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The Role of Blue Sky Laws After NSMIA and the JOBS Act

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ABSTRACT

State securities laws—in particular, state laws requiring that securities offered by issuers be registered with the states—have been an impediment to the efficient movement of capital to its highest and best use. The pernicious effects of these laws—generally referred to as "blue sky laws"—have been felt most acutely by small businesses, a vital component of our national economy.

It has been difficult to remedy this problem. States and state regulators have been tenacious in protecting their registration authority from federal preemption. The Securities and Exchange Commission, on the other hand, has been reluctant to advocate for preemption and unwilling to exercise its delegated power to expand preemption by regulation.

In recent years some progress has been made toward a more efficient regulation of capital formation, principally as a result of some congressional preemption of state registration authority. Nonetheless, state registration provisions continue to impede significantly businesses'—especially small businesses'—efficient access to external capital.

Further gains in efficient regulation of capital formation can be achieved but require actions both by states and the federal government. States must allocate more resources and effort toward vigorous enforcement of their antifraud provisions. At the federal level, Congress must preempt completely state registration authority. This duty of preemption falls to Congress, because the Commission has shown a sustained unwillingness to exercise its broad, delegated power to preempt state registration authority.

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INTRODUCTION

In our system of federalism, it has proven difficult to achieve an efficient regime regulating capital formation—an overall regime that facilitates the movement of capital to its highest and best use with a minimum of transaction costs.

This difficulty is perhaps not surprising in light of the fact that historically our rules governing capital formation have been generated by our federal government and also by each individual state. In the best of cases, the good-faith, idiosyncratic views of multiple sovereign rulemakers and administrators about what is "good" for their particular citizens may differ. It also is possible, of course, that rank turf battles could erupt—battles driven not by good-faith disagreements over "good" regulation but, instead, by less noble factors or considerations.

In any event, in a system of federalism, we may wind up with an overall regime that does not correct market imperfections but, instead, creates additional impediments to the efficient flow of capital to its highest and best use. Unfortunately, this has been the case in the United States.

The focus of this Article is on blue sky laws. These are the state laws that most directly impact capital formation. The laws require that companies seeking external capital file registration statements with states[1] and prohibit those companies from engaging in deceptive or manipulative conduct in connection with their capital-raising activities.[2]

Historically, these blue sky laws and regulations—in particular, the state provisions requiring that securities offered by issuers be registered with the states—have been an impediment within our market economy to the efficient movement of capital to its highest and best use. The pernicious effects of these state laws have been felt most acutely in regard to small-business capital formation.

1. *See, e.g.*, UNIF. SEC. ACT § 301 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1956) (requiring the registration of securities).

2. *See, e.g.*, *id.* § 101 (prohibiting, inter alia, material misstatements in connection with the sale of securities). In LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, 1 SECURITIES REGULATION 15 (5th ed. 2013), the authors refer to the "prescription of fraud" and the "policing of affirmative disclosure of corporate information" as the "basic foundation of any system of investor protection."

In more recent times, the problems wrought by these blue sky laws have been ameliorated, at least to an extent, by some federal preemption of state authority over registration.[3] This Article demonstrates, however, a continuing harmful impact of blue sky laws on the efficient allocation of capital.

Further gains in efficiency in capital formation, particularly capital formation by small businesses, require the complete elimination of state authority over registration and the redeployment of state resources into the enforcement of states' own antifraud provisions. The Article shows, however, the difficulties within our system of federalism in achieving this outcome and argues that any solution to the pernicious effects of state registration authority depends on Congress's creating a comprehensive federal statute that preempts all state authority over the registration of securities.

Part I of this Article provides an overview of the history of the relationship between state and federal governments in the regulation of capital formation. Part II explains the current role of blue sky laws in regard to capital-formation regulation. Part III analyzes the extent to which today's blue sky laws promote efficient capital allocation. The Conclusion reiterates the view that although efficiency has improved, further progress on that score is needed and requires congressional preemption of state authority over registration and a redeployment of state regulatory resources.

I. HISTORY OF THE RELATIONSHIP BETWEEN STATE AND FEDERAL REGULATION (AND REGULATORS) OF CAPITAL FORMATION

A. *Before the National Securities Market Improvement Act (NSMIA)*

Two historical facts continue to impact the nature of the rules governing capital formation within our system of federalism. The first

3. In 1996, Congress enacted the National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.). Broadly stated, NSMIA preempted state registration authority over the offer and sale of securities (1) listed on a national securities exchange; (2) issued by a registered investment company; (3) offered and sold to "qualified purchasers," as defined by the Securities and Exchange Commission (the Commission); and (4) offered and sold under the exemption provided by 17 C.F.R. § 230.506 (2016). *See* 15 U.S.C. § 77r (2012). In 2012, Congress passed the Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012), further preempting some state authority over registration. For a summary of federal preemption of state authority over registration, see *infra* notes 97–98 and accompanying text.

is that states developed comprehensive statutes governing capital formation before the federal government passed its securities legislation.

In 1911, Kansas enacted a broad statute governing the offer and sale of securities.[4] The statute required the registration of securities and the licensing of persons involved in the business of selling securities.[5] Previously, there were no comprehensive statutes—either state or federal—regulating the offer and sale of securities,[6] although some states had earlier enacted statutes regulating certain aspects of capital-formation activities.[7]

Other states soon followed Kansas's lead.[8] By the time Congress passed the federal Securities Act of 1933 (the 1933 Act), forty-seven of the forty-eight states as well as the then-territory of Hawaii had adopted blue sky laws.[9]

The second significant historical fact is that when Congress passed the 1933 Act, there was no preemption of state authority over the registration of securities. Each state and the territory that at the time required the registration of securities continued to exercise that authority.[10] Predominately, those blue sky regimes were based on a

4. 1911 Kan. Sess. Laws 210. *See History*, KAN. OFFICE OF SEC. COMM'R, http://www.ksc.ks.gov/index.aspx?nid=154 [https://perma.cc/PW9L-6CVQ].

5. *See* LOUIS LOSS & EDWARD M. COWETT, BLUE SKY LAW 7–8 (1958) (discussing the content and terms of the act).

6. Authors and scholars have offered interesting accounts of capital-formation activities before the advent of comprehensive securities legislation. *See, e.g.*, JOHN CHAMBERLAIN, THE ENTERPRISING AMERICANS: A BUSINESS HISTORY OF THE UNITED STATES 130–32 (1961) (describing post-war sales of securities); JAMES S. MOFSKY, BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS 9–16 (1971) (describing promoter activities in connection with railroad construction).

7. *See* LOSS, SELIGMAN & PAREDES, *supra* note 2, at 58–60 (discussing early securities laws in Connecticut, Nevada, and Rhode Island). For an earlier version of this discussion, see LOSS & COWETT, *supra* note 5, at 5–7.

8. LOSS & COWETT, *supra* note 5, at 10 (reporting that within two years of the Kansas act, twenty-three states had adopted blue sky laws, and that "[a]ll but six of [those] acts were either identical with the Kansas statute or modeled upon it").

9. *See* LOSS, SELIGMAN & PAREDES, *supra* note 2, at 65. The authors further report that "[t]oday all 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have blue sky laws in force." *Id.* at 66.

10. It is not entirely clear that the U.S. Congress had authority to regulate capital formation in 1933. *See* Carter v. Carter Coal Co., 298 U.S. 238, 298 (1936) (discussing the scope of Congress's commerce power, which "includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states" as well as "embrac[ing] the instruments by which commerce is carried on"). In 1937, however, the Supreme Court in *NLRB v. Jones & Laughlin*

qualification theory, not the disclosure theory that was at the heart of the 1933 Act.[11]

This framework of federalism for the regulation of capital formation continued essentially unchanged for over half a century.[12] During that time period, an issuer that elected to do a national distribution of its securities had to meet the federal registration requirements imposed by the 1933 Act and the separate and individual registration requirements imposed by states, territories, and the District of Columbia.[13]

Over the decades after the enactment of the 1933 Act, there were some efforts to deal with the burden imposed on capital formation by the obligation to meet the registration requirements and, in most cases, the qualification requirements of fifty-plus sovereign jurisdictions. For example, the Uniform Securities Act, some form of which was adopted by most states,[14] provides for state registration by coordination.[15] Essentially, this coordination meant that an issuer could provide its federal filing package to states, and when the federal filing was declared effective, the state registrations also became effective.[16] The Uniform Securities Act also provides for an exemption from state

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Steel Corp. made it clear that Congress has authority to regulate ordinary industry demonstrably connected to interstate commerce. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937).

