

2013

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### Recommended Citation

Hugo Gallegos *The JOBS Act and Lifting the Ban on General Solicitation and Advertising: Is the U.S. Ready for Investment Opportunity Infomercials?*, 25 Loy. Consumer L. Rev. 448 (2013).

Available at: <http://lawcommons.luc.edu/lclr/vol25/iss4/7>

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# THE JOBS ACT AND LIFTING THE BAN ON GENERAL SOLICITATION AND ADVERTISING: IS THE U.S. READY FOR INVESTMENT OPPORTUNITY INFOMERCIALS?

*Hugo Gallegos\**

## I. INTRODUCTION

President Barak Obama enacted the Jumpstart our Business Startups Act (“JOBS Act”) on April 5, 2012. The goal of the JOBS Act is to increase American job creation and economic growth. Section 201 of the JOBS Act requires the United States Securities Exchange Commission (“SEC”) to modify Rule 506 of the Securities Act of 1933 (“1933 Securities Act”) and lift the ban on general solicitation and advertising.<sup>1</sup> Rule 506 does not define the terms “general solicitation” and “general advertising,” but Rule 502(c) does provide examples, which include advertisements published in newspapers and magazines, communications broadcast on television and radio, and seminars whose attendees have been invited by general solicitation or general advertising.<sup>2</sup> This change in regulation is intended to help emerging businesses raise capital by reducing some of the more stringent regulatory requirements included in the Sarbanes-Oxley Act (“SOX Act”) of 2002. The proposed regulation will make it easier for companies to solicit potential investors while not having to incur the costs of

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\* J.D. Candidate, May 2014, Loyola University Chicago School of Law; M.B.A., March 2011, Michigan State University; B.S., December 2003, University of Michigan. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

<sup>1</sup> Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201 (April 5, 2012).

<sup>2</sup> Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 Fed. Reg. 54464 (proposed Aug. 29, 2012) (to be codified at 17 C.F.R. pts. 230, 239).

registering and complying with the SEC regulations like the SOX Act. The SEC voted 4-1 to lift the ban on general solicitation and advertising on August 29, 2012.<sup>3</sup> In compliance with the Administrative Procedure Act “APA,” 5 U.S.C. §551, *et seq.*, the SEC published the proposed rule in the Federal Registrar on August 29, 2012 and allowed for interested parties to comment on the proposed rule for at least thirty days. The final rule has not been issued yet.

Advocates for the repeal of the ban on general solicitation claim that it will lead to business creation and growth because companies will have greater access to capital, which in turn benefits the recovering U.S. economy as it comes out of a recession. Conversely, critics are concerned that this repeal will open the floodgates for fraud. Critics fear that vulnerable investors, like the elderly, will be targeted, or companies will misrepresent information, or even that shell companies will be created with the sole purpose of taking investor’s money.

This comment will first discuss the background of securities regulations in the U.S. followed by the proposed regulatory changes enacted under the JOBS Act. Next it will analyze the benefits and risks of lifting the general solicitation and advertising ban on private companies and the ultimate effect on consumer investors. Finally, this comment will make recommendations that attempt to reconcile the conflicting goals of protecting consumer investors and achieving the goal of the JOBS Act to promote and fund business in the U.S. The JOBS Act could create opportunities for emerging companies to acquire capital for growth; unfortunately the proposed regulation lacks the necessary safeguards to protect the investing consumer.

## II. BACKGROUND

### *A. The Securities Act of 1933 and Securities Exchange Act of 1934*

The stock market crash of 1929 and the Great Depression led to the creation of the 1933 Securities Act.<sup>4</sup> The 1933 Securities

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<sup>3</sup> Alexandra Alper, *Update 3- U.S. SEC proposes dropping ad ban on private stock offers*, REUTERS, Aug. 30, 2012, available at <http://in.reuters.com/article/2012/08/29/jobsact-sec-solicitation-idINL2E8JT6DS20120829>.

<sup>4</sup> *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. EXCH.

