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Securities and Exchange Commission
100 F Street NE
Washington DC 20549

Ladies and Gentlemen:

I write with comments on rulemaking for the JOBS Act, with a particular focus on the CROWDFUND Act (Title III). I started my career as an entrepreneur, and have founded three companies. More recently, I spent seven years as an institutional investor in small, growing companies, both as a traditional venture capitalist (doing $1-10 million equity investments) and as a non-traditional specialty financier (doing smaller debt and revenue-based investments), and I hold the Chartered Financial Analyst designation. My comments are therefore from the perspective of one who has both invested in and operated the types of businesses that are likely to avail themselves of the CROWDFUND Act's opportunities.

I am also an interested party because my company, Applied Dynamite Inc., is seeking to market data verification services to the crowdfunding industry.

I. Anti-Fraud Checks, Qualifications, and Disqualification Requirements

The CROWDFUND Act provides for a number of criteria which funding portals must apply, variously to issuers (including the promoters of the issue) and to investors. These criteria include some affirmative duties explicit in the statute (such as background checks on issuers), and some lesser duties (such as the disqualification of certain issuers in 4(A)(j)).

A. Tractability and Intractability

Most of these criteria are possible to achieve in automated or semi-automated inquiries to sources (databases or data services) that exist today, or will likely exist by the time the CROWDFUND Act takes effect. However, certain of these criteria are generally intractable, because they rely upon open-ended definitions.

Specifically, the following disqualifications from section 230.262 of 17 CFR are intractable criteria for any automated or semi-automated (or, indeed, even a diligent professional human) process to satisfy with confidence:

- "Any court of competent jurisdiction" having entered an order (because there is no limit to the number of courts which may have, at some time, been competent to enter an order regarding an issuer).
- Being "subject to" certain unpublished orders or injunctions (such as a USPS false representation order).
- The extension of disqualification criteria to predecessors and affiliated issuers (because of the

unenumerable ways in which two issuer companies might be deemed to be affiliated).

The Commission should follow a general principle in its rulemaking, of making *tractable* criteria the duty of the funding portal to fulfill via automated or semi-automated means, and making *intractable* criteria the responsibility of the issuer to address with representations and warranties, and assigning liability for failure of that duty respectively.

This is not to suggest that merely difficult-to-check criteria, or data sources commercially unavailable as of today, should merit treatment as "intractable." For example, my company, and doubtless others, seek to aggregate and make available the difficult, but tractable data sources. The market for such services, as well as the interest of the investing public, is best served by making a stringent requirement that funding portals do verify all tractable criteria.

B. Agency and Sufficiency of Data Checks

Funding portals should be permitted to purchase or partner with other entities to acquire the necessary data checks for the tractable criteria, rather than to be deemed to have a duty to conduct such checks by their own personnel.

However, in order to satisfy the Commission as well as the investors, any reliance by a funding portal upon third party vendors or partners should be predicated upon such third party providing a detailed audit trail of which sources were checked and when.

C. Collaborative Data on Transaction Limits

Because certain of the limitations upon amounts transacted in a time period, for either issuers or investors, pertain to aggregate amounts across all funding portals, it is imperative that sharing of transaction data be mandated with sufficient transparency for all parties to meet their regulatory obligations without undue delay.

For example, it should be required that Funding Portal A be able to query of Funding Portals B, C, and D, what the total amounts have been that each has facilitated in fundraising by Company Issuer X. Such query must not be able to be unduly delayed or arbitrarily withheld, although funding portals must be able to recoup reasonable costs and to limit access to bona fide queries.

D. Privacy, Portability, and Persistence.

Intermediaries are required to "protect the privacy of information collected from investors" in the course of crowdfunding transactions. The Commission should specifically permit funding portals (and other intermediaries) to make the following unlimited disclosures:

- to and among its vendors and partners for the purposes of conducting data checks, funds transfers, and other aspects of processing the transaction;
- to and among other funding portals (including through vendors or partners) as part of any risk-sharing or collaborative data process (as contemplated in I.(C) above); and
- as investors themselves shall direct, including by means of using Web site controls (such as, "hide or show my profile," or "post this comment for other investors to see.").

A related issue is the portability of status by issuers or investors having been examined or qualified at

one funding portal. For example, Issuer A completes a series of data checks, representations, and warranties, rendering it "eligible," and this was all conducted at Funding Portal X. However, Issuer A determines that the niche of Funding Portal X is inappropriate for the type of investor it seeks, and that the transaction is best done at Funding Portal Y. If Funding Portals X and Y are willing and able (such as by reliance on common data formats or common third-party vendor services), they should be able to make Issuer A's eligibility "portable" between the portals, thereby avoiding a costly duplication of efforts. The Commission should permit, but not mandate, such portability (subject to persistence and freshness rules, below).

Most or all of the regulatory requirements for issuers and investors under the Act have an aspect of "freshness." For example:

> A funding portal conducts the required background check and other inquiries on promoter John Smith on 01 January, and all comes back clean. On 02 January, John Smith embarks on a life of crime, is immediately caught and, on 03 January, made subject to a variety of convictions, orders, and injunctions which render him and his issuer disqualified. If the funding portal proceeds to facilitate a transaction which closes on 01 February, has the funding portal complied with the law, even though the funding portal could have known (had it duplicated all of its initial checks on 31 January) that John Smith was disqualified?

(This is not a novel problem of crowdfunding; similar "race conditions" of possibly changing circumstances occur in any sufficiently complex securities transaction.)