11. Stated simply and generally, in a "qualification" or "merit" regime, an issuer offering securities must meet certain standards or conditions in connection with the offering. *See, e.g.*, UNIF. SEC. ACT § 306(a)(2)(F) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1956) (prohibiting excessive underwriting commissions). In a "disclosure" regime, the issuer is required to disclose prescribed investment information to investors. *See* 15 U.S.C. § 77e (2012) (obligating issuers to disclose investment information to the Commission and investors). An exhaustive report by the ABA in 1986 concluded that some form of a merit regime was applicable in thirty-nine states. ABA Ad Hoc Subcomm. on Merit Regulation of the State Regulation of Sec. Comm., *Report on State Merit Regulation of Securities Offerings*, 41 BUS. LAW. 785, 788–89 (1986). In an article I wrote in 1997, I reviewed the registration provisions in a five-state sample and concluded that all five of the states applied some form of merit standards to registration. Rutheford B. Campbell, Jr., *Blue Sky Laws and the Recent Congressional Preemption Failure*, 22 J. CORP. L. 175, 186 n.65 (1997).

12. In 1996, Congress enacted NSMIA, preempting some state authority over registration. *See* National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416.

13. *See supra* notes 8–10 and accompanying text.

14. Approximately forty jurisdictions (thirty-seven states, two territories, and the District of Columbia) have "adopted or substantially adopted with modifications" the Uniform Securities Act. *Jurisdictions Adopting the Uniform Securities Act*, 2015 BLUE SKY L. REP. (CCH) ¶ 5500.

15. UNIF. SEC. ACT § 303.

16. *Id.* § 303(c) (stating that a registration statement "automatically becomes effective at the moment the federal registration statement becomes effective if all the following conditions are satisfied").

registration for an issuer offering its securities that are traded on a national securities exchange.[17]

The North American Securities Administrators Association (NASAA) over time also promulgated and offered to the states for adoption policies, protocols, and model rules and forms, some of which were designed to promote better cooperation and uniformity among the states regarding the blue sky rules governing capital formation.

One example was the Uniform Limited Offering Exemption (ULOE),[18] which was designed to provide a uniform state exemption from registration for offerings under federal Rule 505[19] and Rule 506.[20] Two other examples of NASAA initiatives were the Small Company Offering Registration (SCOR) initiative,[21] which is a protocol designed to provide a coordinated state registration of small offerings made under federal Rule 504[22] or Regulation A,[23] and a coordinated-equity-review initiative, which is a protocol designed to coordinate state

17. The Act exempts from registration "any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, or the Midwest Stock Exchange." *Id.* § 402(a)(8).

18. *See* SEC, REPORT ON THE UNIFORMITY OF STATE REGULATORY REQUIREMENTS FOR OFFERINGS OF SECURITIES THAT ARE NOT "COVERED SECURITIES" (1997), https://www.sec.gov/news/studies/uniformy.htm [https://perma.cc/U5KL-6BWJ] [hereinafter SEC UNIFORMITY REPORT].

19. 17 C.F.R. § 230.505 (2015) (providing an exemption from federal registration requirements for offerings up to $5 million). On November 21, 2016 the Commission adopted an amendment to Rule 504 raising the maximum limit of an offering thereunder to $5 million. *See* Exemptions to Facilitate Intrastate and Regional Securities Offerings, 81 Fed. Reg. 83,494 (Nov. 21, 2016), Securities Act Release 33-10238 (to be codified at 17 C.F.R. pts. 200, 230, 239, 240, 249, 270, 275). In the same release the Commission repealed Rule 505, 17 C.F.R. § 230.505. 81 Fed. Reg. 83,553 (to be codified at 17 C.F.R. pt. 230). It also finalized amendments to Rule 147, 17 C.F.R. § 230.147. 81 Fed. Reg. 83,550–51 (to be codified at 17 C.F.R. pt. 230).

20. 17 C.F.R. § 230.506 (providing an exemption from federal registration for offerings without regard to dollar amount).

21. NASAA's website states:

> CR-SCOR provides for coordinated review of an offering of securities in two or more states located within a geographic group when the offering is intended to be made in reliance upon an exemption from registration with the US Securities and Exchange Commission (SEC) under Rule 504 of SEC Regulation D or SEC Regulation A.

Coordinated Review, N. AM. SEC. ADM'RS ASS'N, http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review [https://perma.cc/77EH-FRKL].

22. 17 C.F.R. § 230.504. The Commission has adopted an amendment to Rule 504 raising the maximum offering under that Rule to $5 million. *See supra* note 19.

23. Regulation A was enacted by the Commission under its delegated authority in the 1933 Act. 15 U.S.C. § 77b(b) (2012). Regulation A (before the JOBS Act and its regulatory implementation by the Commission) was found at 17 C.F.R. §§ 230.251–.262 (2011).

review of initial public offerings that are the subject of federal registration.[24]

Although the states broadly adopted these NASAA initiatives,[25] data and other available information show that the initiatives have been scantly utilized for the offering of securities. Consider, for example, the SCOR regime, which was adopted by the vast majority of states.[26] In a 2000 article, I gathered information on the use of SCOR from a sample of ten states.[27] The article reported that among the sample states, Iowa had four SCOR filings in the most recent three years; Indiana had two SCOR filings in a thirty-two month period;[28] Kansas had fifteen, six, and three SCOR filings in the most recent

24. NASAA's website states: "CR-Equity provides a uniform procedure designed to coordinate the blue-sky registration process among states in which the issuer seeks to sell its equity securities." *Coordinated Review*, *supra* note 21. Another website, sponsored by NASAA, states:

> CR-EQUITY provides a uniform procedure designed to coordinate the blue-sky registration process among states in which the issuer seeks to sell its equity securities. . . . CR-EQUITY offers issuers registration efficiencies by creating a uniform scheme of review. . . . CR-EQUITY simplifies the process for resolution of issues raised during review of the registration application. . . . Finally, CR-EQUITY offers issuers expedited review. . . . CR-EQUITY generally is intended only for initial public offerings of common stock, preferred stock, warrants, rights and units comprised of equity securities.

CR-Equity Overview, COORDINATED REVIEW, http://www.coordinatedreview.org/cr-equity/overview [https://perma.cc/Q7RG-J7ED].

25. It is reported, for example, that the CR-Equity protocol has been adopted by all but two jurisdictions. *See* COORDINATED REVIEW, *supra* note 24 ("Of the jurisdictions that register offerings eligible to use CR-EQUITY, all but two currently are participating in the program."). Regarding the adoption of ULOE by states, a 1997 SEC report to Congress stated that "[a]pproximately 30 states have adopted ULOE to some extent." SEC UNIFORMITY REPORT, *supra* note 18. A later sample of ten states indicated that nine of the ten states sampled had adopted some form of ULOE. Rutheford B. Campbell, Jr., *The Insidious Remnants of State Rules Respecting Capital Formation*, 78 WASH. U. L.Q. 407, 419 n.45 (2000). Regarding the adoption of the CR-SCOR protocol, as of 1996, NASAA reported forty-three jurisdictions had adopted SCOR or Form U-7. N. Am. Sec. Adm'rs Ass'n, *State Adoptions of Small Corporate Offerings Registration Program and Form U-7*, 6-2001 NASAA Rep. (CCH) ¶ 267.

26. As of 2015, approximately forty-five jurisdictions (forty-three states, Puerto Rico, and the District of Columbia) have adopted SCOR or informally accept SCOR filings. *Small Corporate Offering Registration Program and Form U-7*, 2015 BLUE SKY L. REP. (CCH) ¶ 6461.

