The SEC's Inglorious Role in Limiting Small Business's Access to Capital

*By Rutheford B. Campbell, Jr.**

One of the most curious and misdirected regulatory approaches of the Securities and Exchange Commission (SEC) is the Commission's relentless refusal to permit small corporations to solicit broadly for external capital.[1] The Commission has over time been ably assisted in this unfortunate approach by state blue sky laws and state securities regulators.[2] As a result, small businesses, which are vital to our national economy and otherwise face enormous structural impediments when they compete for external capital, are further disadvantaged by burdensome, inefficient, and anti-competitive governmental regulatory schemes.

To some extent, it has always been a perfect storm for small businesses in this regard. At the federal level, the SEC has never understood small businesses, the way they raise capital and the obstacles they face in the capital markets.[3] There are also matters of public choice and fashion at work here. A public choice analysis suggests that small entrepreneurs have been unable to overcome the collective action problems they encounter when they compete for efficient rules from the Commission.[4] Relatedly, as a matter of fashion, high profile issues—matters, for example, involving large publicly traded companies and the regulation of public trading markets—dominate the Commission's attention, leaving little agency time for consideration of the problems of small issuers. But whatever the explanation, the Commission has never had the ability, inclination or interest to fix the problems it has created for small issuers.

The other component of the perfect storm is state blue sky laws. States and their securities regulators have the capacity to eviscerate nearly any federal regulation that is sympathetic to the capital formulation needs of small companies and over the years have shown a hostility to legitimate capital formation activities by small companies.[5]

Small entrepreneurs, who already suffer major structural disadvantages in capital formation, are therefore further and significantly disadvantaged by an ineffective and generally disinterested Commission and by misguided and hegemonic state regulators.

The purpose of this article is to make the case for Commission action freeing small companies from regulatory rules that unfairly limit their legitimate capital formation activities. The focus of the article is Regulation D,[6] which is the most likely path small issuers take in order to meet the requirements of the Securities Act of 1933. Regulation D, however, requires issuers in marketing their securities to refrain from any "general solicitation or general advertising."[7] State blue sky laws also effectively prohibit any general solicitation by small businesses attempting to rely on Regulation D.

The Commission can—and should—eliminate both the federal and state prohibition against general solicitations in Regulation D offerings. Permitting small issuers to solicit broadly in a Regulation D offering would improve small businesses access to external capital without any loss of investor protection.

A. The Important But Disadvantaged Place of Small Businesses in our Economy

Data demonstrate the importance of small businesses to our national economy. There are about 5 million small businesses in the United States (businesses with less than 20 employees).[8] This amounts to almost 90% of all business units.[9] These small firms employ approximately 20 million workers, which amounts to 19% of the nation's entire workforce.[10] If one considers firms with less than 100 employees, those firms employ nearly 40 million workers,[11] amounting to 37% of all jobs nationally.[12]

A somewhat more qualitative evaluation of small businesses may lead one to conclude that even these impressive raw numbers understate the real value of small firms to our nation. Additional data, supplemented by educated estimates, suggest that small businesses may be disproportionately innovative,[13] provide entrepreneurial opportunities for historically disadvantaged groups,[14] and create new jobs disproportionate to their relative size.[15]

Data and educated estimates, therefore, confirm the apparent—that small businesses are hugely important to our nation.

Data also confirm what is apparent to everyone, which is that small businesses need access to external sources of capital.[16] Starting a new business and maintaining that business, especially as the business becomes successful and begins to expand, inevitably requires external capital.

Small businesses' search for external capital is hampered by significant economic and structural impediments. One impediment is that small firms usually need small amounts of capital. This means that expenses in a small offering—legal, accounting and offering expenses[17] —will be very high relative to the size of the offering, and it is relative, not absolute, offering costs that foreclose small firms from the capital markets.[18] To use extreme examples to make this point, offering expenses of $90,000 will likely foreclose an offering of $100,000 by a company, but the same $90,000 offering costs will not foreclose a $20 million offering by a company.

