFF, *supra* note 10, § 10:1, at 656 (providing "tabular approach" of Rule 144A application to resale of restricted stock). Additionally, section 201(b) amends section 4 of the '33 Act to provide that offers and sales made under the Rule 506 exemption are not to be considered public offerings due to an issuer's use of general solicitation or advertising. See Jumpstart Our Business Startups Act § 201(b)(2) (harmonizing relaxation of general-solicitation ban with public-offering registration requirements under federal securities laws).

85. See Eliminating the Prohibition, *supra* note 47, at 44,796-98 (analyzing economic benefits of lifting ban on general solicitation). Regarding the potential benefits for EGCs from relaxing the ban, the SEC stated,

allowing issuers to generally solicit would likely lower the search costs associated with finding accredited investors who would be interested in a particular private offering, thus enhancing economic efficiency. If lower search costs expand the pool of interested investors for offerings, there could be greater competition among investors, thereby lowering the cost of capital for issuers.

Id. at 44,797-98. Likewise, investors may also benefit from the increase in the availability of information about issuers, which promotes efficiency in pricing and capital formation. See *id.* at 44,798 (admitting lowering cost of investor access to information will likely yield more efficient capital allocation). But see Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 557 (1998) (placing blame on small-business issuers for regulatory hurdles rather than on regulations themselves).

86. See Hodge et al., *supra* note 80, at 2 (observing potential impact of JOBS Act's relaxation of general-

to generally solicit or advertise is the language in section 201(a)(1), which requires “that all purchasers of the securities are accredited investors.”⁸⁷ The JOBS Act conditions an EGC’s right to engage in general solicitation on *all* purchasers of the securities being accredited investors as compared to the Rule 506(b) exemption criteria, which allows for up to thirty-five unaccredited investors in a private placement conducted without general solicitation.⁸⁸ Accordingly, determining who merits the designation of an accredited investor remains an important consideration for an EGC in search of capital.⁸⁹

The JOBS Act’s does not invent a new accredited-investor requirement, but instead refers to Regulation D’s longstanding Rule 501 precondition with respect to Rule 506 offerings.⁹⁰ What is novel in this regard, however, is how EGCs may now reach accredited investors who represent viable sources of start-up funding.⁹¹ Whereas before, the first financing hurdle EGCs faced in the capital-raising process was how to solicit accredited investors, after the JOBS Act they need only be concerned with whether the investors are accredited and, as discussed ahead in Part II.C, whether they have done their due diligence in making this determination.⁹² In other words, EGCs are no longer required to foster substantive relationships with potential investors as a prerequisite to executing a private placement.⁹³ Comprehensively, the JOBS Act purports to strike a workable balance between providing access to capital for legitimate job-creating EGCs and protecting investors from fraud.⁹⁴

solicitation ban on private investment funds).

87. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a)(1), 126 Stat. 303, 313 (codified at 15 U.S.C. § 77d(b) (2012)).

88. *Compare id.* (permitting issuer to engage in general solicitation provided offering made to accredited purchasers), with 17 C.F.R. § 230.506(b)(2)(2013) (allowing up to thirty-five unaccredited investors in private placement offering executed without general solicitation).

89. *See supra* notes 54–55 and accompanying text (discussing accredited-investor criteria under Rule 501).

90. *See* Jumpstart Our Business Startups Act § 201(a)(1) (modifying Rule 502(c), upholding Rule 506 subject to SEC revisions, and not mentioning Rule 501); 17 C.F.R. § 230.501(a) (2013) (stating accredited-investor criteria). Accordingly, Congress has elected to uphold the accredited-investor requirement as it stands under Rule 501(a). *See* Eliminating the Prohibition, *supra* note 47, at 44,772 n.17, 44,773 n.22 (discussing Rule 501 accreditation requirements and maintaining them for implementation of JOBS Act Section 201).

91. *See* Jumpstart Our Business Startups Act § 201(a)(1) (permitting general solicitation and advertising).

92. *See id.* (conditioning general solicitation on issuer’s having taken reasonable steps to verify purchaser’s accreditation); Sjostrom, *supra* note 8, at 14–15 (explaining effect of former prohibition on general solicitation and advertising).

