Private Offerings in the Age of Surveillance Capitalism and Targeted Advertising

Social media platforms, as well as the internet more broadly, have fundamentally altered many aspects of modern life. In particular, platforms' targeted advertising mechanisms have revolutionized how companies reach consumers by providing advertisers more effective tools for reaching consumers and by tailoring content to consumers' individual interests. Advertising, in many respects, has always been targeted—it has always sought to reach and influence a certain set of consumers. Today's targeted advertising, however, allows advertisers to influence consumer behavior on an increasingly granular and intimate level, further skewing the power imbalance between advertisers and consumers. This new dynamic, together with changes to advertising rules for private securities offerings, creates a regulatory gap: should issuers be allowed to promote private offerings through targeted advertising on social media?

This Note examines that gap and considers how contemporary targeted advertising mechanisms interact with the law of private securities, which has long restricted issuers' use of advertising in promoting private offerings. These and other restrictions reflect an understanding that private securities are more volatile (and, as a result, often yield higher returns) than public securities. In 2013, though, the Securities and Exchange Commission (the "Commission" or "SEC") lifted a longstanding ban on the use of general solicitations for private offerings, paving the way for issuers to employ widely disseminated advertisements to solicit investors. But the Commission did not anticipate—and could not have anticipated—the ways in which social media and "surveillance capitalism" would change advertising, and the current regulatory regime does not contemplate how targeted advertising fits into the private offering landscape.

With the ability not only to target but also to influence specific consumers, private securities issuers can wield new power with targeted advertising. Consumers may understandably be enticed by promises of high returns, and advertisements for private offerings can now appear in consumers' social media newsfeed alongside personal and professional content. More importantly, targeted advertising algorithms curate personalized content with the goal of imperceptibly and gradually changing consumer thinking, perhaps

leading a user to finally click on an advertisement she once scrolled past. While such a dynamic may be acceptable, and even desirable, with respect to material goods and services, it raises complicated and pressing concerns in the context of private securities offerings. This Note proposes modifications to the private securities rules that would prohibit the use of targeted advertising in private offerings—a change that would adequately remediate the harms posed and provide clarity to the many stakeholders involved.

INTRODUCTION

In the first initial public offering[1] of 2020, mail-order mattress startup Casper did something commentators called "unusual."[2] The company acknowledged a risk that the "use of social media and influencers may materially and adversely affect [its] reputation or subject [it] to fines or other penalties."[3] Considering how social media has become a pivotal part of our economy, this acknowledgement should come as no surprise. And Casper is not the first to acknowledge the potential impact of social media and influencers on its value as a company: both Madewell and Peloton included similar risk assessments in recent filings with the Securities and Exchange Commission (the "Commission" or "SEC").[4] Even in the seemingly siloed and abstract world of securities, social media and the internet are playing an increasingly central role in how information is exchanged.

In the "age of surveillance capitalism,"[5] information is generated at unprecedented rates.[6] Every keystroke becomes a data point, which

1. An initial public offering, commonly known as an IPO, is "the first time a company offers its shares of capital stock to the general public." *Investor Bulletin: Investing in an IPO*, U.S. SEC. & EXCH. COMM'N (Feb. 25, 2013), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-17 [https://perma.cc/V7MY-67RR].

2. Sarah Frier, *Casper Warns of an Unusual Risk in Its IPO Filing: Influencers*, BLOOMBERG (Jan. 10, 2020, 4:30 PM), https://www.bloomberg.com/news/articles/2020-01-10/casper-warns-of-an-unusual-risk-in-its-ipo-filing-influencers [https://perma.cc/A2FG-AFPZ]; Avery Hartmans, *The 6 Most Surprising and Unusual Takeaways from Casper's IPO Filing*, BUS. INSIDER (Jan. 13, 2020, 2:54 PM), https://www.businessinsider.com/casper-sleep-mattress-ipo-surprising-takeaways-from-s-1-filing-2020-1#casper-warned-that-influencers-could-cause-its-business-to-take-a-hit-1 [https://perma.cc/QRP3-B9TL].

3. Casper Sleep Inc., Registration Statement (Form S-1) 17, 32–33 (Jan. 10, 2020).

4. Frier, *supra* note 2.

5. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019).

6. *See* Devin Pickell, *What Is Big Data? A Complete Guide*, G2 LEARNING HUB (Aug. 22, 2018), https://learn.g2.com/big-data [https://perma.cc/98PE-UN7P] (discussing the astounding rates at which information is created over the internet, both directly through social media posts and indirectly through information gathered by smart watches and the like).

is then available for use by companies and other actors seeking to discern information about particular segments of the market. Specifically, companies can use this information to deploy targeted advertisements, which proponents argue can be useful for both advertisers and consumers.[7] Now that advertisers can not only target but also influence consumers, targeted advertising raises complicated questions about what exactly should be advertised and to whom. Particularly, there are profound implications for the offer and sale of private securities, which, until recently, could not be promoted through advertising.

In a traditional public securities offering, issuers[8] must register their securities with the SEC and disclose information about the company, the company's financial health, and the securities the company is offering.[9] When it comes to securities investments, information is power. With more information, prospective investors are in a better position to decide whether and where to invest their money.[10] Information disclosures ensure that investors are informed and educated participants in the securities markets, mitigating the risk of potentially devastating financial loss.[11] By contrast, issuers are not subject to these registration and disclosure requirements for private securities offerings,[12] which are considered riskier than public offerings

7. The benefit is that advertisers can know exactly to whom they should advertise, making their advertising efforts more effective. Consumers, in turn, are shown advertisements that are relevant only to them, making their browsing more interesting and efficient. Maya Frai, *Targeted Advertising: The Good and the Bad*, MEDIUM: ART + MKTG. (Mar. 29, 2017), https://artplus marketing.com/targeted-advertising-the-good-and-the-bad-da469976310c [https://perma.cc/WP4G -YSMM]; FED. TRADE COMM'N, PROTECTING CONSUMERS IN THE NEXT TECH-ADE: A REPORT BY THE STAFF OF THE FEDERAL TRADE COMMISSION 11 (2008), https://www.ftc.gov/sites/default/files/ documents/reports/protecting-consumers-next-tech-ade-report-staff-federal-trade-commission /p064101tech.pdf [https://perma.cc/4A3K-LB6P].

8. This Note will use the term "issuer" to refer to companies that issue or attempt to issue securities. *See Guide to Definitions of Terms Used in Form D*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/info/smallbus/formddefinitions.htm (last updated Sept. 12, 2008) [https://perma.cc/NY8J-RNL6] (providing definition for "issuer").

9. *See* Securities Act of 1933, 15 U.S.C. § 77e (making it unlawful to sell securities absent an effective registration statement, which must disclose certain information to investors). Under Section 5 of the Act, issuers must disclose information about the company, the security offered, the company's management, and the company's financial health. *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/about-lawsshtml.html#sec act1933 (last visited Mar. 11, 2021) [https://perma.cc/Y4QX-L944].

10. STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 20–21 (4th ed. 2015); s*ee also* U.S. SEC. & EXCH. COMM'N, *supra* note 9 (discussing the purpose of registration and the benefits of disclosing information to investors).

11. This is particularly true for individuals, as opposed to institutions, who wish to invest in the securities markets, as discussed *infra* Section III.A.

12. 15 U.S.C. § 77d(a)(2); *see also* 17 C.F.R. § 230.506 (2020). Regulation D provides regulatory safe harbors through which issuers may conduct offerings that are "private" within the meaning of the 1933 Act and therefore are exempt from the disclosure requirements imposed on

because of this disclosure waiver.[13] Still, private offerings are desirable to issuers, who can raise capital without incurring the cost associated with publicly offering securities, and to qualifying investors, who can access riskier but often higher-return investments.[14]

Recent events, when considered together, have heightened the investor risks associated with private offerings beyond what the law should permit. First, in 2013, the SEC lifted the historic ban on employing general advertisements and solicitations in private offerings.[15] The ban functioned as an important investor protection mechanism, moderating the risks of private offerings by ensuring that investors had preexisting relationships with issuers and were therefore in a better position to discover information about a private offering.[16] Now, in certain offerings, issuers may solicit investors for private offerings via widely disseminated advertisements.[17] Contemporaneously, targeted social media advertising and "surveillance capitalism" began to fundamentally alter the way society receives information, including information about the securities markets.[18] Social media platforms have developed algorithms that not only predict but also influence user behavior over time by curating individualized posts and advertisements.[19] Taken together, these changes have created a regulatory gap: How should the federal securities laws treat targeted advertisements in the context of private securities placements?

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public offerings. 17 C.F.R. § 230.506. Two of those exemptions, known as Rule 506(b) and Rule 506(c), will be the focus of this Note. *Id.* § 230.506(b)-(c).

13. *Cf.* U.S. SEC. & EXCH. COMM'N, *supra* note 9 (discussing the importance of disclosing to investors certain information about investments).

14. Greg Oguss, *Should Size or Wealth Equal Sophistication in Federal Securities Laws?*, 107 NW. U. L. REV. 285, 286–87 (2015).

15. For the purposes of this Note and the relevant securities regulations, a general solicitation (or general advertisement) refers to an advertisement that is broadcast over mass media such as the radio or in a newspaper. *See* 17 C.F.R. § 230.502(c) (2020); *infra* Section I.A.2 (discussing the meaning of general solicitation).

16. *See infra* Section I.B (discussing the 2013 removal of the general solicitations ban). Lifting the ban was intended to strike a new balance between allowing issuers to raise capital and giving investors access to higher-return investments, while still protecting investors from increased risks involved with private placements. *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 9,415, Exchange Act Release No. 69,959, 78 Fed. Reg. 44,771, 44,774 (July 24, 2013) [hereinafter SEC Release on Rule 506].

17. Although this Note will argue that targeted advertisements should not be considered general solicitation for purposes of compliance with federal securities laws, it will demonstrate how removal of the general solicitations ban has paved the way for use of mechanisms like targeted advertisements to promote securities offerings.

18. *See infra* Part II.

19. THE SOCIAL DILEMMA (Exposure Labs 2020); *see* ZUBOFF, *supra* note 5, at 293–94 (describing three concepts of "behavior modification": tuning, herding, and conditioning).

Part I of this Note examines the existing legal framework that governs the private securities markets, particularly private offerings conducted under Rule 506. It also examines the historical purposes behind the general solicitations ban and SEC guidance on how the internet fits into the securities regulation framework. In Part II, the discussion turns to consider targeted advertising, highlighting social media platforms' capacity to powerfully manipulate users while still restricting certain advertising content. Part III evaluates how the potential use of targeted advertising in private offerings could cause harm to investors, markets, and issuers. It then considers the implications for the social media companies themselves. Finally, Part IV proposes that the SEC issue guidance and, eventually, engage in formal rulemaking to prohibit the use of targeted advertising in private securities offerings. Such an outright prohibition, this Note argues, is the only solution that will adequately protect investors against the potential harms posed by allowing targeted advertisements and social media to facilitate private offerings.

I. BACKGROUND AND LEGAL FRAMEWORK FOR PRIVATE SECURITIES OFFERINGS

Following the 1929 Stock Market Crash and the Great Depression, Congress passed the Securities Act of 1933 (the "1933 Act" or "Act") to install protections for investors and restore confidence in the country's financial markets.[20] Specifically, the Act requires companies to register their securities with the SEC and disclose various types of information to investors in making public securities offerings.[21] The Act's public offering requirements often prove too financially onerous for small businesses, though, leaving many firms without access to capital through the offer and sale of securities.[22] To facilitate capital formation for smaller firms, in 1982, the Commission promulgated Regulation D under the 1933 Act, which clarifies and expands the registration exemptions in section 4 of the Act by enumerating regulatory safe harbors through which issuers can conduct private offerings.[23]

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20. Wallis K. Finger, Note, *Unsophisticated Wealth: Reconsidering the SEC's "Accredited Investor" Definition Under the 1933 Act*, 86 WASH. U. L. REV. 733, 737–38 (2009).

21. Securities Act of 1933, 15 U.S.C. § 77e.

22. Jason A. Tiemeier, Note, *Striking a Balance Between Protecting Investors and Promoting Small Business: The New Rule 506, Accredited Investor Standards, and the Guidelines of General Solicitation*, 10 OHIO ST. BUS. L.J. 101, 103 (2015) (noting that the "time and expense" required to conduct a public offering makes it very difficult for small and emerging businesses to raise capital through the public markets).

23. *Id.*

Because private offerings are exempted from the registration and disclosure requirements of section 5, they provide an attractive option for issuers looking to access large amounts of capital at relatively low cost.[24] By the same token, investors value having access to private securities because they can have exponentially higher returns than traditional publicly traded securities.[25] In lowering the barriers for issuers seeking to raise capital, however, Regulation D also removes key protective mechanisms for the investors who provide that capital—namely, the disclosure and registration requirements of the 1933 Act. To mitigate the effects of this removal, the SEC instituted rules that restrict who can invest in private securities and how issuers can conduct private offerings.[26]

A. Private Offering Exemptions Under Regulation D and Rule 506

Rule 506 of Regulation D provides a nonexclusive safe harbor that allows issuers to conduct private securities offerings, as permitted by the section 4(a)(2) exemption from section 5's requirements.[27] In other words, if issuers follow the rules provided in Regulation D, they can reap the benefits of conducting a private offering without fear of violating the federal securities laws. Rule 506(b), the original safe harbor for private offerings, contains two key investor protection devices. First, issuers may offer private securities under Rule 506(b) to "an unlimited number of 'accredited investors' " and "to no more than 35 non-accredited investors who meet certain 'sophistication' requirements."[28] Second, issuers may not solicit investors for a 506(b) offering using general solicitations. In practice, this means that issuers

24. *Id.* at 101–02.

