



Immix Law Group ^{PC}
TRUSTED LEGAL ADVISORS

Jerry Carleton, Principal / Attorney
Jon French, Attorney
Robert Scott, Attorney
Kane Lemley, Intern

October 4, 2012

U.S Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Suggestions for the SEC Regulatory Initiative under the JOBS Act pertaining to the Title III Crowdfunding Exemption.

Ladies and Gentlemen,

The provisions for crowdfunding contained in the Title III of the Jumpstart Our Business Startups Act (“the Act”) represent an exciting development for fundraisers and investors alike. With appropriate and thoughtful implementation, crowdfunding will provide much needed capital for new and growing businesses, meanwhile sufficiently protecting unsophisticated investors.

Our hope in this memorandum is to succinctly contribute our insights into the needs of the small business community from the perspective of our clients, and drawing upon our experiences gained in representing them in securities matters, to help ensure that crowdfunding’s full potential is realized through the Securities and Exchange Commission’s (“the Commission”) rulemaking process over the coming months. We are keenly interested in the careful implementation of crowdfunding because our clients will participate in all aspects of

crowdfunding. We advise businesses and individual clients on securities compliance related to fundraising; we represent entrepreneurs who plan to develop funding portals; and we advise investors and investment groups. The success of crowdfunding will contribute much to the success of our clients, who are already planning to make fruitful use of the new tools crowdfunding makes available.

In this memorandum we will first address the Act's section 302 requirements on intermediaries. Second, we will address the Act's section 302 requirements for issuers. Third, we will address the Act's section 304 funding portal regulation requirements. Understanding that this memo is very brief and the subject very complex, we stand ready to provide further input or any assistance your office may ask.

Requirements Pertaining to Intermediaries

1. Preventing Overinvestment. The Act requires intermediaries to make appropriate efforts to ensure that investors do not exceed the investment limits now set forth in section 4(6)(B) of the Securities Act of 1933 ("Securities Act"). Intermediaries' obligations to prevent overinvestment should not be overly burdensome or the cost of compliance will prevent intermediaries from offering economical services to small businesses. Intermediaries should be allowed to rely on information provided by potential investors in the course of the initial investor screening process. *We propose the following rulemaking language:*

"An intermediary satisfies the requirements of section 4A(a)(8) of the Securities Act by requiring an investor to disclose the investor's annual income, net worth, and relevant investment activity during the initial investor screening process, and by appropriately determining the investor's eligibility to make additional investments in accordance with section 4(6)(B) of the Securities Act."

Requirements Pertaining to Issuers

2. Entity Flexibility. The Act refers to “shares” and “corporate actions” in describing the requirements for issuers, apparently assuming all issuers are organized as corporations. The Act does not expressly indicate whether crowdfunding will be available for other types of business entities. Many small businesses organized as limited liability companies could benefit from, and should be allowed to utilize crowdfunding. *We propose the following rulemaking language:*

“The crowdfunding exemption provided by section 4(6) of the Securities Act will be available to issuers organized as either a corporation or as a limited liability company.”

3. Notices and Advertising. The Act prohibits issuers from advertising the terms of an offering, except for notices directing investors to the funding portal or broker. Crowdfunding has tremendous potential for small businesses with extensive social networks, but its potential can only be realized if these businesses are able to confidently communicate through their networks. The Commission’s rulemaking should clarify what information issuers may include in a notice and how issuers may share a notice. *We propose the following rulemaking language:*

“For purposes of compliance with section 4A(b)(2) of the Securities Act, an issuer’s notice directing investors to the funding portal or broker may contain the following information:

- (1) the name, legal status, physical address, and website address of the issuer;
- (2) the name and website address of the funding portal or broker;
- (3) the type of security being offered; and
- (4) the offering period.”

“For purposes of compliance with section 4A(b)(2) of the Securities Act, an issuer may transmit a notice directing investors to the funding portal or broker, without such transmission constituting advertising, by:

- (1) posting the notice on the issuer’s website and at the issuer’s place of business;
- (2) including the notice in any correspondence to existing customers, subscribers, or clients;
- (3) sharing the notice online through the issuer’s social networks, with members of the issuer’s social networks.”

