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To: Mary Jo White, Chair
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Re: Release No. 33-9416; Release No. 34-69960; Release No. IC-30595; File No. S7-06-13

Review of Selected Comments Submitted to the SEC Regarding Release # 33-9416 (S7-06-13); Part 3

Consider the stated mission of the U.S. Securities and Exchange Commission, and my further analysis:

"**Introduction**

The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."

See: http://www.sec.gov/about/whatwedo.shtml

I'd like the SEC to explain who "**investors**" are, and what "**investment**" is, in the case of Rule 506(c) securities advertised publicly. A dictionary definition of "investment" from Google offers these ideas:

in·vest·ment (noun)

1. the action or process of investing money for profit or material result.
synonyms: investing, speculation; stake, share, money/capital invested

a thing that is worth buying because it may be profitable or useful in the future.
synonyms: venture, speculation, risk, gamble;

an act of devoting time, effort, or energy to a particular undertaking with the expectation of a worthwhile result.
synonyms: contribution, surrender, loss, forfeiture, sacrifice

2. (archaic) the surrounding of a place by a hostile force in order to besiege or blockade it.

We must ask and answer the question, as an industry and as human beings, “WHAT IS THE BASIC OBJECTIVE HERE?” Are we each trying to achieve maximum efficiency for the process of sending unsolicited commercial email (spam) so we may turn that spam into money? Or are we attempting to codify Rules that will surround everyone who seeks capital with a hostile force to besiege or blockade?

It is my firm belief that public "capital formation" is NOT defined as "the highly-efficient process of separating fools from their money through unsolicited commercial email or an exciting IPO sponsored by an investment bank" but rather the true definition of public "capital formation" is captured in terms of productive relationships and control, similar in manner to how Wikipedia currently covers the topic:

"Capital formation ... refers to any method for increasing the amount of capital owned or under one's control, or any method in utilising or mobilizing capital resources for investment purposes. Thus, capital could be 'formed' in the sense of 'being brought together for investment purposes' in many different ways. This broadened meaning is not related to the statistical measurement concept nor to the classical understanding of the concept in economic theory."

"Capital formation measures were originally designed to provide a picture of investment and growth of the 'real economy' in which goods and services are produced using tangible capital assets."

http://en.wikipedia.org/wiki/Capital_formation

Quoting from SEC News Digest, January 25, 1974, Issue 74-18, SEC Docket, Vol. 3, No. 12 – Feb 5) –

“Everyone has been shocked by the massive betrayal of public investors in recent years and inevitably the focus is upon the people and the process through which these debacles came about.”

COMMISSIONER SOMMER OUTLINES THE RESPONSIBILITIES OF THE SECURITIES LAWYER

Speaking before the Banking Corporation and Business Law Section of the New York State Bar Association, Commissioner A. A. Sommer, Jr. discussed the emerging responsibilities of the securities lawyer. After noting some of the recent events impacting on lawyers, Commissioner Sommer stated “I would suggest that the security bar's conception of its role too sharply contrasts with the reality of its role in the securities process to escape notice and attention – and in such situations the reality eventually prevails. Lawyers are not paid in the amounts they are to put the representations of their clients in good English, or give opinions which assume a pure state of facts upon which any third year law student could confidently express an opinion.”

“I would suggest that in securities matters (other than those where advocacy is clearly proper) the attorney will have to function in a manner more akin to that of the auditor than to that of the advocate. This means several things. It means he will have to exercise a measure of independence that is perhaps uncomfortable if he is also the close counselor of management in other matters, often including business decisions. It means he will have to be acutely cognizant of his responsibility to the public who engage in securities transactions that would never have come about were it not for his professional presence. It means he will have to adopt the healthy skepticism toward the representations of management which a good auditor must adopt. It means he will have to do the same thing the auditor does when confronted with an intransigent client – resign.”

See: http://www.sec.gov/news/digest/1974/dig012574.pdf

Comment #37
On August 12, 2013, Naval Ravikant, CEO, AngelList, commented that “rules that may be easy for Wall Street are a death sentence for startups.” Mr. Ravikant describes numerous scenarios in which capital is raised through private placement non-public Offerings that do not utilize general solicitation or general advertising, and repeatedly expresses fear that these private activities will mean “death for the startup.”