Act is also known as the “truth in securities” law.<sup>5</sup> The Act requires that investors receive accurate and complete financial information along with other significant information concerning the securities that are offered to them.<sup>6</sup> The Act prohibits deceit, misrepresentations, and other fraud in the sale of securities.<sup>7</sup> The 1933 Securities Act accomplished these goals by requiring companies offering securities to register with the federal government and then compelling registered companies to comply with all current and future SEC regulations.<sup>8</sup>

The Securities Exchange Act of 1934 (“1934 SEC Act”) created the SEC.<sup>9</sup> The 1934 SEC Act empowered the SEC to regulate all facets of the securities industry.<sup>10</sup> The SEC has the power to register, regulate, and oversee brokerage firms, transfer agents, and self-regulatory organizations, such as the New York Stock Exchange.<sup>11</sup> This Act also identified and prohibited certain types of conduct and equipped the SEC with disciplinary powers.<sup>12</sup> Finally, the 1934 SEC Act allowed the SEC to require periodic reporting of information by companies with publicly traded securities.<sup>13</sup>

### *B. Registration with the SEC*

Generally, to sell securities in the U.S. public companies must register with the SEC or find an exemption from registration in the 1933 Securities Act.<sup>14</sup> The registration process requires the disclosure of important information, known as a prospectus, to investors.<sup>15</sup> The prospectus must contain audited

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COMM’N, <http://www.sec.gov/about/whatwedo.shtml#create> (last visited Jan. 5, 2013) [hereinafter *Investor’s Advocate*].

<sup>5</sup> *The Laws That Govern The Securities Industry*, U.S. SEC. EXCH. COMM’N, <http://www.sec.gov/about/laws.shtml#jobs2012> (last visited Mar. 6, 2013) [hereinafter *Securities Industry*].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *SEC Proposes Rules to Implement JOBS Act Provision About General Solicitation and Advertising in Securities Offerings*, U.S. SEC. EXCH. COMM’N, <http://www.sec.gov/news/press/2012/2012-170.htm> (last visited Aug. 29, 2012) [hereinafter *Proposed Rules*].

<sup>15</sup> *SEC Disclosure Laws and Regulations*, INC. MAGAZINE,

financial statements, a summary of selected financial data, and management's description of the company's business and financial condition.<sup>16</sup> Additionally, the prospectus must include a summary of the company's material business contracts and list all forms of compensation given to the company's top five officers.<sup>17</sup> The prospectus is intended to provide the potential investor with accurate and complete information to ensure they make informed decisions about whether to purchase a company's securities.<sup>18</sup> The 1933 Securities Act requires that the prospectus be accurate, but does not mandate that the company guarantee the information.<sup>19</sup>

### *C. Exemptions to Registration*

The SEC commissioners understand the importance of exempting small companies from the registration process. Consequently, the agency seeks to foster capital formation by lowering the cost of offering securities to the public.<sup>20</sup> Some of the exemptions from the registration requirement include: private offerings, intrastate offerings, and securities of municipal and state governments.<sup>21</sup>

### *D. Regulation D – Exemptions for Registration Requirements of the SEC*

Under the 1933 Securities Act, Regulation D offers three Rules, 504, 505, and 506, which provide exemptions to the registration requirements of the SEC.<sup>22</sup> However, companies that elect to use and qualify for an exemption under Regulation D must still file a form known as "Form D" when they first sell securities.<sup>23</sup> Form D is a brief notice that includes the names and addresses of the company's owners and stock promoters, and the

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<http://www.inc.com/encyclopedia/sec-disclosure-laws-and-regulations.html>  
(last visited Mar. 6, 2013) [hereinafter *SEC Disclosure Laws*].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Securities Industry, supra* note 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Regulation D Offerings*, U.S. SEC. EXCH. COMM'N, <http://www.sec.gov/answers/regd.htm> (last visited Jan. 5, 2013).