4. Information Available Through Intermediaries. The Act requires issuers to only share the terms of an offering with potential investors through an intermediary. In many cases, investors may be motivated to invest because of a personal connection with, or affinity for, the undertaking of a particular business. Businesses should be able to capitalize on these connections by maintaining adequate communications with investors. In addition to providing the standard disclosures mandated by the Act, issuers should be permitted to use modern media formats to share information through an intermediary. *We propose the following rulemaking language:*

“In addition to providing the standard disclosures required by section 4A(b)(1) of the Securities Act, issuers may communicate with potential investors through the intermediary as follows:

(1) issuers may make information available to investors in modern media formats such as video and webcasting, provided that the information conveyed in such formats is also available to investors in document form;

(2) potential investors may post questions and issuers may answer such questions, provided that all investor questions and issuer answers are made available to all potential investors; and

(3) issuers may share due diligence reports pertaining to the issuer’s business or offering with potential investors, provided that the disclosure requirements of section 4A(b)(3) of the Securities Act are satisfied.”

5. Investor Rescission. The Act requires that, prior to sale, an issuer must provide investors with an opportunity to rescind their commitments to purchase securities. Issuers are also required to establish a target offering amount and a deadline to reach the target offering, and intermediaries may not release proceeds to an issuer until the aggregate capital raised is at least equal to the target offering amount.

Small businesses will invest significant time and resources to conduct a crowd-funded offering. Last-minute investor rescissions causing the aggregate capital raised to fall below the target offering amount could jeopardize the success of an issuer’s offering. The Commission’s

rulemaking should allow investors facing such a situation to attempt to remedy their offerings by extending the target deadline. *We propose the following rulemaking language:*

“If, at the time of an issuer’s declared deadline to reach the target offering amount, the aggregate capital raised is at least equal to the target offering amount, but subsequently falls below the target offering amount as a result of investors exercising their rights of rescission pursuant to section 4A(b)(1)(G) of the Securities Act, the issuer shall be allowed to extend the target offering deadline, for a maximum of 21 additional days.”

6. Eligible Security Types. The Act requires issuers to file with the Commission and provide to investors and the intermediary the terms of the securities being offered. The Act does not specify what types of securities may be offered through crowdfunding. Crowdfunding will be most useful if small businesses can conduct offerings tailored to their specific needs. The Commission’s rulemaking should provide for flexibility with regard to the types of securities that are eligible for crowdfunding. *We propose the following rulemaking language:*

“The following types of securities may be offered pursuant to the crowdfunding exemption in section 4(6) of the Securities Act: (1) equity securities; (2) debt securities; (3) debt securities convertible or exchangeable to equity interests; (4) options, warrants, or other rights to acquire another security; (5) securities to be acquired upon exercise of option, warrant or other right to acquire property; and (6) revenue-based financing.”

Funding Portal Regulation

7. Facilitating Investor Communication. The Act prohibits funding portals from offering investment advice or recommendations. However, investors will be able to make more informed investment decisions if they are able to benefit from the shared knowledge and collective experience of other investors, and funding portals are uniquely situated to facilitate such communication. The Commission’s rulemaking should establish that facilitating investor information sharing does not constitute the offering of investment advice. *We propose the following rulemaking language:*

“For purposes of compliance with section 3(a)(80) of the Exchange Act, funding portals may create and maintain an online forum for investors to post and view comments pertaining to a particular offering of securities, and the creation and maintenance of such a forum shall not constitute an offer of investment advice, provided that the funding portal’s moderation of the forum is limited to the removal of inappropriate material or spam, and that the funding portal may not remove any investor comment because of the content or viewpoint expressed therein.”

“Investors posting comments to such a forum must comply with the disclosure requirements of section 4A(b)(3) of the Securities Act.”

“Investors posting comments to such a forum are exempted from any investment advisor registration requirements under the Investment Advisors Act, provided that such exemption extends only to the posting of comments on a forum maintained by a funding portal.”

“Before allowing an investor to view or post comments to such a forum, the funding portal shall ensure that the investor positively affirms that the investor understands that:

- (1) investor comments may contain inaccurate information;
- (2) the funding portal is not responsible for the accuracy of information contained in investor comments;
- (3) any opinions expressed in investor comments are the opinions of individual investors and not of the funding portal or the issuer, unless otherwise disclosed;
- (4) unless otherwise disclosed, investors posting comments are not professional investment advisors; and
- (5) investors who post inaccurate information may be subject to liability under principles of tort or other applicable law.”

8. Investor Education Materials. The Act prohibits funding portals from offering investment advice but indicates that funding portals will provide certain investor education materials.

Unsophisticated investors will be able to make better investment decisions with the benefit of readily available materials explaining general investment concepts. The Commission’s

rulemaking should allow funding portals to provide such materials to investors. *We propose the following rulemaking language:*

“For purposes of compliance with section 3(a)(80) of the Exchange Act, funding portals may provide educational materials to investors, including examples and explanations of common investment documents and their terms. The provision of

such materials shall not constitute an offer of investment advice, provided that such materials are objective and do not advocate for a particular issuer, investment strategy, or type of investment that could reasonably be construed as an endorsement of a particular issuer.”