27. Campbell, *supra* note 25, at 424. In evaluating the use of SCOR, it is good to remember that there are more than five million small businesses (businesses with fewer than twenty employees) in the United States. U.S. SMALL BUS. ADMIN., THE SMALL BUSINESS ECONOMY: A REPORT TO THE PRESIDENT 99–100 tbl.A6 (2009) (providing data for the year 2006).

28. Campbell, *supra* note 25, at 424.

years; and Michigan had a total of twelve SCOR filings over a three-year period.[29]

I updated the data in 2015, and those data show that SCOR registrations are now virtually unused. Currently, SCOR registrations involving multiple states can be coordinated by a single filing (Coordinated Review-Small Company Offering Registration or CR-SCOR) within four designated geographic areas. SCOR filings can also be made directly with a single state or multiple states. The totals of all CR-SCOR registrations in all regions were three in 2012, five in 2013, and one in 2014.[30] In addition, the total of uncoordinated SCOR filings in the nine sample states (I was unable to get data from one sample state) was four in 2012, four in 2013, and one in 2014.[31]

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29. *Id.* at 424–25 n.82.

30. E-mail from Joy Sakamoto-Wengel, Assistant Attorney Gen., Md. Div. of Sec., Atl. CR-SCOR Region, to Molly Coffey, Student, Univ. Ky. Coll. of Law (Nov. 20, 2015, 15:10 EST) (on file with the *Duke Law Journal*); Telephone Interview with Lynn Hammes, Dir., Fin. & Admin., Kan. Sec'y Comm'rs Office, Midwest CR-SCOR Region (Nov. 19, 2015); Telephone Interview with Patricia Loutherback, Dir., Registration Div., Tex. State Sec. Bd., Southwest CR-SCOR Region (Nov. 19, 2015); Telephone Interview with Sarah Reynolds, Div. of Sec., Wash. State Dep't of Fin. Insts., West CR-SCOR Region (Nov. 19, 2015).

31. SCOR filings can now occur through coordinated filing or filing directly in individual states that have adopted the SCOR filing regime. Out of the ten sample states, Indiana, Kansas, Kentucky, Louisiana, Maine, and Maryland had zero SCOR filings in 2012, 2013, and 2014. I obtained this information through emails from state securities registration employees to my research assistant, and through telephone conversations with their enforcement staff. *See* E-mail from Joy Sakamoto-Wengel, Assistant Attorney Gen., Md. Div. of Sec., to Molly Coffey, Student, Univ. Ky. Coll. of Law (Nov. 19, 2015, 06:35 EST) (on file with the *Duke Law Journal*); E-mail from Patrick Sanders, Registrations Attorney, Ind. Sec. Div., to Molly Coffey, Student, Univ. Ky. Coll. of Law (Jan. 13, 2016, 09:12 EST) (on file with the *Duke Law Journal*); E-mail from Steven Wassom, Exec. Dir., Kan. Sec. Comm'r Office, to Molly Coffey, Student, Univ. Ky. Coll. of Law (Dec. 23, 2015, 12:05 EST) (on file with the *Duke Law Journal*); Telephone Interview with Anthony Murphy, Registration Branch Manager, Div. of Sec., Ky. Dep't of Fin. Inst. (Jan. 6, 2016); Telephone Interview with Len Riviere, Deputy Chief Exam'r, Sec. Div., La. Office of Fin. Inst. (Dec. 28, 2015); Telephone Interview with Paige Turney, Assistant Sec. Adm'r, Office of Sec., Me. Dep't of Prof'l and Fin. Regulation (Dec. 28, 2015). Iowa and Michigan both had one filing in 2013 but zero in 2012 and 2014. E-mail from Mich. Dep't of Licensing and Regulatory Affairs (LARA), to Molly Coffey, Student, Univ. Ky. Coll. of Law (Jan. 13, 2016, 17:54 CST) (on file with the *Duke Law Journal*); Telephone Interview with Tom Alberts, Dir., Corp. Fin., Iowa Sec. Bureau (Dec. 22, 2015). Illinois had the most SCOR filings, with two in 2012, two in 2013, and one in 2014. E-mail from David Finnigan, Senior Enf't Attorney, Ill. Sec. Dep't, to author (Dec. 22, 2015, 11:58 EST) (on file with the *Duke Law Journal*). A 2012 GAO report is generally consistent with the foregoing, although the report unfortunately is not based on any hard data. The report states that "[t]he efficacy of the efforts to streamline the state registration process is unknown." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-839, SECURITIES REGULATION: FACTORS THAT MAY AFFECT TRENDS IN REGULATION A OFFERINGS 15 (2012),

Similarly, NASAA's coordinated-equity-review program is little used. In 1997, the Securities and Exchange Commission (the Commission) reported that there had to that date been only two coordinated equity reviews.[32] My 2000 article reported that by late 1999, only seventeen offerings pursuant to a coordinated equity review had become effective.[33] More recent data show the continued, extremely modest use of coordinated equity reviews. The Pennsylvania Securities Commission, which coordinates the program, reported that only one coordinated equity review was filed between 2012 and 2014.[34]

B. The Fight over Preemption

Starting in the mid-1980s, scholars[35] and ultimately Congress focused on the problems wrought by the fact that each state and the federal government had a different and independent set of rules governing capital formation. This led to the introduction of the Capital Markets Deregulation and Liberalization Act of 1995,[36] which with significant changes was enacted into law in 1996 as NSMIA.[37] In NSMIA, Congress, for the first time since the passage of the 1933 Act, preempted some state registration authority.

It was clear in 1996 that Congress if it so chose could preempt state authority over the registration of securities.[38] What Congress finally enacted in NSMIA, however, was far short of complete preemption of

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http://www.gao.gov/assets/600/592113.pdf [https://perma.cc/XDB6-GMTF]. The report continues as follows:

> According to several of the state securities administrators whom we interviewed, they have not participated in regional reviews or used SCOR forms for Regulation A filings because there have been so few Regulation A filings in their state. Similarly, a researcher and securities attorneys with whom we met noted that some of these methods, like SCOR, have not been widely used because of the low number of Regulation A filings in recent years.

Id.

32. SEC UNIFORMITY REPORT, *supra* note 18, at Part III.B.1.a.ii(A).

33. Campbell, *supra* note 25, at 426.

34. Telephone Interview with Brett Warren, Counsel, Div. of Corp. Fin., Pa. Dep't of Banking & Sec. (Dec. 28, 2015).

35. *See generally* Rutheford B. Campbell, Jr., *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. CORP. L. 553 (1985) [hereinafter Campbell, *Open Attack*] (discussing the impact on capital formation of state requirements regarding registration, merit qualification, regulation of brokers and dealers, and antifraud provisions).

36. H.R. 2131, 104th Cong. (1995).

37. National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416.

38. *See supra* note 12 and accompanying text.

states' registration authority. Briefly stated, NSMIA preempted state authority in three areas: offerings of securities by mutual funds,[39] offerings by companies traded on a national securities exchange,[40] and exempt offerings under Rule 506.[41] NSMIA also delegated authority to the Commission to expand preemption by regulation.[42]

The debates and adoption process leading to the 1996 enactment of NSMIA turned out to be a precursor of the future relationship between state and federal regulators.

In the legislative hearings leading to NSMIA, for example, the state regulators offered vigorous testimony against preemption,[43] and their effective lobby seems certain to have influenced the congressional committee considering NSMIA and ultimately Congress to limit significantly the broader legislative preemption provision initially proposed in the Capital Markets Deregulation and Liberalization Act.[44] The Commission, on the other hand, refused in its committee testimony to endorse preemption.[45]

Over the nearly three decades that followed, the Commission failed in any meaningful fashion to expand preemption,

39. 15 U.S.C. § 77r(b)(2) (2012) (preempting state registration authority of "a security issued by an investment company that is registered . . . under the Investment Company Act of 1940").

40. *Id.* § 77r(b)(1)(B) (preempting state registration authority over a security "listed, or authorized for listing, on a national securities exchange").

41. *Id.* § 77r(b)(4) (preempting state registration authority over a security "with respect to a transaction that is exempt from registration . . . pursuant to . . . Commission rules or regulations issued under section 77(d)2").

