Testimony of

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Committee on Financial Services

"The JOBS Act at Four: Examining Its Impact and Proposals to Further Enhance Capital Formation"

Good morning. Thank you Chairman Garrett, Ranking Member Maloney, and Members of the Committee for inviting me to testify today.

I am Paul Atkins, CEO of Patomak Global Partners. For six years ending in 2008, I served as a commissioner on the U.S. Securities and Exchange Commission (SEC), and from 2009 to 2010, I was a member of the Congressional Oversight Panel for TARP, where I had the pleasure of serving with Chairman Hensarling. I am testifying this morning on my own behalf.

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Mr. Chairman, as you know, small businesses are vital to our nation's economy. Since 2002, small businesses generally have been responsible for almost 50 percent of U.S. private, non-farm GDP.[1] In 2012, small businesses with fewer than 20 employees made up almost 90 percent of the 5.73 million employer firms in the U.S.[2] Indeed, start-ups and young companies are a primary driver of job creation in the U.S.[3] For example, between 1993 and the middle of 2013, small businesses accounted for 63 percent of the net new jobs created in the U.S.[4] More recently, a year-end 2015 report from the National Small Business Association shows that 23 percent of small businesses hired more employees last year, 57 percent reported increasing employee compensation, and 35 percent plan to hire new workers.[5] From February to March of this year alone, private sector small business employment increased by 86,000 jobs.[6]

What do these numbers really mean? Put simply, if we are serious about spurring strong and lasting economic growth, creating more jobs outside of Washington, D.C., and breaking down our two-tiered economy, we do not need higher taxes or more government spending – instead, the data suggest that we need more entrepreneurs and more small businesses, and we need to continue to create a sensible regulatory environment in which these firms and individuals can succeed. With that background in mind, I appreciate the opportunity to testify here today on the early achievements of the JOBS Act, as well as additional measures to promote small business capital formation.

I. The JOBS Act at Four

The bipartisan JOBS Act proves that you do not need hundreds or thousands of pages of complex legislation to help Main Street businesses and protect consumers and investors. Weighing in at a lean seven titles spanning only 22 pages, the JOBS Act has already achieved significant results for small businesses seeking access to much-needed growth capital, while at

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1 *See* Small Business & Entrepreneurship Council, Small Business Facts & Data (citing SBA Office of Advocacy) ("SBEC Facts & Data"), http://sbecouncil.org/about-us/facts-and-data/.

2 *See id.* (citing U.S. Census Bureau).

3 *See*, *e.g.*, Haltiwanger, Jarmin & Miranda, Who Creates Jobs? Small vs. Large vs. Young, NBER Working Paper 16300, at 2 (Aug. 2010), http://www.nber.org/papers/w16300.pdf.

4 *See* SBEC Facts & Data.

5 *See* National Small Business Association, 2015 Year-End Economic Report, at 8, http://www.nsba.biz/wp-content/uploads/2016/02/Year-End-Economic-Report-2015.pdf.

6 *See* ADP Press Release, ADP Small Business Report: Small Business Employment Increased by 86,000 Jobs in March (Mar. 30, 2016), http://investors.adp.com/releasedetail.cfm?releaseid=962715.

the same time maintaining important investor protections and providing more opportunities for Americans to put their hard-earned dollars to work investing in America's future.

A. *Title I – The IPO On-Ramp*

Thanks in large part to the self-effective provisions of Title I of the JOBS Act, also known as the "IPO On-Ramp", IPO activity accelerated from the second quarter of 2013 through year-end 2014.[7] In fact, 2014 was one of the strongest years for the IPO market since 2004.[8] According to one study, "the JOBS Act has led to 21 additional IPOs annually, a 25% increase over pre-JOBS [Act] levels."[9] Since the JOBS Act was enacted in 2012, Emerging Growth Companies (EGCs) – a new class of issuer created by Title I of the JOBS Act – have dominated the IPO market, representing 85% of IPOs that have gone effective.[10] Many EGCs have taken advantage of Title I's scaled regulatory requirements, including the confidential review accommodation, simplified executive compensation disclosure, and streamlined financial information disclosure (for example, two years of audited financial statements in an EGC IPO registration statement, versus three years for a registration statement on Form S-1), all of which make public offerings more attractive for smaller companies, while preserving essential information for investors.[11] Ultimately, more IPOs mean more jobs,[12] something that the U.S. could really use after nearly seven years of what Chairman Hensarling has referred to as the current "non-recovery recovery."

