Ms. Meredith Cross
Director, Division of Corporate Finance
U. S. Securities and Exchange Commission

Mr. Adam Arkel
Associate General Counsel, Office of the General Counsel
Financial Industry Regulatory Authority

November 30, 2012

Dear Ms. Cross and Mr. Arkel:

At the outset of this letter, I wish to acknowledge and thank both of your organizations for your openness and welcoming of public comment concerning the rulemaking process for implementing Title II (General Solicitation) and Title III (Crowdfunding) of the JOBS Act, both of which I have supported from their outset and continue to do so. As an example, I was one of the remote participants in both the morning and afternoon sessions of the recent SEC-sponsored Forum on Small Business Capital Formation. Although some have expressed impatience that Congressionally mandated timetables have not been met, I appreciate the deliberate and inclusive approach being taken as being greatly to the public's enduring benefit, by attempting to craft maximally effective long-term mechanisms rather than short-term but doomed-to-fail naïve or political gestures.

In this vein, the main purpose of this letter is to note, respectfully and professionally, the over-representation of certain organizations and interests from the financial ecosystem in JOBS Act discussions to date, and to request specifically enhanced attention to the views of important but heretofore under-represented end-user constituencies. Specifically, almost all of the publicly posted comments and open meeting participation have come from the vocal and well-organized service provider sector (actual or planned intermediaries, other service providers, etc.), with little to none from the primary intended beneficiaries of the Act, namely, fund-raising entrepreneurs and fund-providing investors.

Notwithstanding the competence, integrity and good intentions of most service-providing companies and individuals, this sector's over-representation in public commentary regarding various portions of the JOBS Act is noteworthy and of concern for the following reasons. First, it is broadly felt within the Intermediary community that since these firms will be an essential focus of Crowdfunding oversight, then all regulation should naturally flow through them, and that they should have primary input regarding the developing regulatory framework. In contrast to this view, let us not overlook that the Act imposes restrictions and requirements on Issuers and Investors as well, and as will be discussed below, multiple reasons exist why these parties can and perhaps should be regulated directly and not via the Intermediaries. Second, many in the Intermediary community do not understand or accept the concept that ALL stakeholders have an essential place in any regulatory discussion. Thus, even regarding rules and procedures targeted towards Intermediaries specifically, Issuers, Investors, the public generally, etc., all of whom will be significantly and concretely affected by the Intermediary actions so regulated, are legitimately part of the discussion. Third, there is inherent and unavoidable conflict of interest involved. Even and especially if (as expected) most Crowdfunding investors individually and as a group lose money overall on such investments (anecdotally like most Angel investors and investment), and only a minority of Crowdfunded entrepreneurs succeed (again, like most Angel-backed enterprises), Intermediaries and Service Providers will make money on each and every transaction they process. For these reasons, it is critical that Investors and Entrepreneurs, and their unique needs and perspectives, be significantly and directly heard in industry-defining initial discussions.

Unfortunately, this past month the well known advocacy group Crowdfund Intermediary Regulatory Advocates (CfIRA), on whose Executive Board I until recently served, considered but explicitly rejected advocating equally for the greater good of the entire Crowdfunding ecosystem (especially and specifically the Act-targeting and primary fund-raising Entrepreneurs and fund-providing Investors). Instead, the Board reaffirmed its original purpose of representing primarily the transaction-mediating Intermediary community, concluding that in the event of an unresolvable disagreement on a given issue, then as far as CfIRA is concerned the position of the Intermediaries must govern. The fact that CfIRA recently established sub-committees focused on various constituencies does not change the bedrock fact that CfIRA has chosen to fundamentally represent Intermediaries. No person or organization can be two irreconcilable things simultaneously (i.e. fish or cut bait, and in this case, inclusive yet dedicated in advance to one party's perspective.) This turn of events saddens me because, despite continuing personal regard for many of the individuals involved, the decision inescapably lessens the moral authority of this very knowledgeable group. And, since many including myself believe that the foundational rulemaking now taking place, as well as continuing oversight of this potentially significant and congressionally mandated financing mechanism must reflect first and foremost the interests of and consequences to Entrepreneurs and Investors, rather than the convenience and profit of vocal and well-organized Intermediaries, I resigned this month from the CfIRA Board rather than continue lending my support to a group explicitly dedicated its own perspective and interest. The distinct voices of the entire range of Crowdfunding constituencies, and especially those of Investors and Issuers, must hereafter be directly represented at the regulatory table rather than internally within CfIRA.