42. *Id.* § 77r(b)(3) (preempting state registration authority over the "offer or sale of the security to qualified purchasers, as defined by the Commission by rule"); *see infra* notes 46–51 and accompanying text.

43. *See, e.g.*, *Capital Markets Deregulation and Liberalization Act of 1995: Hearings on H.R. 2131 Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Commerce*, 104th Cong. 307 (1995) [hereinafter *Hearings on H.R. 2131*] (statement of Dee R. Harris, President, North American Securities Administrators Association) ("NASAA is opposed to the preemption of the state authority to register and review securities offerings.").

44. As originally proposed, the Capital Markets Deregulation and Liberalization Act of 1995, H.R. 2131, 104th Cong. (1995), preempted state registration authority over securities issued pursuant to a section 3(b) exemption under the Securities Act of 1933. If that provision had been adopted, states would have lost registration authority over offerings under Regulation A, Rule 504, and Rule 505.

45. *See Hearings on H.R. 2131*, *supra* note 43, at 105 (statement of Arthur Levitt, Chairman, Securities and Exchange Commission).

notwithstanding a broad delegation of authority in NSMIA to the Commission to expand preemption through regulation.[46]

NSMIA permitted the Commission to preempt by regulation state registration authority over any offering "to qualified purchasers, as defined by the Commission by rule."[47] The breadth of this delegation is made clear on the face of the legislation, which limits the Commission's authority to define "qualified purchaser" only by requiring that the definition must be "consistent with the public interest and the protection of investors."[48] Regarding the "public interest" limitation, the legislation provides that when in the enactment of regulations the Commission is required to act in the "public interest, the Commission shall also consider, in addition to the protection of investors, whether the action promotes efficiency, competition, and capital formation."[49]

The Commission never used this delegated authority to expand preemption, notwithstanding the apparent inefficiency of a registration regime that may impose fifty-plus separate registration statutes on a company that engages in a broad solicitation for external capital and the overwhelming evidence that state authority over registration had wrecked both Regulation A offerings[50] and Regulation D offerings.[51]

Although the Commission was unwilling to advocate on behalf of preemption or expand preemption by regulation, the antipreemption

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46. The Commission did, however, expand the preemption regarding the offer and sale of securities traded on a national exchange by defining securities traded on the Pacific Exchange as "covered securities" preempted from state registration authority. Covered Securities Pursuant to Section 18 of the Securities Act of 1933, 17 C.F.R. pt. 230, Exchange Act Release No. 33-7494, 66 S.E.C. Docket 583 (Jan. 2, 1998). In 2001 the Commission proposed to define "qualified purchaser" as "any accredited investor" under Regulation D. Defining the Term "Qualified Purchaser" Under the Securities Act of 1933, 66 Fed. Reg. 66,839 (proposed Dec. 27, 2001). The Commission failed to adopt this proposal.

47. 15 U.S.C. § 77r(b)(3).

48. *Id.*

49. *Id.* § 77b(b).

50. *See* Rutheford B. Campbell, Jr., *Regulation A: Small Businesses' Search for "a Moderate Capital*,*"* 31 DEL. J. CORP. L. 77, 106–12 (2006). Prior to the Commission's most recent amendments, 17 C.F.R. §§ 230.251–.263 (2015), Regulation A provided an exemption from federal regulation requirements for offerings up to $5 million, predicated on disclosure of prescribed investment information. Issuers had abandoned the use of this exemption, due largely to state registration requirements. *See* Campbell, *supra*, at 110–12.

51. *See generally* Rutheford B. Campbell, Jr., *The Wreck of Regulation D: The Unintended (and Bad) Outcomes for the SEC's Crown Jewel Exemptions*, 66 BUS. LAW. 919 (2011) (describing how state authority over registration created problems with Regulation D and providing remedial actions for the problems).

forces under the leadership of state regulators and NASAA continued to wage an aggressive and imaginative campaign against preemption.

For example, an exposure draft[52] of the Dodd-Frank Act,[53] which was to be the blueprint for dealing with the Wall Street failures seen as the cause of the recession of 2008, had a provision buried deep in the roughly 1,200 pages of the proposed legislation that would have repealed the preemption of state registration authority over Rule 506 offerings.[54] The provision was not part of the final Dodd-Frank Act.

NASAA also established a website designed to coordinate better the efforts to limit and roll back preemption of state authority over registration.[55]

But perhaps the most aggressive initiative against any expansion of preemption occurred in connection with the regulatory implementation of the Jumpstart Our Business Startups Act (JOBS Act).[56]

Title IV of the JOBS Act[57] is the basis for the new Regulation A+ rules.[58] The Act delegates to the Commission the authority to preempt by regulation state registration authority over Regulation A+ offerings, provided the securities in the offerings are offered or sold to a "qualified purchaser."[59]

State regulators and antipreemption forces fought this perceived threat to state registration authority on multiple fronts. State

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52. STAFF OF S. COMM. ON BANKING, HOUS., AND URBAN AFFAIRS, 111TH CONG., RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2009 (Comm. Print 2009) (introduced by Sen. Chris Dodd).

53. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered titles of the U.S. Code).

54. STAFF OF S. COMM. ON BANKING, HOUS., AND URBAN AFFAIRS, *supra* note 52, at 680–81 (referencing § 928, which aimed to give state regulators authority over Regulation D offerings).

55. *NASAA Preemption Resource Center*, N. AM. SEC. ADM'RS ASS'N, http://www.nasaa.org/issues-and-advocacy/nasaa-preemption-resource-center/#Challenges to State Regulatory Authority [https://perma.cc/U8SP-MAMK].

56. Jumpstart Our Business Startups Act, Pub. L. No. 112-206, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.).

57. *Id.* §§ 401–402, 126 Stat. at 323–25.

58. *Id.* § 401, 126 Stat. at 324 (giving the Commission the authority "by rule or regulation [to] add a class of securities to the securities exempted pursuant to this section" under § 401(b)(2)). The new Regulation A+ Rules, 17 C.F.R. §§ 230.251–.263 (2016), provide an exemption from federal registration requirements for offerings by companies that are not subject to the reporting requirements of the 1934 Act. The limit on the offering is $50 million and is predicated on the company providing investment information to investors. *Id.*

59. 15 U.S.C. § 77r(b)(4)(D) (2012).

regulators wrote numerous letters of comment on the proposed regulations, strongly urging the Commission against any significant regulatory preemption of state authority over Regulation A+ offerings.[60] U.S. senators and representatives were convinced to write letters directly to the chair of the Commission, urging her to eschew or limit any preemption of state registration authority.[61] Finally, after the Commission issued its final rules under the new Regulation A+ preempting state registration authority over larger, Tier 2 Regulation A+ offerings, state regulators unleashed a new tactic: suing the Commission and claiming that the Commission exceeded its delegated authority by expanding preemption to cover Tier 2 offerings under the new Regulation A+.[62]

The strategies and roles of the Commission and state regulators that were first established in the context of NSMIA, therefore, continue to this day, and this relationship seems unlikely to change. It is a relationship that has been important in defining today's rules governing capital formation and that will continue to be important in defining society's rules in the future. State regulators have vigorously and seemingly with renewed energy opposed the expansion of preemption. The Commission, on the other hand, has been unwilling to any significant degree to promote preemption.[63]

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60. Amendments to Regulation A, Exchange Act Release No. 33-9741, 80 Fed. Reg. 21,806, 21,857–58, 21,857 n. 772 (Apr. 20, 2015).

61. *See id.* (citing letters written by U.S. senators and representatives as "object[ing] to the preemption of state securities law registration and qualification requirements" in an Exchange Act Release).

62. *See* Petition for Review at 1–2, Galvin v. SEC, No. 15-1150 (D.C. Cir. May 22, 2015), *consolidated with* Lindeen v. SEC, 825 F.3d 646 (D.C. Cir. 2016) (No. 15-1149) (filing a petition "relating to the preemption of state securities law registration and qualification requirements for certain Regulation A securities," and asking for a permanent injunction on the basis that the rules are "arbitrary, [and] capricious"); *see also* Opening Brief of Petitioners Monica J. Lindeen and William F. Galvin at 54–55, *Lindeen*, 825 F.3d 646 (No. 15-1149). The court has now rendered its opinion, holding that the Commission did not exceed its delegated authority in preempting state registration authority over Tier 2 offerings under Regulation A+. *Lindeen*, 825 F.3d at 656–58.