93. *See* Hodge et al., *supra* note 80, at 2 (presuming use of questionnaires and other methods to show substantive relationship no longer required). If, however, an EGC conducts a Rule 506 private placement in which at least some of the purchasers include unaccredited investors, the pre-JOBS Act prohibition against general solicitation will remain in place. *See id.* (observing decision to relax general-solicitation ban where offerings involve unaccredited investors left to SEC).

94. *See* Eliminating the Prohibition, *supra* note 47, at 44,788 (noting need to align rule for verifying accredited-investor status with purpose of JOBS Act).

2. *The JOBS Act's Legislative History and Congressional Intent*

Unambiguously, the stated purpose of the JOBS Act is to facilitate small-business capital formation, thereby creating jobs and inciting economic growth.⁹⁵ Indeed, the name of Title II of the JOBS Act—“Access To Capital For Job Creators”—is suggestive of Congress’s intent in this regard.⁹⁶ Remarkably, the JOBS Act garnered bipartisan support in Congress, notwithstanding the historical political division among Democrats and Republicans regarding U.S. economic policy, which is perhaps indicative of the importance of the legislation to the federal government.⁹⁷

Upon considering the Act, the House Committee on Financial Services report explains that “[s]mall companies are critical to economic growth in the United States,” and “[i]n order to grow and create jobs, small companies must have access to capital.”⁹⁸ The report further clarifies Congress’s intent, stating:

The objective of [the JOBS Act] is to make it easier for small companies to raise capital in U.S. financial markets, thereby facilitating their growth and creating jobs. Because small companies are critical to the economic growth of the United States, [the JOBS Act] establishes a new category of issuers, EGCs, and exempts them from certain regulatory requirements in order to encourage

95. See *supra* note 5 (providing JOBS Act’s stated purpose). U.S. House of Representatives Majority Leader Eric Cantor was the JOBS Act’s chief proponent. See Jake Sherman, *Eric Cantor To Make Rare Appearance with Obama for JOBS Act Signing*, POLITICO (Apr. 1, 2012, 1:18 PM), <http://www.politico.com/blogs/on-congress/2012/04/eric-cantor-to-attend-jobs-act-signing-119290.html> (indicating Cantor “shepherded” JOBS Act through House of Representatives). With respect to the purpose underlying the legislation, Representative Cantor was quoted as saying, “[t]his bill makes it easier for start-up businesses to happen again.” Jennifer Liberto, *House Passes Bipartisan Bill Aimed at Start-Ups*, CNNMONEY (Mar. 8, 2012, 3:24 PM), http://money.cnn.com/2012/03/08/smallbusiness/House-startup-bill/index.htm?hpt=hp_t1.

96. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, tit. II, 126 Stat. 306, 313 (codified at 15 U.S.C. § 77d(b) (2012)) (providing title containing section 201). The Supreme Court has counseled that in discerning congressional intent, the analysis begins with the statute’s plain language. See *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (stressing primary resort should be made to statute’s text in statutory construction); see also *N.Y. State Higher Educ. Servs. Corp. v. Adamo (In re Adamo)*, 619 F.2d 216, 222 (2d Cir. 1980) (“It is a well established principle of statutory construction that a statute should not be applied strictly in accord with its literal meaning where to do so would pervert its manifest purpose.”).

97. See Susan Crabtree, *Jobs Act Signing a Show of Bipartisan Support*, WASH. TIMES, Apr. 5, 2012, <http://www.washingtontimes.com/news/2012/apr/5/obama-signs-bipartisan-small-business-bill> (highlighting bipartisan support in connection with enactment of JOBS Act); Liberto, *supra* note 95 (quoting Cantor in framing bipartisan cooperation in passing JOBS Act in light of political divide); *Small Biz Jobs Act Is a Bipartisan Bridge Too Far*, BLOOMBERG (Mar. 18, 2012, 7:01 PM), <http://www.bloomberg.com/news/2012-03-18/small-biz-jobs-act-is-a-bipartisan-bridge-too-far-view.html> (noting U.S. House of Representatives voted 390 to 23 to pass JOBS Act). Democrats and Republicans have historically quarreled over issues of domestic economic policy in the United States. See Mark Hendrickson, *The Great American Policy Divide, and the Democratic Temptation*, FORBES, Oct. 19, 2012, <http://www.forbes.com/sites/markhendrickson/2012/10/19/the-great-american-policy-divide-and-the-democratic-temptation> (citing differing Democrat and Republican approaches to balancing U.S. budget as example of political divide).

