

MEMORANDUM

FROM: Sebastian Gomez Abero
Special Counsel
Office of Chief Counsel, Division of Corporation Finance
U.S. Securities and Exchange Commission

RE: Meeting with representatives of Frankfurt Kurnit Klein & Selz

DATE: February 27, 2013

On February 27, 2013, Commission staff met with representatives of Frankfurt Kurnit Klein & Selz (Frankfurt Klein) to discuss issues regarding the implementation of Title III of the Jumpstart Our Business Startups Act.

The following Commission staff were present: Tamara Brightwell and Sebastian Gomez Abero from the Division of Corporation Finance; Joseph Furey, Joanne Rutkowski, Leila Bham, Timothy White, Daniel Gien, Shaheen Zuver and Wonju Sul from the Division of Trading and Markets.

The following representatives from Frankfurt Klein were present: Thomas Selz and Jerrold Spiegel.

The meeting agenda provided by the representatives from Frankfurt Klein is attached.

Agenda for meeting with SEC, Feb. 27, 2013

1. *Unified exemptions in single offering:* Ability to combine, in one offering, exemptions for accredited investors, crowdfunding, and donations for non-monetary consideration; possible separate regs for offering involving crowdfunding only
2. *Cap on individual investments:*
 - a. Annual income or net worth: 5% test is if either income or net worth fall below \$100k and 10% test is if either is equal to or over \$100k: if both income and net worth are below or above the threshold, to which one do you apply the 5% or 10% test?
 - b. Need to clarify which periods of time are used to determine whether income or net worth test has been met
 - c. For 10% test, seems to be if either income or net worth is greater than \$100,000, the investor can invest up to 10% of the higher number, up to \$100,000: is the intent to use the lower of the two for 5% and the higher of the two for 10%?
 - d. What investigation must a broker or portal conduct to avail itself of a safe harbor when determining if an investor can invest, and how much the investor can invest?
3. *Issuer financials:* Raise the minimum annual revenue test for audited financial statements since at \$500,000 cost of annual audit will harm financial condition of the issuer and lessen amounts to be available for investors
4. *Intermediary obligations:* Statute seems to require that dealers or portals “ensure” that investors: (A) review education information, (B) positively affirm that an investor understands risks, (C) answer questions demonstrating an understanding of risk involved with startups, liquidity, (D) have not exceeded the 12 month cap on crowdfunded investments, and other matters determined by the SEC. The SEC should adopt regulations for each requirement to afford brokers and portals with a safe harbor if the regs have been followed. Also need to clarify what happens if: (1) some but not all of the obligations have been met; and (2) requirements are not met for all investors in a crowdfunded offering: If not true for one investor, does that eliminate exemption in dealing with all other investors, or would rescission for one investor be sufficient?
5. *Obligation not to pay finders:* How does prohibition against a broker or portal paying a finder’s fee operate in the context of an Internet offering? Does this prohibit paying for email lists?
6. *Compensation for Funding Portals:* Statute seems to provide that in order for portals to avoid having to register as broker-dealers, they cannot receive compensation “in connection with the

purchase or sale of such security". Is this intended to apply to flat fees and/or to "success" percentage fees, for posting an offering on the website of the portal. Given the level of due diligence about each investor, this raises several issues:

- a. It puts funding portals at a disadvantage compared with brokers. What would be the policy justification for this different treatment?
- b. Why would a funding portal incur these expenses without compensation? If charging expenses, or a fee to cover expenses, would be permitted since it is not "compensation", this would need to be clarified in the regulations.
- c. Early stage issuers may not have the necessary capital to pay the funding portal an upfront flat fee to list. It would facilitate financing these companies if they could pay a fee which was based on the amount raised, when raised. This fee could be capped at 1 or 2% of the capital raise, and be used solely to cover the expenses of operating the platform and conducting the necessary due diligence and other activities, and specifically not to pay fees to individuals who identify funding sources.