The other significant structural impediment that small businesses face is the absence of financial intermediation services. Underwriting services are not available for small offerings. The modest size of offerings by small businesses will not support underwriting fees sufficient to compensate underwriters for their efforts in investigating, learning, and selling the securities of a small issuer. The unavailability of those intermediation services are a significant disadvantage to the small company attempting to access external sources of capital.[19]

This means that small companies—companies whose significance to the economy may be under described by reference to the approximately 20% of all jobs that they provide—are disadvantaged by exogenous factors that in some

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cases exclude them from the capital markets and in all cases drive up their costs of capital beyond the efficient cost levels encountered by larger firms.

B. The Overall Theory of Federal Securities Laws: Disclosure Philosophy, Mandated Disclosures, and Exemptions from Mandated Disclosures

Consider the philosophy and purpose of the Securities Act of 1933 in light of the exogenous structural impediments small businesses face when they attempt to raise external capital.

The 1933 Act is based on a disclosure philosophy.[20] The cornerstone of the 1933 Act is Section 5,[21] which mandates disclosure of closely prescribed investment information by companies selling their securities into the capital markets. Since efficient trading depends on fully informed parties, a rule requiring issuers to disclose investment information to purchasers appears, at least preliminarily, to be sound.

The problem, however, is that mandated disclosure may cause a significant drag on capital formation. This can be illuminated by imagining excessively burdensome disclosure requirements, which drive up the issuer's transaction costs[22] and in turn diminish the value of the trade between the issuer and investors or, in the worst case, actually exclude the issuer from offering its securities.[23] Alternatively, one may describe the problem as mandating inefficient levels of disclosure. Because the level of disclosure required in a particular transaction is dictated by the government rather than the parties themselves, it may result, for example, in more information (and thus more expense) for the parties than they would have agreed upon, were they free themselves to set the level of disclosure.[24] The top down rule, in other words, destroys part of the value of the trade and thus diminishes the incentive for value creating transactions.

In an attempt to ameliorate the economic problems caused by a ubiquitous application of a mandated disclosure rule and to balance the competing interests of capital formation and investor protection, Congress and the SEC have carved out a number of exceptions to the registration and prospectus delivery requirements of Section 5. Generally, these exceptions may be seen as involving situations in which the parties to the sale of securities are in a position cheaply to acquire for themselves investment information necessary for efficient trading. So, for example, if parties have geographic proximity to one another[25] or have access to information as a result of position or economic bargaining power,[26] exemptions from the registration and prospectus delivery requirements remove governmentally prescribed and mandated disclosure rules and permit the parties themselves to fashion their own levels of disclosure.

While the 1933 Act from the beginning implicitly recognized the need to balance investor protection with capital formation, Congress later amended the 1933 Act explicitly to require that Commission rules strike an appropriate balance in that regard. Section 2(b) of the 1933 Act now mandates that the Commission, when in its rulemaking it is required to consider the "public interest," is to consider the effect of its action not only on "the protection of investors" but also on "efficiency, competition and capital formation."[27]

Notwithstanding such implicit and now explicit mandates from Congress, the Commission over long decades has refused to accord appropriate consideration to the capital formation needs of small issuers. One of its important failures in that regard has been the impediments it has constructed to the efficient search for external capital by small businesses, and the most pernicious of those impediments may well be the prohibition on general solicitations in Regulation D.[28]

C. Regulation D

Regulation D[29] is a regulatory exemption from the registration requirement of Section 5 and, facially, at least, is consistent with the Commission's obligation to balance investor protection and capital formation.

Rules 504, 505 and 506 of Regulation D provide exemptions from registration, and predicate the availability of the exemptions on more investor protection requirements as deals get larger. The investor protection devices in the Regulation are disclosure[30] and purchaser qualification requirements (*e.g.,* purchaser sophistication).[31] Rule 504 provides an exemption for offering up to $1 million and imposes no disclosure or purchaser qualification requirements. Rule 505 provides an exemption for offerings up to $5 million and imposes a disclosure obligation but no purchaser qualification requirement. Rule 506 provides an exemption without regard to the size of the offering and requires disclosure and purchaser qualification.