98. H.R. REP. NO. 112-406, at 7 (2012), *reprinted in* 2012 U.S.C.C.A.N. 278, 280. The Committee on Financial Services ultimately voted 54–1 to favorably report the JOBS Act to the House of Representatives. See *id.* at 8.

them to go public in the United States.⁹⁹

Congress also provided economic data purportedly supporting its finding regarding the link between EGCs and job creation.¹⁰⁰ Additionally, the economic theory-based argument that certain types of regulation favor large businesses over small ones, and thereby adversely impact the economy, could also be used to bolster Congress's resolve in passing the JOBS Act.¹⁰¹ For example, the type of regulation Congress addressed in section 201 of the JOBS Act—the '33 Act's disclosure requirements—favors larger ventures that can afford to make more substantial offerings.¹⁰²

Apart from addressing the economic benefits to be derived from relaxing the ban on general solicitation and advertising, Congress also recognized the increased potential for fraud arising from offerings conducted in this manner.¹⁰³ Many prominent public-interest groups and unions, including the American Association of Retired Persons, the American Federation of Labor and Congress of Industrial Organizations, and the Consumer Federation of America, opposed the JOBS Act from its inception.¹⁰⁴ Chief among the

99. *Id.* at 12.

100. *See id.* at 7 (indicating lack of start-ups resulted in loss of two million jobs between 2007 and 2012). The House Report also singled out a reduction in the number of initial public offerings (IPOs) over the past ten years as contributing to the economic downturn of the nation. *See id.* Referring to the President's Council on Jobs and Competitiveness, the Report also cites research indicating that ninety percent of business job creation occurs after a company's IPO, and that small businesses have scarcely gone public. *See id.* (connecting drop in number of IPOs with lack of job growth). Finally, the Subcommittee on Capital Markets and Government Sponsored Enterprises, noted in the House Report, solicited testimony from prominent members of the financial community, all of whom testified favorably regarding the JOBS Act's potential. *See id.* (offering testimony of financial markets experts who opined on effectiveness of legislation).

101. *See* Huffman, *supra* note 25, at 308-09 (hypothesizing wide-spread government regulation producing disadvantages for small businesses compared with large businesses hinders economy).

102. *See* Priest, *supra* note 22, at 16 (explaining correlation between increase in size of offering and increase in accompanying economic utility). The phenomena of larger firms deriving cost advantages from their size is referred to as "economies of scale." *See* Kevin G. Wilson, *Deregulating Telecommunications and the Problem of Natural Monopoly: A Critique of Economics in Telecommunications Policy*, 14 MEDIA CULTURE & SOC'Y 343, 345 (1992) (explaining economies-of-scale concept). A result of the persistence of economies of scale in the securities trade is that "[u]niform application of regulatory requirements, without small-business exemptions, gives a competitive advantage to larger firms." Bradford, *supra* note 6, at 29. *But see id.* at 30 (questioning propriety of remediating regulatory economies of scale through legislation).

103. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a)(1), 126 Stat. 306, 313 (codified at 15 U.S.C. § 77d(b) (2012)) (allowing general solicitation of accredited investors and requiring issuer reasonably verify such status). With respect to regulating the securities markets, Congress often finds itself balancing competing policy interests. *Cf.* Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Ass'n, 878 F.2d 742, 751 (3d Cir. 1989) (observing "collision course" between legislative policies regarding bankruptcy and securities law); Samuel P. Rothschild, Note, *Bad Guys in Bankruptcy: Excluding Ponzi Schemes from the Stockbroker Safe Harbor*, 112 COLUM. L. REV. 1376, 1399 (2012) (noting tension arising from Congress balancing competing goals regarding safe harboring Ponzi scheme payments).

104. *See Organizations and Individuals Critical of Anti-investor Provisions in the House JOBS Act and Companion Senate Bills*, CONSUMER FED'N OF AM., <http://www.consumerfed.org/news/473> (last visited Feb. 9, 2014) [hereinafter *Organizations Critical of Anti-Investor Provisions*] (listing organizations and individuals

opposition's concern was that the legislation was "premised on the dangerous and discredited notion that the way to create jobs is to weaken regulatory protections."¹⁰⁵ Responding to these arguments, Congress opted to expand the SEC's fraud prevention role in effectively carrying out a sustainable general-solicitation framework, rather than unconditionally allowing issuers to engage in general solicitation.¹⁰⁶