63. *See supra* notes 45–54 and accompanying text. The only exception to this unwillingness is the Commission's preemption of state authority over Tier 2 Regulation A+ offerings. 17 C.F.R. § 230.256 (2015). The Commission correctly perceived that it was under pressure from Congress to do something about preemption over Regulation A+ offerings because it was the second time Congress had delegated similar authority to the Commission to expand preemption through regulation. *See* 15 U.S.C. § 77r(b)(3) (preempting state registration authority over the "offer or sale of the security to qualified purchasers, as defined by the Commission by rule"). The Commission's regulatory preemption in its Regulation A+ rules is modest, however, only preempting state authority over Tier 2 offerings and leaving Tier 1 offerings—a regulatory regime

II. THE ROLE OF TODAY'S BLUE SKY LAWS

Blue sky laws have an important role in the governance of capital formation. States generally retain authority to make and enforce antifraud rules. States also retain significant authority over registration, although as a result of preemption, states have in recent years lost some authority in this area.

A. States' Authority to Enact and Enforce Antifraud Rules

Today, states generally retain authority to enact and enforce their own antifraud rules. NSMIA specifically preserves these rights for states,[64] and states' securities laws typically have strong antifraud rules that are similar to federal antifraud rules.[65] Stated broadly, these state antifraud provisions prohibit issuers soliciting external capital from making material misstatements and require those issuers to disclose all material facts.[66]

A violation of state antifraud rules by an issuer generates the risk of substantial state-based economic penalties imposed on the issuer in

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crafted for smaller Regulation A+ offerings—subject to state registration authority. This preemption is unlikely to have any material impact on capital formation, since Tier 2 offerings appear to be an unattractive way to raise capital. *See infra* notes 103–05 and accompanying text.

64. 15 U.S.C. § 77r(a)(1) (preempting some state authority only over "registration or qualification"); *id.* § 77r(c)(1) ("[A]ny State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions . . . (A) with respect to—(i) fraud or deceit . . . .").

65. For example, section 101 of the Uniform Securities Act makes it

> unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

UNIF. SEC. ACT § 101 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1956).

66. *See, e.g.*, *id.*

the form of investors' private rights of recovery,[67] as well as administrative[68] and criminal sanctions.[69]

These private and governmental state sanctions, therefore, amount to a significant role for blue sky laws. State antifraud provisions increase issuers' costs of committing fraud in connection with their capital-raising efforts and thus incentivize issuers to provide investors with an efficient level of complete and accurate investment information. These state antifraud provisions can both raise the amount of the penalty and, perhaps even more importantly, raise the probability of detection and prosecution of the miscreant.[70] This latter effect—raising the probability of detection and prosecution—depends to a significant degree on the state's willingness to invest its own resources in the enforcement of its antifraud rules.

B. States' Authority over Registration

As suggested in Part I, states' securities registration role today is complex. It therefore requires a more extensive explanation than what was offered in regard to states' antifraud authority.

To date, there has been a partial preemption of state authority over registration. This preemption started with NSMIA and was recently expanded in the JOBS Act and its final regulations.

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67. Section 410 of the Uniform Securities Act expressly provides a private right of action against one that offers or sells securities through "any untrue statement of a material fact." *Id.* § 410. That provision bears close resemblance to section 12(a)(2) of the 1933 Act. *Compare* 15 U.S.C. § 77l(a)(2) (providing a cause of action when one offers or sells securities "by means . . . which include[] an untrue statement of a material fact"), *with* UNIF. SEC. ACT § 410 (providing a cause of action when one "offers or sells a security by means of any untrue statement of a material fact"). The Securities Litigation Uniform Standards Act (SLUSA), 15 U.S.C. § 78bb(f) and 15 U.S.C. § 77p(b), has had some impact on private rights of recovery under state antifraud provisions. SLUSA preempts the authority of state courts over some private actions filed under state antifraud provisions. *See* 15 U.S.C. § 78bb(f); *id.* § 77p(b). The preemption generally applies only to class actions involving the securities of companies traded on a national exchange. *See generally* DONNA N. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 445–57 (3d ed. 2011).

68. Section 408 of the Uniform Securities Act expressly authorizes state administrators to institute injunction actions against those violating the provisions of the Act. UNIF. SEC. ACT § 408.

69. Section 409 of the Uniform Securities Act expressly authorizes criminal penalties, including imprisonment, for the "willful[]" violation of its provisions. *Id.* § 409.

70. *See infra* notes 115–18 and accompanying text.

The most significant preemption by NSMIA was the preemption of state registration authority over Rule 506 offerings.[71] That preemption eliminated state registration authority over thousands of offerings by issuers each year. For example, data that I developed show that over a twenty-five-month period during 2008–2010, there were more than 25,000 Rule 506 offerings.[72] More recent data developed by Professor Manning Warren show a total of 32,166 Rule 506 offerings over a later eighteen-month period.[73]

NSMIA also preempted state registration authority over offerings by companies with exchange-traded securities.[74] While preempting state registration authority over offerings by such companies is apparently significant since it preempts state registration authority over most larger publicly traded issuers,[75] NSMIA changed less in that regard than may at first appear. That is because prior to the effective date of NSMIA, most blue sky laws had an exemption from state registration for offerings by these companies.[76]

The JOBS Act in 2012 generated two other preemptions of state authority over registration. First, the statute itself preempts state registration authority over offerings under the newly implemented crowdfunding exemption.[77] Under this exemption, as implemented by the final Commission rules,[78] companies not subject to the periodic

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71. 15 U.S.C. § 77r(b)(4) (preempting state registration authority over the issuance of a security "with respect to a transaction that is exempt from registration . . . pursuant to . . . (F) Commission rules or regulations issued under section 77d(2)").

72. Campbell, *The Wreck of Regulation D*, *supra* note 51, at 926 tbl.I.

73. Manning Gilbert Warren III, *The False Promise of Publicly Offered Private Placements*, 68 SMU L. REV. 899, 905 tbl.1 (2015).

74. 15 U.S.C. § 77r(b)(1)(A)–(B). NSMIA also preempts state registration authority over securities issued by registered investment companies. *Id.* § 77r(b)(2).

75. There are currently, for example, approximately 3,137 companies listed on NASDAQ, 3,168 listed on NYSE, and 366 listed on the AMEX. *See Company List (NASDAQ, NYSE, & AMEX)*, NASDAQ, http://www.nasdaq.com/screening/company-list.aspx [http://perma.cc/F8YN-DD2N].

76. *Exchange Exemptions*, 2016 BLUE SKY L. REP. (CCH) ¶ 6401 (listing forty-six states as having exchange-traded exemptions from state registration).

77. 15 U.S.C. § 77d(a)(6); *id.* § 77d-1. The crowdfunding proposal generated a significant amount of scholarship and comment. *See generally* Joan MacLeod Heminway, *Crowdfunding and the Public/Private Divide in U.S. Securities Regulation*, 83 U. CIN. L. REV. 477 (2014) (discussing the impact of crowdfunding on securities regulation in the United States); Joan MacLeod Heminway, *How Congress Killed Investment Crowdfunding: A Tale of Political Pressure, Hasty Decisions, and Inept Judgments that Begs for a Happy Ending*, 102 KY. L.J. 865 (2014) (same).