25. *See* Matt Levine, Opinion, *Private Markets Could Be More Public*, BLOOMBERG (June 19, 2019, 11:01 AM), https://www.bloomberg.com/opinion/articles/2019-06-19/private-markets-could-be-more-public [https://perma.cc/M226-XZGX] (noting that investments in private companies—before a potential IPO—are likely to be more lucrative because that is when companies often experience "explosive growth").

26. *See* 17 C.F.R. § 230.506(b)-(c) (2020). Even with these investor protections in place, the regulatory framework of private offerings has been criticized since its inception. *See infra* Section III.A (discussing the historical issues and criticisms raised about the private securities offering framework).

27. SEC Release on Rule 506, *supra* note 16, at 44,772–73.

28. *Id.* at 44,773; *see also* 17 C.F.R. § 230.506(b)(2)(ii):

> Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

can only solicit investors with whom they have a prior relationship.[29] Together, the accredited investor limits and general solicitations ban work to balance informational risks present in private offerings against a desire to facilitate capital formation.

1. Accredited Investor Thresholds

An accredited investor can be an institution or a natural person.[30] A natural person is an accredited investor if she has a net worth of at least $1 million,[31] if she has an annual income of $200,000 for the prior two years, or if she and her spouse have a combined annual income of $300,000.[32] The SEC recently amended the definition of an accredited investor to also include individuals considered knowledgeable or highly educated on securities and financial markets.[33] In theory, if an investor meets one of these financial or educational thresholds, the law can assume a level of financial sophistication that alleviates the information imbalance in private offerings.[34]

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29. SEC Release on Rule 506, *supra* note 16, at 44,772–73; *see also infra* notes 41–43 and accompanying text (discussing the purposes and application of the general solicitations ban).

30. *See* 17 C.F.R. § 230.501(a) (2020) (providing the definition of an "accredited investor").

31. As required by the Dodd-Frank Act, the net worth calculation has been amended to exclude the value of the investor's primary residence. *See* Net Worth Standard for Accredited Investors, Securities Act Release No. 9,287, Investment Company Act Release No. 29,891, 76 Fed. Reg. 81,793, 81,794 (Dec. 29, 2011).

32. 17 C.F.R. § 230.501(a). Accounting for inflation, today these figures would be roughly $2.8 million, $553,000, and $830,000, respectively. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 11, 2021) [https://perma.cc/3C4X-YASS] (using the inflation calculator, compare each figure between March 1982 buying power and November 2020 buying power). But these financial thresholds have not changed since their promulgation nearly forty years ago. Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6,389, 24 SEC Docket 1166, 1169 (Mar. 8, 1982) (proposing $1 million net worth and $200,000 income thresholds for the accredited investor standard—the same thresholds still in place today). Many wonder if they still adequately mitigate the asymmetry in the private markets. *See, e.g.*, Tiemeier, *supra* note 22, at 116 ("The accreditation standards have been questioned for their reliability, as well as for their usefulness entirely because they are based solely on an investor's wealth and assets." (footnote omitted)).

33. *See* Amending the "Accredited Investor" Definition, Securities Act Release No. 10,734, Exchange Act Release No. 87,784, 85 Fed. Reg. 2574 (proposed Jan. 15, 2020).

34. Tiemeier, *supra* note 22, at 104. According to the Commission, "[T]he accredited investor definition is 'intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or [ability to] fend for themselves render the protections of the Securities Act's registration process unnecessary.' " Amending the "Accredited Investor" Definition, 85 Fed. Reg. at 2577 (first quoting Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Securities Act Release No. 6,683, 52 Fed. Reg. 3015 (proposed Jan. 30, 1987); then citing SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953)).

2. General Solicitations in Private Offerings

Previously, issuers conducting private securities offerings could not use general solicitations to locate investors.[35] Rule 502(c) of Regulation D provides that general solicitations may include but are not limited to "[a]ny advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio" and "[a]ny seminar or meeting whose attendees have been invited by any general solicitation or general advertising."[36] Through interpretive releases, the Commission has confirmed that advertisements on unrestricted websites are general solicitations.[37] Ultimately, "Whether there has been a general solicitation is a fact-specific determination."[38] In general, where many of the individuals contacted are not financially sophisticated and are selected for contact through broad, undiscerning methods, an issuer likely engages in general solicitation.[39]

Practically, Rule 502(c)'s prohibition of general solicitations means that issuers relying on the 506(b) exemption can offer private securities only to investors with whom they have a prior relationship.[40] If issuers and investors have a preexisting relationship, the issuer need not rely on an advertisement to make contact with the investor. The theory underlying the ban on general solicitations has been historically

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35. *See* Amending the "Accredited Investor" Definition, 85 Fed. Reg at 2,601 (discussing the Commission's creation of Rule 506(b), which provides a private offering exemption under which issuers may engage in general solicitation).

36. 17 C.F.R. § 230.502(c)(1)-(2) (2020).

37. SEC Release on Rule 506, *supra* note 16, at 44,773. "General solicitation" is not actually defined in Regulation D. Rather, the Commission provides examples of what it believes qualifies as a general solicitation in order to afford flexibility to issuers seeking to rely on Rule 506's exemptions. *Id.* Therefore, the examples explicitly listed are impermissible general solicitations, but items not listed may be acceptable, depending on the SEC's interpretation. Thus, the lack of bright-line rules on what exactly constitutes general solicitation gives issuers reason to hesitate about conducting Rule 506 offerings. *See* Tiemeier, *supra* note 22, at 123 ("An issuer should not be forced to use one rule out of fear that it will inadvertently violate an unclear provision of another, especially when the rule is predicated on helping small businesses get access to the capital that they need to survive.").

38. *Securities Act Rules: Questions and Answers of General Applicability*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm (last updated Nov. 6, 2017) [https://perma.cc/RRA2-6THG] (Answer to Question 256.27).

39. *See id.* ("[T]he greater the number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation.").

40. *See* Tiemeier, *supra* note 22, at 105 ("[T]he SEC staff has relied upon the idea of preexisting relationships to interpret whether an action constitutes general solicitation."); Ze'-ev Eiger, *Practice Pointers on Navigating the Securities Act's Prohibition on General Solicitation and General Advertising*, MORRISON & FOERSTER 1 (2018), https://media2.mofo.com/documents/160600practicepointersgeneralsolicitation.pdf [https://perma.cc/8RMF-B7VV].

that "public advertising is incompatible with a claim of exemption" for private offerings.[41] Put differently, if an issuer is claiming a *private* offering exemption from section 5's requirements, *publicly* advertising that offering via general solicitations feels inapposite. If an investor has a preexisting relationship with an issuer, the law assumes that the investor has "a better opportunity to make an informed decision" about the security being offered.[42] After years of skepticism from industry actors regarding its efficacy, however, the Commission lifted the ban to allow for general solicitations in certain private offerings.[43]

B. Lifting the Ban on General Solicitations with Rule 506(c)

In 2012, Congress passed the Jumpstart Our Businesses Act (the "JOBS Act"), which directed the SEC to lift the longstanding ban on the use of general solicitations in private offerings.[44] The JOBS Act sought to expand the means by which issuers could reach investors, opening the potential field of investors beyond those with whom the issuer had a preexisting relationship.[45] The Commission implemented this change in 2013 by amending Rule 506 to include a new exemption, 506(c), which provides a safe harbor that allows issuers to attract investors using general solicitations so long as issuers satisfy certain conditions.[46] Under Rule 506(c) of Regulation D, issuers may offer securities to investors via general solicitations if (1) those who purchase the securities are "accredited investors" and (2) the issuer takes "reasonable steps to verify" that all purchasers are accredited investors.[47]

The new Rule 506(c) relies on the same accredited investor definition as 506(b) discussed above,[48] but it also imposes a "reasonable steps" verification requirement on issuers seeking to claim the

41. SEC Release on Rule 506, *supra* note 16, at 44,774.

42. Tiemeier, *supra* note 22, at 105; *see also* Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 EMORY L.J. 67, 71–72 (1989).

43. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Approves JOBS Act Requirement to Lift General Solicitation Ban (July 10, 2013), https://www.sec.gov/news/press-release/2013-124-sec-approves-jobs-act-requirement-lift-general-solic [https://perma.cc/3W8Q-M4PJ]; *infra* notes 52–53 (discussing drawbacks of the ban).

44. SEC Release on Rule 506, *supra* note 16, at 44,772. The JOBS Act aims to make it easier for companies, particularly small businesses, to access funding through the capital markets. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings: A Small Entity Compliance Guide*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/info/smallbus/secg/general-solicitation-small-entity-compliance-guide.htm (last updated Sept. 20, 2013) [https://perma.cc/3EVX-2ZPB].

45. Tiemeier, *supra* note 22, at 108.

46. SEC Release on Rule 506, *supra* note 16, at 44,774.

47. 17 C.F.R. § 230.506(c)(2)(i)-(ii) (2020).

48. *See supra* Section I.A.1.

exemption under the new Rule.[49] In guidance about Rule 506(c), the Commission wrote that "the purpose of the verification mandate is to address concerns, and reduce the risk, that the use of general solicitation in Rule 506 offerings could result in sales of securities to investors who are not, in fact, accredited investors."[50] Recognizing the potential constraints of a bright-line rule, the Commission prioritized flexibility in enumerating a list of ways issuers may verify the accreditation status of potential investors.[51]

Removal of the general solicitations ban is a positive development for small issuers who are new to the private securities markets. The ban perpetuated an "old boys' club," as one commentator put it, where only issuers who had preexisting relationships had access to qualifying investors.[52] Issuers can now find new investors through advertisement, breaking up this exclusive "club." Relaxing the prohibition on general solicitation also alleviates expenses that persist even in lower-cost private offerings, such as those associated with printing offering materials as opposed to transmitting them via email.[53]

When considering changes to Rule 506 and eliminating the ban on general solicitations, the Commission acknowledged that the change "may affect the behavior of issuers and other market participants in ways [that] could compromise investor protection."[54] It took steps to address some of those concerns by implementing the accredited investor

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49. 17 C.F.R. § 230.506(c)(2)(ii).

50. SEC Release on Rule 506, *supra* note 16, at 44,776. The 2013 Rule amendment did not alter Rule 506(b), which is still available for use by issuers under its original terms. *Id.*

51. *Id.* at 44,776–77. Rule 506(c) provides four "non-exclusive and non-mandatory [verification] methods," all of which entail (1) obtaining a written affirmation by the purchaser of her status as an accredited investor and (2) an independent verification of that status by reviewing tax documents, bank statements, and other similarly reliable documentation. 17 C.F.R. § 230.506(c)(2)(ii)(A)-(D). Additionally, in guidance about the new Rule 506(c), the SEC provided a list of factors issuers should consider in verifying investor status through a "facts and circumstances analysis," including:

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

SEC Release on Rule 506, *supra* note 16, at 44,778.

52. Letter from Keith Paul Bishop to Nancy M. Morris, Sec'y, U.S. Sec. & Exch. Comm'n 2–3 (Oct. 1, 2007), https://www.sec.gov/comments/s7-18-07/s71807-19.pdf [https://perma.cc/R4SF-FDMM]. This feedback loop likely disadvantaged new and small businesses, many of whom may have been female- or minority-owned. *Id.*

53. Letter from Joseph McLaughlin to Nancy M. Morris, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Nov. 12, 2007), https://www.sec.gov/comments/s7-18-07/s71807-61.pdf [https://perma.cc/4SYT-C3VB].

54. SEC Release on Rule 506, *supra* note 16, at 44,774.

verification framework mentioned above.[55] In doing so, the Commission relaxed limitations on how to communicate with investors without evaluating the methodology that determines the actual *pool* of investors (i.e., the accredited investor financial thresholds). That pool has ballooned from once including only approximately 1.6% of U.S. households to today including 13% of U.S. households.[56] This exponential increase in the number of potential accredited investors, coupled with technological advancements, provides compelling reasons to believe that the private offering rules need yet another update.

C. SEC Guidance on Internet Use in Private Offerings

Since the 1990s, the SEC has been attentive to how social media and the internet impact the securities regulation landscape.[57] The internet provides issuers with unparalleled access to investors and new ways to share information, no matter where investors are located, and the ability to electronically transmit information (and forgo printing) dramatically reduces an issuer's costs.[58] With respect to private markets specifically, the SEC noted in a recent proposal, "Given the rise of the internet, social media, and other forms of communication, information about issuers and other participants in the [private] markets is more readily available to a wide range of market participants."[59] Yet the private offering rules remained largely the same until the 2013 JOBS Act.[60] As discussed in more detail below, the SEC has provided guidance, often in the form of no action letters,[61] to help

55. *Id.* at 44,776.

56. Letter from Christopher Gerold, President, N. Am. Sec. Adm'rs Ass'n, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 4 (Mar. 16, 2020), https://www.nasaa.org/wp-content/uploads/2020/03/NASAA-Accredited-Investor-Comment-Letter.pdf [https://perma.cc/ERU9-6FD2]. "It is implausible that 16 million American households currently have both the financial sophistication and the capacity to bear the kinds of investment losses that courts and prior Commissions have considered essential prerequisites for participation in private offerings." *Id.* at 4–5.

57. *See, e.g.*, Laura S. Unger, Acting Chairman, U.S. Sec. & Exch. Comm'n, Speech at the 2001 Corporate Law Symposium at the University of Cincinnati School of Law: Raising Capital on the Internet (Mar. 9, 2001), https://www.sec.gov/news/speech/spch471.htm [https://perma.cc/A28P-DC6U] ("The financial services industry has been uniquely susceptible to changes in technology due to its inherently intangible nature.").