B. *Title II – Lifting the Ban on General Solicitation*

Title II of the JOBS Act required the SEC to lift the ban on general solicitation and advertising in connection with private securities offerings to accredited investors under Rule 506 of Regulation D. The SEC completed its rules to implement Title II in July 2013, about a year after the deadline set forth in the statute.

According to the SEC, from September 23, 2013 through December 31, 2015, issuers raised over $50 billion under Rule 506(c) offerings.[13] While this was a promising start – and

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7 *See* Ernst & Young, The JOBS Act: 2015 mid-year update, at 3 (Sept. 2015) ("E&Y 2015 Mid-Year Report"), http://www.ey.com/Publication/vwLUAssets/JOBSAct_2015MidYear_CC0419_16September2015/$FILE/JOBSAct_2015MidYear_CC0419_16September2015.pdf.

8 *See id.* Although IPO activity slowed during the first half of 2015, according to E&Y's 2015 mid-year report, this period still exceeded the average number of IPOs for the half-year periods during the past five years, which averaged around 94 IPOs.

9 Michael Dambra, Laura Casares Field & Matthew T. Gustafson, The JOBS Act and IPO Volume: Evidence that disclosure costs affect the IPO decision, 116 J. of Fin. Econ. 121, 121 (2015), *available at* http://leeds-faculty.colorado.edu/bhagat/JOBSAct-IPO-Volume.pdf.

10 *See* E&Y Mid-Year 2015 Report, at 1.

11 *See id.* The on-ramp has been used by companies across the country in various industries including automotive, biotechnology, and consumer products and services. *See, e.g.,* Edward Teach, On the IPO On-Ramp, How the JOBS Act helped five CFOs take their companies public, CFO Magazine (Sept. 15, 2014), http://ww2.cfo.com/capital-markets/2014/09/ipo-ramp/.

12 *See*, *e.g.*, Martin Kenney, Donald Patton & Jay R. Ritter, *Post-IPO Employment and Revenue Growth for U.S. IPOs, June 1996-2010*, at 1 (May 2012) (finding that EGCs' post-IPO employment increased 156%).

13 *See* Scott W. Bauguess, SEC Division of Economic and Risk Analysis, Private Securities Offerings post-JOBS Act (Feb. 2016) ("DERA JOBS Act Report"), https://www.sec.gov/info/smallbus/acsec/private-

certainly there likely have been more 506(c) offerings since the end of 2015 – it represents about 3 percent of the total capital raised under Rule 506 since 506(c) became effective.[14] There likely are a variety of reasons why Rule 506(c) has not caught on as fast as supporters of the rule change may have hoped. For example, critics have pointed to the Rule's overly-burdensome accredited investor verification requirements.[15] Another major impediment is the uncertainty surrounding the SEC's additional rule proposal in July 2013 to further amend Reg. D in ways that would make – and apparently already have made – Rule 506(c) offerings less attractive to potential issuers.[16] As discussed in more detail below, passing H.R. 4852, The Private Placement Improvement Act, would be a great start toward allowing Rule 506(c) offerings to flourish in the manner originally intended by the JOBS Act.

C. Title III – Crowdfunding

Title III of the JOBS Act required the SEC to draft rules allowing companies to seek up to $1 million through equity crowdfunding from all types of investors, including unaccredited investors. The SEC finalized its rules to implement Title III in October 2015, more than two and a half years after the statutory deadline. While the forms enabling funding portals to register with the SEC have been effective since January 29, 2016, the crowdfunding rules do not go into effect until mid-May of this year. While I expect crowdfunding to develop over time into a valuable source of equity capital for America's small businesses, critics have already pointed to a number of flaws in the SEC's rules that initially will likely make crowdfunding a less attractive option than Congress intended.[17] By passing H.R. 4855, The Fix Crowdfunding Act, Congress

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securities-offerings-post-jobs-act-bauguess-022516.pdf (does not include amendments to offerings or Rule 506(c) offerings initiated by issuers that had a prior Regulation D offering during 2009-2013). *See also* Scott Bauguess, Rachita Gullapalli & Vladimir Ivanov, SEC Division of Economic and Risk Analysis Research Report, Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2014, at 2 (Oct. 2015) ("DERA Capital Raising Report"), https://www.sec.gov/dera/staff-papers/white-papers/unregistered-offering10-2015.pdf.