78. *See* Crowdfunding, 80 Fed. Reg. 71,388 (Nov. 16, 2015) (to be codified at 17 C.F.R. pt. 200).

reporting requirements of the Securities Exchange Act of 1934[79] (the 1934 Act) can sell up to $1 million in securities during a twelve-month period.[80] Investors are limited as to how much each may purchase.[81] The offering must be conducted exclusively through the website of an intermediary (a broker or a "funding portal"),[82] and the issuer is strictly limited regarding any advertising of the offering.[83] The issuer is required to file with the Commission and disclose investment information both at the time of the offering (ex ante disclosures)[84] and on a periodic basis following the offering (ex post disclosures).[85]

The JOBS Act, as implemented by the final Commission rules,[86] also preempts state registration authority over some offerings under the new Regulation A+ rules. The new Regulation A+ rules[87] provide an exemption from registration that is built on the same structure as the pre-JOBS Act Regulation A exemption. Thus the Regulation A+ exemption requires the issuer to file with the Commission and disclose to investors a significant amount of investment information both ex ante[88] and ex post.[89] The amount of investment information is scaled, depending on the size of the offering. More information is required in Tier 2 offerings (offerings of up to $50 million) than is required in Tier 1 offerings (offerings of up to $20 million).[90] The Regulation A+ exemption is not available to issuers subject to the reporting requirements of the 1934 Act.[91]

79. 17 C.F.R. § 227.100(b)(2) (2015) (exemption is unavailable for sales by issuers "subject to the requirement to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934").

80. 15 U.S.C. § 77d(a)(6)(A).

81. *Id*. § 77d(a)(6)(B); 17 C.F.R. § 227.204.

82. 15 U.S.C. § 77d(a)(6)(C).

83. *Id.* § 77d-1(b)(2).

84. 17 C.F.R. §§ 227.201, 227.203.

85. *Id.* §§ 227.202–.203.

86. Amendments to Regulation A, Exchange Act Release No. 33-9741, 80 Fed. Reg. 21,806 (Apr. 20, 2015).

87. 17 C.F.R. §§ 230.251–.263.

88. *Id.* § 230.251(d).

89. *Id.* § 230.257(d).

90. *See, e.g.*, 17 C.F.R. § 239.90 (comparing Form 1-A, Part F/S(b), financial statements required for Tier 1 offerings, with Part F/S(c), financial statements required for Tier 2 offerings).

91. *Id.* § 230.251(a) (stating that the exemption is only available to offerings by an issuer "not subject to section 13 or 15(d) of the Securities Exchange Act of 1934").

The statute authorizing Regulation A+ delegated to the Commission authority to preempt state registration authority.[92] In its final rules, the Commission chose to preempt state registration authority over Tier 2 offerings (offerings up to $50 million) but not over Tier 1 offerings (offerings up to $20 million).[93]

As noted above, shortly after the final Regulation A+ rules were published, a suit was filed that petitioned the court for a permanent injunction against the Commission's rules regarding preemption.[94] The bases for the petition included a claim that the Commission exceeded its delegated authority by preempting state registration authority over Tier 2 offerings.[95] In a recent opinion, the D.C. Circuit rejected that argument, holding that the Commission's rule preempting state registration authority over Tier 2 offerings was within the congressional delegation of power to the Commission.[96]

In summary, state authority over registration has been eliminated with respect to: (1) offerings under Rule 506 (now including public offerings, if purchasers are limited to "accredited investors"[97]); (2)

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92. 15 U.S.C. § 77r(b)(4)(D) (2012). That section preempts state registration authority over

> [a] security . . . with respect to a transaction that is exempt from registration . . . pursuant to . . . a rule or regulation adopted pursuant to section 77c(b)(2) of this title and such security is . . . offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale.

Id. The reference to "paragraph (3)" above is a reference to part of the original NSMIA, and that paragraph, after authorizing the Commission to preempt by regulation state registration authority, goes on to state, "In prescribing such rule, the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors." *Id.* § 77r(b)(3). When the Commission is engaged in rulemaking and is required to consider whether an action is "in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." *Id.* § 77b(b).

93. Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21,806, 21,899 (Apr. 20, 2015) (to be codified at 17 C.F.R. § 230.256) (defining a "qualified purchaser" as "any person to whom securities are offered or sold in a Tier 2 offering [of Regulation A]"). As originally proposed, Rule 256 defined a "qualified purchaser" as "any offeree of such [Regulation A+] security and, in a Tier 2 offering, any purchaser of such security." Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, 79 Fed. Reg. 3926, 4003 (proposed Dec. 18, 2013) (to be codified at 17 C.F.R. § 230.256).

94. *See supra* note 62 and accompanying text.

95. *See supra* note 62.

96. Lindeen v. SEC, 825 F.3d 646, 656–58 (D.C. Cir. 2016).

97. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44,771, 44,804 (July 24, 2013) (to be codified at 17 C.F.R. § 230.506(c)).

offerings by issuers of its securities that are traded on a national exchange; (3) Tier 2 Regulation A+ offerings; and (4) crowdfunding offerings of up to $1 million offered only over the Internet.[98]

Essentially all other securities offerings by issuers are subject to state registration requirements. These include: (1) registered offerings by issuers of securities that are not traded on a national exchange; (2) private placements under the common law of section 4(a)(2); (3) offerings under Rule 504;[99] (4) offerings under Rule 505;[100] (5) Tier 1 offerings under Regulation A+; and (6) intrastate offerings under Rule 147.

As a result, although the scope of state authority has to some degree been constricted by preemption, blue sky laws continue to play a significant role in capital formation with regard to registration obligations. This appears to be most particularly true in connection with small-business capital formation, since the types of offerings listed in the immediately preceding paragraph appear attractive to and, indeed, are generally designed to accommodate the needs of small businesses.

Practically, however, state registration authority over small-business capital formation has been further reduced as a result of small issuers abandoning capital-formation strategies that are subject to state registration authority.

For example, at the time the JOBS Act was passed, states exercised registration authority over Regulation A offerings. Issuers, however, had essentially abandoned Regulation A as a vehicle for capital formation.[101]

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98. The extent to which crowdfunding will be widely—and effectively—used is still a mystery. Certainly it has attracted enormous interest, suggesting that it will be widely used by small issuers. But it has challenges. There are significant ex ante and ex post disclosure requirements. It also appears that the strict limitation on issuer advertising will require issuers using crowdfunding to forego more traditional solicitations. *See supra* notes 81–85 and accompanying text.

99. The Commission has adopted an amendment raising the maximum limit of a Rule 504 offering to $5 million. *See supra* note 19.

100. The Commission has adopted an amendment repealing Rule 505. *See supra* note 19.

101. *See* Rutheford B. Campbell, Jr., *The New Regulation of Small Business Capital Formation: The Impact—if Any—of the JOBS Act*, 102 KY. L.J. 815, 822 tbl.II (2014) (showing that the average annual number of Regulation A filings from 1995 through 2004 was 7.8 and from 2005 through 2011 was 23.1).

Under the new Regulation A+ rules, states will continue to exercise registration authority over Tier 1 Regulation A+ offerings.[102] It is unlikely, however, that Tier 1 Regulation A+ offerings will attract much usage from issuers, because the requirements for a Tier 1 Regulation A+ offering are remarkably similar to the requirements for a pre-JOBS Act Regulation A offering.[103]

Preliminary data support the assumption that there will be very few smaller, Tier 1 offerings under Regulation A+. For example, between the effective date of Regulation A+ (June 19, 2015) and May 24, 2016, there were only thirty-seven Tier 1 Regulation A+ offerings filed with the Commission.[104] During that same period there also were twenty-five Tier 2 offerings of $20 million or less filed with the Commission, a range within which issuers could have relied on Tier 1 rules.[105]

Similarly, data demonstrate that small offerings under Regulation D have largely abandoned Rule 504 and Rule 505—offerings that are subject to state registration authority—in favor of Rule 506 offerings, in which state authority over registration is preempted.[106] Data from a twenty-five-month period before the JOBS Act was enacted show that approximately 79 percent of all Regulation D offerings of $1 million or less—offerings that were within the size limit for a Rule 504 offering—were instead made under the more demanding requirements

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102. *See supra* note 93 and accompanying text.

103. *See supra* notes 87–91 and accompanying text.