The Commission should make explicit lifetimes for the persistence of certain checks. For example, a criminal background check on an issuer might be deemed reliable for 90 days, meaning that a transaction closing 91 days after a background check would necessitate a repetition. Such lifetimes should also be applied to investor qualifications, probably with longer spans (an investor's income or asset qualification might be reliable for one year). Finally, the Commission should not hesitate to put the shortest lifetimes on those checks most likely to be "gamed" by bad actors. For example, a check that a given issuer has not exceeded its annual maximum of fundraising might only be reliable for 24 hours, to make it difficult for an issuer to game the system by parallel fundraising on different portals.

II. Recommendations, Advice, and Critical Speech

A funding portal is prohibited from "offer[ing] investment advice or recommendations." Yet, funding portals are expected to fulfill some of the functions historically done by underwriters. The Commission should narrowly construe the prohibition against "advice or recommendations," and should encourage and facilitate both the exercise by funding portals of proprietary non-advisory judgment, and the deployment by funding portals (and their vendors or partners) of collaborative tools to help prospective investors evaluate investments.

A. Due Diligence and Concentration of Capital

When the bulk of new capital is coming from a small handful of investors, each investor has a relatively large outlay at risk and has corresponding incentive to perform additional due diligence work. This is the case, for example, with traditional venture capital; it is of little concern to spend $10,000 on due diligence to protect an investment of $5 million. But when the capital is sourced from a large number of relatively tiny investors, no one party has the incentive to spend the $10,000 which might be prudent to spend on due diligence.

The Commission should be tolerant in its rulemaking and enforcement with respect to the various methods that may be used to "crowdsource" due diligence and other investment decision-making within and amongst the investors at a funding portal. It is likely that various mixtures of information-sharing, work-sharing, and cost-sharing, facilitated in novel ways by funding portals' software designs, will emerge, and the market will help to select for efficient such designs. The Commission should take care not to chill, quash, or stifle such efforts by funding portals by broadly construing such efforts as being "investment advice or recommendations."

B. Sharing of Opinions and Reputation Systems

While the unfettered exchange of opinions about new crowdfunded issues in a format such as a bulletin board or Web forum may seem an invitation to unscrupulous promoters to "pump and dump," the Commission should nonetheless be highly tolerant, both of the speech of prospective investors in such forums, and of the facilitation of such speech by Funding Portals.

As an example of why, consider that modern collaborative Web software can be used to enable both "moderation" and "meta-moderation," with minimal costs. Moderation is a process whereby particular comments may be voted up or down; meta-moderation is a process whereby such votes are evaluated with weightings based upon the imputed credibility of the voter. The results of such moderating processes can be instantly reflected to the reader in such ways as by changing the font or prominence of comments, adding "badges" or other indica of imputed credibility, etc.

Whereas, in an earlier age, a newsletter of dubious merit might be sent out, hawking a junk issue to credulous investors without any critical context, such a one-sided promotional effort would be unlikely to succeed in a meta-moderated funding portal. Investors dubious of the promoter's claims could merely vote it down; such votes would weigh down on the ability of the promoter to attract further attention. While pumping and dumping might not be eliminated entirely, it certainly becomes harder when any critic of the scheme can instantly raise the alarm, to be heard by all others.

Therefore, it is imperative that the Commission broadly permit prospective investors' opinions, ratings, rankings, votes, comments, etc. to be exchanged within funding portals, without fear that they might be construed as investment advice or recommendations, solicitations, or offers. If the Commission finds it necessary to constrain such speech, then very bright-line definitions should be used, and funding portals (and vendors or partners) should have a safe harbor for timely removal of violators' speech upon notification.

C. Proprietary Non-Advisory Judgments by Portals, Vendors

In addition to a broad tolerance for shared opinions and efforts among investors, the Commission should show a more limited tolerance for the exercise and publication of proprietary judgments about issuers, made by funding portals or their vendors or partners.

In its most basic form, the very decision by a funding portal to permit a given issuer to use its platform is an expression of its proprietary judgment. The inverse should be permissible as well: a decision by a funding portal that a given issuer should not use its system is a judgment which should, at the option of the funding portal, be permissible to share.

Furthermore, if a third party vendor or partner decides to create a rating system for issuers, and award e.g. a "gold, silver, bronze" or "star" rating to an issuer, it should be permitted by the rules that such a

rating be published by that vendor (or anyone having the right to that information) without risk of having rendered "advice or recommendations." The public markets are filled with successful examples of rating services providing objective, proprietary non-advisory judgments in a competitive marketplace (such as Morningstar for mutual funds, or the ratings agencies for fixed income), and such services should be permitted to thrive under crowdfunding.

D. Disclosure and Transparency as Preferred Remedies

As a corollary to the commentary above, the Commission should generally prefer, in its rulemaking, to mandate the disclosure of the identity of the speakers (issuers, prospective investors, and proprietary, non-advisory judgments) who provide various items of information, rather than to restrict the speech.

III. Coherency of CROWDFUND and Other Transactional Exemptions

Because of the exceptional level of public and entrepreneurial interest generated in the CROWDFUND Act, there is a wave of innovation underway in creating software to conduct "crowdfunding" securities sales. Much of the same technology and business process which might be applied to exempt sales to non-accredited investors under the CROWDFUND Act, however, could be in theory used to automate or streamline sales under other exemptions, such as Rule 506.

In order to provide for the maximum flexibility for issuers and funding portals, the requirements for those who wish to be intermediaries for e.g. Rule 506 Internet financings should be harmonized with the requirements for those who wish to become funding portals under the CROWDFUND Act. Ideally, the Commission should provide for a common registration process and requirements for Internet intermediaries and funding portals.

I respectfully submit these comments in the hope they will be of help to the Commission in implementing the CROWDFUND Act.

Sincerely,

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