C. The SEC's Role Under the JOBS Act

1. The "Reasonable Steps To Verify" Mandate

While the JOBS Act requires the SEC to change its existing rules—that is, eliminate the Regulation D prohibition against general solicitation—it has also ordered the SEC to make new rules in a similar capacity.¹⁰⁷ In addition to compelling the SEC to relax the ban on general solicitation for Rule 506 offerings, section 201(a)(1) also states that an issuer must "take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as *determined by* the [SEC]."¹⁰⁸ In other words, to carry out the congressionally mandated modification of Rule 506, the SEC must also issue a new set of rules concerning when a seller has reasonably verified that the buyer is an accredited investor.¹⁰⁹

On July 24, 2013, the SEC issued its final Rule 506 amendments pursuant to the JOBS Act.¹¹⁰ The SEC began by reiterating its view of the verification

opposing JOBS Act).

105. *Public Interest Groups Oppose Anti-Investor "Capital Formation" Bills*, CONSUMER FED'N OF AM., <http://www.consumerfed.org/news/467> (last visited Feb. 9, 2014) [hereinafter *Public Interest Groups*]. *But see* H.R. REP. NO. 112-406, at 8 (2012), *reprinted in* 2012 U.S.C.C.A.N. 278, 281 (dismissing concerns of compromising investor protection via expert testimony of Kate Mitchell, among others); Sjostrom, *supra* note 8, at 45 (refuting potential-for-fraud argument where general solicitation ban is lifted specifically for EGCs).

106. *See* Jumpstart Our Business Startups Act § 201(a)(1) (tasking SEC with promulgating rules for determining when issuer has reasonably verified investor's accreditation); Press Release, *supra* note 1 (acknowledging important SEC role in carrying out JOBS Act); *see also* Sjostrom, *supra* note 8, at 45 (conceding unqualified issuer right to generally solicit would hinder "battling securities fraud"). To further ease concerns over investor protection, the SEC adopted a "bad actor disqualification" from reliance on the Rule 506 exemption for issuers convicted of securities fraud or other violations of the securities laws. *See* 17 C.F.R. § 230.506(d) (2013).

107. *See* Jumpstart Our Business Startups Act § 201(a)(1) (requiring SEC to relax Rule 506 prohibition against general solicitation, while instituting new verification rules). The JOBS Act also requires the SEC to engage in rulemaking apart from the general solicitation issue. *See, e.g.*, §§ 302(b), 303(b), 304(a) (providing for SEC rulemaking with respect to crowdfunding exemption); § 503 (ordering SEC to revise rules regarding small-company capital formation and adopt safe harbor provisions); § 602 (addressing SEC rulemaking concerning amendments to section 12 of Exchange Act).

108. *Id.* § 201(a)(1) (emphasis added).

109. *See* Eliminating the Prohibition, *supra* note 47, at 44,776 (interpreting lack of specificity in JOBS Act mandate upon SEC to set reasonable verification standards). The SEC further stated that it "believe[s] that the purpose of the verification mandate is to address concerns, and reduce the risk, that the use of general solicitation under Rule 506 may result in sales to investors who are not, in fact, accredited investors." *Id.*

110. *See generally id.*

determination as an objective inquiry, based on the unique facts and circumstances of each offering.¹¹¹ In an effort to offer greater guidance to issuers relying on revised Rule 506 and engaging in general solicitation, the SEC set forth two methods of reasonable verification.¹¹² The first, “principles-based,” method instructs issuers to consider,

the nature of the purchaser and the type of accredited investor that the purchaser claims to be; the amount and type of information that the issuer has about the purchaser; and the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering such as minimum investment offering.¹¹³

Second, under the SEC’s “non-exclusive” methods—specific ways an issuer can verify a purchaser’s accredited-investor status—the SEC offered the following list of steps an issuer could take to satisfy the reasonableness standard: An issuer may review the purchaser’s IRS forms that report their income.¹¹⁴ An issuer may also review various types of documentation indicative of the purchaser’s net worth dated within the last three months, such as bank statements and credit reports; and review a purchaser-submitted written representation indicating that he or she has disclosed all of his or her relevant liabilities.¹¹⁵ Additionally, an issuer may have a registered broker-dealer or investment advisor, a licensed attorney, or certified public accountant provide a written confirmation that reasonable steps to verify have been performed, and that they have determined that the purchaser is an accredited investor.¹¹⁶

2. SEC Rule Review

After the SEC has promulgated rules and a party wishes to challenge them, the rules in question may be subject to review by the appropriate United States Circuit Court of Appeals.¹¹⁷ Courts, however, have construed the scope of judicial review of SEC rules narrowly.¹¹⁸ Furthermore, in general, courts are

111. See *id.* at 44,778 (issuing framework to carry out JOBS Act’s accredited-investor verification condition).

112. *Id.* at 44,778-83.