The central fear that Mr. Ravikant appears to be expressing repeatedly is that being required to follow Wall Street-style regulatory compliance rules will be a death penalty for startups, specifically because the open, transparent "public" communications that users of the AngelList website engage in every day might be deemed "general solicitation and general advertising" by the Commission. Everyone knows that use of websites like AngelList has always been a technical rule violation, perhaps even a statutory offense against the 1933 Securities Act and the Federal Regulations promulgated by the Commission. The Internet is public space, even in the case of members-only websites such as AngelList, because any member of the public can join AngelList and use the website to publish a general solicitation to people with whom there is no pre-existing substantive relationship: complete strangers (i.e. other public users).

Advertising a "Securities Offering" to strangers via AngelList happens whether or not there is a price per share established in advance, or a proposed interest rate or other promised dividend or capital gain offered to the prospective investors. The fact that the Commission has previously issued interpretive guidance that seems to give the operator of such a website (e.g. Mr. Ravikant) authorization to continue to do so because advertisements on a members-only website does not constitute a "general solicitation" does not change the fact that the issuers themselves must, with the help of their securities lawyers, use their own judgment to determine whether they are in compliance with the letter and spirit of the law.

Mr. Ravikant expresses understandable concern that individuals and startups who may use AngelList in the future will be compelled to comply individually with Rule 506(c) in order to do so. I concur with his assessment and interpretation, but I do not agree with Mr. Ravikant's "death penalty" fear rhetoric.

As detailed in my previous comment letters, it is perfectly clear to those who have experience with the practical requirements and the procedures of the Commission's existing Rules and Regulations that the Commission has no intention of imposing a one-year financing ban penalty for non-compliance. Any act of non-compliance in connection with a general solicitation that is not part of an ongoing fraud will obviously not result in action by the Commission to halt the Offering nor will a Rule 506(c) exemption from registration be revoked retroactively to the detriment of the issuer and the issuer's investors.

The Commission's proposed one-year prohibition only impacts future Offerings, the proposed ban does not impact any ongoing Offering, even if the Offering remains non-compliant. If the non-compliance is not remedied by the issuer then those responsible for the non-compliant Offering, and the issuer itself, will be prohibited from conducting new Offerings for a period of five years from the date of the event that resulted in non-compliance, unless they ask for and receive a waiver from the Commission. If the non-compliance is remedied by the issuer then those responsible for the non-compliance will only be prohibited from commencing brand-new Offerings (such as on behalf of a different issuer) for a period of one year from the date that the non-compliance was remedied. If the non-compliant Offering is still ongoing during the one-year period of "prohibition" then, from my reading of the Proposed Rule, this will not result in any penalty nor any "death sentence" nor any prohibition, in practice, for either the issuer or any of the people responsible for the non-compliant Offering on behalf of the issuer. Ongoing Offerings will neither be halted nor will they be deemed to have lost any registration exemptions.

What will be prohibited, by Rule, is something which *should* be prohibited: "serial entrepreneur" faulty Offerings that are willfully non-compliant. Anyone who is involved serially in a multitude of Offerings will find that an event of non-compliance may bar them for one year from initiating new Offerings. In my opinion, this is a completely necessary and proper regulatory function and Proposed Rule. What I do not agree with is the manner in which the Commission has intentionally worded the Proposed Rule so as to create misunderstanding and fear, just to try to make the new Rule more politically powerful. The Commission should not be regulating through fear politics, it should use forensics and clear Rules.

Mr. Ravikant asserts that boilerplate legal text cannot possibly be tweeted, but ironically this was not a problem for Twitter itself last week when they sent out the following tweet announcing their S-1 filing:

It is obviously not unreasonable for Twitter to be required to include standardized boilerplate language when it announces the commencement of a planned public Offering. If Twitter had decided to conduct a Rule 506(c) Offering to sell unregistered securities only to accredited investors, instead, it would also not have been unreasonable for Twitter to have been required to comply with Proposed Rule 510T. That Twitter was going to use its @twitter profile to send tweets like "We've confidentially submitted an S-1 to the SEC for a planned IPO." is not difficult, nor is it costly, nor burdensome in any way at all, for it to know in advance. To engage in general solicitation and general advertising of unregistered securities is to decide ahead of time how you are going to communicate formally with the general public about a securities Offering. Mr. Ravikant implies that nobody can know in advance what they might say about their unregistered securities Offering, but this idea is clearly not correct. In my opinion, it is entirely reasonable for the Commission to require pre-publication filing, or at least require filing simultaneous with the Commission, all "general solicitation materials" in accordance with the Proposed Rule 510T.

