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December 28, 2012

Commissioner Elisse Walter [REDACTED]
Securities and Exchange Commission (rule-comments@sec.gov)
100 F Street NE
Washington, DC 20549

Re: **JOBS Act – Title III, Crowdfunding**

Dear Kate:

Thank you for your assistance when I called earlier this month in letting me have your email address and offering to give this letter to Commissioner Walter about the rule making which is underway at the SEC in connection with Article III of the JOBS Act, relating to crowdfunding.

The undersigned are attorneys with Frankfurt Kurnit Klein & Selz in New York City. Among us, we have over 135 years experience representing issuers and investors in private placement transactions. One of us is also an adjunct professor at Columbia Law School, teaching a seminar in which the undersigned has followed developments in crowdfunding in the U.S. and abroad.

We believe Title III of the JOBS Act offers an unprecedented opportunity to provide for new ways for worldwide access to potential investors in US businesses provided two goals are kept in mind: ease capital formation for non-public companies while offering investor protection, taking into account the worldwide reach of the Internet.

To accomplish these goals, we urge the Commission to adopt rules implementing crowdfunding authorized by Title III of the JOBS Act taking into account the following points (for ease of reference we will refer to the rules to be adopted as Rule 507):

1. **Lower Transaction Costs**: One of the biggest impediments to capital formation are the legal and regulatory costs associated with obtaining financing. Requiring crowdfunding issuers to use only broker-dealers or registered portals to assist in meeting prospective investors only perpetuates this problem. We therefore recommend the following be included in Rule 507:

1.1. Issuers may reach out directly to potential investors via the Internet for any crowdfunding (including social media sites) provided the issuers follow Rule 507;

1.2. Standardize the information to be given to investors for the different types of securities to be offered and the information about the issuer, including standardized risk disclosures (which can be supplemented by disclosure about unusual risks related to a particular offering);

1.3. With respect to financial information about the issuer: if an issuer has been in business less than 12 month, no financial information other than this fact; if an issuer has been in business for at least 12 months, the use of management financial information could be used until an issuer has reached a specified level of revenues; then reviewed financial statements by an outside firm of certified public accountants could be used until a higher level of revenues is reached; and then audited financial statements could be used once the revenues justify the expense of an audit;

1.4. Use credit cards or an Internet account such as PayPal to accept investor commitments. Charges would be made by an issuer only when the target amount of an offering has been committed, and only with respect to investors who have not sent notice of rescission after making a commitment, thereby eliminating the need for (and cost of) escrow arrangements;

1.5. All crowdfunding activities will be handled electronically via the Internet. Therefore Rule 507 will expressly authorized: electronic signatures by an issuer and investors; distribution of offering information including subscription agreements and issuer governing documents; investor communications; and distributions by an issuer to the credit card account or Internet payment account such as PayPal used by a subscriber to make the initial investment (as such information may be updated by investors on notice to the issuer);

2. The Internet is worldwide and accessible to all with any device connecting to the Internet: These facts need to be addressed in considering Rule 507, and, we believe, would lead to the following points:

2.1. Crowdfunded offerings should be expressly integrated with other permissible non-public securities offerings. An issuer should be able to accept, in connection with any offering of crowdfunded securities: non-accredited investors within annual exposure caps (see Par. 3.3 below); an unlimited number of accredited investors; and those who wish to provide money to the issuer without receiving the offered security, but in exchange for other non-financial benefits (for example, there may be non-accredited investors who would be perfectly happy receiving an “acknowledgment” credit in the end titles of a film, or a product among the first to be manufactured even before being made available for sale to the public, rather than receiving a security, preferring a short-term benefit to a longer term return of capital and possible profits);

2.2. All information made available by an issuer will be made available at the same time to all potential sources of capital; all updates or reports will also be made available simultaneously to all those who have subscribed or invested;

2.3. Investors outside the US will need to consent to exclusive jurisdiction in the US with respect to the governing securities laws;