<sup>23</sup> *Rule 506 of Regulation D Offerings*, U.S. SEC. EXCH. COMM'N, <http://www.sec.gov/answers/rule506.htm> (last visited Mar. 6, 2013).

date of the first sale of securities.<sup>24</sup>

This comment will focus on Rule 506 under Regulation D. Currently Rule 506 prohibits private companies from generally soliciting or advertising their securities to the public.<sup>25</sup>

#### *E. Rule 506 – Private Offering Exemption*

Rule 506 of Regulation D is considered an exemption for the private offering of securities.<sup>26</sup> Rule 506 allows private companies to raise an unlimited amount of money, without registering with the SEC.<sup>27</sup> To qualify for Rule 506, companies must not use general solicitation or advertising to market their securities.<sup>28</sup> Additionally, the company may sell its securities to an unlimited number of “accredited investors” and up to thirty-five other purchasers that are “sophisticated.”<sup>29</sup> Private companies can decide what information to give accredited investors, but must give non-accredited investors the same disclosure information required in registered offerings.<sup>30</sup>

#### *F. Accredited and Sophisticated Investors*

Rule 501 of the 1933 Securities Act defines eight different ways to be considered an accredited investor.<sup>31</sup> This comment is principally concerned with natural persons as accredited investors. Under Rule 501, a natural person qualifies as an accredited investor if he or she has an “individual net worth or joint net worth with a spouse that exceeds \$1 million at the time of the securities purchase, excluding the value of their primary residence.”<sup>32</sup> Additionally, a natural person is an accredited investor if he or she has “income exceeding \$200,000 in each of the two most recent years or a joint income with a spouse exceeding \$300,000 for those years and a reasonable expectation of the same income level in the current year.”<sup>33</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Accredited Investors*, U.S. SEC. EXCH. COMM’N, <http://www.sec.gov/answers/accred.htm> (last visited Mar. 8, 2013).

<sup>32</sup> *Proposed Rules*, *supra* note 14.

<sup>33</sup> *Id.*

The SEC defines a sophisticated investor as someone that is able to evaluate the risks and merits of the investment or be able to bear the investment's economic risk.<sup>34</sup>

#### *G. Rule 144A – Qualified Investment Buyers Exemption*

Similar to Rule 506, Rule 144A is an exemption from SEC registration for companies that resell securities to large institutional investors, known as Qualified Institutional Buyers (“QIBs”).<sup>35</sup> Under the current rule, these offers of securities can only be made to QIBs.<sup>36</sup> Like Rule 506, the seller of securities is prohibited from engaging in general solicitation and advertising of the securities.<sup>37</sup> This comment will not analyze in depth the effect of repealing the ban on general solicitation and advertising on companies using Rule 144A.

#### *H. Sarbanes-Oxley Act of 2002*

The Sarbanes-Oxley Act of 2002 (“SOX Act”) was a response to the failure of the securities industry and the SEC to adequately protect investors. The bankruptcies of Enron, Tyco, and WorldCom, led to the creation of the SOX Act. Enron, Tyco, and WorldCom were large corporations that went bankrupt because of accounting irregularities, failing to disclose transactions, and corrupt accounting practices—costing investors billions of dollars, employees their jobs, and many people their life savings.<sup>38</sup> The ultimate goal of the SOX Act was to protect investors from fraudulent activities at large corporations, which could potentially cost investors and employees large sums of money.

The SOX Act was the most “far reaching reform of American business practices since the Franklin Delano Roosevelt [administration]” and changed the regulatory authority upon which the SEC operates.<sup>39</sup> The SOX Act mandated reforms that increased corporate responsibility, increased financial disclosures, and combated fraud.<sup>40</sup> The SOX Act addressed the following:

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Alison Fass, *One Year Later, The Impact of Sarbanes-Oxley*, FORBES MAG., (July 22, 2003, 7:00AM), [http://www.forbes.com/2003/07/22/cz\\_af\\_0722sarbanes.html](http://www.forbes.com/2003/07/22/cz_af_0722sarbanes.html)

<sup>39</sup> *Securities Industry, supra* note 5; *SEC Disclosure Laws, supra* note 15.

<sup>40</sup> *Securities Industry, supra* note 5.

