



January 23, 2014

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: File No.: S7-09-13; Due diligence as a means for funding portals to limit offerings**

Dear Ms. Murphy:

I write to ask that the Commission provide further clarification on the means in which registered funding portals may reasonably limit the offerings on its platform without running afoul of the prohibition on providing investment advice. The need for further clarification is highlighted by general confusion present about the acceptable limitations funding portals utilize when issuers approach the platform. I ask that the Commission provide clarification through instruction to proposed Rule 402(b)(1) that clarifies that satisfactorily completing an objective due diligence program does not constitute impermissible investment advice.

**Existing confusion regarding funding portals limiting the securities offered on its platform**

In order to satisfy the statutory directive that registered funding portals be prohibited from offering investment advice, but still be able to perform its role as a gatekeeper for securities issuers, the Commission has proposed a safe harbor rule that allows funding portals to "apply objective criteria to limit the securities offered."<sup>1</sup> The Commission goes on to note types of objective criteria, including the type of securities offered, geographic location of the issuer, and the industry or business segment of the issuer. The Commission provides that these limitations may not involve the "advisability of investing in the issuer or its offering, except to the extent described in paragraph (b)(10)."<sup>2</sup>

It is in this final clause of Proposed Rule 402(b)(1)(ii) where funding portal promoters are confused as to what they are able to do. For instance, in testimony before the Senate Subcommittee on Securities, Insurance, and Investment of the Committee on Banking, Housing, and Urban Affairs, panelists expressed concern that funding portals would be required to allow issuers that are not ready to raise capital or present risks unsuitable to investors.<sup>3</sup> Additionally, in testimony before the House Subcommittee on Investigations, Oversight and Regulations of the Committee on Small Business,

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<sup>1</sup> Proposed Rule 402(b)(1).

<sup>2</sup> Proposed Rule 402(b)(1)(ii).

<sup>3</sup> See The JOBS Act at a Year and a Half: Assessing Progress and Unmet Opportunities: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs, 113th Cong. (2013) (prepared testimony of Sherwood Neiss, Crowdfund Capital Advisors, LLC).

panelists conveyed their unease that funding portals would be liable for the missteps of an issuer when they have little discretion on whether to do business with that issuer.<sup>4</sup>

### **Proposed instruction to proposed Rule 402(b)(1)**

In light of the present confusion about the appropriate activities of funding portals in the course of limiting the offerings on their platforms, I ask that the Commission consider an instruction to proposed Rule 402(b)(1) that clarifies that the satisfaction of objective due diligence, and including the results of such due diligence does not constitute a limitation based on the advisability of investing in the issuer or its offering. Such instruction could highlight the provision contained in proposed Rule 402(b)(10), specifically that the funding portal may deny access to its platform should the funding portal believe the issuer may present the potential for fraud or otherwise raise investor protection concerns as a result of such due diligence.

Thank you for your consideration,

Andrew D. Stephenson  
Research Manager, CrowdCheck, Inc.

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<sup>4</sup> See SEC's Crowdfunding Proposal: Will it Work for Small Businesses?: Hearing Before the Subcomm. on Investigations, Oversight and Regulations of the H. Comm. on Small Business, 113th Cong. (2014) (prepared testimony of Daniel Gorfine, Director, Financial Markets Policy, Milken Institute).