2.4. Currency exchange risks need to be addressed: these include:

2.4.1. The currency in which investments will be accepted need to be disclosed;

2.4.2. Risks of currency fluctuations need to be disclosed;

2.4.3. In setting a target amount to be raised, the target must include both the amounts to be used by the issuer for its business, and an additional 10% (or other percentage deemed reasonable by the Commission) to account for currency fluctuations between the date an investor subscribes and the date an offering closes;

2.4.4. The currency in which distributions will be made needs to be disclosed, and the fact that, based on currency fluctuations, the amount repaid may be less than the amount invested, even if fully repaid as far as the issuer is concerned;

2.5. One reason for a pilot program (see Par. 5 below) would be to allow time for the SEC to coordinate regulation of crowdfunding with regulatory agencies in other countries, while not waiting for the “best” coordinated regulation to get in the way of launching the program authorized by the JOBS Act, and permitting the worldwide regulatory framework to take into account experiences in different countries with crowdfunding;

2.6. Does Rule 507 offer a safe harbor to foreign issuers attracting crowdfunding from the US, or is it a safe harbor only for US issuers? This question needs to be addressed in Rule 507;

2.7. Offering materials should include a section warning investors about tax risks of cross-border financing, and suggesting that they need to consult with local tax advisors about how to structure the investment they are making;

3. Protect Investors:

3.1. Limit professional fees (legal, accounting, brokerage, or portal fees) in a crowd-funded offering to a percentage of the cash to be raised by the issuer, but also permit the issuer to issue securities to professionals advising the issuer, and the value of any such securities issued to such professionals would be added to the target amount to be raised in determining the actual target amount to close the offering; securities issued to such professionals should have a cap on the amount of such securities which can be so issued (10% or another amount deemed appropriate by the SEC);

3.2. Recognizing that events can cause the amount raised to be insufficient to realize the issuer’s goals for which crowdfunding is raised, and to protect the initial crowdfunding investors in such an event, permit a second crowdfunding raise within 12 months from the first crowdfunding raise;

3.3. Investors will be protected by having all information available simultaneously to all interested parties (see Par. 2.2 above) and by having standardized information available (see Par. 1.2 above);

3.4. An SEC website section can have a basic definition of types of securities which may be offered to investors, and even standard risk warnings, including that the SEC has not reviewed or investigated any crowdfunding effort; if all crowdfunding offerings must be offered through the SEC website, in order to access any offering, a potential investor would need to review the definitions and warnings and click through to confirm that the investor has read and understands the definitions and warnings and is proficient in the language of the website and offering materials (or is working with someone who has such proficiency);

3.5. The cap on annual crowdfunding investments by each investor is an important way to limit financial exposure of non-accredited investors who may be unsophisticated, but basing it on a dollar figure is unnecessarily limiting. We would suggest that the maximum amount in a 12 month period which anyone who is not an accredited investor can invest be limited to five percent (5%) of liquid assets (which would need to be defined in Rule 507 and which may or may not include retirement fund assets, as the SEC determines is appropriate). The amount of liquid assets would be self-certified by each investor when they wish to make their first crowdfunding investment, and annually thereafter;

3.6. Having a rescission right is also important to protect investors, but it should not be extended for a long period after an offering has closed. Rather, since there will be only one closing and acceptance of money, an investor can rescind a subscription at any time after making it, up until 3 days after the maximum subscriptions have been reached (including from accredited investors and from those who wish to invest for non-economic reasons). Additional subscriptions may still be accepted until the end of the rescission period, and would be accepted on a first come basis (since subscriptions will be time stamped);

3.7. Each issuer who participates in crowdfunding should be required to report a closing on a form to be required by the SEC (which may be a modified version of Form D), and to update the information on an annual basis (see Par. 4.2 below regarding a central registry), so the success or failure of crowdfunded issuers will become available information for future investors, and to assist the SEC in evaluating the pilot program (see Par. 5 below);

3.8. Penalties for abuse of crowdfunding should be part of Rule 507 (beyond the current anti-fraud laws and regulations). The penalties could include:

3.8.1. To address concerns about the public nature of information in a central registry (see Par. 4 below), there should be penalties for misuse of such information (“misuse” to be defined in Rule 507);

3.8.2. A right of rescission against an issuer and its principals if there is a violation of US securities laws including Rule 507 or if an issuer does not use the proceeds from a Rule 507 offering for the purposes in the offering materials;

3.8.3. Similar to the whistleblower payments, a payment to an individual or company which either sues an issuer for violation of US securities laws including Rule 507 or a misuse of data in the central data registry (see Par. 4.1 below), or refers a matter to the SEC for investigation which results in a finding of wrong doing or (a lesser payment) for a consent decree; the whistleblower's legal expenses would also be paid from any recovery;

3.8.4. To lessen the chance of "strike" suits, the attorneys or individual or company bringing a claim or referring a matter to the SEC for investigation would be liable for defense costs including legal fees if there is a finding of no wrongdoing;

3.9. Rather than limiting crowdfunding to not more than \$ 1 million for an offering, limit it to a percentage of the total offering amount: it will actually help crowdfunding investors to be part of a larger financially sound issuer, and to have other sources of capital besides crowdfunding to build the issuer. Limiting the maximum amount to \$1 million for an offering only increases the risk to investors by having them invest in companies with a more limited financial base;

3.10. Prohibit advertising by issuers soliciting investors other than the information required or permitted by Rule 507;

4. Central data registry. One of the great benefits of computers and the Internet is the ability to create, in one centralized location, vast amounts of data. This data falls into at least 2 categories, all of which can be maintained on a centralized registry at the SEC, accessible through the SEC website:

4.1. Investor Information. This centralized data regarding potential investors can be used by potential issuers to make sure that investors fall within permissible legal requirements: This information would include name, address, social security number or other comparable identifying number for investors outside the United States, date of registering with central registry (which must be updated on a annual basis if an investor wishes to continue making crowd funded investments more than one year from the date of original registration), amount of liquid assets; and crowdfunding investments made by the registrant, identifying the amount invested, the date of investment, and the issuer (information required by issuers to be able to determine if the issuer can accept other crowdfunding investments from a registrant;

4.2. Issuer Information: : Issuers should be required to list name and address and names of principals with decision making authority for the issuer. Issuers would also be required to register the date of closing of an offering including a crowdfunded portion; and the amount raised, including by category (crowdfunding, accredited investors, non-economic sources of capital). On an annual basis, the issuer should then update that information on an annual basis, commencing with its first full fiscal year and annually thereafter, listing revenues, expenses and net income or loss, and any new sources of capital including new offerings or debt, for the most recent reporting period. This information will, over time, help develop information for future potential investors and for the SEC about whether crowdfunding is working for investors;

4.3. Portal Information. If crowdfunding works as anticipated, there will be a large number of issuers seeking to use it. To help potential investors locate information about investments which may be of interest, portals may arise which aggregate information about crowdfunding offerings, broken down by types of industries, size of issuers, or other criteria investors find useful. The portals could have advertising to support the work, provided that such advertising is not from an issuer listed on the website; in other words, an issuer could not pay to be included within a grouping on a portal site (or a portal could charge everyone listed in a grouping a standard fee which would be set by the market);

5. Pilot Program: Rule 507 should have a sunset provision and be identified as a pilot program. The period should be long enough to collect data about what is happening with crowdfunding and information to help evaluate whether it is working both for issuers and for investors (see Par. 4.1 above). It is also a period during which the SEC can coordinate with regulatory bodies in other countries which have crowdfunding initiatives to see which rules are working where. We suggest a 5 year pilot program.

Please let us know if you have any questions about the above suggestions, or if it would be helpful for us to meet with you at your offices in Washington to go over the above proposals in more detail.

Sincerely,

Thomas Selz Jerrold Spiegel Victoria Cook Andrew Hurwitz Alan Sacks