58. *Id.*

59. Amending the "Accredited Investor" Definition, Securities Act Release No. 10,734, Exchange Act Release No. 87,784, 85 Fed. Reg. 2,574, 2,594 (proposed Jan. 15, 2020).

60. *See supra* Section I.B; Amending the "Accredited Investor" Definition, 85 Fed. Reg. at 2574.

61. A "No Action Letter" allows companies to ask if a particular course of action would, in the Commission's opinion, violate the securities laws. *No Action Letters*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answersnoactionhtm.html (last visited Mar. 11, 2021) [https://perma.cc/54Y3-WDQX].

issuers navigate compliance with the securities laws in an increasingly internet-based world.

1. Securities and the Internet, Generally

The Commission's website provides educational resources on how to invest wisely when presented with securities investment opportunities on the internet. In 2012, the SEC released an Investor Alert explaining that the low cost and anonymity of social media make it both an attractive option for fraudsters and difficult to bring bad actors to justice.[62] The Commission provides some classic smart investing advice, such as being skeptical of offers that seem too good to be true. It also provides internet-specific advice, like making sure to configure social media privacy and security settings responsibly[63]—a good practice for social media use regardless of whether users seek securities investments online.

The SEC frequently brings enforcement actions against perpetrators of internet-based securities fraud and once maintained an internet-specific enforcement arm called the Office of Internet Enforcement. This arm merged with the Office of Market Intelligence in 2010[64]—perhaps owing to the fact that, as regulators have acknowledged, "[t]he fundamental principles of securities regulation do not change based on the medium,"[65] thus rendering an internet-specific office unnecessary to achieving enforcement goals. The Commission's website also links to a report on international enforcement efforts with respect to securities law violations perpetrated over the internet.[66] But

62. Off. of Inv. Educ. & Advoc., *Investor Alert: Social Media and Investing – Avoiding Fraud*, U.S. SEC. & EXCH. COMM'N 1 (2012), https://www.sec.gov/investor/alerts/socialmediaandfraud.pdf [https://perma.cc/PRK5-YEYH].

63. *Id.* at 2.

64. *See Enforcement Internet Program*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/oig/reportspubs/aboutoigaudit352finhtm.html#P29_2924 (last updated June 3, 2004) [https://perma.cc/TNM8-K8S5]; *see also Significant SEC Enforcement Actions Led by Office of Internet Enforcement*, JOHN REED STARK CONSULTING LLC, https://www.johnreedstark.com/sec-enforcement-matters/ (last visited Mar. 12, 2021) [https://perma.cc/TV82-M3CP].

65. INT'L ORG. OF SEC. COMM'NS, REPORT ON SECURITIES ACTIVITY ON THE INTERNET III, at 1 (2003), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD159.pdf [https://perma.cc/V75J-6V7N].

66. *See* Off. of Int'l Affs., *Enforcement*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/offices/oia/enforce.htm (last updated Oct. 12, 2006) [https://perma.cc/2U8Q-CSCP] (section titled "Internet Fraud," which provides a link to the International Organization of Securities Commissions Report on Securities Activity on the Internet III); *see also* INT'L ORG. OF SEC. COMM'NS, *supra* note 65.

the report has not been updated since 2003, making it nearly twenty years old.[67]

In most cases, the internet simply provides a new medium for violating securities laws rather than impacting the nature of the violations in a legally substantive way.[68] Fraud and other securities violations perpetrated over the internet are regulated through the usual channels, namely enforcement actions. There are numerous examples of enforcement actions involving securities law violations on social media—from pyramid schemes on Facebook to unregistered securities promoted on Twitter and YouTube—that demonstrate investors' susceptibility to fraud conducted on these mediums.[69]

In one particularly relevant example, the SEC brought an enforcement action against defendants who used social media advertisements, in addition to telephone and e-mail solicitations, to target seniors in a Ponzi scheme that raised $1.2 billion before collapsing.[70] The fund, Woodbridge, filed for Chapter 11 bankruptcy, owing $961 million in principal to investors.[71] Fortunately, most of the investors in this scheme recovered their money after a judge ordered a $1 billion judgement against the fund and related corporate actors.[72] Although case documents do not specify how Woodbridge's scheme came to the attention of the SEC, it seems probable that the large, public bankruptcy proceeding could have attracted regulatory scrutiny. The size and scope of this particular scam likely also made it easier to

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67. By way of example, the report notes that "10 per cent of people in the world now have access to the Internet." INT'L ORG. OF SEC. COMM'NS, *supra* note 65, at 3. Today, almost sixty percent of the world uses the internet. *Global Digital Population as of January 2021*, STATISTA, https://www.statista.com/statistics/617136/digital-population-worldwide/ (last visited Mar. 12, 2021) [https://perma.cc/5SJY-E7MK].

68. *See* INT'L ORG. OF SEC. COMM'NS, *supra* note 65, at 1 ("The fundamental principles of securities regulation do not change based on the medium.").

69. In 2014, the Commission cracked down on an operation in which fraudsters used Twitter and Facebook accounts to lure investors into a pyramid scheme that promised weekly returns of up to three percent. Press Release, U.S. Sec. & Exch. Comm'n, SEC Halts International Pyramid Scheme Being Promoted Through Facebook and Twitter (Mar. 5, 2014), https://www.sec.gov/news/press-release/2014-44 [https://perma.cc/PQ8H-MHYN]. Another enforcement action announced in 2019 halted a scheme involving the promotion of unregistered securities via Twitter and YouTube. Litigation Release, U.S. Sec. & Exch. Comm'n, SEC Charges Nine Individuals and Companies for Roles in Microcap Scheme (Mar. 12, 2019), https://www.sec.gov/litigation/litreleases/2019/lr24419.htm [https://perma.cc/4J8F-P5L2].

70. Complaint at 3, SEC v. Davis, No. 2:18-cv-10481 (C.D. Cal. Dec. 18, 2018), ECF No. 1, https://www.sec.gov/litigation/complaints/2018/comp-pr2018-296-3.pdf [https://perma.cc/DMT8-NAZ4].

71. *Id.* at 12.

72. Press Release, U.S. Sec. & Exch. Comm'n, Court Orders $1 Billion Judgment Against Operators of Woodbridge Ponzi Scheme Targeting Retail Investors (Jan. 28, 2019), https://www.sec.gov/news/press-release/2019-3 [https://perma.cc/7MRE-YGAW]. Robert Shapiro, Woodbridge's former owner, was himself ordered to pay $100 million to recompense victims. *Id.*

prosecute, and, arguably, regulators like the SEC cannot simply ignore frauds of this magnitude.[73] The case is an outlier in this regard: in 2018, the median SEC enforcement action involved only $362,858 in disgorgement of ill-gotten gains and penalties[74]—a mere fraction of the $1 billion figure in Woodbridge. Nonetheless, Woodbridge is representative of the Commission's continued use of its normal regulatory tools as it confronts internet-based fraud and securities law violations.

2. Using the Internet to Conduct Private Offerings

In 1995, the Commission announced that promoting private securities offerings on a public website constitutes a general solicitation in violation of Rule 502(c). This is true even if prospective investors must provide information *before* being able to access offering documents.[75] Later, in a matter called *IPONET*, the SEC determined that the issuer did not engage in general solicitation when, after verifying the accreditation status of investors who shared information, the issuer provided verified investors with a password to access a website containing offering information.[76] Put differently, inviting investors to participate in a specific private offering via a public website qualifies as a general solicitation, but inviting them to share information about their accreditation status or sophistication level through a public website for the prospect of participating in *future*

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73. *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 918–19 (2016) ("Output measures in enforcement are a product of several factors, including (1) the prevalence of misconduct as well as (2) the agency's ability to detect and prosecute such misconduct."). After it reviews the SEC Staff's findings on a matter, the Commission must approve pursuit of enforcement action before it moves forward to, for example, the filing of a federal complaint or an administrative action. *How Investigations Work*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/enforce/how-investigations-work.html (last updated Jan. 27, 2017) [https://perma.cc/4FVS-S8YE]. It stands to reason that when something like a $1.2 billion Ponzi scheme, calculated to prey on vulnerable investors, comes before the Commissioners, they most often will choose to pursue enforcement.

74. DIV. OF ENF'T, U.S. SEC. & EXCH. COMM'N, 2019 ANNUAL REPORT 16 (2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf [https://perma.cc/753L-JF8S].

75. Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7,233, Exchange Act Release No. 36,345, Investment Company Act Release No. 21,399, 60 Fed. Reg. 53,458 (Oct. 6, 1995) (codified at 17 C.F.R pts. 231, 241, 271).

76. Eiger, *supra* note 40, at 5 (discussing the No-Action Letter the Commission issued in *IPONET*); *see also* Heather Traeger & Kris Easter, *Use of Social Media in Private Fund Offerings: Perks, Perils, and Privacy*, 13 J. BUS. & SEC. L. 143, 150 (2013) ("While funds and intermediaries involved in their offerings have been providing information about private offerings for some time via password protected websites that enabled only qualified investors to view the offerings, the [2013 JOBS Act changes] allow them to disseminate information more broadly." (footnote omitted)). After *IPONET*, the Commission found that allowing potential investors to merely self-verify their accreditation status before accessing a website containing offering information ran afoul of Rule 502(c). Eiger, *supra* note 40, at 5–6.

offerings is acceptable under Rule 502(c).[77] In 2015, the Commission clarified that Rule 506(c), the new private offering exemption, "may be available to issuers when offering or selling securities through unrestricted, publicly available websites or other forms of general solicitation."[78]

In sum, although it has mainly applied its usual principles and tools in doing so,[79] the SEC has kept a pulse on how the internet could and should change the securities regulation landscape. Scholars have also hypothesized about how private issuers might leverage the power of the internet to promote offerings under the new Rule 506(c).[80] The adjustments to securities regulation so far have been positive, but others are necessary to address the evolving circumstances with respect to the internet, particularly social media.[81] With its knowledge regarding how technology can impact securities markets, the SEC is well positioned to implement changes with respect to further developments in technology, such as targeted advertising.

II. TARGETED ADVERTISING ON SOCIAL MEDIA AND "SURVEILLANCE CAPITALISM"

While not a new practice, targeted advertising has become an exceedingly powerful tool for companies hoping to compete in our digital economy. Thanks to firms that aggregate and distribute consumer data, including social media giants like Facebook, Twitter, and Google, advertisers can reach consumers with unprecedented precision. Further, platforms now have the capacity to not only target specific users and provide individualized advertising content, but they can also predict and influence future behaviors. Social media platforms assume an important regulatory function by monitoring advertisements that appear on their interfaces and prohibiting the advertisement of certain financial products. This Note argues, however, that these companies do

77. Stephen M. Flanagan, *No Free Speech Violation by Enforcement of Blue Sky Law*, 29 FLETCHER CORP. L. ADVISER 4 (2011). Other guidance confirms this view, explaining that "the use of an unrestricted, publicly available website constitutes a general solicitation and is not consistent with the prohibition on general solicitation . . . if the website contains an offer of securities." U.S. SEC. & EXCH. COMM'N, *supra* note 38.

78. U.S. SEC. & EXCH. COMM'N, *supra* note 38.

79. *See supra* notes 62–74 and accompanying text (exploring how the Commission's advice to investors and treatment of bad actors has remained largely unchanged despite the increasing prevalence of internet-based securities transactions and frauds).

80. *See, e.g.*, Traeger & Easter, *supra* note 76, at 149–52. Scholars, including Traeger and Easter, have also noted how the 2013 rule changes and advancements in internet technology could impact other areas of securities regulation. *See id.* at 152–61. Discussion of these additional areas is beyond the scope of this Note.

81. *See id.* at 161 ("To date, the SEC has not formally addressed the use of social media.").

not go far enough to protect users, and that the advertising practices described here have the potential to cause a lot of harm to users-turned-investors. This Part examines the mechanisms that facilitate targeted advertising on social media platforms, as well as the policies on what advertisers can say about financial and securities products.

A. Social Media Advertising and the "Attention Extraction" Model

Targeted advertising is the practice by which companies seeking to promote a service or product direct advertisements at certain consumers based on characteristics those consumers possess.[82] Although it has taken on new meaning in recent years, targeted advertising is not a new concept.[83] Companies and advertisers have been targeting groups of consumers for decades, trying to discern how habits and demographic characteristics drive purchasing preferences.[84] In a sense, all advertising is "targeted" in one way or another—there are reasons why companies choose to run certain advertisements during Monday Night Football and others during primetime soap operas. Social media advertising moves far beyond targeting demographic groups expected to watch certain television programs, now providing personalized advertisements that are more effective at influencing behavior than ever before.

Targeting consumers through advertisements has become more effective as platforms collect user data in greater and greater quantities. This mass of data is known as "big data," a term coined to refer to the explosive increase in data produced by internet-connected devices.[85] It is called "big" data due to its "volume, velocity, and variety."[86] One source estimates that as of 2018, ninety percent of all the data collected throughout human history had been created in the previous two years.[87] So it is *really* big, and it includes everything from posts on social media to glucose levels measured by a smart watch.[88] Using this information, data collection firms extrapolate all sorts of information.[89] Browsing for motorcycles, for example, might mean that

82. Caitlin E. Jokubaitis, *There and Back: Vindicating the Listener's Interests in Targeted Advertising in the Internet Information Economy*, 42 COLUM. J.L. & ARTS 85, 86–88 (2018).

83. *Id.* at 86.

84. Roy de Souza, *A Short History of Targeted Advertising*, ZEDO (May 27, 2015), https://www.zedo.com/short-history-targeted-advertising/ [https://perma.cc/Z43P-AG3B].