1) Reform of auditing and accounting procedures, including internal controls, 2) the oversight responsibilities of corporate directors and officers and regulation of conflicts of interest, insider dealings, and the disclosure of special compensation and bonuses, 3) conflicts of interest by stock analysts, 4) earlier and more complete disclosure of information on anything that directly and indirectly influences or might influence financial results, 5) criminalization of fraudulent handling of documents, interference with investigations, and violation of disclosure rules, and 6) requiring chief executives to certify financial results personally and to sign federal income tax documents.<sup>41</sup>

Additionally, the SOX Act created the Public Company Accounting Oversight Board, which oversees the audits of public companies by promoting informative, accurate, and independent audit reports.<sup>42</sup>

The SOX Act has been received with mixed reviews. On the one hand many have praised the SOX Act for improving investor confidence and financial reporting. The SOX Act created both an ethical and legal responsibility for upper management at publically traded companies.<sup>43</sup> Additionally, the SOX Act has created more transparency from managers down to the lower level staff, which contributes to investor confidence.<sup>44</sup>

Conversely, critics claim the SOX Act has not lived up to its promises to deter or flush out fraud and corruption in the corporate world.<sup>45</sup> Additionally, critics claim that the cost of complying with the SOX Act is high and unnecessary.<sup>46</sup> Critics also argue that the act oversteps the reach of government into the corporate market place.<sup>47</sup> More importantly, there are claims that

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<sup>41</sup> *SEC Disclosure Laws*, *supra* note 15.

<sup>42</sup> *Securities Industry*, *supra* note 5.

<sup>43</sup> *SEC Disclosure Laws*, *supra* note 15.

<sup>44</sup> *Id.*

<sup>45</sup> Michael Rapoport, *Investors' Prying Eyes Blinded by New Law*, WALL ST. J., (Apr. 5, 2012), <http://online.wsj.com/article/SB10001424052702304072004577325883892874036.html>.

<sup>46</sup> *Id.*

<sup>47</sup> *SEC Disclosure Laws*, *supra* note 15; James Freman, *The Supreme Case Against Sarbanes-Oxley*, WALL ST. J., (December 15, 2009, 3:16PM), <http://online.wsj.com/article/SB10001424052748704431804574539921864252380.html>

the SOX Act put American companies at a disadvantage with foreign companies who are not publically traded in the United States and has stunted the growth of new companies.<sup>48</sup>

*I. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) was a response to the near collapse of the U.S. economy that occurred in 2008. This near collapse was fueled by the housing-mortgage crisis, where many lenders practiced predatory lending, sold shoddy mortgages in combination with excessive packaging, sold the loans to investors, and placed risky bets on securities backed by these loans.<sup>49</sup> The large amount of defaulting borrowers caused many financial institutions to fail and whose impact was felt throughout the entire economy.<sup>50</sup>

The stated goals of the Dodd-Frank Act were to promote: the financial stability of the U. S. by improving accountability and transparency in the financial system, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and to end “too big to fail,” which protected big financial institutions from collapse.<sup>51</sup> The Dodd-Frank Act reshaped the U.S. regulatory system including the areas of consumer protection, trading restrictions, credit ratings, regulation of financial products, corporate governance and disclosure, and transparency.<sup>52</sup> The Dodd-Frank Act also established the new Investor Advisory Committee to advise the SEC on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosures as required by securities regulations, and initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace.<sup>53</sup> The Investor Advisory

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<sup>48</sup> *Id.*

<sup>49</sup> Sewall Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES, (Jan. 25, 2011), [http://www.nytimes.com/2011/01/26/business/economy/26inquiry.html?\\_r=0](http://www.nytimes.com/2011/01/26/business/economy/26inquiry.html?_r=0).

<sup>50</sup> *Id.*

<sup>51</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>52</sup> *Securities Industry*, *supra* note 5.

<sup>53</sup> *Investor Advisory Committee*, U.S. SEC. EXCH. COMM’N, <https://www.sec.gov/spotlight/investor-advisory-committee-2012.shtml> (last visited Jan. 5, 2013).

Committee receives its authority to submit findings and recommendations from the Dodd-Frank Act.<sup>54</sup>

*J. Jumpstart Our Business Startups Act of 2012*

Against the backdrop of the 2008 financial crisis and the Dodd-Frank Act, President Obama enacted the JOBS Act. President Obama signed the legislation on April 5, 2012. The goal of the JOBS Act is to increase American job creation and economic growth by improving access to public capital markets for emerging growth companies.<sup>55</sup> The JOBS Act seeks to accomplish this goal by minimizing regulatory requirements for emerging companies and allowing them greater access to potential investors.<sup>56</sup>

