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1/23/13

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

RE: Recommendations concerning “the Commission’s rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

- (1) capital raising by emerging privately held small businesses and publicly traded companies with less than \$250 million in public market capitalization;
- (2) trading in the securities of such businesses and companies; and
- (3) public reporting and corporate governance requirements to which such businesses and companies are subject.”

On behalf of William Michael Cunningham and Creative Investment Research, I am pleased to submit the comments below.

Background

We suggest the Commission review the following:

http://www.washingtonpost.com/business/capitalbusiness/commentary-the-quest-for-crowdfunding-enters-a-complicated-but-critical-phase/2012/12/23/d15ef280-4939-11e2-ad54-580638ede391_story.html

http://www.washingtonpost.com/business/capitalbusiness/commentary-crowdfunding-can-provide-new-financing-option-for-minority-firms/2012/06/01/gJQAThq7BV_story.html

In the interest of full disclosure, we note that William Michael Cunningham, Social Investing Advisor has submitted a “Friend of the Court” brief in United States Securities & Exchange Commission vs. Citigroup Global Markets Inc. (Second Circuit Court of Appeals Case Number

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11-5227). As a friend to the Court, Mr. Cunningham provides an independent, objective and unbiased view in support of broad public interests. His education and experience have uniquely positioned him to provide objective, independent research and opinions concerning the issues central to the case.

The "Friend of the Court" brief notes that the negative impact of the fraud was \$5.5 billion dollars, calculated, using the Fully Adjusted Return® Methodology, as the sum of the loss of all invested funds and the monetary value of societal impacts. The SEC settled the case for \$285 million. The fact that the penalty is too small is evidence that the regulator/plaintiff has been captured by the financial services industry. Under regulatory capture, full and automatic deference to Agency decisions is inappropriate, since the Agency cannot make legitimate policy decisions in the public interest.

The Brief calls for the creation of a special Financial Institution Court of Law. This Court would be responsible for both financial institution and financial institution regulator oversight. The Court would provide flexible oversight that ramps up when needed, becoming active when the number of cases against Wall Street firms exceeds some predetermined number, or when damage due to financial market fraud exceeds some dollar amount.

"Appellate courts ordinarily defer to the agency's expertise and the voluntary agreement of the parties in proposing the settlement" but these are extraordinary times. When industry participants, despite continual Agency enforcement actions, act repeatedly and with impunity in a manner that damages the industry, the country and the global economy, a Court must step in to protect the public. A decision by the (Appeals) Court in favor of the SEC and Citigroup will further weaken this support, to the detriment of market institutions and the public. My economic models continue to show that the global economy remains at risk.

We also note that Mr. Cunningham has obtained permission from the U.S. Solicitor General to file a "Friend of the Court" brief in *Gabelli v. Securities and Exchange Commission*, currently before the U.S. Supreme Court. A decision in this matter is expected in the court's upcoming term, which ends in June.

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Comments on certain Advisory Board recommendations

We agree that

"The Commission should consider additional investor protections for the new exemption, including publicly accessible electronic filings of offering statements, periodic reporting for companies that have completed an offering pursuant to the new exemption and "bad actor" disqualification provisions."

We further suggest that the "bad actor" disqualification provisions should include automatic disqualification for any firm fined more than \$1 million by any regulatory agency, to specifically include firms that have violated section 17(a) of the SEC Act of 1933. For a listing of these firms we refer the Agency to an article in the New York Times, "Promises Made, and Remade, by Firms in S.E.C. Fraud Cases" by Edward Wyatt published on November 7, 2011.

We also agree that:

"The Commission should, in connection with allocation of resources for the review of regulations affecting capital formation, consider the greater importance of other areas of its review, including the review of rules relating to triggers for public reporting, restrictions on general solicitation and the disclosure requirements and restrictions on communications in initial public offerings."

As I note in my book on the JOBS Act, *The JOBS Act: Crowdfunding for Small Businesses and Startups*, <http://www.amazon.com/The-JOBS-Act-Crowdfunding-Businesses/dp/143024755X>, the JOBS Act specifically seeks to benefit Small Businesses and Startups. It is not designed to benefit hedge funds.

The New York Times noted that "The Securities and Exchange Commission on Wednesday proposed rules that would remove a longtime prohibition against general solicitation by hedge funds, a huge change for an industry that has ballooned in size and influence in recent decades." See: <http://dealbook.nytimes.com/2012/08/29/hedge-funds-rules-allow-secretive-enclave-to-open-up/?comments#permid=1>

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This is contrary to the spirit and the letter of the law. Restrictions were lifted because they had to be. They had to be lifted in order to allow Small Businesses and Startups to raise money over the internet.

Now, hedge funds, the same firms responsible for the recent financial crisis and the lack of small business capital, are seeking a bigger loophole so that they can defraud and damage even more investors than they did last time.

Therefore, the proposed rule should be modified to state that it specifically does not apply to hedge funds.

Thank you,

Sincerely,

William Michael Cunningham

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