85. Pickell, *supra* note 6.

86. *Id.*

87. *Id.*

88. *Id.*

89. Stuart A. Thompson, Opinion, *These Ads Think They Know You*, N.Y. TIMES: PRIV. PROJECT, https://www.nytimes.com/interactive/2019/04/30/opinion/privacy-targeted-advertising

a person is flagged as having a higher tolerance for risky behavior.[90] This identified characteristic—tolerance for risk—then impacts what advertisements the user is shown. And those advertisements, in turn, impact the characteristics assigned to the user.

Social media platforms, such as Facebook, Twitter, and Google, have interfaces that collect and distribute data about their users to third parties.[91] Advertising is how the platforms make money—for example, ninety-eight percent of Facebook's revenue comes from advertising.[92] Facebook has two billion users worldwide,[93] all of whom create monetizable data with every click.[94] In addition, the site provides a platform for advertising, through which it supplies the information about users that companies target.[95] Advertisers can identify and show advertisements to users according to their attributes, such as age and gender, and by their location.[96]

The platforms have also figured out how to predict user behavior and imperceptibly change the way users behave and think over time.[97] As a user engages with a social media platform, the platform "learns"

.html (last visited Mar. 12, 2021) [https://perma.cc/SC27-EC7Q] ("Just by browsing the web, you're sending valuable data to trackers and ad platforms."); Kalev Leetaru, *The Data Brokers So Powerful Even Facebook Bought Their Data – But They Got Me Wildly Wrong*, FORBES (Apr. 5, 2018, 4:08 PM), https://www.forbes.com/sites/kalevleetaru/2018/04/05/the-data-brokers-so-powerful-even-facebook-bought-their-data-but-they-got-me-wildly-wrong/#668c3f43107a [https://perma.cc/FA2X-CLP7].

90. Yael Grauer, *What Are 'Data Brokers,' and Why Are They Scooping Up Information About You?*, VICE: MOTHERBOARD (Mar. 27, 2018, 9:00 AM), https://www.vice.com/en_us/article/bjpx3w/what-are-data-brokers-and-how-to-stop-my-private-data-collection [https://perma.cc/7FD4-R9WT].

91. Cooper Smith, *Social Big Data: The User Data Collected by Each of the World's Largest Social Networks – And What It Means*, BUS. INSIDER (Jan. 16, 2014, 11:40 AM), https://www.businessinsider.com/social-big-data-the-type-of-data-collected-by-social-networks-2014-1 [https://perma.cc/K7CF-UERB].

92. VICE News, *All the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), https://www.youtube.com/watch?v=EM1IM2QUYjk [https://perma.cc/5U4Y-4PZ3].

93. *Id.*

94. *Id.*; *see also* Devin Pickell, *Social Media Data Mining – How It Works and Who's Using It*, G2 LEARNING HUB (Apr. 12, 2019), https://learn.g2.com/social-media-data-mining [https://perma.cc/BKC2-WG3E] (noting that "tweets, comments, [and] status updates" are the primary types of social media data that businesses seek to mine); THE SOCIAL DILEMMA, *supra* note 19, at 14:03.

95. VICE News, *supra* note 92.

96. *Id.* Further, the platforms allow advertisers to connect with users through a powerful tool called "Custom Audiences," through which Facebook will match, for example, a list of email addresses with users on the platform. *See Intro to Custom Audiences*, TWITTER: BUS., https://business.twitter.com/en/help/campaign-setup/campaign-targeting/custom-audiences.html (last visited Mar. 12, 2021) [https://perma.cc/DTM9-KJL2]; *About Custom Audiences*, GOOGLE: SUPPORT, https://support.google.com/google-ads/answer/9805516 (last visited Mar. 12, 2021) [https://perma.cc/H74W-22MK]. This allows advertisers to specify *exactly* which users will see a particular advertisement; the advertisements, known as "dark posts," are visible only to the custom audience. VICE News, *supra* note 92.

97. THE SOCIAL DILEMMA, *supra* note 19, at 14:21 ("It's the gradual, slight, imperceptible change in your own behavior and perception that is the product [social media companies sell].").

about the user, allowing it to predict what content it should provide in the future.[98] Further, social media platforms have developed features designed to create dopamine reactions and keep users glued to their screens. This engagement is more aptly characterized as addiction—another objective of the platforms.[99] Meanwhile, users are both unaware of and powerless to stop this manipulation and their worsening addiction.[100]

Google design ethicist turned tech watchdog Tristan Harris calls this the " 'attention extraction' business model," wherein social media companies "sell[ ] advertisers . . . highly sophisticated techniques to manipulate individuals and the public sphere."[101] Importantly, the model operates through algorithms based on machine learning. There are no human programmers behind the screen doing the predicting—rather, algorithms are the lifeblood of the attention extraction model.[102] They are programmed to absorb and optimize every available datapoint. This powerful model turns users' attention, as well as their long-term behavioral changes, into an extremely valuable product for advertisers.[103] It is central to the new reality of "surveillance capitalism," a system in which users are the product and market participants trade in "human futures."[104]

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98. *Id.* at 15:00.

99. *See* Devika Girish, *'The Social Dilemma' Review: Unplug and Run*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/09/movies/the-social-dilemma-review.html [https://perma.cc/CJ3T-VAFC] ("[C]onscientious defectors from [big tech and social media] companies explain that the perniciousness of social networking platforms is a feature, not a bug.").

100. THE SOCIAL DILEMMA, *supra* note 19, at 28:20 ("One thing [Facebook] concluded is that we now know we can affect real-world behavior and emotions without ever triggering the user's awareness. They are completely clueless."); *id.* at 33:16 ("Social media is a drug . . . [that has] the potential for addiction.").

101. Tristan Harris, *EU Should Regulate Facebook and Google as 'Attention Utilities*,*'* FIN. TIMES (Mar. 1, 2020), https://www.ft.com/content/abd80d98-595e-11ea-abe5-8e03987b7b20 [https://perma.cc/BG4W-8HTK]; *see also* THE SOCIAL DILEMMA, *supra* note 19, at 15:30 (describing "surveillance capitalism").

102. Ben Hoyle, *The Silicon Valley Insider Who Says Turn Off Your Phone*, TIMES (Jan. 4, 2020, 12:01 AM GMT), https://www.thetimes.co.uk/article/the-silicon-valley-insider-who-says-turn-off-your-phone-rwspxt6xr [https://perma.cc/5QZP-QTVG]; *see also* THE SOCIAL DILEMMA, *supra* note 19, at 15:00 (arguing that social media companies sell the certainty of successful advertising, which requires "great predictions" about consumer behavior, which further requires "a lot of data").

103. THE SOCIAL DILEMMA, *supra* note 19, at 14:03.

104. *Id.* at 15:47; *see also* ZUBOFF, *supra* note 5, at 8 ("Surveillance capitalists have grown immensely wealthy from these trading operations, for many companies are eager to lay bets on our future behavior."); Noam Kolt, *Return on Data: Personalizing Consumer Guidance in Data Exchanges*, 38 YALE L. & POL'Y REV. 77, 78 (2019) ("Many technology companies do not charge fees for the services they provide. They market their services as free. But these arrangements can be misleading. The business models of Big Tech firms and other service providers rely on consumers trading personal data for services." (footnote omitted)).

Before it comes time to actually show advertisements to users, platforms review the advertisements and enforce limitations on what advertisements can say. Facebook, Twitter, and Google all have advertisement approval processes that screen out advertisements that do not comply with their standards or that promote certain types of restricted or prohibited content.[105] Google and Facebook do not allow advertisers to include information that signals to recipients they are being targeted—for example, an advertisement that used a recipient's name would be prohibited.[106] Twitter prohibits targeting users on the basis of certain categories of "sensitive information," such as "[n]egative financial status or condition" or "[r]acial or ethnic origin."[107]

Each platform also has policies concerning financial products and services, and for the most part, they all restrict and prohibit the same things. For example, all three platforms prohibit advertisements that promote Initial Coin Offerings ("ICOs") and cryptocurrency token sales.[108] They merely restrict advertisements that provide information about cryptocurrency, such as those about "[e]vents, education and news related to Cryptocurrency (where no cryptocurrency products or services are on offer)," by requiring advertisers to obtain approval to

105. *Advertising Policies*, FACEBOOK, https://www.facebook.com/policies/ads (last visited Mar. 12, 2021) [https://perma.cc/52NS-WYPN]; *Twitter Ads Policies*, TWITTER: BUS., https://business.twitter.com/en/help/ads-policies.html (last visited Mar. 12, 2021) [https://perma.cc/55TB-LQMA]; *Google Ads Policies*, GOOGLE: SUPPORT, https://support.google.com/adspolicy (last visited Mar. 12, 2021) [https://perma.cc/CEZ4-CAMM].

106. *Advertising Policies: Prohibited Content Personal Attributes*, FACEBOOK, https://www.facebook.com/policies/ads/prohibited_content/personal_attributes (last visited Mar. 12, 2021) [https://perma.cc/VKL4-ZP5S]; *Data Collection and Use*, GOOGLE: SUPPORT, https://support.google.com/adspolicy/answer/6020956 (last visited Mar. 12, 2021) [https://perma.cc/N77L-CFUF]; *see also* Thompson, *supra* note 89 ("[Facebook] bans most ads showing how you've been targeted.").

107. *Policies for Conversion Tracking and Custom Audiences*, TWITTER: BUS., https://business.twitter.com/en/help/ads-policies/campaign-considerations/policies-for-conversion-tracking-and-custom-audiences.html (last visited Mar. 12, 2021) [https://perma.cc/L3DA-NWRH]. Interestingly, Twitter's policy also provides that "[a]dvertisers may not create advertisements which assert or imply knowledge of personally identifiable or sensitive information, even when the ad has been created and targeted without using such information." *Id.*

108. *Advertising Policies: Prohibited Content, Prohibited Financial Products and Services*, FACEBOOK, https://www.facebook.com/policies/ads/prohibited_content/prohibited_financial_products_and_services (last visited Mar. 12, 2021) [https://perma.cc/DW8K-U3KQ]; *Advertising Policies: Restricted Content, Cryptocurrency Products and Services*, FACEBOOK, https://www.facebook.com/policies/ads/restricted_content/cryptocurrency_products_and_services (last visited Mar. 12, 2021) [https://perma.cc/A8K7-K86M]; *Financial Products and Services*, TWITTER: BUS., https://business.twitter.com/en/help/ads-policies/ads-content-policies/financial-services.html (last visited Mar. 12, 2021) [https://perma.cc/P6YT-U6RV]; *Financial Products and Services*, GOOGLE: SUPPORT, https://support.google.com/adspolicy/answer/2464998 (last visited Mar. 12, 2021) [https://perma.cc/T65Y-DXLX].

run such advertisements.[109] Google forbids advertisements that contain "unreliable claims" such as those related to financial products or services that promise "large financial return with minimal risk, effort or investment" (" '[g]et rich quick' schemes").[110] Twitter similarly prohibits advertisements that endorse "unacceptable business practices" like "[p]romoting misleading information or omitting vital information on pricing, payment terms, or expenses the user will incur."[111]

B. Not Your Mother's Targeted Advertising

Advertising platforms such as those provided by Facebook, Twitter, and Google might seem like mere conduits for advertising, but what they facilitate is a new, more powerful type of targeted advertising operating within the "attention extraction" economy.[112] The advertising landscape has changed with respect to how data is collected, how advertisements reach consumers, and how those advertisements impact consumers.[113] Instead of extrapolating about consumer preferences from broad characteristics of certain groups of people—users over the age of fifty, for example—companies now have access to

109. *Advertising Policies: Restricted Content, Cryptocurrency Products and Services*, *supra* note 108; *see also Financial Products and Services*, *supra* note 108 (restricting certain cryptocurrency information); *Financial Products and Services*, *supra* note 108 (same).

110. *Misrepresentation*, GOOGLE: SUPPORT, https://support.google.com/adspolicy/answer/6020955?hl=en&ref_topic=1626336 (last visited Mar. 8 2021) [https://perma.cc/9SXM-DS35]. More broadly, Google prohibits "[s]camming users by concealing or misstating information about the advertiser's business, product, or service," such as "[e]nticing users to part with money or information through a fictitious business that lacks the qualifications or capacity to provide the advertised products or services." *Id.*

111. *Unacceptable Business Practices*, TWITTER: BUS., https://business.twitter.com/en/help/ads-policies/ads-content-policies/unacceptable-business-practices.html (last visited Mar. 12, 2021) [https://perma.cc/WRP5-TA74]. Facebook has a comparable prohibition on advertisements that "promote products, services, schemes or offers using deceptive or misleading practices, including those meant to scam people out of money or personal information." *Advertising Policies: Prohibited Content, Unacceptable Business Practices*, FACEBOOK, https://www.facebook.com/policies/ads/prohibited_content/unacceptable_business_practices (last Mar. 12, 2021) [https://perma.cc/RJ5H-4E9Q].

112. *See* Harris, *supra* note 101 (discussing how the "attention extraction" business model harms society); THE SOCIAL DILEMMA, *supra* note 19, at 30:35 ("That's what's changed. Social media isn't a tool that's just waiting to be used. It has its own goals, and it has its own means of pursuing them by using your psychology against you.").

