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April 18, 2012

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: SEC Regulatory Initiatives Under the JOBS Act
File No. JOBS Act Title III — Crowdfunding

Ladies and Gentlemen:

Set forth below are additional comments that relate to Title III of the JOBS Act supplementing those set forth in my comment letter to you on the subject dated April 17, 2012. The comments in this letter relate solely to crowdfunding intermediaries. Because I expect that I may provide additional input through Committees of the Business Law Section of the American Bar Association concerning the details of the Commission rules when they are proposed, this letter is restricted to certain comments which I believe may be important to be addressed in the proposed enabling regulations. These comments are mine alone and do not reflect any input from other members of the Business Law Section of the American Bar Association or the Securities Laws Committee of the Washington State Bar Association, nor does it constitute the official position of this firm or any of its clients on the subject.

Again, I commend the Commission's invitation for the public to submit comments before enabling rules for the JOBS Act are proposed, as this should expedite the rulemaking process.

Crowdfunding Intermediaries Should be Located Within U.S. Regulatory Reach

Crowdfunding may only be used by small business issuers that are organized under and subject to the laws of a State or territory of the United States or the District of Columbia.¹ However, there is nothing in the JOBS Act that imposes a similar requirement on funding portal intermediaries. The ability of the Commission and other U.S. authorities to make surprise audits or investigations of, or bring enforcement action against, a funding portal intermediary would appear to be at least as compelling for intermediaries as for issuers. In this regard, crowdfunding intermediaries will be serving in effect as private gatekeepers in crowdfunding offerings as surrogates for traditional securities regulators, and the regulators need access to them to be able to monitor and regulate them appropriately. For this reason, I respectfully suggest that the implementing rules for registration of funding portals include a requirement that, like crowdfunding issuers, the funding portal also be organized under and subject to the laws of a State or territory of the United States or the District of Columbia.

Clear and Reasonable Due Diligence Standards for Intermediaries

Under the JOBS Act, in addition to registering with the Commission and any applicable self-regulatory organization,² a crowdfunding intermediary will have to take “measures to reduce the risk of fraud,” including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20% of the outstanding equity securities of the crowdfunding small business.³ The background check should include criminal history in order to confirm that the company is not disqualified from using the crowdfunding mechanism.⁴ The problem is that, although at least one commercial data company⁵ will now provide a 50-state criminal check for roughly \$40 per person, a 50-state securities enforcement regulatory history check is not currently available to the public through a commercial data company at any price. Presumably, between now and the time the Commission’s rules implementing crowdfunding under the JOBS Act are effective, one or more commercial data companies will be able to provide a 50-state securities enforcement regulatory history check at a price that will be acceptable to crowdfunding intermediaries. In view of these problems, however, I respectfully suggest that the Commission’s implementing rules indicate that signed certifications to the intermediary by each officer, director, and person holding more than 20% of the outstanding equity securities of the crowdfunding issuer should

¹ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(f).

² JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a).

³ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a)(5).

⁴ JOBS Act, Section 302(d).

⁵ Intelius, Inc.

suffice for a background and securities enforcement regulatory history check that is sufficient to constitute “measures to reduce the risk of fraud” in the absence of a 50-state securities enforcement regulatory history check that is then currently available to the public through a commercial data company at a reasonable price.

Clear and Reasonable Investor Monitoring Requirements for Intermediaries

Crowdfunding intermediaries must make efforts to ensure that no investor in a 12-months period has purchased securities that in the aggregate from all crowdfunding issuers exceeds the applicable investments for that particular investor⁶ in accordance with the Commission’s enabling rules. Because it would be virtually impossible for an intermediary to check on whether a particular crowdfunding investor making an investment using the intermediary’s facilities has made, is making or will make another crowdfunding investment using the facilities of some other crowdfunding intermediary within the same 12 months period, I respectfully suggest that the Commission in its enabling rules indicate that a representation by the investor that the investor has not made, is not making, and will not make within the same 12 months period another crowdfunding investment using the facilities of some other crowdfunding intermediary would constitute sufficient “efforts . . . to ensure” that such has occurred for purposes of Section 4A(a)(8) of the Securities Act of 1933, which has been added by Section 302(b) of the JOBS Act. The crowdfunding intermediary would still be obligated to check its own records, however, to ensure that a crowdfunding issuer was not making another crowdfunding offering through the intermediary’s own crowdfunding facility.

Also, Section 4A(a)(4) of the Securities Act of 1933, which has been added by Section 302(b) of the JOBS Act, requires that an intermediary ensure that each investor “answer questions demonstrating” an understanding of the level of risk applicable to investing in startups and associated investment illiquidity.⁷ Literally, this language suggests that investors be required to take some sort of test, which would be unorthodox and awkward at best and would likely not produce answers that would be particularly helpful for investor protection. Under these circumstances, I respectfully suggest that the Commission’s enabling rules indicate that the signed acknowledgement by investors that they understand each of enumerated warnings about the specific risks in the investment would suffice for compliance with this requirement.

⁶ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a)(8).

⁷ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a)(4).

Articulation of Other Applicable Standards in Plain English and in Context

The crowdfunding provisions of the JOBS Act have several provisions designed to discourage an attempt to sell a company's shares by use of hype that circumvents the official offering disclosures made through the crowdfunding intermediary. For example, an intermediary must not compensate promoters, finders or lead generators for providing the intermediary with the personal identifying information of any potential investor,⁸ must take steps to protect the privacy of information collected from investors,⁹ and it must prohibit its directors, officers, or partners from having any financial interest in the company being crowdfunded,¹⁰ And a funding portal intermediary may not offer investment advice or recommendations, may not solicit purchases, sales or offers to buy the securities, and may not compensate employees, agents or other persons for such solicitation or based upon the sale of the securities.¹¹ Further, a crowdfunding issuer may not advertise the terms of the offering, except for notices which merely direct investors to the intermediary.¹² This language is vague and not particularly meaningful to even the legally trained, and I respectfully suggest that the Commission in its implementing rules describe in plain English the underlying intent and meaning of these requirements in order to facilitate compliance by those who will be using crowdfunding but may not be legally trained. For example, if the steps that are needed to protect the privacy of information collected from investors are those imposed on financial institutions by the Gramm-Leach-Bliley Act and Regulation S-P, the Commission should say so, and if they are not; that should be said also, all in order to put the matter in perspective. Specific, detailed requirements would also be helpful in furthering compliance with these regulations.

I hope that the above additional comments will prove useful to the Staff and the Commission in developing the proposed rules to implement Title III of the JOBS Act.

Very truly yours,



Mike Liles, Jr.

⁸ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a)(10).

⁹ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a)(9).

¹⁰ JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(a)(11).

¹¹ JOBS Act, Section 304(b), amending the Securities Exchange Act of 1934 by adding Section 3(a)(80).

¹² JOBS Act, Section 302(b), amending the Securities Act of 1933 by adding Section 4A(b)(2).