113. Eliminating the Prohibition, *supra* note 47, at 44,778.

114. *Id.* at 44,781; see 17 C.F.R. § 230.506(c)(ii)(2)(A) (2013).

115. Eliminating the Prohibition, *supra* note 47, at 44,781; see § 230.506(c)(ii)(2)(B).

116. Eliminating the Prohibition, *supra* note 47, at 44,781; see § 230.506(c)(ii)(2)(C).

117. See 15 U.S.C. § 78y(b)(1) (2012) (permitting judicial review of SEC rules). With respect to the standard for judicial review, courts are to “affirm and enforce the rule unless the [SEC’s] action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” *Id.* § 78y(b)(4). SEC rulemaking may also be subject to judicial review under the Administrative Procedures Act, but only where there “is no other adequate remedy in court.” See 5 U.S.C. § 706 (2012); *id.* §§ 702, 704.

118. See *Levy v. SEC*, 462 F. Supp. 2d. 64, 68 (D.D.C. 2006) (finding judicial review of SEC rules limited

reluctant to tread on Congress's delegation of authority to the SEC with respect to regulating the securities markets, at least without a showing that the SEC has acted arbitrarily or capriciously.¹¹⁹ In any event, SEC rulemaking (or rule amendments) pursuant to the JOBS Act potentially falls within the ambit of judicially reviewable SEC rules because Regulation D finds its authority in several of the enumerated statutory sections that create causes of action.¹²⁰

III. ANALYSIS

A. Post-JOBS Act EGC Capital Raising and the SEC's Dichotomous Role

Fundamentally, the JOBS Act aims to reduce the regulatory burdens EGCs face in the capital-raising process.¹²¹ Among the chief burdens for EGCs is the cost of raising capital.¹²² EGCs can ill-afford to commit precious capital, which is crucial to their early-stage growth and long-term viability, toward the cost of amassing funds through a public offering.¹²³

By making access to capital more cost-effective, Congress expects EGCs to prosper and create more domestic jobs.¹²⁴ Indeed, because public offerings can cost, on average, \$300,000 to \$500,000, it follows that if deregulating the capital markets is to succeed as a job creation method, EGCs must be able to raise capital more cost-effectively under the JOBS Act than they otherwise could through a conventional public offering.¹²⁵ Congress, however, also recognized the need for fraud remediation and investor protection.¹²⁶

to those enumerated in § 78y(b)(1)); *cf.* *Kixmiller v. SEC*, 492 F.2d 641, 643–44 (D.C. Cir. 1974) (interpreting 15 U.S.C. § 78y(a) as restraining court's authority to only review SEC orders).

119. *See* *Stead v. SEC*, 444 F.2d 713, 717 (10th Cir. 1971) (stressing Congress tasked SEC, and not judiciary, with primary responsibility of protecting investors in securities); *Union Pac. R.R. Co. v. Chicago & Nw. Ry. Co.*, 226 F. Supp. 400, 406 (N.D. Ill. 1964) (“The SEC is vested with primary responsibility for enforcing the [Exchange] Act and protecting public interest. It makes the rules.”).

120. *See* 15 U.S.C. § 78y(b)(1) (specifying statutory sections forming basis of reviewable SEC rules); *Eliminating the Prohibition*, *supra* note 47, at 44,804 (citing statutory authority for proposed rule amendments).

121. *See supra* notes 95–96 and accompanying text (outlining legislative intent underlying JOBS Act).

122. *See* *Cohn & Yadley*, *supra* note 57, at 7 (emphasizing importance of time and money for start-ups insofar as procuring capital quickly and efficiently).

123. *See id.* at 7–8 (characterizing registered offering as impractical for small companies due to time, delay, and expense).

124. *See* H.R. REP. NO. 112-406, at 7 (2012), *reprinted in* 2012 U.S.C.C.A.N. 278, 280 (indicating legislation introduced to encourage EGCs to go public, generate economic growth, and create jobs); *supra* note 76 and accompanying text (noting SEC's acknowledgment of effect of its own rule prohibiting general solicitation on small businesses).