This stair-stepped approach—Brequiring additional investor protection as the size of the transaction increases—is a sound philosophy, but the prohibition in Rules 504, 505, and 506 against any general solicitation for investors undercuts the claim that Regulation D strikes a sensible balance between investor protection and capital formation. The prohibition against general solicitation significantly and adversely affects the ability of small issuers to find external capital but offers no material protection to investors.

D. Prohibition Against "General Solicitation"

The prohibition in Regulation D against any "general solicitation" has two components—"general" and "solicitation."

The term "solicitation" should be understood to have the same meaning as "offer" under the 1933 Act. It is a broad term that applies to any action undertaken by an issuer for the purpose of facilitating a sale of its securities. Under such a purpose or intent test, activities by an issuer that are intended to condition the market for a sale would amount to an "offer" or "solicitation". Thus, even those activities that fall far short of a formal or common law offer would amount to a "solicitation" under Regulation D.[32]

The definition of "general" has always been something of a mystery. At first blush, one might think of "general" as meaning a large number. So, a large number of solicitations (offers) may amount to a "general" solicitation. The Commission, however, has never put a quantitative limit on "general."

Pursuing a more indirect interpretative path—relying on Commission releases, no action letters and scholarly interpretations—one may conclude the following regarding when solicitations or offers reach the level of "general": (1) offers are "general" if they are likely to reach an undetermined number of offerees;[33] (2) offers limited to sophisticated or accredited offers may still be "general;"[34] (3) indiscriminate offers—those

not preceded by some screening or vetting—are more likely to be considered "general" than offers in which offerees are screened or vetted;[35] (4) notwithstanding the absence of any specific number test, numbers are important, and the more offerees the more likely the solicitation is to be "general;"[36] and (5) a pre-existing relationship between the offeree and the issuer or issuer's agent reduces the likelihood that the solicitation (offer) is "general."[37]

The purpose of listing these five factors, however, is not to illuminate the line between actions that are "general" and non-general. Instead, the purpose is to show that the concept of "general" is broad both in scope and marginal ambiguity and, as a result, is effective in precluding issuers that rely on Regulation D from an efficient search for external capital.

It is clear that an issuer who attempts to identify potential investors through the use of any medium of wide circulation, including newspapers, radio, TV or the internet, is involved in a "general" solicitation and thus precluded from using Regulation D.[38] It is also clear that even more limited methods of identifying potential investors may involve levels of risk the cause reliance on Regulation D to be economically irrational. Assume, for example, that a small issuer wishes to use Regulation D as a way to raise $2 million in equity. In order to identify potential investors, the issuer proposes to send a letter to 150 persons offering the opportunity to invest in the offering. If that letter creates a 0.3 probability of amounting to a "general" solicitation[39] and thus destroying the availability of Regulation D and creating a potential $2 million liability for the issuer, a rational issuer may be unwilling to accept that amount of residual risk. Thus, the broad marginal ambiguity of Regulation D may make the exemptions practically unavailable to issuers, even in instances in which conduct may have a relatively low probability of amounting to a "general" solicitation.

Precluding issuers that rely on Regulation D from an efficient search for investors involves costs—both to the issuer and to society—for which there are no comparable benefits. Indeed, it is impossible to find any material benefit that is generated by limiting the issuer's ability to offer its securities broadly, so long as appropriate investor protection devices are effectively in place *at the point of sale*.

Consider, for example, the investor protection devices of Regulation D, which are disclosure and investor qualification requirements (sophistication or accreditation). The effectiveness of neither of these protections would in any way be compromised by allowing companies to solicit broadly for investors, so long as those investor protection devices were effectively in place at the time of sale.

If the Commission were to eliminate the prohibition against general solicitations in Regulation D, small issuers searching for capital would be free to solicit broadly for investors, using, if they so chose, radio, TV, newspapers, periodicals, internet, etc. Issuers could also use less expansive investor identification techniques, such as sending solicitation letters to 150 potential investors or unlimited calls to friends and business associates. In all such cases, however, investor protection requirements would be imposed at the relevant point, which is at the time of sale. Thus if the particular Regulation D offering requires both disclosure and investor qualification, the issuer would have to ensure that any broadly solicited offerees who became purchasers of the offering were at the point of sale qualified and fully informed.[40] The effectiveness of those investor protection provisions would be uncompromised by the broad solicitation.