Going forward, when the Commission or Authority seek input on further issues or documents (such as recently submitted industry suggestions for "Best Practices", to be discussed below), please consider the deliberate inclusion of the major intended target constituencies of JOBS Act Title III Crowdfunding, namely, Investors and Entrepreneurs. Such input might be significantly provided by the Crowdfund Professional Association (CFPA) if it elects to pursue an advocacy effort broader than and non-comingled with and directed by that of CfIRA, or by Crowdfunding Investment Angels (CFI Angels), an organization recently founded to facilitate the communication, interaction and cooperation of Crowdfunding Investors independent of the management, oversight and representation by Intermediaries individually or collectively. Although Intermediaries will always be an important functional part of the Crowdfunding ecosystem, the congressionally intended targets and beneficiaries of the Act, Entrepreneurs and Investors, have an obvious stake in how Intermediaries are regulated and function, and deserve to be heard explicitly and directly on these matters. We in these primary constituencies are very willing and eager to collaborate with the Commission, Authority and all other stakeholders in order to make Crowdfunding a success for all.

Sincerely,

Charles L. Sidman, MBA, PhD
Manager, Crowdfunding Investment Angels (CFI Angels)
Founding Board Member, Crowdfund Intermediary Regulatory Advocates (CfIRA) and Crowdfund Professional Association (CFPA)
Public Policy Committee Member, Angel Capital Association (ACA)
Managing Partner, ECS Capital Partners
[redacted]

Appendix regarding CfIRA-proposed "Best Practices for Funding Portals"

While there is much that is common-sensical and laudable in CfIRA's recently submitted "Best Practices" document, the following comments are offered from an Investor perspective regarding a number of issues or recommendation contained therein. These views could have been included in that document's preparation but were not, due to CfIRA's determination to represent primarily the Intermediaries' interests and perspective. Nonetheless, significant matters for the Investor regarding securities-based Crowdfunding (Title III of the JOBS Act) include:

Investor Privacy: Investor privacy is a critical issue both as a fundamental citizen right as well as an important practical determinant of participation in, and thus the success and impact of, Title III Crowdfunding. Unfortunately, the just submitted "Best Practices" document envisions a Portal-focused process of verifying and enforcing congressionally mandated Investor and Issuer Crowdfunding participation limits that is 1. unacceptably privacy intrusive and 2. Not adequately spelled out in advance because it simply will not be possible to realize and implement effectively and consistently by the anticipated multitude of disparate Intermediaries. However, at least one alternative is suggested below to a Portal-centric approach to this important issue.

n order for Portals to verify an investor's statement of his or her appropriate individual aggregate participation limit in, and amounts already committed to, Title III Crowdfunding, a range of financial information currently unmatched (to my knowledge) in any governmental program or database would need to be collected, verified, stored and utilized properly (with appropriate oversight, detailed logging of queries, meaningful penalties for deliberate or inadvertent misuse or release, etc.) by a host of separate private entities. Since Congress has legislated that Crowdfunding participation limits can be based either on individuals' annual income or net worth, the documents that might need to be submitted and processed range from simple pay statements to more extensive tax returns to currently unreported gift or tax exempt income to definitive documentation of wealth (public or private security holdings, non-financial assets such as precious metals, real estate, art, etc.) that could be subject to extensive discussion or argumentation. On privacy, practical as well as expertise grounds, Portals and other private Intermediaries are simply not appropriate or feasible recipients and processors of such extensive and diverse individual financial information.

An alternative to asking Portals to perform this inappropriate as well as unrealistic verification function, and one that places the burden squarely where Congress legislated, is for the Commission and/or Authority to simply require Portals to report to an appropriate government office all Title III Crowdfunding participation by individuals, and to establish a significant penalty (ex. 50% of any excess amount invested) to nvestors for participation that goes beyond an individual's statutory limit. Portals would retain (and be judged in the market by their performance of) their essential education responsibility, Investor privacy would be protected, and the reporting government office could approach verification and impose penalties as deemed appropriate in the future.

Due Diligence and Investment Advice: The Commission has been firm in discussions to date that Portals will not be allowed to provide investment advice, and must merely act as transactional, non-judgmental, intermediaries. This is entirely appropriate and welcome, as it places the onus and responsibility for good investment decision-making and its consequences entirely where these belong, i.e. on the individual (Investor) making these decisions.