113. *See* Thompson, *supra* note 89 ("Just by browsing the web, you're sending valuable data to trackers and ad platforms."); THE SOCIAL DILEMMA, *supra* note 19, at 15:00, 15:30 (describing "surveillance capitalism" and the business model of social media companies that relies on unprecedented amounts of data collected).

user-specific data, which they can aggregate, isolate, and otherwise manipulate in a matter of keystrokes.[114]

Proponents of targeted online advertising argue that there is a significant, cognizable advantage for consumers, in addition to the benefits that advertisers reap. Consumers, they claim, get a personalized advertising experience, which is efficient and simply gives people what they really want.[115] This argument feels strong and logical, especially considering just how many options consumers must sort through when browsing the internet.[116] Applying these benefits to the private securities market, it seems true that there are individuals for whom targeted advertisements about securities offerings might be a good thing. But do the benefits to some outweigh the potential for harm to others—others who are likely much more vulnerable than those who stand to benefit?

The fact that "social media can be addictive and creepy isn't a revelation to anyone who uses Facebook, Twitter, Instagram and the like."[117] But many users might be shocked to learn how sophisticated the manipulative tactics of platforms are. Their tools are incredibly effective at changing user perspectives over time—all to the benefit of advertisers who provide social media companies' primary source of revenue.[118] Because the platform learns more about users the more time users spend scrolling, and it suggests content based on what it thinks users like *and* what it wants them to engage with,[119] targeted advertising arguably does not provide consumers what they want. It provides consumers what the platform and advertisers *want* consumers to want.

These targeted advertising practices, and the surveillance capitalism economy in which they operate, present concerns regardless of what product is the subject of advertisement. When advertisements concern material goods or everyday services, these practices raise questions about privacy, consumer health, and the role social media

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114. *See supra* note 94 and accompanying text (discussing the monetization of data by social media companies).

115. *See Protecting Consumers in the Next Tech-ade: A Report by the Staff of the Federal Trade Commission*, *supra* note 7, at 10–11 (describing the creation of user-specific advertising messages by profiling the users' online habits, which may lead to more relevant advertising for users).

116. *See supra* notes 85–88 and accompanying text (discussing "big data" and the vast amount of information available on the internet).

117. Girish, *supra* note 99.

118. *Id.*; THE SOCIAL DILEMMA, *supra* note 19, at 27:56 ("It's not like [social media companies] are trying to benefit *us*. Right? We're just zombies, and they want us to look at more ads so they can make more money.").

119. THE SOCIAL DILEMMA, *supra* note 19, at 28:20, 29:04, 29:29.

plays in society.[120] But when advertisements concern financial services and securities, particularly private instruments, an additional layer of risk materializes, bringing a nuanced set of securities-specific harms along with it.[121] Notably, the algorithms move user behavior slowly and imperceptibly—for the risk tolerant consumer, perhaps the algorithms start by showing advertisements for motorcycles, then maybe advertisements for skydiving. Next, maybe the algorithm decides the consumer might like to see advertisements for a casino, where the consumer is presented with a risky money-related opportunity. Eventually, this type of progression could lead the algorithms to present advertisements for—and the consumer to become interested in—private securities offerings.[122]

Despite their shortcomings, the advertising policies reveal a key strength in social media companies' approaches to targeted advertising. The platforms appear to recognize the high risk of investor harm associated with certain types of financial products, as well as the platforms' potential role in facilitating that harm.[123] By prohibiting advertisers from selling cryptocurrency on their platforms, Facebook, Twitter, and Google assume a regulatory function in an area where the law is still evolving.[124] But these policies on cryptocurrency advertising are likely best understood as attempts to minimize liability exposure as the SEC and private companies battle over whether ICOs are securities

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120. *See generally id.* (describing concerns regarding the impact of social media on society).

121. *See infra* notes 140–145 and accompanying text (discussing the particular risks and harms that arise when targeted advertising and private securities offerings intersect).

122. Political radicalization occurring via social media and at the hands of these algorithms offers a helpful analog. In essence, algorithms detect themes, like conservative principles or risk-taking behavior, and extrapolate out to locate related content. *See, e.g.*, Jonas Kaiser & Adrian Rauchfleisch, *How YouTube Helps Homogeneous Online Communities*, BROOKINGS INST. (Dec. 23, 2020), https://www.brookings.edu/techstream/how-youtube-helps-form-homogeneous-online-communities/ [https://perma.cc/9XC4-9J9E]:

> YouTube's algorithms work really well at detecting shared themes and forming communities around them. Yet these algorithmic decisions lack nuance: They cannot distinguish between "news" on the one hand and "political punditry" on the other. And without the ability to make nuanced determinations about content, the algorithms sidestep questions about the veracity of the information presented and extremist speech.

123. *See supra* notes 105–111 (detailing the policies of social media companies); *NASAA Expands Annual Top Investor Threat List*, N. AM. SEC. ADM'RS ASS'N (Oct. 15, 2013), https://www.nasaa.org/27012/nasaa-expands-annual-top-investor-threats-list/ [https://perma.cc/562S-PATP] (identifying "digital currency" as one of the top ten riskiest financial products).

124. *See* Nikhilesh De, *The SEC Just Released Its Long-Awaited Crypto Token Guidance*, COINDESK, https://www.coindesk.com/the-sec-just-released-its-crypto-token-guidance (last updated Apr. 3, 2019, 11:21 AM) [https://perma.cc/FB7Q-MVLN] (discussing new guidance from the SEC regarding whether cryptocurrencies are securities).

offerings that must comply with federal securities laws.[125] While it is commendable that the platforms also prohibit advertisements that are manipulative, deceptive, and fraudulent, these prohibitions seem to add little to the existing securities regulation framework, which also prohibits such practices.[126]

Regardless of motivation, the advertisement policies discussed above are a net positive for investor protection, adding another layer of oversight in a high-stakes system.[127] But given the wide array of financial products and services *not* covered by social media advertising policies (i.e., anything that is not crypto) and the manipulative realm in which the advertisements exist, the potential for harm—and the platforms' role in it—remains.

III. HARMS OF ALLOWING TARGETED ADVERTISEMENTS IN PRIVATE SECURITIES OFFERINGS

Since its inception, the private securities offering regime has drawn criticism from all sides. Most relevantly for this Note, critics point to its failure to provide sufficient investor protection in high-risk offerings where frauds flourish. All potential issues arising with private placements are given new meaning with the introduction of targeted advertising on social media. At the intersection of surveillance capitalism's human futures market and the historically volatile private securities market, the risks are amplified.

This Part examines longstanding criticisms of the regulatory structure that governs private offerings, then identifies how targeted advertising and surveillance capitalism aggravate issues related to that structure. The potential overlap between private securities markets and targeted advertising heightens the risk of harm not only to investors but also to the markets, issuers, and social media companies that play crucial roles in the system.

125. Matt Robinson & Olga Kharif, *SEC Sues Kik over $100 Million ICO, Sees Kin as a Security*, BLOOMBERG, https://www.bloomberg.com/news/articles/2019-06-04/sec-sues-crypto-firm-that-s-raising-money-to-fight-regulator (last updated June 4, 2019, 1:02 PM) [https://perma.cc/TM2H-ELLT] (discussing the SEC's lawsuit against Kik for allegedly conducting an illegal securities offering and Kik's efforts to raise funds to combat the SEC's enforcement actions).

126. *See* Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2020) (making it unlawful to, "in connection with the purchase or sale of any security," employ any means to defraud, make false statements, or engage in deceitful practices).

127. *See, e.g.*, *Advertising Policies: Prohibited Content, Prohibited Financial Products and Services*, *supra* note 108 (explaining Facebook's advertising policies with respect to financial products).

A. Risks Associated with Private Offerings

Private offerings present distinctive risks for individual investors for a few reasons.[128] First, because private offering issuers do not have the same disclosure obligations as they would for a public offering, investors have less information about the securities and are not always well-positioned to judge the value of an investment.[129] To exacerbate this informational deficit, private securities offered under Rule 506 are illiquid,[130] meaning that investors could then be saddled with volatile, unpredictable investments.[131] The features that make private securities offerings so attractive to issuers and investors alike—relatively low levels of regulation and minimal barriers to entry—are also what make them fertile ground for fraudulent and unfair practices.[132] To heighten concerns, fraudsters often target vulnerable individuals and exploit investor vulnerabilities to encourage investment in private offerings.[133] Private securities provide fraudsters

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128. Although institutions are also eligible to participate in private offerings, this Note focuses on individual investors, as they are most vulnerable to the risks discussed and are the group potentially impacted by targeted advertising on social media. *See* 17 C.F.R. § 230.501(a) (2020) (defining an "accredited investor" to include institutions and natural persons).

129. *See* N. AM. SEC. ADM'RS ASS'N, *supra* note 123 ("While Reg D/Rule 506 offerings are used by many legitimate companies to raise capital, they carry high risk and may not be suitable for many individual investors.").

130. The illiquidity of private securities comes from the fact that participation in the private markets is restricted to certain investors, *see supra* Section I.A, meaning that the securities are difficult to sell quickly simply because there is "a lack of ready and willing investors or speculators to" buy. Christina Majaski, *Illiquid*, INVESTOPEDIA, https://www.investopedia.com/terms/i/illiquid.asp (last updated July 13, 2020) [https://perma.cc/K4LX-XTBE]. Consequently, "illiquid [securities] tend to have lower trading volume, wider bid-ask spreads, and greater price volatility." *Id*.

131. *See* N. AM. SEC. ADM'RS ASS'N, *supra* note 123 ("By definition these are limited investment offerings that are highly illiquid, generally lack transparency and have little regulatory oversight."); *see also Rule 506 of Regulation D*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/additional-resources/general-resources/glossary/rule-506-regulation-d (last visited Mar. 12, 2021) [https://perma.cc/V8WK-2VDU] ("Purchasers of securities offered pursuant to Rule 506 receive 'restricted' securities, meaning that the securities cannot be sold for at least six months or a year without registering them.").

132. *See* Ilon Oliveira, Comment, *Regulation of Rule 506 Private Placements: The Teetering Balance Between Investor Protection and Capital Formation*, 45 GOLDEN GATE U. L. REV. 287, 304 (2015) ("Furthermore, Rule 506 offerings have been ranked 'as the most common vehicle for fraud, as they are highly illiquid, and lack transparency and regulatory oversight.' ").

133. *See* N. AM. SEC. ADM'RS. ASS'N, *supra* note 123 (identifying Rule 506 private placements as posing the highest risk of fraudulent activity); *see also Investor Alert: Have Something in Common with Someone Selling an Investment? It May Make You a Target for Fraud.*, U.S. SEC. & EXCH. COMM'N (July 15, 2019), https://www.investor.gov/additional-resources/news-alerts/investor-alerts/investor-alert-have-something-common-someone [https://perma.cc/HK2Q-NNZM] (warning investors to be wary of individuals who may pretend to have something in common with them in order to convince them to invest in an unsuitable product). For example, the SEC brings enforcement actions every year against issuers who conduct fraudulent private offerings targeted at elderly investors who are swindled out of their savings. *See, e.g.*, Press

with a perfect hideaway, free from public and regulatory scrutiny but within easy reach of large amounts of capital.

The law is most concerned about people with the least amount of money to invest (and therefore the most to lose).[134] Say an investor purchases $150,000 in private securities, and those securities lose two-thirds of their value due to a market event and the underlying volatility of the instruments, meaning that they are eventually worth only $50,000. While a $100,000 loss might be insignificant to a large investment fund, it could devastate an individual investor, making the harm of the loss greater despite bearing the same price tag.[135] Conversely, the law is less worried about investors who have more money—like the aforementioned investment fund, or even an individual who has large amounts of personal wealth—because it assumes they are either more sophisticated, in a better position to hire a financial advisor, or simply more capable of tolerating significant financial loss.[136] These assumptions are directly reflected in the existence of the accredited investor thresholds, although they, too,

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Release, U.S. Sec. & Exch. Comm'n, SEC Charges Staten Island-Based Firm with Operating Boiler Room Scheme Targeting Seniors (Dec. 18, 2014), https://www.sec.gov/news/pressrelease/2014-287.html [https://perma.cc/2ZSA-W3DT] ("[Defendants] used high-pressure sales tactics to convince seniors to invest in [private] companies purportedly on the brink of conducting initial public offerings (IPOs)."). The SEC's website also warns investors about "affinity fraud," through which fraudsters claim to belong to a particular affinity group—often a racial or ethnic minority—in order to gain investors' trust and get them to invest in a fraudulent scheme. *SEC Spotlight: Affinity Fraud*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/affinity-fraud.shtml (last updated Sept. 20, 2016) [https://perma.cc/R8VQ-QVAL].

134. Jeffrey J. Hass, *Small Issue Public Offerings Conducted over the Internet: Are They "Suitable" for the Retail Investor?*, 72 S. CAL. L. REV. 67, 139 (1998) (discussing limitations on issuers that could keep securities "out of the hands of the most vulnerable investors").

135. The mere perception of this type of loss could have disastrous consequences for an individual investor. In June 2020, 20-year-old college student Alex Kearns committed suicide after seeing a negative balance of $730,000 on his account with Robinhood, a commission-free online trading platform. Even more tragically, the negative balance was "only temporary and would be corrected once the underlying stock was credited to his account." Sergei Klebnikov & Antoine Gara, *20-Year-Old Robinhood Customer Dies by Suicide After Seeing a $730,000 Negative Balance*, FORBES (June 17, 2020, 10:55 AM), https://www.forbes.com/sites/sergeiklebnikov/2020/06/17/20-year-old-robinhood-customer-dies-by-suicide-after-seeing-a-730000-negative-balance/ [https://perma.cc/56FQ-YK5Q]. Kearns repeatedly tried to contact Robinhood about the staggering figures on his account, but no one at the company answered him. His family has filed suit against Robinhood for wrongful death. Matt Egan, *'He Would Be Alive Today': Parents Detail Son's Desperate Attempts to Contact Robinhood Before He Killed Himself*, CNN: BUS., https://www.cnn.com/2021/02/11/investing/robinhood-lawsuit-suicide-alex-kearns/index.html (last updated Feb. 11, 2021, 2:08 PM) [https://perma.cc/CGZ5-R3VU]. According to those who knew him, Kearns began trading on Robinhood during the COVID-19 pandemic, and although he was an amateur investor, he was careful about his savings and transactions. In a note he left for his family, "Kearns insisted that he never authorized [the trading strategy at issue] and was shocked to find his small account could rack up such an apparent loss." Klebnikov & Gara, *supra*.