125. *See* *Sjostrom*, *supra* note 45, at 575–76 (providing average cost to EGC of engaging underwriter in public offering). A public offering is even less desirable to smaller EGCs undertaking more modest offerings given the fact that, generally, “the smaller the deal, the higher the [underwriter's] commission percentage [is].” *Id.* at 575 n.314.

126. *See* *Bradford*, *supra* note 22, at 30 (acknowledging higher likelihood of fraud in small offerings); *supra* note 106 (examining Congress's balancing interests including preventing fraud in implementing Jobs Act); *see also* *Pierce*, *supra* note 85 (faulting small firms for causing higher incidence of “social bads” including fraud).

Accordingly, as President Obama stated when signing the Act into law, “the SEC is going to play an important role” in carrying out the legislation.¹²⁷

As previously noted, following the JOBS Act, EGCs may now undertake general solicitation and advertising in recruiting investment capital.¹²⁸ Rather than declaring an unconditional right to engage in general solicitation and advertising, Congress delegated the task of relaxing the ban to the SEC.¹²⁹ Yet, in doing so, Congress also directed the SEC to draft its own methods for determining when an issuer has reasonably verified that those purchasing the securities are accredited investors.¹³⁰

Essentially, under the JOBS Act, the SEC is to replace its existing rules restricting an issuer’s conduct regarding soliciting investors for a private placement (former Rule 506) with *new* rules that set standards for determining when issuers have conducted sufficient due diligence with respect to the solicited investor’s accreditation.¹³¹ Because the SEC is to replace its former rules with new rules in order to carry out Congress’s intent, Congress’s chosen means to relax the ban constitute a dichotomy in terms of the SEC’s function.¹³² The term “dichotomy” is appropriate in describing the SEC’s role under the JOBS Act because the SEC is required to divide its principal purpose of investor protection into two mutually exclusive, contradictory groups: it must remove rules (albeit antiquated ones) designed to protect investors and replace them with new rules designed to protect investors.¹³³

127. Press Release, *supra* note 1.

128. See *supra* note 8 and accompanying text (highlighting success of movement advocating for relaxation of prohibition against general solicitation).

129. See Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (codified at 15 U.S.C. § 77d(a) (2012)) (ordering SEC to revise Rule 506); *supra* note 106 and accompanying text (noting Congress’s choice of SEC rulemaking as conduit for implementing relaxation of general-solicitation ban). Congressional delegation of rulemaking as a method of carrying out legislation aimed at financial reform is not uncommon. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act § 173(c), 15 U.S.C. § 78o (2012) (enabling SEC to initiate rulemaking concerning standards of care in broker-dealer and investment advisor businesses); Sarbanes-Oxley Act of 2002 § 107, 15 U.S.C. § 7217 (2012) (establishing SEC’s “oversight and enforcement authority” over accounting oversight board); Small Business Investment Incentive Act of 1980 § 506, 15 U.S.C. § 80c-3 (2012) (ordering SEC to use best efforts to identify and reduce capital-raising costs facing small businesses).

130. See Jumpstart Our Business Startups Act § 201(a)(1); Eliminating the Prohibition, *supra* note 47, at 44,778-79 (articulating approach to determine reasonableness of issuer’s attempt to verify purchaser’s accreditation); see also *supra* note 90 (discussing accredited-investor requirement in light of JOBS Act legislation).

131. See *supra* notes 107–09 and accompanying text (addressing modification of Rule 506); see also Eliminating the Prohibition, *supra* note 47, at 44,776 (setting forth new Rule 506(c) permitting general solicitation to implement JOBS Act’s mandated rule change).

132. See *supra* note 31 and accompanying text (observing SEC’s function and purpose); *supra* notes 118–20 and accompanying text (reviewing source and extent of SEC rulemaking authority).

133. See Jumpstart Our Business Startups Act § 201(a)(1) (providing SEC’s role under JOBS Act via rule amendment and rulemaking).