The simple and effective prescription, therefore, is for the Commission in Regulation D to select the investor protection devices that are appropriate, always balancing (as they are obligated to do) investor protection and capital formation. These protection devices should be imposed prior to sale, leaving issuers relying on Regulation D free—subject only to antifraud rules—to solicit investors broadly.

E. The Role of the States and NSMIA

While the elimination of the prohibition against general solicitation would be a relatively simple administrative matter for the Commission,[41] achieving the final desired result, which is to free small issuers to solicit broadly for capital, implicates another formidable obstacle, and that is state securities laws.

At the present time, issuers offering their securities under Rule 504 or Rule 505 of Regulation D are subject to state securities registration requirements, since the National Securities Markets Improvement Act of 1996 (NSMIA) did not preempt state registration requirements for offerings under Rule 504 or 505.[42] As a result, issuers relying on those exemptions under Regulation D are likely meet state registration requirements by qualifying for either the state's small offering exemption from registration[43] or its Uniform Limited Offering Exemption (ULOE).[44] The small offering exemption is a statutory exemption and is typically limited to a very few offerees.[45] The ULOE is a state regulatory exemption predicated on the offering's meeting the requirements of federal Rule 505 or Rule 506 and additional requirements under ULOE designed to enhance investor protection.[46]

It is highly unlikely that either of these state exemptions would be available for a Regulation D offering that permitted a general solicitation. As described above, the state small offering exemption has strict quantitative limitations on the number of permissible offerees,[47] which would prohibit any general solicitation. As concerns the availability of the ULOE, state regulators would certainly resist any state coordination with a Regulation D offering that permitted general solicitations. State securities regulators have a history of resisting general solicitations for exempt offerings[48] and a demonstrated willingness aggressively and effectively to protect their own administrative turf.[49]

The Commission, however, has two paths by which it could prevent states from neutralizing a federal rule that permitted a general solicitation for investors in a Regulation D offering. First, the Commission could by its own regulation expand NSMIA's preemption. Under NSMIA, Congress delegated to the Commission authority to expand the federal preemption over state securities regulation to offerings made to "qualified purchasers," as defined by the Commission.[50] Both the 1933 Act itself and the history of NSMIA strongly suggest that the Commission would be well within its delegated authority to define a "qualified purchaser" as including one who purchases in an offering under a revised version of Regulation D that permitted general solicitations.[51]

The second path open to the Commission is to lead a legislative initiative to expand NSMIA's preemptive scope. A complete federal preemption of state registration requirements is certainly the preferred prescription for the longstanding and significant pernicious effects that state blue sky laws have caused in efficient capital formation, especially capital formation by small issuers.[52]

Whichever option it chooses, neutralizing state hegemony over federal policy is essential if the SEC is ever to construct a Regulation D that permits a broad search for investors by small companies. It is certain that state regulators would fight that move by the SEC, but it is time for the Commission to exercise its own hegemonic advantage for the benefit of small entrepreneurs and the economy.

CONCLUSION

Small businesses are essential to our national economy, and efficient access to external capital is essential to small businesses. Structural obstacles—small capital needs and the absence of financial intermediation—put small businesses at a significant disadvantage, when they compete for external sources of capital. Federal and state securities rules that prohibit a broad solicitation for external capital exacerbate this problem.

The Commission has for too long ignored the pernicious effects of its own regulations on the legitimate capital formation needs of small issuers and has been inappropriately deferential to the misdirected actions of well meaning but overly zealous state securities regulators. Small businesses and the rest of us have been the losers in this.

The Commission should take steps to ensure that Regulation D is available for small issuers that solicit broadly for their external capital.

Endnotes

1 This problem has existed for decades. *See* Rutheford B Campbell, Jr., *The Plight of Small Issuers Under the Securities Act of 1933: Practical Foreclosure from the Capital Market*, 1977 Duke L.J. 1139 (hereinafter Campbell, *The Plight Under the 1933 Act*); Rutheford B Campbell, Jr. *The Plight of Small Issuers (and Others) Under Regulation D: Those Nagging Problems That Need Attention*, 74 Ky. L.J. 127 (1985-86) (hereinafter Campbell, *The Plight Under Regulation D*).