Nonetheless, numerous elements in the current "Best Practices" document appear to entail and anticipate Intermediary judgment and advice. The first of these is the repeated statement and clear intention that Portals will provide "Due Diligence" functions and materials. What and how much Due Diligence is adequate, and the standards therefor, are matters of art rather than science for different investors, and the use of this term could be taken as a claim that funding Portals have performed this function satisfactorily or completely, thus generating consequences for the Investor and liability for the Portal. In this same vein, the laudably extensive (but seldom completely realized even in current Private Placement practice) list of materials to be provided by Issuers and posted on Portal web sites, while a gold-standard for Due Diligence by many investors but still incomplete for others, unarguably goes beyond what is required by the Act, inevitably requires judgment as to suitability, quality and completeness for acceptance and posting, and will clearly mislead certain (or even many) Investors. Portals should be required to assure that Congressionally mandated Issuer disclosure requirements and background checks are satisfied. However, neither fulfilling these requirements nor providing anything in addition should be labeled or claimed as Due Diligence, in order not to mislead Investors into thinking that sufficient (i.e., Due) Diligence has been performed or judged satisfactory.

A final issue bearing on the topic of Due Diligence entails the fundamental question of the public vs. private nature of Title III JOBS Act (i.e. Crowdfunded) securities. In public securities markets, investors and analysts are restricted to operating with publicly and generally accessible information, and both outsiders and company insiders are precluded from exchanging and acting on such private information. In the private securities arena, no such prohibition exists, and private inquiries form an essential part of Due DIligence. How is Title III Crowdfunding to be regarded, and may prospective investors make inquiries (i.e. conduct their own Due Diligence) directly from and about Issuers independent of the offices (and postings) of Portals?

<u>Rescission (and Participation) Rights</u>: It is generally accepted that Investors should have a right of rescission (i.e. cancellation of any investment commitment and COMPLETE return of funds proffered) up to the time of investment closing and funds transfer to Issuers. Such investment closing and transfer of funds to an Issuer is mandated by the Act to occur no sooner than 21 days after an offer's posting on an Intermediary web site, and in order to allow perspective Investors to adequately and completely review all such offering materials, it is recommended that ANY change to a posted offering restart the 21-day clock. Determining the materiality of such a change in order to restart the 21-day clock (or not), as called for in the subject "Best Practices" document, will inevitably be a subjective matter of opinion, and non-material corrections do not need to be posted in any case.

The current "Best Practice" document also calls for Issuers to have the right to cancel (or rescind) an Investor's participation in an offering. While it is clearly in everyone's interest that an entire offering may be suspended or withdrawn, for any reason of an Issuer's or Portal's choosing, permitting Issuers or Portals to cancel an individual Investor's participation could be problematical for several reasons. On the positive side, the traditional ability of an Issuer in a non-Crowdfunded private transaction to choose its (limited number of) security holders is essential and unchallenged. In particular, Issuers may find it advantageous to keep competitors out of their Investor "family", or to accept preferentially Investors with larger commitments now or deeper pockets for the future. However, in line with the above discussion on Due Diligence and private vs.public information, as well as the clear Congressional and regulatory interest in protecting the multitude of smaller Investors envisioned (and hoped) to participate in Crowdfunding, is the traditional prerogative of an Issuer to choose their specific Investors still appropriate? Inevitably, the ability of Issuers and Portals to choose which individual Investors to accept entails significant risk of personal or group discrimination, Investor confusion and disappointment, etc. (Parenthetically, the same issues pertain to Intermediaries being allowed to participate in, or be compensated with, the instruments they facilitate, as so often, and recently, evidenced in the world of larger traditional IPO's.) Without clearly stated and interpretable guidelines published in advance, a standard of Investor priority for participation by date of commitment of funds to escrow might be appropriate.

<u>Electronic Communications</u>: The current "Best Practices" document repeatedly speaks of electronic communications (emails) as the standard mèthod of notice between Portals and Investors in the Crowdfunding space. While such communications are usually and certainly convenient when they work, the ubiquitous presence and sometimes uncontrollable operation of "Spam Filters", plus numerous other intermittent internet inconsistencies, make it inevitable that some number of important communications between parties in the Crowdfunding arena will go awry for technological reasons. It is here suggested that if internet communications are used for Crowdfunding investment decisions or notices, thath they only be considered sent and delivered after return of receipt confirmation, the technology for which is available and routinely used for other contractual or voluntary enrollment emails. In the absence of such electronic receipt confirmations, standard practice in the financial and business worlds should be followed by employing signature-requiring private courier services.