Furthermore, I do not think it makes any sense for the Commission to defer to the special interests of a group of self-described "angel investors" even when that group numbers in tens of thousands and when that group is actively considering investing in the 100,000+ startups that Mr. Ravikant has signed up on his website. The fact that AngelList has this many startups listed, all of whom are effectively engaging in general advertising of their unregistered securities to prospective investors by being signed up, needs to be considered in the context of the number of financing events that Mr. Ravikant reports facilitating. If only 2% of the startups that engage in potentially-illegal general solicitation and general advertising by way of the AngelList website manage to successfully raise any capital at all by way of AngelList, which I believe is an accurate self-reported success ratio from Mr. Ravikant, then this clearly shows that there is something very wrong with the entire process of "angel investing" as it exists today. This business model must change, and in my opinion the Proposed Rules and the JOBS Act are more likely to bring about this change than continuation of the legally-questionable practices of so-called "angels."

"Fundraising startups aren't profitable yet, so the penalty for non-compliance - a one-year financing ban – often means death for the startup."

“At AngelList, we’ve facilitated introductions that have resulted in over 2,000 financings with zero reported cases of fraud. That transparency disappears if entrepreneurs are told that every change the public can see requires a new SEC filing (the rule “510T”).”

“... the very activity that is now entirely out in the open and trackable on sites like AngelList without needing additional regulation.”

See: http://www.sec.gov/comments/s7-06-13/s70613-37.pdf

Comment #41
On August 13, 2013, Lawrence T Levine commented that confidential Form D filings would help with compliance. In my opinion, confidentiality in any public Offering is inappropriate and contrary to the Commission's regulatory purpose. It is sensible to permit confidential S-1 filings, in accordance with the JOBS Act, because the pre-IPO regulatory process is complex and iterative. Allowing issuers to ask the Commission for a confidential pre-IPO review will streamline and improve the quality of exchange listing, and already since the JOBS Act went into effect the majority of S-1 filings submitted to the Commission have utilized the new confidentiality procedure. However, the issuers in question have not commenced their proposed exchange-listed or registered public Offerings as of the date that the S-1 is filed, so there is a compelling reason to allow confidentiality in such a filing if requested by the issuer.

There is no compelling reason, and it makes no logical sense, to allow a public Offering of unregistered securities to be commenced with a confidential Form D filing. If the Commission were to make a Rule in the future permitting confidential Form D filings, those would need to be limited to Offerings that do not involve any general solicitation or general advertising. However the problem with allowing Form D to be filed confidentially, even in the case of private securities Offerings, is that any secondary market resales (including by way of a private secondary market such as SharesPost or SecondMarket) must be able to reasonably filter out completely-illegitimate securities. If the Commission does not operate THE DEFINITIVE FORENSIC DATABASE of all issuers that have conducted prior unregistered securities Offerings then there will be no definitive database of such issuers and therefore no starting point for any potential future secondary market operator or potential purchasers of securities to search in doing minimal due diligence prior to facilitating or becoming a buyer in a resale transaction. If there were such a thing as a confidential Form D filing, there would need to be a mechanism for future publication of the formerly-confidential filing, and holders of securities issued by issuers “in secret” that are raising capital and operating “in stealth mode” would be effectively unable to resell their securities privately.

“5) Allow for more confidentiality in Form-D filings. Compliance that provides strategic information to competition is worse than non-compliance.”

See: http://www.sec.gov/comments/s7-06-13/s70613-41.htm

Comment #98
On August 17, 2013 Michael Libes, Entrepreneur in Residence, Bainbridge Graduate Institute, urged changing the definition of accredited investor to include everyone who has at least twice the median household income or ten times average household net worth excluding the investor's primary residence. To further increase the definition, Mr. Libes suggests permitting anyone who has above-average net worth and also above-median earnings to self-certify as a “sophisticated” investor who already makes their own investment decisions such as by way of an online brokerage. I support this recommendation.

See: http://www.sec.gov/comments/s7-06-13/s70613-98.htm

Comment #113
On August 17, 2013, Iris Germanica commented that "slow teams will die in bootstrapping period, the fast ones will die in investment period" and pointed out that a fast-reacting team that doesn't take time to file documents with the Commission may have lower chances for survival because of the Proposed Rules, while a slow-moving team that does invest the time and resources in compliance will have low chances of survival, anyway, because they are slow-moving and choose to focus on things other than serving paying customers and communicating quickly and efficiently with prospective investors.