### III. CHANGES TO SECURITIES REGULATIONS UNDER THE JOBS ACT

*A. Change to Rule 506: Lifting the Ban on General Solicitation and Advertising*

The JOBS Act directed the SEC to remove the prohibitions on general solicitation and advertising for private securities offerings that qualify for the Rule 506 exemption.<sup>57</sup> Section 201 (a)(1) of the JOBS Act directs the SEC to amend Rule 506 to allow for general solicitation and advertising, provided that purchasers of the private securities are “accredited investors.”<sup>58</sup> The JOBS Act further states that the SEC must outline “reasonable steps” for the issuer of private securities to verify that purchasers of securities are accredited investors.<sup>59</sup>

*B. Change To Rule 144A: Lifting the Ban on General Solicitation and Advertising*

The JOBS Act instructs the SEC to revise Rule 144A, lifting

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<sup>54</sup> *Id.*

<sup>55</sup> Jumpstart Our Business Startups Act Pub. L. 112-106, § 201, 126 Stat 306 (2012).

<sup>56</sup> *Investor’s Advocate*, *supra* note 4.

<sup>57</sup> *Proposed Rules*, *supra* note 14.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

the ban on general solicitation and advertising on the private resale of securities to QIBs.<sup>60</sup> The JOBS Act also allows the issuer to resell to non-QIBs as long as the securities are sold to persons whom the seller reasonably believes are QIBs.<sup>61</sup> While Rule 144A is similar to Rule 506, this comment will focus on the issues pertaining to Rule 506, lifting the ban on general solicitation and advertising; and how it effects the potential investors who could be targeted by private companies using the Rule 506 exemption.

#### IV. LIFTING THE BAN ON GENERAL SOLICITATION AND ADVERTISING

The SEC commissioners realize the implications that lifting the ban on general solicitation and advertising could have on investors. As previously mentioned, President Obama enacted and signed the JOBS Act on April 5, 2012. The JOBS Act instructs the SEC to lift the ban no later than 90 days from the date of enactment. While the SEC voted 4-1 to lift the ban on August 29, 2012,<sup>62</sup> as of January 5, 2013, the SEC still has not issued a final rule.<sup>63</sup> The SEC published the proposed rule on August 29, 2012 in the Federal Registrar and allowed for interested parties to comment on the proposed rule for thirty days, as required by the Administrative Procedure Act.<sup>64</sup> However, the SEC has decided to extend the comment period beyond the thirty days.<sup>65</sup> Former SEC chairman, Mary Schapiro, told congressional lawmakers in August 2012, that she plans on reading the public comments before finalizing the repeal of the solicitation and advertising ban.<sup>66</sup> An SEC spokesperson made it clear that implementing the rule too quickly could expose the agency to court challenges.<sup>67</sup>

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<sup>60</sup> Comment from Sally Braeuer, VILL. SCH. L., to SEC on File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, *available at* <http://www.sec.gov/comments/s7-07-12/s70712.shtml>.

<sup>61</sup> *Proposed Rules*, *supra* note 14.

<sup>62</sup> Alper, *supra* note 3, at 101.

<sup>63</sup> SEC, *supra* note 2, at 6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Andrew Ackerman, *SEC Delays Rules On Advertising*, WALL ST. J., (Aug. 17, 2012), <http://online.wsj.com/article/SB10000872396390443324404577595573566984212.html>.

<sup>67</sup> *Id.*

*A. Benefits of Lifting the Ban*

The goal of the JOBS Act is clear: to increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.<sup>68</sup> Advocates for lifting the ban are frustrated that the SEC is taking so long to repeal the ban on solicitation and advertising.<sup>69</sup> Congressmen Scott Garret, Patrick McHenry, and Kevin McCarthy wrote in a letter to the SEC; “As the economy continues to recover from the financial crisis, businesses need additional avenues to grow and create jobs. Congress passed the JOBS Act to ensure that over burdensome regulation does not strangle innovation and job creation.”<sup>70</sup> The benefit of the JOBS Act can be seen in the more than 600 businesses that have filed as “emerging growth companies” since the JOBS Act was signed by President Obama.<sup>71</sup> The JOBS Act defines an “emerging growth company” as a company with fewer than one billion dollars in revenue, which has been publicly traded less than five years, and meets other market capitalization thresholds.<sup>72</sup> Many of these emerging growth companies are the same companies that could apply and qualify for a Rule 506 exemption using general solicitation and advertising.