104. Regulation A+ data were obtained from the subscription-only Lexis Securities Mosaic website. *See Form 1-A Data*, LEXIS SEC. MOSAIC, www.lexissecuritiesmosaic.com [https://perma.cc/YB43-NPJH] (click "SEC Filings" tab; then follow "SEC Filings" hyperlink; then search "Form 1-A"). Following the passage of the JOBS Act, NASAA adopted a new coordinated-review regime for offerings under Regulation A+. N. AM. SEC. ADM'RS ASS'N, NASAA COORDINATED REVIEW OF REGULATION A OFFERINGS REVIEW PROTOCOL (2014), http://www.nasaa.org/wp-content/uploads/2014/05/NASAA-Regulation-A-Review-Protocol-final-Adopted-March-7.pdf [https://perma.cc/48FR-AD3G]. NASAA reported that the regime was adopted by forty-nine of its fifty-three members. Amendments to Regulation A, 80 Fed. Reg. 21,806, 21,861 n. 826 (Apr. 20, 2015). As of June 2, 2016, only ten coordinated reviews for Tier 1 offerings had been filed with the states. E-mail from Faith L. Anderson, Esq., Chief of Registration & Regulatory Affairs, Wash. Dep't of Fin. Insts. Sec. Div., to author (June 2, 2016, 17:17 EST) (on file with author).

105. *See Form 1-A Data*, LEXIS SEC. MOSAIC, *supra* note 104.

106. To capture the full benefits of a Rule 506 offering, issuers in these small offerings overwhelmingly limit them to "accredited investors." *See* Campbell, *supra* note 51, at 930 tbl.VII (noting that 88.3 percent of Rule 506 offerings of $1 million or less were limited to "accredited investors" and 9l.8 percent of Rule 506 offerings of $1 million to $5 million were limited to "accredited investors").

of Rule 506.[107] Approximately 92 percent of offerings of $1 million to $5 million—offerings that were within the size limit of Rule 505—were moved to a Rule 506 offering.[108]

Data from Professor Manning Warren show that more recently only about 1.3 percent of all Regulation D offerings are made pursuant to Rule 504, and only about 2.5 percent of Regulation D offerings are made pursuant to Rule 505.[109] Other data show, however, that approximately 55 percent of all Regulation D offerings are within a size range that would qualify for a Rule 504 or Rule 505 offering.[110]

A recent Commission proposal regarding the intrastate exemption of Rule 147[111] may also generate some migration from, or at least diminished use of, offerings under that exemption. The Commission's proposal relaxes the requirements for Rule 147 offerings,[112] which would seem to encourage the use of this federal exemption over which the states still retain registration authority. The proposal, however, imposes a new requirement for the federal exemption.

Under the proposal, the federal exemption under Rule 147 requires the offering to either be registered under the state's blue sky laws or meet the requirements for the particular state's crowdfunding exemption from registration.[113] If adopted, the practical effect of this new requirement will be that issuers are no longer able to coordinate a Rule 147 offering with, for example, a state small-offering exemption.[114] The irony here is that the proposed amendments to Rule

107. *Id.* at 928 tbl.III.

108. *Id.* at 928 tbl.IV.

109. Warren, *supra* note 73, at 903 fig.1 (analyzing 450 Rule 504 offerings and 824 Rule 505 offerings out of a total of 34,199 Regulation D offerings in the sample).

110. *See* Campbell, *supra* note 51, at 927 ("[A]pproximately 55 percent of the Regulation D offerings in our 27,000 sample were for amounts of $5 million or less.").

111. Exemptions to Facilitate Intrastate and Regional Securities Offerings, 80 Fed. Reg. 69,786 (proposed Oct. 30, 2015) (to be codified at 17 C.F.R. pt. 230).

112. *Id.* at 69,831–32 (to be codified at 17 C.F.R. § 230.147(c) (relaxing the "doing business" requirement).

113. *Id.* at 69,831–32 (to be codified at 17 C.F.R. § 230.147(a)). Registration of the offering under blue sky laws seems unlikely, due to the expense of state registration.

114. On November 21, 2016, the Commission adopted final amendments to Rule 147. Exemptions to Facilitate Intrastate and Regional Securities Offerings, Securities Act Release No. 33-10328, 81 Fed. Reg. 83,494 (Nov. 21, 2016) (to be codified at 17 C.F.R. pts. 200, 230, 239, 240, 249, 270, 275). The amendments are to be effective on April 20, 2017. *Id.* at 83,494. The final amendments omit any requirement that the Rule 147 offering be registered with the state or compliant with the state's crowdfunding exemption. *Id.* at 83,550–51 (to be codified at 17 C.F.R. § 230.147).

147, which are seemingly designed to enhance the significance of and reliance on state registration authority to protect investors, may actually drive a portion of these offerings into other types of offerings that preempt state registration authority.

Thus, although small issuers—as opposed to larger companies with large capital needs—are most likely to be subject to state registration authority, one must realize that these small businesses have to a degree abandoned capital-formation strategies that are subject to state registration authority.

* * *

Today, blue sky laws continue to play a significant role in governing capital formation. States invariably have laws that prohibit fraud in connection with the purchase and sale of securities. States also exercise some authority over registration of securities, although that authority has been diminished somewhat by federal statutory preemption. Data also show that small businesses often deal with state registration by restructuring their transactions to meet the requirements for a federal exemption that preempts state registration authority.

III. THE EFFICIENCY OF TODAY'S BLUE SKY LAWS

Although progress has been slow and somewhat messy, today's blue sky laws are considerably more efficient than in prior periods. Regulatory efficiency can be further enhanced, however, by states focusing additional attention and resources on the enforcement of their own antifraud provisions and by further federal preemption of state registration authority, especially in regard to small-business capital-formation activities.

A. State Antifraud Rules

Blue sky laws that prohibit fraud, deception, or manipulative conduct in connection with the sale of securities make economic sense, particularly when backed up by administrative and criminal sanctions and private rights of recovery. These state laws, properly enforced, incentivize the issuer to disclose an efficient level of investment information to investors.[115]

Economists may view potential criminals and law-breakers as rational calculators who commit bad acts only when the anticipated benefits to the perpetrator exceed the perpetrator's anticipated costs of committing the bad act.[116] States can increase the perpetrator's penalty costs of her bad conduct by increasing the actual penalty (for example, higher fines and increased jail time and civil fines) or by increasing the probability of detection and conviction.[117]

State antifraud provisions seem likely to promote an efficient allocation of capital by allowing states to impose higher penalty costs on perpetrators of manipulation or deception in connection with the offer and sale of securities. Congress's decision in NSMIA not to preempt state antifraud authority appears, therefore, to have been economically sound.[118]

Indeed, efficiency may be further enhanced if states invest more in antifraud enforcement. States might accomplish this by reallocating resources away from the enforcement and administration of state registration rules and reinvesting those resources in the vigorous enforcement of the states' antifraud rules.

B. State Rules Requiring the Registration of Securities

Blue sky laws granting states authority over registration were, prior to NSMIA, impossible to justify as promoting an economically efficient allocation of capital.[119] State authority over registration during that time not only failed to facilitate the movement of capital to its highest and best use but also in many instances significantly impeded the efficient allocation of capital. Subjecting capital formation to fifty-

115. *See supra* notes 66–70 and accompanying text.

116. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 278–87 (8th ed. 2011). Posner explains the view that persons committing crimes may be "rational calculators" who determine whether to commit a crime on the basis of a cost-benefit analysis. *Id.* The "costs" to the perpetrator include the penalty costs, which are the perceived present negative value to the perpetrator of detection and punishment. *Id.*

117. *Id.*

118. States may actually enjoy efficiencies compared to federal authorities in prosecuting these economically bad acts. For example, the proximity of state regulators to the actual perpetration of the fraud may make the detection and gathering of information less expensive.

119. *See* Campbell, *supra* note 35, at 557–67 (discussing the inefficient allocation of capital resulting from blue sky laws granting states authority over registration before NSMIA).

plus sets of independent rules governing registration increased offering costs with no apparent efficiency benefits.

Regarding the increase in offering costs, assume a situation before NSMIA in which a business announced an offering of its securities by posting information about the offering on its website or by advertising to investors in a widely distributed publication. In such a case the business that was seeking capital would likely have been subject to the separate and individual registration requirements of each of the fifty-plus jurisdictions that had blue sky laws. In each state, therefore, the issuer would have been required to underwrite the costs of either registering its securities under the registration provisions of that particular state or meeting the particular state's requirements for an exemption from registration. Even if the offering had been limited to four states, the business soliciting for investors would have had to underwrite the costs of registration or qualifying for an exemption from registration in each of the four states.