[14] *See* DERA JOBS Act Report (does not include amendments to offerings or Rule 506(c) offerings initiated by issuers that had a prior Regulation D offering during 2009-2013).

[15] *See*, *e.g.*, Karlee Weinmann, 5 Reasons Funds Won't Touch JOBS Act Marketing Rules, Law360 (Apr. 10, 2014), http://www.law360.com/articles/526895/5-reasons-funds-won-t-touch-jobs-act-marketing-rules; William Carleton, The Trojan Horse of Accredited-Investor Verification, Wall St. J. (Sept. 27, 2013), http://blogs.wsj.com/accelerators/2013/09/27/weekend-read-the-trojan-horse-of-accredited-investor-verification/; David Verrill, SEC Rules Will Clip the Wings of Angel Investors, Wall St. J. (July 24, 2013), http://www.wsj.com/articles/SB10001424127887323309404578611543232094874.

[16] *See, e.g.,* DERA Capital Raising Report, at 13 ("[T]he Commission's proposed amendments to Regulation D and Form D at the time Rule 506(c) was adopted have elicited widely divergent views from commenters and remain outstanding."); Laura Kolodny, Startups Advertising to Raise Funding More Than VC Firms Are, Study Says, Wall St. J. (Oct. 2, 2014), http://blogs.wsj.com/venturecapital/2014/10/02/startups-advertising-to-raise-funding-more-than-vc-firms-are-study-says/; Weinmann, 5 Reasons Funds Won't Touch JOBS Act Marketing Rules; Emily Chasan, New Private Fundraising Rules Attract Meager Interest, Wall St. J. (Mar. 24, 2014), http://blogs.wsj.com/cfo/2014/03/24/new-private-fundraising-rules-attract-meager-interest/.

[17] *See*, *e.g.*, JD Alois, Title III Crowdfunding Fix: House Financial Services Committee Schedules Hearing to Build on JOBS Act Success, Crowdfund Insider (Apr. 8, 2016), http://www.crowdfundinsider.com/2016/04/84007-title-iii-crowdfunding-fix-house-financial-services-committee-schedules-hearing-to-build-on-jobs-act-success/; Christopher Mims, Tech Startup Crowdfunding Isn't All It's Cracked Up to Be, Wall St. J. (Dec. 7, 2015), http://www.wsj.com/articles/tech-startup-crowdfunding-isnt-all-its-cracked-up-to-be-1449464460.

can prevent some of these problems before they negatively impact crowdfunding issuers, crowdfunding platforms, and the ordinary investors seeking to deploy capital to small businesses.

D. Title IV – Regulation A+

Title IV of the JOBS Act directed the SEC to amend the Regulation A offering exemption to allow issuers to, among other things, raise up to $50 million in a 12-month period subject to certain basic disclosure requirements and exempt from the requirements of state blue sky laws (so long as the securities are sold to qualified purchasers). The SEC issued its final rules, now commonly known as Regulation A+, in March 2015. While Reg. A+ is only about a year old, the exemption has already been used by a number of small businesses to raise much-needed growth capital.[18] As SEC Chair Mary Jo White recently remarked:

> As for Regulation A+, which just became effective in June, it is obviously too early to draw conclusions. Companies are beginning to take advantage of the new rules in greater numbers than was the case under the prior version of the exemption, with approximately 34 companies publicly filing offering statements and 16 companies filing non-public draft offering statements. The staff has qualified three offerings so far, and it remains to be seen how investors will react to such offerings.[19]

II. The Continuing Regulatory Burden on Small Businesses and the Economy

As described above, just four years after its enactment, the JOBS Act has been a major step toward rationalizing and modernizing the current regulatory environment to better serve small businesses and investors alike. But there is more work to be done. Today, our startups and small businesses continue to be buried under an ever-increasing mountain of red tape that inhibits the ability of these firms to innovate, grow, create jobs, and spur economic growth.

The Obama Administration has been perhaps the most prolific regulatory force in U.S. history. To date, federal agencies have issued a record 392 major rules with economic impacts greater than $100 million annually.[20] At least another forty-seven major rules are expected in the coming months.[21] Six of the seven highest Federal Register annual page counts now belong to President Obama.[22] And these rules do not only affect big corporations. In fact, the number of

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18 *See* Robin Sosnow, Reg A+: A Successful First Year Despite Regulatory Ambiguities, Crowdfund Insider (Mar. 31, 2016), http://www.crowdfundinsider.com/2016/03/83688-reg-a-a-successful-first-year-despite-regulatory-ambiguities/.