Additionally, advocates for the repeal of the ban argue that “entrepreneurial growth companies” have served as the U.S. economy’s primary job creators throughout its history.<sup>73</sup> Many

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<sup>68</sup> Jumpstart Our Business Startups Act, Pub L. 112-106, 126 Stat 306 (2012).

<sup>69</sup> Alper, *supra* note 3; Comment from Rep. Patrick McHenry to SEC on File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, *available at* <http://www.sec.gov/comments/s7-07-12/s70712.shtml>; Comment from Rep. Scott Garrett et al. to SEC on File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, *available at* <http://www.sec.gov/comments/s7-07-12/s70712.shtml>.

<sup>70</sup> Comment from Rep. Scott Garrett et al. to SEC, *supra* note 69, at 109-110.

<sup>71</sup> Becky Yerak, *JOBS Act intended to help workforce grow, but investor advocates have concerns*, CHI. TRIB., Dec. 9, 2012, [http://articles.chicagotribune.com/2012-12-09/business/ct-biz-1209-emerging-companies—20121209\\_1\\_jobs-act-investor-advocates-growth-companies](http://articles.chicagotribune.com/2012-12-09/business/ct-biz-1209-emerging-companies—20121209_1_jobs-act-investor-advocates-growth-companies).

<sup>72</sup> Rapoport, *supra* note 45, at 10644.

<sup>73</sup> Comment from Rep. Scott Garrett et al. to SEC, *supra* note 69, at 109-110.

advocates concede that investor protection is important, but point out that Congress took this concern into consideration when passing the JOBS Act, evidenced by the language in the JOBS Act that repeals the ban.<sup>74</sup> Congressmen have stated, in letters to the SEC, that Congress diligently drafted the JOBS Act and gave instructions on how to implement the final ruling on the repeal of the ban on general solicitation and advertising.<sup>75</sup> Additionally, advocates suggest that investors are protected when capital markets are functioning properly and investors have additional places to invest their money, besides the private companies taking advantage of the Rule 506 exemption.<sup>76</sup>

### *B. Risks of Lifting the Ban*

Critics of lifting the ban fear that it would open the floodgates for fraud.<sup>77</sup> They claim lifting the ban and exempting companies from registering with the SEC “lowers the bar of transparency.”<sup>78</sup> Andrew Stoltmann, a Chicago lawyer who represents investors, may have accurately stated how critics feel about the repeal when he stated, “With investor confidence eviscerated after the 2008 market crash, this is not the right time for less disclosure.”<sup>79</sup> Additionally, the President of the North American Securities Administrators Association stated, “Lifting the advertising ban on these highly risky, illiquid offerings, without requiring appropriate safeguards will create chaos in the market and expose investors to an even greater risk of fraud and abuse.”<sup>80</sup> The biggest concern is for the people that will be

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<sup>74</sup> Comment from Rep. Scott Garrett et al. to SEC, *supra* note 69, at 109-110; Comment from Rep. Patrick McHenry to SEC, *supra* note 70, at 109-110; Comment from Sen. John Thune et al. to SEC on File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, *available at* <http://www.sec.gov/comments/s7-07-12/s70712.shtml>.

<sup>75</sup> Comment from Rep. Patrick McHenry to SEC, *supra* note 69, at 109-110.

<sup>76</sup> Comment from Rep. Scott Garrett et al. to SEC, *supra* note 69, at 109-110.

<sup>77</sup> Sarah N. Lynch, *SEC officials raise concerns about lifting advertising ban*, REUTERS, (Nov. 15, 2012), <http://www.reuters.com/article/2012/11/15/jobs-act-secidUSL1E8MF3Y320121115>.

<sup>78</sup> Yerak, *supra* note 71, at 110.