136. *See* Hass, *supra* note 134, at 139 (describing the merits of offerings to wealthy investors); *see also* Oguss, *supra* note 14, at 290 (discussing the view that wealthy investors are sophisticated and capable of protecting their interests).

provide questionable levels of investor protection.[137] As one commentator noted, however, the events of the 2008 financial crisis "prove[d] [these] assumption[s] false."[138] That crisis demonstrates that even wealthy and financially sophisticated individuals and institutions can fall prey to unfair or unsound investment practices.[139]

B. Potential Harms of Allowing Targeted Advertising in Private Offerings

Targeted advertising, and the internet more broadly, provide new, powerful tools for bad actors seeking to commit securities fraud on vulnerable populations.[140] The frequency of SEC enforcement actions related to deceitful internet activity makes clear that people are susceptible to securities fraud over the internet.[141] That risk increases when the ability to target vulnerable individuals is added to the equation, especially when the targeting is itself intended to facilitate harm.[142] Just as there is nothing to stop companies from targeting motorcycle purchasers, there are relatively few barriers to stop

137. The accredited investor thresholds have long been criticized as inappropriately proxying financial sophistication through wealth. Tiemeier, *supra* note 22, at 116. Additionally, the thresholds are both over- and under-inclusive. *See* Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CALIF. L. REV. 279, 310–11 (2000) ("The definition of an accredited investor, for example, may treat otherwise financially sophisticated investors as nonaccredited, while treating financial neophytes as accredited.").

138. Oguss, *supra* note 14, at 288–89.

139. *See* Matt Levine, Opinion, *You Never Want to Be Suckered This Badly*, BLOOMBERG (May 17, 2018, 5:00 PM), https://www.bloomberg.com/opinion/articles/2018-05-17/securities-fraud-can-happen-with-private-transactions [https://perma.cc/B43J-YJE3]. Still, the risks associated with private placements are less of a concern with institutional accredited investors for a number of reasons. First, because institutions such as pension funds or large corporations have more money, they are better shielded from loss than the average person, even if that person is fairly wealthy. *See* Levine, *supra* note 25. Second, institutional investors have access to higher return (i.e., higher quality) private investments that do not present the same risks as the types of private investments individuals normally can access. *Id.* Finally, sophisticated institutional investors often have access to large amounts of information about private investments through an opportunity to conduct due diligence, which is a privilege individual investors typically do not enjoy and puts institutional investors at an informational advantage. *See id.* Information is power in the world of securities, and institutional investors therefore have exponentially more power than individuals, which allows them to make better decisions about their investments. *See supra* notes 9–10 and accompanying text (discussing the view that information is power in the world of securities investments).

140. *See* Girish, *supra* note 99 (discussing the manipulative capacity of social media); *cf.* Unger, *supra* note 57 (discussing of the impact of the internet on raising capital).

141. *See supra* notes 69–74 and accompanying text (discussing enforcement actions involving internet-based securities fraud).

142. *See supra* note 133 and accompanying text (discussing how issuers may target individuals from certain groups for participation in private offerings due to perceived vulnerability of those individuals); *see also* THE SOCIAL DILEMMA, *supra* note 19 (explaining that social media companies have developed techniques by which they can target individual users to provide unique content designed to change that user's behavior and thinking over time).

fraudsters from using advertisements for fraudulent securities offerings to target apparently vulnerable (and possibly gullible) individuals.[143] Additionally, with the ability to provide content designed to influence consumer behavior, users may not realize that the platform has nudged them toward viewing and responding to such advertisements—moving from motorcycles to securities gradually over time.[144] In doing so, the algorithm has functioned exactly as it was designed to.[145]

The Commission has explicitly acknowledged the risks presented to investors by social media.[146] It maintains guidance for investors on how to protect themselves from securities fraud conducted over social media, and it counsels investors to remain wary of investment opportunities presented online.[147] It stands to reason, though, that the investor who knows to seek this guidance from the SEC about online investments is probably not the type of investor the law needs to worry about. Research indicates that Americans, including those who invest in securities, are not very financially literate overall.[148] Among the most consistently financially illiterate groups are the elderly and particular minorities.[149] These populations are frequently targeted for "affinity fraud" schemes, perhaps because of this perceived financial illiteracy.[150]

Platforms' existing rules for targeted advertising do offer some protection to users. For example, Facebook requires that advertisements actually lead to real landing pages when clicked, preventing the possibility that a user might click on an advertisement expecting one thing but finding something else, perhaps something unsavory.[151] Information about this landing page rule is available for anyone to find, including fraudsters. So, someone hoping to advertise a

143. *Cf. supra* notes 105–111 and accompanying text (discussing policies that limit what advertisers can include in content disseminated on social media platforms).

144. *See supra* note 122 and accompanying text (discussing political radicalization resulting from social media algorithms).

145. *See supra* notes 112–119 and accompanying text (discussing the manipulative aims of social media content curation and advertising).

146. *See supra* Section I.C (discussing the Commission's acknowledgement of the dangers posed by the internet).

147. Off. of Inv. Educ. & Advoc., *supra* note 62.

148. Lisa M. Fairfax, *The Securities Law Implications of Financial Illiteracy*, 104 VA. L. REV. 1065, 1077, 1082–83 (2018).

149. *Id.* at 1081.

150. *See supra* note 133 and accompanying text (discussing how securities fraudsters often target the elderly and members of certain affinity groups).

151. In other words, this policy requires that when users click an advertisement, the page they land on is (pun intended) as-advertised and fully functional. *See Advertising Policies: The Ad Review Process*, FACEBOOK, https://www.facebook.com/policies/ads (last visited Mar. 12, 2021) [https://perma.cc/52NS-WYPN].

fraudulent offering on Facebook—and who is sophisticated enough to perpetrate securities fraud—presumably would make sure their advertisements match the landing page. The platforms also prohibit the advertisement of certain instruments,[152] but this prohibition falls far short of covering all options for bad actors seeking to sell fraudulent securities. The nail in the platforms' coffin, of course, is that their algorithms operate autonomously to curate content intended to influence user behavior, so even well-designed and well-intended protection mechanisms like those discussed above cannot stop manipulation in a system that is designed to manipulate.[153]

In addition to a concern over abuse of these platforms and their data, there is also a possibility that honest users of consumer data may inadvertently target the wrong types of individuals.[154] Data collected by a social media platform may be limited, and the platform may also share only select data with advertisers, often due to privacy agreements the platform has with users.[155] More concerning, though, is the possibility that an algorithm might lead a user to engage with advertisements for private offerings, without knowing that the user is *not* an accredited investor.[156] Again, the algorithm here is functioning as its programmers intend it to, capitalizing on data to influence the user to the benefit of advertisers who spend money on the platform.[157] These limitations on the utility of social media data could lead issuers to misidentify people who appear to be accredited based on certain behaviors but in fact do not meet the accredited investor thresholds.

Notwithstanding consequences for the system overall, targeted advertising of private securities has the potential to negatively impact aspects of and particular groups within that system. In addition to

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152. *See supra* notes 108–111 and accompanying text.

153. *See supra* notes 118–119 and accompanying text (discussing the algorithms that run social media platforms).

154. *See* Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 274 (2019) ("First, the proper workings of algorithms depend on the input of clear, correct, and codable data. When algorithms access informational sources (like alternative data) that are ambiguous, falsified, or overly noisy, their output will be tainted by error and thus unreliable.").

155. Alexandra Olteanu, Carlos Castillo, Fernado Diaz & Emre Kiciman, *Social Data: Biases, Methodological Pitfalls, and Ethical Boundaries*, FRONTIERS BIG DATA, July 11, 2019, at 1, 13, https://doi.org/10.3389/fdata.2019.00013 [https://perma.cc/BG9K-M4CB] (pdf download available at URL provided). Furthermore, advertisers can extrapolate only so much from certain types of data—for example, Oletanu et al., *supra*, observe that sometimes advertisers know what users "Like" and what users write, but not what they read. Additionally, using different types of data to answer the same questions (i.e., is this user likely to click on our advertisement based on past activity) can yield different answers.

156. *See* THE SOCIAL DILEMMA, *supra* note 19 (explaining that algorithms collect and analyze data about social media users in order to predict what content it believes the user would like to engage with).

157. *See id.* (indicating that social media companies use algorithms to influence user behavior).

somewhat obvious risks to investors, allowing targeted advertising for private securities offerings will ultimately harm our markets and even the issuers themselves. Social media companies face mounting criticism and scrutiny over advertising practices, among other features, and they risk huge losses depending on how lawmakers decide to regulate them. These harms and risks, though they can be categorized according to who and what they impact, are also interconnected in important ways.

1. Harm to Investors

Investors face harm from targeted advertising in obvious and acute ways, most of which this Note has already discussed. The crux of these risks and harms can be distilled down to this: targeted advertising exacerbates the preexisting asymmetries between investors and issuers in private offerings. The information gap between issuers and investors becomes an information crevasse, where issuers can locate investors based on the most intimate types of data and influence investors' thinking about securities investments. Investors may not even realize what is happening nor have any power to change the dynamic. Indeed, an investor may be targeted precisely because she is not financially literate and also not averse to risky behavior. But there is a difference between taking a risk like riding motorcycles and taking a risk in purchasing private securities. A motorcycle will likely not deplete or steal your life savings, but a private securities investment gone wrong might.

When the private offerings turn out to be a bad investment—or worse, fraudulent—investors are stuck with ex post remedies that do not account for the increased ex ante risk. If there have been violations of the securities laws, the SEC can bring an enforcement action, or investors can sue privately to recover lost funds. But full recovery may be impossible since the issuer may not be solvent, especially in the case of fraud. If the offering was legitimate, the investor is out of luck, and she will simply have to deal with the loss. Over time, investors may become disillusioned with securities investing and choose to keep their money elsewhere, resulting in harm to our markets and issuers themselves.

2. Harm to Markets and Issuers

The U.S. financial markets are built on public trust—trust in government, trust in financial institutions, and trust in the American

way.[158] When these structures falter, "loss of public trust can quickly reverberate throughout the economy."[159] If people no longer trust that the financial markets will do right by them and their money, they may choose not to invest their money at all, instead leaving it in savings accounts where it is safe from market volatility and greedy financial professionals. In turn, the market suffers further, as do the issuers and firms "whose lifeblood is the continued public trust in our securities markets."[160]

This is not a new idea—indeed, it spurred the creation of the modern U.S. securities regulation regime following the Great Depression.[161] With the addition of targeted advertising, a loss of trust would likely have far-reaching effects. An event causing this type of loss of public confidence would occur at the intersection of two major facets of modern American life: financial markets and the internet. As such, the "reverberation" of the loss could be expected to ripple out even further than would a purely financial market-based loss.[162]

C. Where Does This Leave Social Media and Big Tech?

Social media and Big Tech companies stand to lose a lot in a potential targeted advertising/private offering fallout. Americans are already concerned about the lack of control they have over collection of

158. *See* ARTHUR W. PAGE SOC'Y & BUS. ROUNDTABLE INST. FOR CORP. ETHICS, THE DYNAMICS OF PUBLIC TRUST IN BUSINESS: EMERGING OPPORTUNITIES FOR LEADERS 14 (2009), https://knowledge.page.org/wp-content/uploads/2019/02/Full_Report-1.pdf [https://perma.cc/S6C7-BMJ3] (arguing that trust in business "is what enables economic efficiency and prosperity on both the scale of a small, family-owned restaurant and the macroeconomic scale of the free market").

159. CFA INST. CTR. FOR FIN. MKT. INTEGRITY, SELF-REGULATION IN TODAY'S SECURITIES MARKETS: OUTDATED SYSTEM OR WORK IN PROGRESS? 22 (2007), https://www.cfainstitute.org/-/media/documents/article/position-paper/self-regulation-in-todays-securities-markets-outdated-system-or-work-in-progress.ashx [https://perma.cc/B58G-E3YZ]. Recent examples of this phenomenon include the Enron scandal and the 2008 Financial Crisis. *See* ARTHUR W. PAGE SOC'Y & BUS. ROUNDTABLE INST. FOR CORP. ETHICS, *supra* note 158, at 19 (noting a "lack of concern about public trust among the investment community as the Enron-era business scandals became more remote," which changed quickly in the wake of the 2008 Financial Crisis as "governments around the globe [intervened] in financial markets on an unprecedented scale in the name of restoring investor confidence and public trust, which are widely recognized as vital to economic recovery").

160. H.R. REP. NO. 100-910, at 15 (1988) (discussing proposed legislation to curb insider trading and the havoc it wreaks on the financial markets).

161. *See* ARTHUR W. PAGE SOC'Y & BUS. ROUNDTABLE INST. FOR CORP. ETHICS, *supra* note 158, at 15 ("[G]overnment has stepped in to protect the public interest by regulating corporate activity in response to a perceived imbalance of power between corporations and the public. . . . During the Great Depression, Franklin Roosevelt's New Deal focused first on financial services . . . [with the] Securities Acts of 1933 and 1934 . . . ."); *see also supra* note 20 and accompanying text (discussing the context of the passage of the Securities Act of 1933).