19 SEC Chair Mary Jo White, Keynote Address at the 47th Annual Securities Regulation Institute: "Building a Dynamic Framework for Offering Reform" (Oct. 28, 2015), https://www.sec.gov/news/speech/building-dynamic-framework-for-offering-reform.html.

20 *See* Nick Timiraos, Obama Readies Flurry of Regulations, Wall St. J. (Apr. 7, 2016), http://www.wsj.com/articles/obama-readies-flurry-of-regulations-1460077858.

21 *See id.*

22 *See* Clyde Wayne Crews, Bureaucracy Unbound: 2015 is Another Record Year for the Federal Register, Competitive Enterprise Institute (Dec. 30, 2015), https://cei.org/blog/bureaucracy-unbound-2015-another-record-year-federal-register.

federal regulations affecting small businesses at the end of 2012 was 13 percent higher than in 2008.[23]

As I have said in the past, I believe that a major cause of the uncertainty handcuffing our economy today is in fact government policy, particularly the sweeping Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010 ostensibly for the sake of market stability and investor confidence. This 2,319-page behemoth, requiring between 243 and 533 new rules, depending on how you count them, continues to spawn uncertainty and undermine the climate necessary for economic growth.[24]

Indeed, the real tragedy – or inconvenient truth – behind Dodd-Frank and the hundreds of other rules flowing from Washington every year is that consumers, investors, and small business are harmed the most.[25] For consumers and investors, increasing amounts of regulation means higher prices, diminished returns, or restricted choices. Small businesses, which have fewer monetary and human resources available to handle red tape compared to their larger peers, also are disproportionately impacted by government regulation. In 2015, for example, the National Federation of Independent Business (NFIB) estimated that the "runaway train" of government regulation now costs small businesses almost $12,000 per employee every year, 30% more than the regulatory costs to larger companies.[26] And, major small business surveys recently have highlighted access to credit as being one of the most significant growth concerns currently facing small companies.[27] A 2014 Harvard Business School report found, for example, continued "weakness in small business credit markets, which disproportionately impacts Main Street businesses."[28] Similarly, even though small businesses were the victims – not the cause – of the financial crisis, a report from the American Enterprise Institute finds that "it is the start-up

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[23] *See* Scott Shane, To Help Small Business, Cut Regulation, Entrepreneur Magazine (Jan. 10, 2014), https://www.entrepreneur.com/article/230727.

[24] While some may argue that Dodd-Frank was necessary to address the financial crisis and prevent future crises, it was failed federal housing policy, not a lack of regulation, that was the primary cause of the crisis. *See generally* Peter Wallison, Hidden in Plain Sight: What Really Caused the World's Worst Financial Crisis and Why It Could Happen Again (2015). Dodd-Frank did not address this primary cause at all.

[25] *See*, *e.g.*, Ben Gitis & Sam Batkins, Regulatory Impact On Small Business Establishments, American Action Forum Research Report (Apr. 24, 2015), http://www.americanactionforum.org/research/regulatory-impact-on-small-business-establishments/; Clyde Wayne Crews Jr., Competitive Enterprise Institute, Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State, at 1-2 (2014 ed.), http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf.

[26] *See* Andrew Wimer, NFIB Legal Counsel to Congress: "Who is minding the regulatory store?" (July 15, 2015), http://www.nfib.com/article/nfib-legal-counsel-to-congress-who-is-minding-the-regulatory-store-70163/.

[27] *See* Karen Gordon Mills & Brayden McCarthy, The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game, Harvard Business School Working Paper 15-004 (July 22, 2014) ("Harvard Credit Markets Study"), http://www.hbs.edu/faculty/Publication%20Files/15-004_09b1bf8b-eb2a-4e63-9c4e-0374f770856f.pdf. *See also* William C. Dunkelberg, National Federation of Independent Business Small Business Economic Trends, at 3, 18 (Feb. 2016), http://www.nfib.com/assets/SBET-February-2016.pdf (ranking "government regulation and red tape" as the second most important problem facing small business owners behind taxes, and noting that small business owners reported being "very pessimistic about business conditions in the coming months and spending and hiring plans have softened").