2 *See* Rutheford B Campbell, Jr. *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. Corp. L. 553 (1985) (hereinafter, Campbell, *An Open Attack*).

3 Once again, this is a long standing problem. For example, as originally promulgated, Rule 144, 17 C. F. R. ' 230.144 (1975) was practically unavailable for resales by investors in small companies, because they were unable to meet its requirements. Nonetheless, the Commission's release adopting Rule 144 blatantly attempted to force all resales of restricted securities into Rule 144 transactions. *See* Campbell, *The Plight Under the 1933 Act*, *supra* note 1, at 1150-54.

4 *See* Rutheford B Campbell, Jr., *The Impact of NSMIA on Small Issuers*, 53 Bus. Law. 575, 583-85 (1998) (hereinafter Campbell, *The Impact of NSMIA*).

5 *See* Campbell, *An Open Attack, supra* note 2; Rutheford B Campbell, Jr., *The Insidious Remnants of State Rules Respecting Capital Formation*, 78 Wash. U. L.Q. 407 (2000) (hereinafter Campbell, *The Insidious Remnants*).

6 17 C.F.R. '' 230.501-.508 (2008).

7 The prohibition against general solicitation, 17 C. F. R. ' 230.502(c) (2008), is incorporated by reference into the requirements for an exemption under Rule 504, 17 C. F. R. ' 230.504(b)(1) (2008), under Rule 505, 17 C. F. R. ' 230.505(b)(1) (2008), and under Rule 506, 17 C. F. R. ' 230.506(b)(1) (2008).

While other requirements of Regulation D make that exemption less than perfectly efficient for small issuers, it is the prohibition on general solicitations that is most harmful to the legitimate efforts of small companies attempting to access external capital efficiently. *See* Campbell, *The Plight Under Regulation D*, *supra* note 1, at 136-43; Daugherty, *Rethinking the Ban on General Solicitation*, 38 Emory L.J. 67 (1989).

8 U.S. Small Business Administration, The State of Small Business: A Report of the President 2000 (hereinafter The State of Small Business 2000), at 61, Table A.4.

9 *Id.* at 61, Table A.4 (reporting that 89.4% of firms had less than 20 employees).

10 *Id.* (reporting that 18.8% of all workers were employed by firms with less than 20 employees).

11 *Id.* (reporting that firms with less than 100 employees employed 39,653,019 workers).

12 *Id*. (reporting that firms with less than 100 workers employed 36.7% of all workers).

13 U.S. Small Business Administration, The State of Small Business: A Report of the President 1994 (hereinafter, The State of Small Business 1994), at 15 (estimating that small businesses and their employees generate proportionately more innovations than larger businesses); U.S. Small Business Administration, The State of Small Business: A Report of the President 1998 (hereinafter The State of Small Business 1998), at 3 (then President Bill Clinton referred to small businesses as "continual sources of new ideas... and their experimental efforts are an essential part of the organic and ever-changing American economy.").

14 The State of Small Business 2000, *supra* note 8, at 102, Table A.14 (showing increases in minority and female ownership of businesses); *id.* at 17 (A[s]mall business continued to be an important means by which women, minorities, and immigrants entered the American economic mainstream and managed to increase their share in the economy.).

15 *Id.* at 84, Table A.9 (reporting that 50.2% of all new jobs were created by small firms) .

16 *See* Rutheford B Campbell, Jr., *Regulation A: Small Businesses' Search for "A Moderate Capital"*, 31 Del. J. Corp. L. 77, 86-88 (2006) (hereinafter Campbell, *"A Moderate Capital"*) (discussing and providing data that demonstrate small businesses' resort to external sources of capital); The State of Small Business 1998, *supra* note 13, at 3 (reporting that approximately 85% of firms with 10 to 19 employees relied on external capital).