<sup>79</sup> *Id.*

<sup>80</sup> Melanie Waddell, *Rule 506's Lifting of Ban on Private Offering Advertising Will Create 'Chaos': Industry Groups*, ADVISORONE, (Oct. 10,

targeted as “accredited investors.”<sup>81</sup> Even if investors meet the SEC’s standards of accredited investors, it does not mean they are sophisticated or fully understand the risks of their investment.<sup>82</sup> Given the financial threshold for an accredited investor, (\$1 million net worth for a natural person) elderly people, who may even suffer from mental illness, are prime targets for companies looking for investors.<sup>83</sup>

Under the Rule 506 exemption, companies will be able to solicit investors without disclosing all the same information that is required of public companies during registration and initial public offerings. Robert Murphy, a former SEC lawyer, expressed his concern for the risks these new companies pose. Murphy considers these companies “blank check” companies and claims that one in eight companies that have filed as “emerging growth companies” have virtually no employees or operations.<sup>84</sup> The companies are set up to acquire a business that wants to become public without an expensive initial public offering.<sup>85</sup>

### C. Recommended Safeguards

The SEC must implement efficient safeguards to ensure that lifting the ban on general solicitation and advertising facilitates legitimate companies acquiring capital and protects investors. The SEC is required by the JOBS Act to lift the ban on general solicitation and advertising, but the SEC also has the duty to adopt rules that protect investors and promote market integrity. This requires the SEC to reconcile the competing goals of protecting the investing public from fraud and allowing companies’ access to public markets through deregulation. The lack of a simple solution to this issue has led the SEC commissioners to delay its final rule repealing the ban on general solicitation and advertising and to request comments from the general public for an extended period of time. The agency has

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2012), <http://www.advisorone.com/2012/10/10/rule-506s-lifting-of-ban-on-private-offering-adver>.

<sup>81</sup> Jason Zweig, *Want to Buy a Private Stock?*, WALL ST. J., (Sept. 7, 2012), <http://online.wsj.com/article/SB10000872396390443589304577637790108826970.html>.

<sup>82</sup> Comment from Sally Braeuer to SEC, *supra* note 60, at 108.

<sup>83</sup> Zweig, *supra* note 81, at 111.

<sup>84</sup> Yerak, *supra* note 71, at 110.

<sup>85</sup> *Id.*

stated concerns that additional requirements and rule changes could be overly burdensome in some cases, ineffective in others, and possibly counterproductive to the goals of the JOBS Act.<sup>86</sup>

As the SEC works toward reconciling its mandate to lift the ban on general solicitation and its duty to protect investors, the SEC should consider the following recommendations in determining the final rule.

*D. Define “Reasonable Steps” in Verifying an Accredited Investor*

The JOBS Act proposes the issuer of new stock to take “reasonable steps” to verify the purchasers of securities are accredited investors, using such methods as determined by the SEC.<sup>87</sup> The first thing the SEC should do is define the “reasonable steps” companies should take.

First, companies should carefully look at the type of accredited investor the buyer is claiming to be. For the purposes of this comment, the SEC should give additional consideration to natural persons as accredited investors. Companies should require copies of the potential investor’s financial statements or tax returns, showing they meet the thresholds outlined by the SEC for accredited investors. Additionally, companies should require the investor to sign a waiver or disclaimer showing they are aware of the risks in the investment. Finally, companies should look at the buyer’s recent investment history for the past five years to determine if the investor is “sophisticated” and realizes the risks of the investment.

*E. Investor Self Accreditation*

Members of Congress and the SEC want to make the process of verifying accredited investors as easy and efficient as possible. To achieve this goal the SEC should consider implementing a way for investors to become self-accredited investors. This can be done with an online application that investors fill out and submit along with financial statements. The SEC would then review the application and the supplemental materials and decide if the investor meets the accredited investor requirements. The SEC should then maintain an accessible online database of accredited

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<sup>86</sup> *Proposed Rules*, *supra* note 14, at 103.

<sup>87</sup> Jumpstart Our Business Startups Act Pub. L. 112-106, § 201, 126 Stat 306 (2012).

investors, which would be accessible to companies to check and make sure the purchaser of securities is accredited before issuing their securities.

#### *F. Redefine Accredited Investor*

The SEC should also clarify the definitions of accredited investors to ensure that accredited investors are sufficiently financially sophisticated to analyze the risks of the investment.<sup>88</sup> The current definition only takes into account the assets and income of the person, not their ability to analyze risk.<sup>89</sup> A more refined definition should place a requirement to provide past investment transactions in addition to assets and income. This would demonstrate the purchasers' understanding of the potential risks in investment opportunities.