*B. A Hypothetical EGC Challenge of SEC Rules:
Can the SEC Defy Congressional Intent Through Its Rulemaking Function?*

Suppose an EGC engages in general solicitation, but arguably fails to comply with the SEC's standards for undertaking reasonable steps to verify that purchasers of its offering were accredited investors, thereby rendering the Rule 506 safe harbor inapplicable to its private placement.¹³⁴ The result would likely be catastrophic for the EGC because its investors could rescind their purchases of the company's securities, and it may also be subject to SEC prosecution.¹³⁵ Presumably, the aggrieved EGC could seek to judicially challenge the SEC's rulemaking authority based on a statutory cause of action.¹³⁶ One argument the EGC might raise is that the SEC's methods for determining the reasonable-steps-to-verify standard defy Congress's intent under the JOBS Act.¹³⁷ According to this congressional-intent-based objection, any SEC rule that imposes new regulatory barriers that make access to capital more difficult (i.e., more expensive) for small-business job creators would contravene Congress's legislative purpose.¹³⁸

Yet, on the other hand, the SEC has traditionally enjoyed broad discretion with respect to the orders it issues and the rules it promulgates.¹³⁹ For example, judicial interpretations of challenges to SEC rulemaking pursuant to 15 U.S.C. § 78y(b) have construed the statute narrowly; limiting a plaintiff's cause of action to SEC rules authorized under one of the enumerated statutory sections.¹⁴⁰ Precedent may also favor the SEC, especially in this hypothetical, where it can resort to the counter-argument that in passing the challenged rule it is carrying out its judicially recognized role of investor protection and fraud remediation.¹⁴¹ Assuming, arguendo, that the SEC prevailed on its investor-

134. See *id.* (exempting offerings involving general solicitation compliant with Rule 506 but affording SEC revisionary rulemaking discretion); *SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007) (reiterating framework for determining violation of section 5 of '33 Act); *supra* notes 110-16 and accompanying text (explaining SEC's final rule amendments pursuant to JOBS Act).

135. See 15 U.S.C. § 77(a)(1) (2012) (dictating civil liability for offering in violation of section 5 of '33 Act regardless of exemption status); 15 U.S.C. § 77t(d) (2012) (allowing SEC to seek damages upon issuer's violation of '33 Act); Bradford, *supra* note 22, at 17 (contemplating effect of violating section 5 of '33 Act on small-business issuers).

136. See 15 U.S.C. 78y(b)(1) (2012) (providing judicial remedy for improper SEC rules).

137. See *supra* notes 98-99 and accompanying text (stating Congress's purpose in enacting JOBS Act); *cf.* Rothschild, *supra* note 103, at 1395-96 (observing litigants often argue specific application of statute conflicts with congressional intent).

138. See H.R. REP. NO. 112-406, at 7 (2012), *reprinted in* 2012 U.S.C.A.N. 278, 280 (identifying need for improved small-business capital formation); Fisch, *supra* note 6, at 58 (summarizing typical hindrances for start-ups in accessing capital).

139. See *supra* note 118 and accompanying text (looking at challenges to SEC authority under federal securities laws).

140. See *Levy v. SEC*, 462 F. Supp. 2d 64, 68 (D.D.C. 2006) (limiting review of SEC rules to those statutorily enumerated).

141. See *supra* note 119 and accompanying text (identifying precedent regarding SEC's zone of congressionally delegated authority).

protection argument, what remains to be seen is how a court deciding the issue could square such a holding with what would appear to be a contravention of congressional intent.¹⁴²

One solution to the question of SEC rulemaking immunity under the JOBS Act is to base the analysis on the likelihood of fraud in the case.¹⁴³ Balancing the costs of potential fraud with defying legislative intent would serve as an economic solution to an otherwise economic problem: the failure of the JOBS Act to create jobs.¹⁴⁴ If the incidence of fraud in the case is sufficiently high (e.g., a likely violation of other securities laws), the associated cost may outweigh any economic gains from possible job creation.¹⁴⁵

Above all, because the JOBS Act was passed to create jobs, its ultimate success will be measured in terms of how many new jobs are attributable to it.¹⁴⁶ Applying basic economic principles to Congress's scheme under the Act—namely considering the costs and benefits of the initial deregulation of the capital markets and subsequent re-regulation of them—there is support for the conjecture that certain regulatory-based disadvantages to EGCs due to economies of scale warrant congressional intervention.¹⁴⁷ Here, the more cumbersome issue is if, upon implementing the JOBS Act's reforms through replacing rules with rules, the SEC's chosen regulation effectively creates jobs via the relaxation of the Regulation D prohibition against general solicitation,