162. *See* CFA INST. CTR. FOR FIN. MKT. INTEGRITY, *supra* note 159, at 22; *cf.* Brummer & Yadav, *supra* note 154, at 278 ("[K]ey features of fintech combine to create novel risks to market integrity: the potential for damage is uniquely difficult to measure.").

their data; privacy feels like a rare commodity in the age of surveillance capitalism.[163] Governments are increasingly wary of these platforms' ability to self-police and protect consumers, and formal regulation is all but inevitable.[164] Platforms like Facebook, Twitter, and Google have a great interest in complying with federal securities laws, as well as in making sure that public confidence in their companies erodes no further.[165] But their business models are dependent on the revenue streams from the very advertising that threatens harm, necessitating a change of some kind—and surely, these companies would rather change from within than roll the dice on whatever restrictions regulators eventually impose.[166]

IV. MINDING THE GAP: AN EX-ANTE SOLUTION TO A GROWING PROBLEM

In light of the original purposes of the general solicitations ban, as well as the attitude of Congress and the Commission regarding subsequent changes to the regulatory scheme, targeted advertisements should not be considered general solicitations under the federal securities laws.[167] Yet targeted advertisements should not be considered something *opposite* of a general solicitation, either, because of the even larger information asymmetry between targeted advertisement senders (issuers) and recipients (investors). Instead, this Note suggests that targeted advertising—and the unique challenges it poses—should be regulated in a new, distinct category. To install protections robust enough to address these challenges, the Commission

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163. *See* Lee Rainie, *Americans' Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RSCH. CTR.: FACT TANK (Mar. 27, 2018), https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/ [https://perma.cc/8XUA-N9MQ] (providing survey results indicating that Americans feel they have lost control over how their personal information is used in the era of social media).

164. In the last year, social media companies have faced scrutiny from many angles, drawing the attention of antitrust regulators and Congress. *See, e.g.*, Tony Romm, *Facebook, Twitter Could Face Punishing Regulation for Their Role in U.S. Capitol Riot, Democrats Say*, WASH. POST (Jan. 8, 2021, 11:51 AM), https://www.washingtonpost.com/technology/2021/01/08/facebook-twitter-congress-trump-riot/ [https://perma.cc/9DB4-MY6Z] (discussing congressional anger at the role of social media companies in the Capitol riot of January 2021).

165. It is true that social media companies seem to be waking up to a need to take firmer responsibility for harms generated by their platforms, as demonstrated by the actions taken by Facebook, Google, and Twitter following the Capitol riot of January 6, 2021. *See id.* (noting that these companies took varying degrees of corrective action against President Trump and to remove content spreading right-wing conspiracy theories from their platforms). Many say this action comes too little, too late with respect to the events that unfolded following the 2020 presidential election. *Id.*

166. *See, e.g.*, Harris, *supra* note 101 (proposing that social media platforms should be regulated as public utilities).

167. *See* discussion *supra* Sections I.A, I.B (discussing general solicitations under federal securities law).

should impose a prohibition on using targeted advertisements over social media to promote private offerings.

A. Targeted Advertising Does Not Fit into the Current General Solicitations Framework

On a basic level, the use of targeted advertising for securities feels odd, as does offering securities via social media networks. At least part of the reason for that feeling is that securities are not like other products for sale in today's economy, like an article of clothing or the latest iPhone. With most material goods, we know almost immediately whether our purchase was a good one, simply based on our subjective evaluation of the item.[168] With securities, however, it may take days, months, or even longer to figure out whether the investment is sound (i.e., whether it makes or loses money). Furthermore, the soundness of a securities investment depends in part on actions taken after purchase by another person or entity,[169] whereas material goods remain valuable based on factors such as their utility or sentimental value.

Targeted advertising provides issuers with the power to locate and powerfully influence specific individuals over social media, including those who appear less averse to engaging in risky behavior (such as people who browse for motorcycles) and who issuers may believe are more likely to participate in a private securities offering. An investor may be understandably enticed into a private offering that promises high returns despite a high risk of loss—she keeps seeing the same advertisements for the offering on her social media page and eventually decides to check it out. In addition to mapping directly onto theories of human psychology and behavior,[170] this all happens within

168. Defects in the product aside, of course, such as a hole in an article of clothing or a bug in the latest iPhone. Economists describe the discovery of such value-reducing information as the "lemon" problem. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

169. This feature is indeed part of what makes something a security. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946) (explaining that an investment contract, which is a security within the meaning of the 1933 Act, "means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party"). More broadly, a security is simply "[a]n investment instrument such as a stock or bond." *Introduction to Investing Glossary: Security*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/security (last visited Mar. 12, 2021) [https://perma.cc/KW4D-62TT].

170. Due to a phenomenon called the "mere-exposure effect," a user may become increasingly comfortable with the platform and the content it shows her over time—she may even become increasingly comfortable with the private offering advertisement itself. *See Mere-Exposure Effect*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/mere-exposure-effect (last visited Mar. 12, 2020) [https://perma.cc/B654-KCC2]. The American Psychological Association defines the mere-exposure effect as "the finding that individuals show an increased preference (or liking) for a

the bounds of the current law. The issuer who disseminated the advertisement has done nothing wrong, since the advertisement was targeted at the investor and thus is not a "general" solicitation.[171] Furthermore, the issuer in this scenario has used the platform as its creators intended, leveraging the great power of the human futures market within the surveillance capitalism system.[172]

Because the law currently does not contemplate how targeted advertisements fit within the existing framework, there is an opening to argue that they do not constitute the type of general solicitations prohibited by Rule 502(c) and in offerings conducted under Rule 506(b)[173] (but permissible under Rule 506(c)).[174] The nomenclature suggests as much: a "targeted" advertisement is by nature not "general." Targeted advertisements also function differently from general solicitations; in theory, an issuer seeking to advertise an offering on social media could target users that she believes are accredited investors. But given the historical underpinnings of the Rule 506 framework—particularly how it regulates issuer communication with investors—targeted advertisements cannot be considered a foil to general solicitation.

Despite what its name suggests, targeted advertising looks nothing like the preexisting relationship contemplated by the general solicitation framework. Issuers seeking to deploy targeted advertisements have no closer a relationship to potential investors than investors who might see advertisements on television or hear one on the radio—which, under the current Rule 502(c), are prohibited as general

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stimulus as a consequence of repeated exposure to that stimulus." *Id.* Interestingly, this effect "tends to be strongest when the person is not consciously aware of the stimulus presentations." *Id.*

171. Recall that under Rule 506(b), issuers can offer securities to thirty-five nonaccredited investors, upon only a "reasonable" belief that no more than thirty-five of these investors are participating in the offering. 17 C.F.R. § 230.506(b)(2)(i) (2020). Such nonaccredited investors must possess or have access to the "knowledge and experience in financial and business matters [such] that he is capable of evaluating the merits and risks of the prospective investment." *Id.* § 230.506(b)(2)(ii). Again, the issuer must possess only a reasonable belief about whether nonaccredited investors meet this threshold. *Id.*

172. *See* THE SOCIAL DILEMMA, *supra* note 19, at 15:47 (describing the "human futures" market that arises from the data collected from social media users); *cf.* Girish, *supra* note 99 (explaining that in *The Social Dilemma*, "Roger McNamee, an early investor in Facebook, delivers a chilling allegation: Russia didn't hack Facebook; it simply *used* the platform" to influence the 2016 election).

173. Informational material from the law firm Morrison & Foerster suggests that others have already contemplated this idea. In a document called "Practice Pointers on Navigating the Securities Act's Prohibition on General Solicitation and General Advertising," attorney Ze'-ev Eiger defines general solicitations as being "communications that are not *targeted* or directed to a specific individual or to a particular audience." Eiger, *supra* note 40, at 1 (emphasis added).

174. 17 C.F.R. § 230.506(c)(2)(i)-(ii) (providing that issuers may conduct private securities offerings with the use of general solicitations so long as all purchasers are accredited investors and the issuer takes reasonable steps to verify the accreditation status of all purchasers).

solicitations in certain offerings.[175] Functionally, targeted advertisements are no different than traditional advertisements in the sense that they facilitate a connection between a seller and a consumer who would not otherwise be connected. In this regard, the ability to target specific individuals should make no difference in how the law views these types of advertisements. On the other hand, the continually expanding informational deficit between targeted advertisers and targeted advertisees suggests that the law should view targeted advertisements with even greater skepticism.

A social media platform—like Facebook, Twitter, or Google—would likely qualify as a public website in the Commission's view, despite the fact that users must log in with a password.[176] Recall the *IPONET* matter discussed above.[177] Key in the Commission's determination that the issuer there did not engage in general solicitations was the fact that only previously verified investors could access the webpage containing information about offerings.[178] By contrast, anyone is free to create accounts on social media platforms, which then gives them access to all the information on the platforms—including any advertisements.[179] Further, when potential investors in *IPONET* first accessed the online survey, they were presumably aware first, that the website was administered by an issuer of securities, and second, that they were providing information in order to have an opportunity to potentially purchase those securities.[180] When someone creates a Twitter account, she merely expects to "[j]oin the public conversation on Twitter."[181] Maybe it crosses her mind that she will receive advertisements while on the platform, but the content of those advertisements is likely not what drew her to the site in the first place.[182]

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175. *Id.* § 230.502.

176. *Cf. supra* note 75 and accompanying text (discussing the Commission's guidance regarding features of a website that impact the nature of offerings, including whether investors need a password to access information).

177. *See supra* note 76 and accompanying text.

178. Eiger, *supra* note 40, at 5; *supra* note 76 and accompanying text (noting that password protection played a key role in determining that IPONET had not engaged in general solicitation); *see also* Traeger & Easter, *supra* note 76, at 150 ("[F]unds and intermediaries involved in their offerings have been providing information about private offerings for some time via password protected websites that enabled only qualified investors to view the offerings . . . .").

179. *See, e.g.*, *Signing up with Twitter*, TWITTER: HELP CTR., https://help.twitter.com/en/using-twitter/create-twitter-account (last visited Mar. 12, 2021) [https://perma.cc/G2KD-5RJE].

180. *See* Eiger, *supra* note 40, at 5 (noting that individuals were invited to fill out a questionnaire on the website of a registered broker-dealer).

181. *Signing up with Twitter*, *supra* note 179.

182. The ability to browse for and locate new products may *become* a primary motivation for using the platform, though, as discussed *infra*. *See infra* notes 184–185 and accompanying text (indicating that users may join social media to research products to buy).

Despite certain benefits of lifting the general solicitations ban,[183] the Commission made the change without adequate consideration of the modern advertising environment—namely, the role that targeted advertising plays. The Commission cannot be faulted for failing to predict exactly how big and bad targeted advertising would become in the years following the 2013 rule update. But with the benefit of hindsight, the Commission must now reevaluate how the meaning of "general solicitation or advertisement" has changed (and continues to change) in light of current targeted advertising practices.

B. Targeted Advertising Should Be Regulated as a New Category and Prohibited in Private Offerings

The continued rise of social media platforms is an important feature of the current advertising landscape. The average internet user spends nearly two and a half hours per day on social media, up from roughly one and a half hours per day in 2012.[184] That means that since the Commission lifted the general solicitations ban in 2013, social media use has increased by two thirds. Research also indicates that around one in three users "cite researching products to buy as a main reason for using social media."[185] In other words, consumers expect to be able to research and purchase goods via social media networks, and companies are meeting this demand.

Using Facebook Marketplace to buy a new motorcycle is different than using it to purchase private securities—if the motorcycle turns out to be a lemon, it still retains some value because it is a physical item with a value that generally does not fluctuate, even if the true value of the motorcycle is lower than the buyer initially thought.[186] If the motorcycle has severe mechanical issues or otherwise does not work as expected, these issues may be covered by insurance and are, at a minimum, fixable. Put differently, there is a safety net. The same cannot be said of illiquid, volatile private securities whose value is tied

183. *See supra* notes 52–53 and accompanying text (noting that lifting the ban lowered costs for issuers and facilitated market entry for smaller issuers).

184. *See* Marie Ennis-O'Connor, *How Much Time Do People Spend on Social Media in 2019? [Infographic]*, MEDIUM (Aug. 8, 2019), https://medium.com/@JBBC/how-much-time-do-people-spend-on-social-media-in-2019-infographic-cc02c63bede8 [https://perma.cc/6D2U-KSWH].

185. MTS Staff Writer, *Doomscrolling on Social Media Platforms Through the Infodemic"*, MARTECH SERIES (July 29, 2020), https://martechseries.com/social/social-media-platforms/doomscrolling-social-media-platforms-infodemic/ [https://perma.cc/LZ49-4EDQ]; *see also* Ennis-O'Connor, *supra* note 184; GLOBALWEBINDEX, SOCIAL: GLOBALWEBINDEX'S FLAGSHIP REPORT ON THE LATEST TRENDS IN SOCIAL MEDIA 10 (2020), https://www.globalwebindex.com/reports/social [https://perma.cc/TLC2-4S9E].

186. For an in-depth discussion of the "lemon" problem, see Akerlof, *supra* note 168, at 489–90.

to market information that investors often do not have[187]—value that often cannot be recovered once lost.[188]

Targeted advertising should not be allowed *at all* in private offerings—not even for offerings conducted under Rule 506(c), where issuers are permitted to use general solicitations—due to the fundamental differences between traditional and targeted advertising. In light of evolving circumstances, the securities regulation framework must also evolve in order to continue providing adequate protection to investors. This Note proposes that the best way to address the risks and potential harms involved is to prohibit social media targeted advertising for private securities altogether, primarily because of the difficulty and probable inadequacy of formulating a middle-ground rule.