[28] Harvard Credit Markets Study at 26.

category that would be having the most difficulty getting bank credit as a result of the tightening lending standards and greater small bank regulatory costs induced by Dodd-Frank."[29]

III. Next Steps to Promote Small Business Capital Formation

A. H.R. 4852, The Private Placement Improvement Act of 2016

The U.S. market for private securities offerings under Reg. D is the largest, most vibrant private securities market in the world. From September 23, 2013 through December 31, 2015, over 48,000 offerings under Rule 506 raised well over a trillion dollars in capital.[30] Many small businesses depend on Rule 506 of Reg. D to raise capital to maintain and grow their operations – for example, the mean and median offering sizes of Reg. D offerings of non-financial companies in 2014 were $10 million and $1 million, respectively.[31] In Title II of the JOBS Act, Congress sought to further enhance this market by lifting the ban on general solicitation in connection with private securities offerings under Rule 506.

Title II mandates that within 90 days of enactment of the JOBS Act, the SEC revise its rules to lift the ban on general solicitation in connection with private securities offerings under Rule 506 of Reg. D, provided that the purchasers of the securities are accredited investors and the issuer take reasonable steps to verify that such purchasers are accredited investors using methods determined by the SEC. Despite this clear language, in connection with issuing final rules in 2013 to lift the ban on general solicitation, the SEC simultaneously issued a separate rule proposal to further amend Reg. D and Form D in order "to assess developments in the private placement market now that the rule to lift the ban on general solicitation has been adopted."[32]

Notwithstanding its rather innocuous justification, the SEC's rule proposal – which was not called for under the JOBS Act – would impose a number of burdensome and unnecessary obligations on issuers seeking to raise capital using general solicitation under Rule 506(c). For example, while the current rule requires issuers to file a single Form D within 15 days of the first sale of securities, the proposed rules would require that issuers file two additional Forms D, one 15 days before the offering and another within 30 days of completion of the offering. The proposed rules would also take the drastic step of imposing a one-year ban on offering securities under Rule 506 for any issuer that fails to comply with the Form D filing requirements.

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[29] Peter J. Wallison, Is the Dodd-Frank Act Responsible for the Economy's Slow Recovery from the Financial Crisis and the Ensuing Recession? American Enterprise Institute Paper for the Ninth Hillsdale College Free Market Forum, at 9 (Oct. 16, 2015), http://www.aei.org/publication/is-the-dodd-frank-act-responsible-for-the-economys-slow-recovery-from-the-financial-crisis-and-the-ensuing-recession/. *See also* Gitis & Batkins, Regulatory Impact On Small Business Establishments (finding that regulations cumulatively reduce the number of small and medium-size businesses, while being associated with an increase in the number of large businesses).

[30] *See* DERA JOBS Act Report.

[31] *See id.* at 9. *See also* David R. Burton (The Heritage Foundation), Comment Letter to SEC on Amendments to Regulation D, Form D and Rule 156 (Nov. 4, 2014), https://www.sec.gov/comments/s7-06-13/s70613-462.pdf.

[32] SEC Fact Sheet, Proposing Amendments to Private Offering Rules (July 10, 2013), https://www.sec.gov/news/press/2013/2013-124-item3.htm.

In addition, the SEC's proposed rules would require that issuers include certain legends and cautionary statements in written general solicitation materials, as well as temporarily to file such materials with the SEC. Finally, the rule proposal would extend SEC guidance in Rule 156 on potentially misleading statements in the sales literature of investment companies to the sales literature of private funds, whether or not such funds are involved in general solicitation.

The SEC's rule proposal, which is still pending, has been widely criticized as adding to the already large administrative costs and burdens on small issuers seeking to raise capital through private securities offerings.[33] Many of these critics have pointed to the uncertainty of the proposed rules as a wet blanket deterring many small businesses from raising capital using general solicitation under Rule 506(c), contrary to the very spirit and intent of Title II of the JOBS Act. As noted above, private securities offerings using general solicitation have so far accounted for only about three percent of the total capital raised under Rule 506 from September 2013 through December 2015.

The SEC fundamentally departed from its more normal practice of adopting a rule change, conducting after an appropriate implementation period a study of how the rule works in the marketplace, and then (if needed based on the study) considering proposals to amend the rule, including an analysis of the costs and benefits thereof. Basically, regarding 506(c), a majority of the Commission put the cart before the horse, proposing further amendments even before the ink was dry on the rule as adopted.