<u>Platform Fees</u>: CfIRA's current document calls for Portals "to charge issuers fees and other compensation so as to be profitable...", which is entirely understandable and allowable for commercial entities but not inevitable, and should not be adopted as "Best Practice" for the entire Crowdfunding landscape. Public or semi-public economic development organizations, universities and other research organizations, etc., are very interested in the potential of Crowdfunding, and may very well form and utilize Portals that are not organized for profit. Freedom from competition by such formally or merely in practice not-for-profit Portals should not be enshrined in industry "Best Practices".

<u>Relationship of Non-Accredited and Accredited Investors in Crowdfunding</u>: Accredited Investors are allowed by law to invest any amount they choose in non-Crowdfunded private transactions. Will the Commission limit their participation in Crowdfunding transactions to the maximum of $100,000 per year stated in the JOBS Act, thus reducing the net amount they could and might otherwise wish to contribute to entrepreneurial economic development? If the Commission decides that the maximum investment limits stated in the Act apply to only non-Accredited Investors, a further question is whether

amounts furnished by Accredited Investors will count towards the Issuer limitations also contained in the Act (i.e whether Congress intended, as some would interpret the language of, JOBS Act Title III to pertain to and address only small fund raises by companies that could not obtain funding through other means?)

Given the Act's clear language that an issuer cannot utilize Crowdfunding to raise more than $1,000,000 in any 12-month period, from all investors in aggregate including those relying on the Crowdfunding exemption, will "all investors" include prior family and friends support, non-Crowdfunded Rule 506 transactions, loans, etc.? Also of concern is the order of such multiple transactions if one of these involves Crowdfunding. While private investments by Accredited Investors relying on Rule 506 within the 12-months preceding would necessarily be disclosed during a subsequent Crowdfunding transaction, thus being known and influencing Issuer offer terms and Investor decision-making, what about an Accredited Investor Rule 506 fund raise taking place shortly after a Crowdfunding one? Accredited Investors' clear advantage relative to Non-Accredited Investors with respect to financial bargaining power, experience and sophistication, make it likely that such a Rule 506 raise taking place even a day after a Crowdfunding round would yield significantly different terms (i.e. better securities for lower consideration, etc.) for the Accredited Investors than those obtained by the earlier Crowdfunding Investors, who would not necessarily even know about the subsequent transaction. Imposing some sort of blackout period for (or "Integrating") an Issuer's ability to raise additional funds via a Rule 506 offering for a defined period (ex. six months?) after a Crowdfunding transaction might be considered in order to provide a degree of protection for Crowdfunding Investors, while admittedly also compromising an Issuer's subsequent fundraising flexibility. Balancing all of these competing factors, it is not unreasonable from the viewpoint of Investor protection to regulate an Issuer's utilization of broad-based Title III Crowdfunding vs. more restricted Rule 506 offerings to primarily Accredited Investors as an essentially either/or choice in any limited period of time. It should also be noted that if a Crowdfunding Issuer is viewed as sufficiently attractive by Accredited Investors but the Crowdfunding offering is not, it is entirely possible that Accredited Investors would seek to negotiate an alternative, Rule 506-based private placement, with the inevitable effect of causing the Crowdfunding offering to be withdrawn in its entirety.

<u>"Best Practice" Terminology</u>: Given the host of important issues discussed above, it is clear that the regulatory landscape for JOBS Act Title III Crowdfunding is still in great flux, with significantly different perspectives and positions on the part of Service Providers (including but not limited to Intermediaries), Investors, Entrepreneurs, etc. Issuing a set of recommendations labeled "Best Practices" and urging their adoption by all participants in the industry, is both presumptuous given the narrow perspective and distinct interests of its authors, and premature in that no alternatives have been market tested and thus comparatively evaluated. The document in question can only be viewed as a set of proposals, by a respected and well-intentioned but narrowly restricted and self-selected sub-community interest group, that does not rise to and should not be regarded as the claimed standard of "Best Practices."