142. Cf. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (favoring inquiry into statute's purpose when following its plain language otherwise leads to absurd results); *N.Y. State Higher Educ. Servs. Corp. v. Adamo (In re Adamo)*, 619 F.2d 216, 222 (2d Cir. 1980) (sanctioning departure from textual statutory interpretation approach where doing so conflicts with statute's purpose); Rothschild, *supra* note 103, at 1395–96 (discussing appropriateness of judicial resort to discerning congressional intent in statutory interpretation). Alternatively, if the aggrieved EGC prevailed on its argument that the SEC's amended rules contradict the JOBS Act's purpose, it is equally perplexing how the investor-protection argument would be any more amenable to judicial construction in this context. Cf. *Am. Trucking Ass'ns*, 310 U.S. at 543 (emphasizing primacy of plain language in statutory interpretation).

143. See *Eliminating the Prohibition*, *supra* note 47, at 44,778 (viewing accredited-investor verification determination as objective, fact-specific inquiry); Fisch, *supra* note 6, at 58 (noting regulatory authorities identified small businesses as among riskiest investment opportunities); *Organizations Critical of Anti-Investor Provisions*, *supra* note 104 (criticizing JOBS Act's deregulation of capital markets as inviting fraud); *Public Interest Groups*, *supra* note 105 (expressing concern over JOBS Act's weakened investor protections). But see H.R. REP. NO. 112-406, at 8 (discounting fraud concerns via expert testimony during congressional hearings).

144. See Trebing, *supra* note 19, at 89–90 (focusing on promoting-general-welfare justification for governmental regulatory intervention). But see Huffman, *supra* note 25, at 313 (suggesting purpose of regulation to shift costs from third parties to transacting parties).

145. See *Eliminating the Prohibition*, *supra* note 47, at 44,796-98 (considering economic benefits of relaxing general solicitation ban); Press Release, *supra* note 1 (expecting JOBS Act to create jobs, but implying SEC instrumental in deterring fraud). But cf. Pierce, *supra* note 85 (seeing small businesses as culpable for undesirable effects of regulation designed to benefit them).

146. See *supra* note 100 (referring to congressional findings regarding connection between EGC and job creation).

147. See Huffman, *supra* note 25, at 308-09 (discussing unfavorable treatment of small businesses compared to larger ones under various government regulation); Priest, *supra* note 22, at 16 (connecting larger firms making larger offerings to increase in economic utility compared with smaller firms).

and thus promotes the general welfare in economic terms.¹⁴⁸

IV. CONCLUSION

Congress has been forthright in articulating its resolve in passing the JOBS Act. It believes in the fundamental importance of small-business start-ups, particularly EGCs, to the health of the U.S. economy. Congress took action after acknowledging the bureaucratic regulatory barriers these companies face in raising capital, basing the JOBS Act on the following set of inferences: improved access to capital for EGCs will yield an aggregately greater amount of start-up funding for these businesses, more funding will result in more EGCs, and more EGCs will in turn require more labor, ultimately creating more U.S. jobs.

Regarding the ability of the JOBS Act to create jobs, the legislation may be more symbolic than pragmatic insofar as significantly affecting labor demand across the U.S. economy. In any event, assessing the propriety of the Act in isolation would likely prove difficult, given the vast number of macroeconomic variables (other than government regulation) that impact the American job market. Nonetheless, what the JOBS Act does accomplish by “relaxing the ban” is the removal of an archaic rule that has little place in today’s sophisticated securities market—one vastly different from that of 1982, when Regulation D was first promulgated.

On the other hand, the modern technology-centric securities market is increasingly a breeding ground for fraud. From here emerges the tension between improving access to capital and remediating fraud, and also the SEC’s dichotomous role of replacing old rules with new rules. Whether SEC rulemaking that hinders (or at least does not improve) EGC access to capital and thereby contravenes Congress’s job-creation purpose will go unchecked remains to be seen. Regardless, given that investor protection is arguably the SEC’s highest priority, the effect of its rulemaking authority on the JOBS Act will be significant. At least from an EGC’s perspective, the SEC is the gatekeeper.

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148. See *Eliminating the Prohibition*, *supra* note 47, at 44,796-98 (taking into account economic gains for EGCs and investors stemming from deregulating capital markets); *Exemption for California Issues*, *supra* note 76, at 35,641 (indicating SEC’s recognition of former Rule 506’s adverse consequences from restrictions placed upon small issuers).