#### *G. Outline Duties the Issuer Owes the Investor*

Additionally, the SEC should include a set of duties and disclosure requirements that issuing companies owe to investors at the initial investment stage and throughout the business relationship. These disclosures should include a business plan, quarterly unaudited financial statements, yearly unaudited financial statements, notice of important meetings, notice of upcoming material business decisions, and a yearly business summary letter with set goals for the upcoming year. Ultimately, the investors are owners of the company and are entitled to the all the above information because of the fiduciary duties of majority shareholders and management to all shareholders.

#### *H. Advertising Guidelines and Regulation*

The SEC should also use their powers to regulate the general solicitation and advertising. They should issue guidelines that regulate the "manner and substance" of the solicitation and advertisements.<sup>90</sup> The guidelines should include what types of

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<sup>88</sup> Comment from SEC Investor Advisory Committee to SEC on File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, *available at* <http://www.sec.gov/comments/s7-07-12/s70712.shtml>.

<sup>89</sup> *Id.*

<sup>90</sup> Comment from Sen. Carl Levin to SEC on File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, *available at*

materials or media are allowed as well as what advertising content is allowed. The goal is to protect investors from deceptive, fraudulent, and unfair practices.<sup>91</sup> Careful consideration should be placed on target marketing that may focus on certain demographics, such as the elderly. Elderly upper-middle class individuals could fall under the accredited investor threshold and may be the target of unsolicited offers.<sup>92</sup>

The SEC should also require advertising materials to include warnings and warning labels about the potential risks of investing. These warnings should be placed candidly in the advertisements, similar to warning labels and statements on alcohol.

### *I. Heavy Sanctions and Penalties*

Finally, the SEC should make the consequences clear for companies that defraud investors. New fines and penalties may not necessarily be needed. However, current securities laws, duties, and penalties should be clearly available and explained to issuing companies and investors. When companies complete their online “Form D,” a form that is required when a company first issues their securities, the SEC should require the company’s agent to click through a few slides outlining the reasonable steps for determining an accredited investor, and the relevant advertising guidelines, and communicating the fines and penalties for defrauding investors.

## V. CONCLUSION

It is time that the SEC takes a proactive approach to protecting investors, not a reactive approach. History has shown that Congress and the SEC have always issued regulation in response to huge times of crisis or cases of fraud, as evidenced by events such as the stock market collapse of 1929, the Enron scandal, and the recent mortgage crisis. The transparency created by the SOX Act helped regain and foster investor confidence. Now, the JOBS Act scales back the regulations that were implemented to protect investors. Research has shown that the general investing public is not sophisticated, nor knowledgeable.<sup>93</sup>

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<http://www.sec.gov/comments/s7-07-12/s70712.shtml>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Zweig, *supra* note 81, at 111.

Lifting the ban on general solicitation and advertising allows companies to cast a wide net for investors, while allowing them to hide from the scrutiny of the SEC.

The JOBS Act has the potential to promote the creation and growth of private companies, leading to American job creation. Additionally, the JOBS Act creates investment opportunities for people who have capital to invest, but might not know how to invest in the current system. Unfortunately, the risk of investors being defrauded is a serious concern.

Risk is inherent in any securities transaction. Risk is present whether you buy stock in Apple, Inc. or a company like Enron. The difference is that sometimes investors lose because the market dictates it, and sometimes they lose because of the greed and deceit of corporate decision-makers. The 1933 Securities Act, the SOX Act, and Dodd-Frank were implemented to protect investors and shareholders from these evils and prevent future disasters of the magnitude of Enron and the collapse of the banking industry.

The JOBS Act has good intentions and there is no doubt that American job seekers and many companies could benefit from the provisions of the JOBS Act. The thought of creating the next Apple, Google, or Facebook is enticing, but at what cost should investors risk financial ruin? The economy still has not fully recovered from the recent economic recession and many people would agree it needs to be jumpstarted, but lifting the ban on general solicitation and advertising without implementing proper protection for investors is not the solution.