9. Cautionary Advice to Investors, Issuers, and Portal Operators. The Act is, of course, intended to expand fundraising opportunities for new businesses while protecting relatively unsophisticated investors. In order to ensure that the Act achieves these intended goals it would be beneficial to investors, issuers and would-be portal operators who may seek to avail themselves of the crowdfunding exemption for the SEC rules to provide mandatory cautionary advice encouraging individuals and businesses to consult with competent legal counsel and/or seek other appropriate professional advice prior to investing or fundraising under the provisions of the Act. Similar to legends that must be placed on securities issued pursuant to exemptions under Regulation D and Regulation S, these cautionary statements should be required to be posted on portal websites where an issuer can register with a portal or an investor can make an investment. Additionally, operators of funding portals themselves should be strongly encouraged to seek the assistance of securities counsel due to the substantial compliance obligations they will be required to meet. This cautionary language should be presented during portal registration. *We propose the following rulemaking language:*

For Investors

“INVESTING IN EARLY-STAGE COMPANIES IS INHERENTLY SPECULATIVE AND EXTREMELY RISKY. YOU SHOULD NOT INVEST IN THIS COMPANY UNLESS YOU CAN AFFORD TO LOSE YOUR ENTIRE INVESTMENT. EVEN IF THIS COMPANY IS SUCCESSFUL AND PROFITABLE, YOU MAY NEVER SEE A RETURN OF YOUR INVESTMENT. IF YOU DO NOT FULLY UNDERSTAND THIS RISK, YOU SHOULD SEEK THE ADVICE OF AN EXPERIENCED INVESTMENT ADVISER. IF YOU DO NOT UNDERSTAND THE SPECIFIC TERMS OF THIS INVESTMENT, YOU SHOULD SEEK THE ADVICE OF AN EXPERIENCED INVESTMENT ATTORNEY.”

For Issuers

FUNDRAISING THROUGH CROWDFUNDING IS PERMITTED PURSUANT TO CERTAIN EXEMPTIONS FROM U.S. FEDERAL AND STATE SECURITIES LAWS. USE OF THE CROWDFUNDING EXEMPTION IS CONDITIONED UPON STRICT COMPLIANCE WITH NUMEROUS DETAILED AND COMPLEX REQUIREMENTS, AND YOU MAY BE INELIGIBLE TO RELY ON ANY EXEMPTION. YOU SHOULD NOT RELY ON A FUNDING PORTAL TO DETERMINE YOUR ELIGIBILITY FOR ANY EXEMPTION OR TO ASSIST YOU WITH EXEMPTION COMPLIANCE. IF YOU FAIL TO SATISFY THE REQUIREMENTS OF AN EXEMPTION, YOU AND YOUR COMPANY COULD BE SUBJECT TO CIVIL AND/OR CRIMINAL LIABILITY UNDER FEDERAL AND STATE LAW. YOU ARE STRONGLY ENCOURAGED TO SEEK THE ASSISTANCE OF A QUALIFIED SECURITIES ATTORNEY BEFORE RELYING ON THE CROWDFUNDING SECURITIES EXEMPTION OR ANY OTHER EXEMPTION.

For Portals

USE OF THE CROWDFUNDING EXEMPTION IS CONDITIONED UPON STRICT COMPLIANCE WITH NUMEROUS DETAILED AND COMPLEX REQUIREMENTS. YOU SHOULD NOT ESTABLISH OR OPERATE A CROWDFUNDING PORTAL WITHOUT SEEKING THE ASSISTANCE OF A QUALIFIED SECURITIES ATTORNEY. OPERATING A CROWDFUNDING PORTAL WITHOUT SECURITIES COUNSEL COULD SUBJECT YOU TO SERIOUS RISK OF CIVIL AND/OR CRIMINAL LIABILITY. FUNDING PORTALS CANNOT PROVIDE LEGAL ADVICE TO ISSUERS OR INVESTORS.

Thank you for considering our perspectives and suggestions.

NOTE: THIS MEMORANDUM REFLECTS THE PERSONAL OPINIONS OF INDIVIDUAL ATTORNEYS. THESE OPINIONS SHOULD NOT BE RELIED UPON OR CONSTRUED AS LEGAL ADVICE.

Respectfully,



Jerry Carleton
Principal / Attorney



Robert Scott
Attorney



Jon French
Attorney