I believe this is very important market sentiment. I have personally experienced both fast-moving team dynamics and slow-moving team dynamics. The problems that slow-moving teams have should be easy to solve with the help of broker-dealers who should be legally allowed to help introduce anyone who is conducting a Rule 506(c) Offering. But this is like saying that every business should always have had no problem selling unregistered securities to big banks whom have always been exempted from the 1933 Securities Act prohibitions. If obtaining capital for a startup was as easy as bringing a PPM to a bank and signing a subscription agreement, then the JOBS Act would not have been necessary to force this broken industry to change itself to make capital available to more early-stage ventures.

The reason fast-moving teams have trouble with compliance is that the previous Rules were hard for everyone to understand, and many securities lawyers advised clients that it was not necessary to file a Form D in order to conduct a private placement Offering because failure to file did not result in a loss of eligibility for registration exemption. Fast-moving teams need to understand how easy it is, today, to file Form D, even in Rule 506(b) Offerings. Since it is unlikely that the banking industry will ever open its doors to funding startups, the Commission is, in effect, serving the basic function of banking proxy. It is, in my opinion, crucial for the Commission to collect at least a Form ID and a Form D from every issuer that conducts a Regulation D Offering. Issuers who do not offer to sell and sell securities across state lines never had to worry about Regulation D compliance in the past, and they won't have to worry about it in the future. Everyone else should be required to contact the banking proxy, since banks have utterly failed in their core purpose of serving customers because they choose to serve only themselves.

Although I support the comment, below, it is another example of a misunderstanding of the Proposed Rule for one-year disqualification. The commenter appears to think, as AngelList asserted wrongly, that the Offering that becomes non-compliant will be halted for one year. This is clearly not the intent, nor the wording, of the Proposed Rule. The Commission should clarify this immediately, and prominently. Fast-moving teams that do not comply with the Proposed Rules should indeed be prohibited from any pivot that cuts out their previous investors by commencing a new Offering instead of the Offering that became non-compliant. So-called "serial entrepreneurs" should not be pivoting every 15 days to new groups of investors while leaving their previous investors holding worthless securities. Such behavior is contrary to common sense and common decency and violates the spirit of investment agreements, even if it does not violate the letter of any Rule, Regulation or contract. I fully support the one-year period of disqualification only for ***future Offerings*** by anyone involved in a non-compliant Rule 506(c) Offering.

"Either you spend a day serving customers who feed the team, or filing some docs. As fast-reacting the team – as higher its chances to make it to the 1st investment round – as higher their chances to be punished by one year ban from fundraising – as lower their chances for survival."

See: http://www.sec.gov/comments/s7-06-13/s70613-113.htm

Comment #294
On August 22, 2013, James Graham, COO/CFO, CMP.LY, commented that their company is already

providing workable solutions for regulatory compliance in social media and social networking. In my experience, James Graham and CMP.LY are correct that for those who wish to comply with regulations requiring, among other things, simple disclosures and legends similar to Proposed Rule 509, complying with such regulations has been workable in practice. The more regulatory compliance there is in the marketplace, the more compliance will become the accepted normal standard of practice and the better everyone will be, on average, at complying. Provided that the compliance requirements are reasonable and serve a legitimate purpose, and provided that regulations and the Commission's Rules are crafted in such a way as to first comply with the constitution and with common sense, I support whatever Rules may be finally adopted for the Proposed Rule 509. The SEC should consider my previous suggestions relating to the creation of an SEC.GOV/509 web page and the requirement that this short-form URL, which everyone can easily understand who is familiar with Web page addressing, should be included by issuers in any published general solicitation materials and other Rule 506(c) advertising campaigns.

The Commission should also formally adopt its own Twitter hashtag for Rule 509 compliance, such as:

#RULE509

Which would allow issuers to explicitly draw attention to tweets representing general solicitations, and allow the Commission to measure or monitor the amount of Rule 506(c) fundraising activity over time.

"In the past, we have seen respondents complain that regulatory requirements for disclosure and/or monitoring in social media were burdensome and impractical. The Commission and other agencies (notably the Federal Trade Commission) have responded with guidance on how to use hyperlinks and other solutions to provide disclosure in mobile and short form environments in other instances. We believe that similar solutions can be equally effective in this context and we view protests from other respondents with skepticism."