State registration, however, generated no apparent material gain in investor protection or efficiency. Investors without the benefit of blue sky registration provisions would have been protected by federal and state antifraud provisions, which required the issuer to disclose all material facts. Investors also would have been protected by federal registration requirements, which would have required the issuer either to file a registration statement with the Commission and provide a prospectus to investors or to qualify for an exemption from the registration requirement. Imposing fifty-plus additional state registration regimes on top of these significant obligations of the issuer would have added no material increase in investor protection or efficiency.

Partial preemption in NSMIA and the JOBS Act of state authority over registration, however, has enhanced efficiency. Now, Rule 506 offerings, offerings by companies traded on a national securities exchange, crowdfunding offerings, and Tier 2 Regulation A+ offerings are subject to a single, federal set of rules respecting registration. The registration regime in those cases is under the administrative oversight of the Commission, the most professional, balanced, and resource-rich agency operating in this area. That amounts to progress in establishing an overall regulatory system that is efficient—one that enhances the allocation of capital to the highest and best use at the lowest transaction costs.

Still, as is the case in the enforcement of antifraud rules, there is work left to be done, especially in the area of small-business capital formation. Small businesses are vital to our national economy.[120] They face unique obstacles in their search for external capital. Most importantly, their offerings involve high relative transaction costs,[121] and they are usually unable to secure financial intermediation.[122] Imposing fifty-plus registration regimes on these offerings, therefore, is especially burdensome on these very important small businesses.

After the implementation of NSMIA and the JOBS Act, small businesses can secure the benefit of preemption for their offerings by a Rule 506 offering limited to accredited investors[123] or by crowdfunding.[124] Each of these is economically sound and helpful to small businesses, but each is significantly limited. For example, in Rule 506 offerings limited to accredited investors, those investors may amount to 5 percent of the total population,[125] excluding perhaps 95

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120. There are more than five million small businesses (businesses with fewer than twenty employees) in the United States. U.S. SMALL BUS. ADMIN., THE SMALL BUSINESS ECONOMY: A REPORT TO THE PRESIDENT 99–100 tbl.A.6 (2009) (data for year 2006). In recent times, these small businesses have accounted for slightly less than 20 percent of total employment in the United States. *Id.* at 101 tbl.A.7 (data for year 2006). For a more detailed historical look at the significance of small business, see Campbell, *supra* note 50, at 84–86.

121. "Relative transaction costs" are the offering costs divided by the total size of the offering. Thus, in a $100 million deal, offering costs of $1 million generate relative transaction costs of only 1 percent. In a $1 million deal, offering costs of $1 million generate relative transaction costs of 100 percent, which kills the offering. Data that I developed show 28.9 percent of all Regulation D offerings were for $1 million or less, and 54.8 percent of all Regulation D offerings were for $5 million or less. Campbell, *supra* note 51, at 927 tbl.II.

122. Data that I developed reflect financial intermediation in only 5.8 percent of Regulation D offerings of $1 million or less. *Id.* at 931 tbl.IX.

123. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44,771, 44,804 (July 24, 2013) (to be codified at 17 C.F.R. § 230.506(c)). Although Rule 506 does not require that all investors be accredited, small Rule 506 offerings overwhelmingly are limited to accredited investors in order to relieve small issuers from burdensome requirements, such as disclosures, sophistication of investors, and prohibition against general advertising, of Rule 506 offerings involving unaccredited investors. *See* Campbell, *supra* note 51, at 932–33.

124. Crowdfunding, 80 Fed. Reg. 71,388 (Nov. 16, 2015) (to be codified at 17 C.F.R. pt. 200). Under the new final Regulation A+ rules, small issuers can also achieve preemption by migrating to Tier 2 offerings. The requirements for Tier 2—most importantly, the disclosure requirements—impose burdens that make Tier 2 offerings under Regulation A+ unattractive to offerings involving small amounts of securities. *See supra* notes 87–91 and accompanying text. Preliminary data suggest that only a few small Regulation A+ offerings migrate to Tier 2. *See supra* notes 104–05 and accompanying text.

125. Justin Bryan, *High-Income Tax Returns for 2012*, IRS STAT. INCOME BULL., Summer 2015, at 2, https://www.irs.gov/pub/irs-soi/soi-a-inhint-id1510.pdf [https://perma.cc/2H8J-FQR8]

percent of the population from the investment opportunity and small businesses from a significant demand for their securities. Crowdfunding, for example, limits sales strategies to posting the offer on the Internet.[126] Obviously, not all potential investors are reached through this method, and the crowdfunding rules severely restrict the issuer from other, more traditional, face-to-face and personalized selling techniques.[127]

To compete and survive, small businesses need to utilize other federal exemptions from registration, such as Rule 504, Rule 505, and Tier 1 Regulation A+, as avenues to external capital. But state registration requirements may block access to these types of offerings. As described above, small businesses have to a large extent abandoned offerings under Rule 504 and Rule 505 because of the requirements of state registration provisions, and preliminary data indicate that small businesses are not using Tier 1 offerings under Regulation A+ for the same reason.

Efficiency in registration rules requires one set of rules generated by the most efficient rulemaker. In short, efficiency requires complete preemption of state authority over registration, leaving the federal government, acting through Congress and the Commission, as the sole rulemaker regarding the registration of securities.[128]

(providing that approximately 3.62 percent of all 2012 tax returns reported an adjusted gross income of $200,000 or more). For tax year 2007, see Justin Bryan, *High Income Tax Returns for 2007*, IRS STAT. INCOME BULL., Spring 2010, at 4, http://www.irs.gov/pub/irs-soi/10sprbulhiinret07.pdf [https://perma.cc/A7NX-FE4Q] (providing that 3.17 percent of all 2007 tax returns reported an adjusted gross income of $200,000 or more).

126. *See* 17 C.F.R. § 227.100(a)(3) (2015).

127. *See id.* § 227.204.

128. The recently proposed amendment to Rule 147 offers an interesting suggestion, however, regarding a possibly efficient role for states' authority over registration. For a discussion of this proposal, see *supra* notes 115–18 and accompanying text. If one believes that section 3(a)(11)'s intrastate exemption is based on the assumption that these local offerings within a single state should be a matter for state regulation, then it may make some sense for the federal government essentially to turn the matter over to the states. That would require the Commission to relax and clarify the federal regulation for the intrastate exemption. Reducing the importance and burden of federal regulation in that manner would mean that there would be only one *meaningful* set of rules governing registration, and that would be the rules of the single state in which the offering occurred.

CONCLUSION

The history of society's regulation of capital formation tells us much about where we are today and where we may be headed in this important economic matter.

The failure of Congress in 1933 to take away state authority over registration was a mistake. But, after all, states were there before the federal government, and in 1933 at the depth of the Great Depression, legislators likely did not think of the dangers to a market economy of overregulation of capital formation.

Once this dual regulation was set in place within our system of federalism, however, it became difficult to correct. States and state regulators, it turned out, were tenacious defenders of their authority over the registration of securities. The Commission, on the other hand, was unwilling to advocate on behalf of preemption and reluctant to expand preemption by regulation. The Commission failed to act in this regard notwithstanding a broad delegation of authority from Congress to preempt state registration authority and clear evidence that businesses—especially small businesses—were struggling under the burdens and inefficiencies of state registration requirements.

But some progress toward efficient regulation of capital formation has by this point been made. Principally, this is the result of partial congressional preemption of state registration authority and Congress's decision not to preempt states' authority over the enforcement of state antifraud rules.

Efficient regulation can be further enhanced by states reallocating resources to enforcement of state antifraud provisions and by complete preemption of state authority over registration. With regard to further preemption of state registration authority, history suggests—unfortunately, rather strongly—that only Congress can effect this goal. States, certainly, will not voluntarily surrender their authority over registration, and there is no indication that the Commission can overcome its longstanding reluctance to expand preemption by regulation. Any improvement in the efficient regulation of capital formation, especially small-business capital formation, will require congressional action.