I believe that H.R. 4852, introduced by Chairman Garrett, is critically important to remove the regulatory uncertainty currently holding many issuers back from utilizing general solicitation under Rule 506(c) as Congress originally intended. H.R. 4852 would prevent the SEC from implementing the most burdensome provisions of its Reg. D rule proposal, including the requirement to file multiple Forms D; the one-year statutory ban for failing to file Form D; the requirement to file general solicitation materials with the SEC; and the extension of the requirements contained in Rule 156 to private funds.

In addition, H.R. 4852 contains two additional reforms to enhance private securities offerings under Rule 506(c). Current rules require that an issuer using Rule 506(c) file its Form D in every state where securities have been sold. In an electronic age, this burden is quite a throwback to an earlier era, particularly given that Forms D are filed electronically with the SEC. H.R. 4852 would relieve this burden on issuers by requiring the SEC to distribute Form D filings to each state securities commission. In addition, H.R. 4852 would address some of the concerns of those who find the accredited investor verification requirements to be unreasonable by classifying "knowledgeable employees" of private funds as accredited investors for purposes of Rule 506 offerings.[34]

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[33] *See generally*, *e.g.*, Burton, Comment Letter to SEC on Amendments to Regulation D; Annemarie Tierney (SecondMarket Holdings, Inc.), Comment Letter to the SEC on Amendments to Regulation D, Form D and Rule 165 (Sept. 18, 2013), https://www.sec.gov/comments/s7-06-13/s70613-359.pdf. *See also supra* notes 15-16.

[34] The SEC also should consider other ways to make it easier to verify that purchasers are accredited investors for purposes of Rule 506(c).

It bears mentioning that, as the SEC acknowledged this year, there has been "[n]o measured increase in the incidence of fraud in [the] new Rule 506(c) market," and nothing in H.R. 4852 changes or diminishes the SEC's existing enforcement authorities.[35] I urge the Committee to pass H.R. 4852 so that we can more fully realize the intended impact of the JOBS Act on the private securities markets.

B. Additional Legislation to Improve Small Business Capital Formation

I also support H.R. 4855, the Fix Crowdfunding Act, to improve the regulations governing equity crowdfunding under Title III of the JOBS Act;[36] H.R. 4854, the Supporting America's Innovators Act, to increase funding for start-ups by qualified venture capital funds; and H.R. 4850, the Micro Offering Safe Harbor Act, to exempt certain micro-offerings from the registration requirements of the Securities Act of 1933. These bills contain important reforms needed to further enhance the ability of startups and other small businesses to access the capital markets, create jobs, and promote a healthy economy fueled from the ground up.

C. A More Active Role for the SEC

Although the SEC's statutory mission is to promote fair, orderly, and efficient markets, to protect investors, *and* to facilitate capital formation, it often has neglected its duty to help small businesses obtain much-needed growth capital. For example, while the SEC had the authority to effect most, if not all, of the changes called for in the JOBS Act on its own, these reforms emanated from the halls of Congress rather than the SEC's headquarters just a few blocks away. In addition, as noted above, when the SEC was faced with a clear Congressional mandate under the JOBS Act to lift the ban on general solicitation, the SEC chose unnecessarily to insert itself in the way of reform by proposing, on its own accord, additional amendments that would undermine the fundamental purpose of the JOBS Act.

In the wake of the financial crisis, it was incumbent on the SEC to take steps to address issues within its statutory remit that helped to cause the financial crisis and to act to foster a robust recovery. Unfortunately for the American people, the SEC failed property to prioritize its activities. While the SEC delayed finalizing growth-encouraging rules under the JOBS Act well beyond their statutory deadlines, the SEC implemented rules under the Dodd-Frank Act that have nothing to do with fixing the actual causes of the financial crisis and only add to the regulatory burdens facing U.S. companies, both large and small, including, among others, the conflict minerals, resource extraction, and CEO pay ratio disclosure rules. In fact, former SEC Chair Mary L. Schapiro unmistakably responded to political pressure from special interest groups favored by the Administration to give precedence to rules supported by those groups. The SEC should have exercised its discretion to prioritize its limited resources first and foremost on rules that fulfill its core mission. If start-ups and young companies are to continue to serve as the primary drivers of job creation and economic growth in this country, the SEC must devote more consistent attention and resources to promoting small business capital formation.