See: http://www.sec.gov/comments/s7-06-13/s70613-294.pdf

The Commission simply MUST do more to explain to everyone what "best practices" consist of today. Profiles of evolving interpretations of "capital formation" and "investing" and "investors" are essential. Not only do too few people comprehend the complex and nuanced, non-linear force that is "business" but the very meaning of "corporation" evolves. See: http://en.wikipedia.org/wiki/Benefit_corporation The SEC has Spotlight pages on Enron, Worldcom, Foreign Corrupt Practices Act and insider trading. There should clearly also be Spotlights shined by the Commission on "good actors" not just bad ones.

http://www.sec.gov/spotlight/enron.htm
http://www.sec.gov/spotlight/worldcom.htm
http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml
http://www.sec.gov/spotlight/insidertrading/cases.shtml

"The SEC hosts an annual forum that focuses on the capital formation concerns of small business. Called the 'SEC Government-Business Forum on Small Business Capital Formation,' this gathering has assembled annually since 1982, as mandated by the Small Business Investment Incentive Act of 1980. A major purpose of the Forum is to provide a platform to highlight perceived unnecessary impediments to small business capital formation and address whether they can be eliminated or reduced. Each forum seeks to develop recommendations for government and private action to improve the environment for small business capital formation consistent with other public policy goals including investor protection"

http://www.sec.gov/info/smallbus/sbforum.shtml

Finally, many people have said the same thing in hundreds of comment letters: “why are you making it harder to raise capital instead of easier?” This is unbelievable, how can anyone say such a thing? The 1933 Securities Act made it harder to raise capital by removing a constitutionally-guaranteed freedom. That freedom has been restored, and only now people are complaining about being required to file a few forms with the SEC? It is as though they don't comprehend how important it is that the constitution has been restored to its rightful place as the governing law of the United States of America. In my view, people who complain about being required to file forms were violating the 1933 Securities Act every day of their lives and they were happy that the majority of other people were not doing so because it made raising capital easier for them – less competition, because most people followed the insane law.

In response to these comments, and to everyone who has asserted things like “15 days is an eternity for a startup” or “if we have to wait 15 days before we can start raising money, then we won't even try” my response is that such ideas are so patently false that it's impossible to take seriously anything else that these people have to say. I have been working for over 15 years to try to raise capital for my startups.

Like many other people who have been doing the same, I have managed to keep myself employed and have had some big profitable successes as well as some setbacks during this time, just like anyone else who has self-funded successfully for decades. My startups are obviously valuable, innovative, and can make a real difference in people's lives and they could help to shape the future of entire industries. But finding the right mix of market conditions, personal and professional relationships, and recognition by others that what you are doing is likely to produce enough value if they invest in it that they will realize a profit in an equitable fashion when you do, yourself, is incredibly difficult and improbable. Having the best idea, being first to market, and being uncapitalized is the same as being a spectator at a football game rather than owning a team or even being a player or coach on the field. Without capital there is no chance that a small company can grow into a bigger one, just as there is no chance that somebody in the audience watching the game is going to be asked to replace any player or coach on the field.

When customers provide the capital, when companies self-fund by bootstrapping and from co-founder equity or personal credit cards, as the majority of startups do, just staying in business is the typical measure of success but real growth remains elusive, because real growth requires substantial capital.

Capital lines up the teams and sets the game in motion. Forming capital privately, the old way, is unfair. In every instance where funding meets talent, it is the capital that decides it is going to buy a team, and the individuals who occupy the position of good fortune are usually not any better than any other team that didn't get funded. Over time the capital makes the team better, or the capital goes somewhere to die because it didn't care enough in the first place to try to make sure the team could win. What everyone deserves a fundamental right to do, in compliance with regulation, is to communicate publicly that they are seeking capital for the improvement of their team, and their industry, and to say that they are open to outside owners and capital, so that they can get into the game instead of watching from the audience.

To anyone who thinks that complying with regulations makes it “harder” to raise capital, now that the constitutional right to speak publicly about raising capital has been abolished (finally, after 79 years), I would like to say that you are completely wrong. The thing that is going to make it harder for **you** to raise capital is that now you will be competing on a level playing field with law-abiding citizens who have always been more skilled, more dedicated, than you are, both to their startups and to their ethics.

It will indeed be more difficult for unethical people who refuse to follow the law to attract the majority of the startup capital in the future. This should make it possible for many more startups to get funded!

I hope everyone enjoys the freedom to try to raise capital from the public. It is our constitutional right.