17 James D. Cox, Robert W. Hillman & Donald C. Langevoort, Securities Regulation Cases and Materials 149 (4th ed. 2004) (*hereinafter* Cox, Hillman & Langevoort, Securities Regulation (4)) ("reporting a 'recent estimate' for the expenses of an IPO as '$150,000-$300,000 in fees to counsel; $100,000-$150,000 for the audit; $10,000-$20,000 for underwriter counsel expenses... and $50,000-$100,000 for printing costs'").

18 *See* Campbell, *"A Moderate Capital"*, *supra* note 16, at 88-90.

19 *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 613-21 (1984) (describing the value of financial intermediation to firms selling securities); and Donald C. Langevoort, *Angels on the Internet: The Elusive Promise of "Technological Disintermediation" for Unregistered Offerings of Securities*, 2 J. Small & Emerging Bus. L. 1, 16-18 (1998) (citing social science-based research "that also speaks to the role of intermediation in the capital-raising process." *Id.* at 16.

20 Louis Loss & Joel Seligman, I Securities Regulation 171-93 (3d ed. 1989) (discussing the battle over philosophies for federal securities laws).

21 15 U.S.C. ' 77e (2008).

22 *See* Cox, Hillman & Langevoort, Securities Regulation (4), *supra* note 17.

23 In economic terms, if transactions costs exceed the value created by the trade, rational parties will not trade. Thus, it is highly unlikely that a company will make a $100,000 offering if it costs $90,000 to make the mandated disclosures.

24 *See, e.g.,* Richard A. Posner, Economic Analysis of Law 481 (7th ed. 2007) ("Capital markets are competitive, and competitive markets generate information about products sold.").

25 The intrastate exemption provided by Section 3(a)(11) of the 1933 Act, 15 U.S.C. ' 77c(11) (2008), and Rule 147 promulgated thereunder, 17 C.F.R. ' 230.147 (2008), predicate the availability of the exemption on the issuer's and the investors' being located in the same state.

26 *See, e.g.*, SEC v. Ralston Purina Co., 346 U.S. 119 (1953) (listing as important to the availability of the exemption in Section 4(2) factors such as investors' ability to "fend for themselves" and their "access to the same kind of information that registration would disclose").

27 15 U.S.C. ' 77b(2) (2008).

28 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, 355 (1999) ("No limitation characterizes the phobia of securities regulators more than the prohibitions against general advertising and solicitation."). *See* Daugherty, *supra* note 7.

29 17 C.F.R. '' 230.501-.508 (2008).

30 Rule 502(c), 17 C.F.R. ' 230.502(c) (2008), which prohibits any "general solicitation or general advertising," is incorporated by reference into Rule 504, 17 C.F.R. ' 230.504(b) (2008), Rule 505, 17 C.F.R. ' 230.505(b)(1) (2008), and Rule 506, 17 C.F.R. ' 230.506(b)(1) (2008).

31 Rule 506(b)(ii), 17 C.F.R. ' 230.506(b)(2)(ii) (2008), requires each purchase to be either an "accredited investor" or sophisticated.

32 *See* Campbell, *The Plight Under Regulation D*, *supra* note 1, at 137-40 (describing SEC no-action letters and release that provide define "offer" or "solicitation").

33 *See, e.g.*, Aspen Grove, SEC No-Action Letter (Dec. 2, 1982) (*available on* Lexis Fedsec library, No act file) (offer in a thoroughbred horse trade publication).

34 *See, e.g.,* The Texas Investor Newsletter, SEC No-Action Letter (Jan. 23, 1984) (*available on* Lexis, Fedsec library, No act file) (offer to 2,000 accredited investors is "general").

35 *See, e.g.,* Aspen Grove, SEC No-Action Letter, *supra* note 33 (distribution of offering materials at a horse sale without vetting or screening of distributees).

36 *See* Campbell, *The Plight Under Regulation D*, *supra* note 1, at 141.

37 *See* the discussion in James D. Cox, Robert W. Hillman & Donald C. Langevoort, Securities Regulation Cases and Materials 302-310 (5th ed. 2008) (hereinafter Cox, Hillman & Langevoort, Securities Regulation (5)) (discussing the importance of pre-existing relationship, *id.* at 302, solicitations by brokers on behalf of issuers, *id.* at 304, and match-making services or investment databases, *id.* at 306).