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[35] *See* DERA JOBS Act Report.

[36] *See*, *e.g.*, Senator Michael F. Bennet, Letter to Hon. Mary Jo White (Feb. 16, 2016), *available at* https://wefunder.com/post/59-senator-bennet-s-letter-to-the-sec.

One area I am particularly concerned about is the potential for reflexive over-regulation of the evolving "fintech" industry. This past February, Mark Carney, governor of the Bank of England and head of the Financial Stability Board (FSB), told the G-20 finance ministers that the FSB will evaluate "the potential financial stability implications of emerging financial technology innovation for the financial system as a whole, working with standard setters that are monitoring developments in their respective sectors."[37] Shortly thereafter, Chair White followed suit, announcing in March that the SEC also is considering how best to regulate financial technology, including blockchain, robo-advisers, and online marketplace lending platforms.[38]

Innovative and dynamic new technologies in the securities, banking, lending, and other financial services industries have the potential to greatly reduce transaction costs and administrative burdens, enhance market efficiency, create new sources of capital for small businesses, and enhance investment options for investors. While I applaud Chair White's recognition of the challenges posed by fintech and her commitment to investor protection, I would urge the SEC not to rush to regulate in this area until it has a more complete understanding of the products and services these emerging companies provide, their businesses models, and the marketplaces in which they operate. Disruptive technology and business models can be a huge boon for industries, increasing competition, breaking down barriers to entry, and benefiting consumers, investors, employees, and taxpayers. Nor should the SEC necessarily attempt to jam fintech into its existing, one-size-fits-all regulations. But that does not mean simply kicking the proverbial can down the road as the agency seems to have done in other areas, such as addressing market structure regulation; instead, the SEC needs to be proactive and thoughtful at the same time, responsibly embracing evolving trends that will shape the future of our capital markets.

As the SEC considers whether and how to regulate fintech, it also should – as my colleague, former SEC Commissioner Dan Gallagher has noted – take a step back and assess the rules governing small business capital formation "on a big picture level."[39] This effort should include, among other things, a retrospective review of SEC rules to ensure that small companies operate under a regulatory regime that is understandable (without the help of expensive lawyers), up-to-date, and right-sized; improvements to the market structure for publicly-traded small and

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37 *See* Caroline Binham, Financial Stability Board adds fintech to list of worries, Financial Times (Feb. 27, 2016), http://www.ft.com/intl/cms/s/0/d6813cba-dd55-11e5-b072-006d8d362ba3.html#axzz45TzEMDO1.

38 *See* SEC Chair Mary Jo White, Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative (Mar. 31, 2016), https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html. In addition, the Office of the Comptroller of the Currency recently issued a white paper on fintech, and the Consumer Financial Protection Bureau issued a bulletin and set up an online complaint portal on marketplace lending. *See* Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective, OCC White Paper (Mar. 2016), http://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf; CFPB Press Release, CFPB Now Accepting Complaints on Consumer Loans from Online Marketplace Lender (Mar. 7, 2016), http://www.consumerfinance.gov/newsroom/cfpb-now-accepting-complaints-on-consumer-loans-from-online-marketplace-lender/.

39 Remarks by SEC Commissioner Daniel M. Gallagher, Whatever Happened to Promoting Small Business Capital Formation? (Sept. 17, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370542976550#_edn22.

mid-cap stocks, including measures to enhance market liquidity[40] (for example, through the formation of venture exchanges) and eliminate one-size-fits-all disclosure rules and other regulatory requirements that disincentivize companies from going public; and additional enhancements to the private securities markets, including possible broader blue sky exemptions for Reg. D offerings. Not only will such measures improve small business capital formation, they will benefit investors by providing more investment options and the potential for higher investment returns.

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Over the last five-and-a-half years, this Committee has been at the forefront of helping America's small businesses grow and create jobs. I thank you for all of your efforts and for the opportunity to testify here today.

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[40] *See*, *e.g.*, Charles Collver, SEC Division of Trading & Markets, A characterization of market quality for small capitalization US equities, (Sept. 2014) https://www.sec.gov/marketstructure/research/small_cap_liquidity.pdf ("The smallest stocks with market capitalization less than $100 Million are exceptionally illiquid relative to larger stocks with capitalizations between $1 Billion and $5 Billion. They have wider quoted and effective spreads and trade lower dollar volumes.").