1. Ex Ante Clarity Benefits Issuers, Social Media Networks, the SEC, and—Most Importantly—Investors

All legal and regulatory regimes attempt to balance ex ante and ex post remedies based on the upsides and downsides of protecting against harm or correcting it after the fact. The securities regulation framework in particular balances the desire to facilitate capital formation and market growth against protecting investors, often sacrificing one at the expense of the other.[189] The ex ante/ex post balance is delicate in securities regulation: too much ex ante regulation and protection for investors could stifle market and issuer prosperity, while too much reliance on ex post remedies could inadequately protect investors and kick in only when it is too little, too late.[190]

Such a balance, and the difficulty of achieving it, provides the background for regulating in this space,[191] and it drives the need for a clear, ex ante rule—here, a prohibition on using targeted advertisements through social media to attract investors for private

187. *See* DOUGLAS J. ELLIOTT, BROOKINGS INST., MARKET LIQUIDITY: A PRIMER 3–4 (2015), https://www.brookings.edu/wp-content/uploads/2016/07/Market-Liquidity.pdf [https://perma.cc/6CFA-384Z] (providing an overview of market liquidity and explaining how it can increase price volatility, thereby increasing risk to investors).

188. *See supra* Section III.B.1 (discussing traditional ex-post remedies available to investors).

189. *See supra* Sections I.A, I.B (discussing private offerings exemptions and the ban on general solicitations).

190. *See, e.g.*, Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715 (2015).

191. Professors Brummer and Yadav's theory of the fintech "trilemma" illustrates this background well. In crafting regulations on financial technology that "(i) provide clear rules, (ii) maintain market integrity, and (iii) encourage financial innovation, regulators can achieve, at best, two out of these three objectives," they argue. Brummer & Yadav, *supra* note 154, at 242. Regulation that provides clear rules and promotes market integrity will inevitably stifle innovation, but regulation that prioritizes innovation will either come at the expense of rule clarity or market security. *Id.*

securities offerings. Crafting a middle-ground rule, while hypothetically attractive, will be ineffective to remediate harms in this arena. A poorly formulated, imprecise rule would negatively impact legitimate issuers by not providing clear guidance on what is and is not permissible, while benefitting deceitful issuers hoping to leverage gray areas of the law. On the other hand, providing a clear, categorical bar is helpful for issuers who want to know what is and is not allowed, as well as social media networks that must police targeted advertising on their platforms. An outright prohibition also protects investors from fraud and subsequent losses that they may not have the financial fortitude to withstand—and potential losses from legitimate but risky offerings.[192] In other words, a prohibition provides ex ante simplicity and protection that matches the challenges posed.

Prohibiting targeting social media users for participation in private securities offerings addresses the major issues with the practice, including in instances where legitimate and rule-abiding issuers might seek to use targeted advertising on social media. First, it removes the possibility that algorithms (or humans) incorrectly interpret data such that investors who are not in fact accredited inadvertently receive these advertisements.[193] Second, it ensures that if an investor participates in a private offering, the participation does not begin with an advertisement she sees on Facebook, provided to her by an algorithm that predicts and influences her behavior. Instead, it encourages independent desire for and research into investments that present a high risk of loss, which furthers the information-gathering goals of the securities regulation regime and Regulation D. Completely prohibiting the practice is perhaps most impactful in combatting fraud, as such a change in the law will require social media companies to adjust their policies accordingly and thus greatly reduce the chance that this type of fraud will occur on their platforms.

A natural counterargument to this type of regulatory change is that it will further stifle access to capital for firms that already have

192. *See supra* notes 128–137 and accompanying text (framing the impact of financial loss as proportional to the loser's level of wealth).

193. 17 C.F.R. § 230.501(a) (2020) (providing the definition of an "accredited investor"); *see also* Harris, *supra* note 101 (explaining that social media companies employ algorithms that analyze user activity to determine what content to show the user in the future). There is evidence that these types of algorithms incorrectly extrapolate user preferences with relative frequency. For example, a Forbes journalist discovered that one algorithm had, based on his browsing practices, determined that he is a young, single parent but also a "golden grandparent," and that he shops for baby products, women's clothing and cosmetics, and retirement services. Leetaru, *supra* note 89. One study estimates that with accuracy at 42%, "digital audiences for gender are, on average, less often correct than random guessing." Nico Neuman, Catherine E. Tucker & Timothy Whitfield, *Frontiers: How Effective Is Third-Party Consumer Profiling? Evidence from Field Studies*, 38 MKTG. SCI. 918, 924 (2019).

trouble raising money. After all, the point of having exemptions under Regulation D is to facilitate capital formation.[194] While these types of concerns are legitimate, there are two reasons why they do not overcome the need to regulate. First, legitimate issuers who want to take advantage of targeted advertising could still do so, just not on social media platforms. Second, investor protection remains a primary goal of the SEC,[195] and the immense risks presented outweigh the downside of what would likely be only a slight curbing effect on capital formation.[196]

In addition, more relaxed alternatives—for example, requiring companies that use targeted advertising to disclose this information—suffer from the same pitfalls as allowing the practice in the first instance. First, it stands to reason that an investor who knows to seek out these types of disclosures is likely sophisticated enough to participate in private offerings and not the type of investor the law worries about. Second, by the time an investor is made aware of the targeted advertising practices, it is likely too late, because she will have already seen an advertisement that invites her to participate in the offering.

2. Implementation: Seeking Clarity and Adaptability

Given the rapidly changing nature of targeted advertising and social media use, in addition to the numerous and often conflicting interests of the stakeholders involved, the Commission might consider beginning by providing guidance on using social media targeted advertising to promote private securities offerings.[197] This guidance should highlight the differences between the traditional understanding of general solicitations and targeted advertisements, in addition to announcing skepticism about allowing targeted advertisements for private securities offerings in general. Starting with guidance before undertaking full rulemaking allows the Commission to gather

194. *See supra* Part I (explaining that the main goal of providing exemptions under Rule 506 and Regulation D is to provide businesses with a cost-effective alternative to publicly offered securities).

195. *See What We Do*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/Article/whatwedo.html (last updated Dec. 18, 2020) [https://perma.cc/G6U9-V3U6] (describing protecting investors as the mission of the Commission).

196. *See supra* Section III.A (describing the general risks associated with private offerings).

197. *See* Mary Whisner, *Some Guidance About Federal Agencies and Guidance*, 105 LAW LIBR. J. 385, 391–93 (2013) (discussing various forms of and uses for administrative guidance); Brummer & Yadav, *supra* note 154, at 283–84 (explaining potential forms and merits of informal guidance in the context of securities regulation).

information before proposing any rule changes.[198] It gives the Commission an opportunity to initiate talks with the various stakeholders without the pressure of a formal rulemaking, especially the social media companies who would be required to adjust their policies to accommodate a change in the law.[199] Then, in the notice and comment process that accompanies rulemaking, the Commission can continue to solicit information and perspectives from the public.[200]

A change to the regulations governing private offerings should come in the form of adding language to Rule 502, which provides "conditions [that] shall be applicable to offers and sales under Regulation D," including general solicitation and advertising rules.[201] Specifically, the language governing manner of offering in Rule 502(c) should be changed to provide a prohibition on targeted advertising, in addition to its prohibition on general solicitations.[202] For example, 502(c) could be adjusted to include language such as (with the strike-through language to be removed and the bolded language to be added):

> (c) Limitation on manner of offering. ~~Except as provided in § 230.504(b)(1) or § 230.506(c),~~ **N**either the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:
>
> > (1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio, **except as provided in § 230.504(b)(1) or § 230.506(c)**; and

198. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 246 (2019) ("[I]t is surely an important exercise of power when the agency opts to enshrine one means of compliance in a guidance document rather than another means, since the various means on the menu may have different costs and benefits for different stakeholders."). As with guidance from any other agency, the Commission's guidance is not legally binding. *See* Stephan Hylas, Note, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1652 (2017) (explaining that agency guidance does not carry the force of law). There is evidence, however, that actors are generally compliant with guidance the SEC provides, as demonstrated by the industry's tendency to "regard [no-action letters] as illuminating how the SEC will act upon its enforcement authority, and they respond accordingly." *Id.*; *see also* Parrillo, *supra*, at 184–218 (discussing numerous incentives regulated parties have to follow agency guidance).

199. *Cf.* Brummer & Yadav, *supra* note 154, at 283 ("Such [informal guidance] enables . . . firms to better innovate, insofar as they are able to better recognize what kind of regulatory burden they might face.").

200. *See* Whisner, *supra* note 197, at 391 ("When agencies adopt rules, they must publish a notice of proposed rule making and give interested parties an opportunity to comment." (footnote omitted)).

201. *See* 17 C.F.R. § 230.502 (2020).

202. *Id.* § 230.502(c). Slight adjustments to other parts of the rule—namely, 504(b)(1) and 506(c), which are exempt from compliance with Rule 502(c)—will be necessary to ensure that targeted advertising is not permitted in any private offering conducted under Regulation D.

> **(2) Any advertisement disseminated on a social media platform, network, or other similar website in such a way that targets a specific individual or group of individuals using data unique to that individual or group of individuals.**[203]

This proposal is not intended to function as a reinstatement of the ban on general solicitation. As discussed above, all advertising is "targeted" in some respects, but the proposal seeks only to regulate one powerful type of advertising that has emerged in the last several decades. Further, such a particularized prohibition would not come close to covering *all* targeted advertising that takes place on the internet. Instead, the proposal seeks the assistance of powerful private actors—social media companies—that control an enormous segment of the targeted advertising market to implement changes that will curb specific harms occurring in a uniquely harmful environment. Importantly, the proposed rule change would allow the Commission to continue using its traditional enforcement mechanisms, and by considering how modern targeted advertising interacts with the goals of the private securities regulation regime, the proposal also accounts for the idea that "[t]he fundamental principles of securities regulation do not change based on the medium."[204]

Because technology in general, and social media and targeted advertising in particular, continue to evolve faster than the law, truly effective solutions will pull in actors from both the public and private sectors to craft flexible approaches.[205] In addition to the fact that traditional regulatory and legal schemes cannot keep pace with technological changes,[206] they do not adequately reflect the realities of modern society, where companies like Google, Twitter, and Facebook

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203. *See id.* (providing the original text) Such a change to the rules can, of course, be further clarified in interpretive releases and guidance, as the Commission did with its guidance on using public websites for private offerings. *Supra* Section I.C.

204. *See* INT'L ORG. OF SEC. COMM'NS, *supra* note 65, at 1; *see also* notes 68–69 and accompanying text (noting that internet-based securities violations are addressed through the normal enforcement and regulatory channels).

205. *See* Gary E. Marchant, *Governance of Emerging Technologies as a Wicked Problem*, 73 VAND. L. REV. 1861, 1877 (2020). In framing the regulation of rapidly evolving technology as a "wicked problem," Marchant calls for the combination of solutions that have historically been treated as mutually exclusive. "Traditional government regulation will not work, at least by itself, due to the pacing problem, the diversity of applications and stakeholders, and the complexity created by unprecedented uncertainties and concerns," he argues. *Id.* These ideas are salient here, as regulators work to address issues identified here by leveraging the strength of the various actors involved.

206. Traeger & Easter, *supra* note 76, at 161.

occupy an important part of American life. Not only would it be wise to leverage the immense power of these companies, which already perform certain regulatory functions, but a solution that does not involve them as partners will never be fully adequate.

This is not to say that social media companies should be expected or trusted to police these issues alone. Relying on the platforms to self-regulate here simply does not account for the economic realities these platforms face.[207] Specifically, the issues highlighted in this Note arise within an ever-expanding, multibillion-dollar online advertising industry.[208] Social media platforms have great incentives to chase profits, which almost exclusively come from advertising, but they also have great incentives to comply with the federal securities laws. Given the power these companies enjoy, however, they should be expected to assist in the solution.

CONCLUSION

Investor protection is a main objective of the Commission.[209] By protecting investors from fraudulent and unfair investment practices, the Commission arguably works toward its other goals—facilitating capital formation and maintaining orderly, efficient markets.[210] If investors have confidence in their investments, issuers continue to raise capital, and markets remain stable. Threats to investor protection therefore threaten our markets, so they should be scrutinized carefully and eradicated where appropriate. Targeted advertisements within social media's attention extraction model present one such threat, heightening preexisting risks beyond what the securities regulation regime should allow. The age of surveillance capitalism has only just begun, and now is the time to address the issues it creates. This Note highlights only a small set of potential issues within much larger

207. *See* THE SOCIAL DILEMMA, *supra* note 19, at 14:21 (discussing the "product" social media companies offer to advertisers as measurable changes in consumer behavior toward a preference for advertised products and services); *id.* at 15:30 (explaining the "surveillance capitalism" business model).

208. *See* Rani Molla, *Twitter, Google and Facebook Have Banned Cryptocurrency Ads — But These Networks Still Haven't*, VOX, https://www.vox.com/2018/3/19/17123674/cryptocurrency-bitcoin-advertising-ban-microsoft-twitter-google-facebook-oath-snap (last updated Mar. 26, 2018, 1:43 PM) [https://perma.cc/TD7R-P4XF] (indicating that as of early 2018, Google's digital advertising revenue was nearly $85 billion, Facebook's was about $50 billion, and Twitter's was $2.2 billion).

209. U.S. SEC. & EXCH. COMM'N, *supra* note 195.

210. *Id.*

discussions—with respect to both securities regulation and the increasing need for regulation of the internet and internet actors. Regardless of where the conversation leads, and no matter what further technology comes along, the fundamental principles of securities regulation should be the touchstone that grounds any legal or regulatory approach.

*Christina M. Claxton**

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