38 *See, e.g.,* Sec. Release No. 7233, ex. 20 (Oct. 6, 1995) (offering "on the internet would not be consistent with the prohibition against general solicitation").

39 *See* Campbell, *The Plight Under Regulation D*, *supra* note 1, at 142 (opining that offerings to 100 pre-screened investors should not be considered "general").

40 Under the present version of Regulation D, when disclosure is required, it must be accomplished "a reasonable time prior to sale," 17 C.F.R. ' 230.502(b)(1) (2008), and the investor qualification requirements of Rule 506 are imposed respecting each "purchaser." 17 C.F.R. ' 230.506(b)(2)(ii) (2008).

41 One technical matter for the Commission would be whether Rule 506 could remain a Section 4(2) exemption without a prohibition on general solicitations, since common law interpretations of Section 4(2), 15 U.S.C. ' 77d(2) (2008), seem to define "public offering" by reference to offers rather than sales. *See* Cox, Hillman, Lanevoort, Securities Regulation (5), *supra* note 37, at 283 ("As... virtually every... case on Section 4(2) make[s] clear, the critical inquiry concerning the private offering exemption is the need of the offerees B not just the purchasers...."). The Commission could solve this problem by re-enacting Rule 506 as an exemption authorized by its delegated authority in Section 28, 15 U.S.C. ' 77bb (2008).

42 15 U.S.C. ' 77r (2008) (preempting state registration provisions respecting registration for "covered securities", which do not include securities offered under Section 3(b) of the 1933 Act). NSMIA did, however, preempt state securities laws in the case of Rule 506 offerings. 15 U.S.C. ' 77r(b)(4)(D) (2008). If the Commission were to re-enact Rule 506 as a Section 28 exemption as a way to permit a general solicitation, *see supra* note 41, securities issued under that version of Rule 506 would not within today's version of NSMIA be "covered securities" and thus not be eligible for preemptive status.

43 *See, e.g.*, Unif. Sec. Act ' 402(b)(9), 7B U.L.A. 601-602 (1958).

44 *See* Uniform Limited Offering Exemption, NASAA Rep. (CCH) & 6201 (Oct. 1990).

45 *See, e.g.*, Unif. Sec. Act ' 402(b)(9), 7B U.L.A. 601-602 (1958) (ten offerees in a twelve month period).

46 *See* Uniform Limited Offering Exemption, NASAA Rep. (CCH) & 6201 (Oct. 1990).

47 *See, e.g.*, Unif. Sec. Act ' 402(b)(9), 7B U.L.A. 601-602 (1958) (ten offerees in a twelve month period).

48 *See, e.g.*, Mark A. Sargent, *A Future for Blue Sky Law,* 62 U. Cin. L. Rev. 471, 477-79 (1993); and Marc J. Steinberg, *The Emergence of State Securities Laws: Partly Sunny Skies for Investors*, 62 U. Cin. L. Rev. 395, 408-11 (1993), which describe the resistence of state securities administrators to changes in Regulation A.

49 State regulators operating through NASAA were, for example, an important force in reducing the pre-emptive reach of NISMA. *See* Campbell, *The Insidious Remnants*, *supra* note 5, at 413; Campbell, *The Impact of NSMIA*, *supra* note 4, at 585-86.

50 15 U.S.C. ' 77r(b)(3) (2008).

51 *See* Campbell, *The Impact of NSMIA*, *supra* note 4, at 586-87 (the 1933 Act the Commission "is able to expand significantly the scope of preemption, limited only by the principles of the protection of investors and the promotion of competition and capital formation." *Id.* at 586).

52 With regard to anticipating resistence that the Commission may face if it were to lead a legislative initiative to expand NSMIA, one should recall that as originally proposed the legislation that became NSMIA preempted all state control over registration, except for offerings under the intrastate exemption. State securities regulators and their organization, the North American Securities Administrators Association, were effective in significantly weakening the final version of NSMIA, constricting the scope of preemption and essentially eviscerating the benefit of the legislation for small businesses. *See* Campbell, *The Impact of NSMIA*, *supra* note 4, at 581-89.