seedinvest

February 3, 2014

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

Re: Proposed Rule Crowdfunding S7-09-13: Balancing the Funding Portal and Broker-Dealer Regulatory Regimes

Dear SEC Commissioners and Staff:

We appreciate the opportunity to comment on Proposed Regulation Crowdfunding ("Proposed Rules") promulgated pursuant to Title III of the Jumpstart Our Business Startups Act (the JOBS Act).

Balancing the regulatory regimes applicable to funding portals and broker-dealers is central to the orderly operation of the crowdfunding market. In short, funding portals should generally act as more passive facilitators (with appropriate limitations on liability and obligations) and broker-dealers should play a more traditional intermediary role without being inappropriately limited from doing funding portal style deals.

Liability of Funding Portals

The Proposed Rules put Funding Portals between a rock and a hard place.[1] On the one hand, they are prohibited from curating deals or giving investment recommendations and on the other hand, the funding portal, and each of their directors and officers personally, are deemed to be "issuers" and therefore take responsibility (and liability) of the statements of every issuer.[2]

[1] New Section 4A(c)(2) of the Securities Act provides that an "issuer" will be subject to liability if it, by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by any means of any written or oral communication, in the offering or sale of a security in a transaction exempted by the provisions of Section 4(a)(6), makes an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission; and does not sustain the burden of proof that such issuer did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

[2] "Issuer" is broadly defined to include any person who is a director or partner of the issuer, and the principal executive officer or officers, principal financial officer, and controller or principal accounting officer of the issuer (and any person occupying a similar status or performing a similar function) that offers or sells a security in crowdfunding exempt offering, and any person who offers or sells the security in such offering). The Proposed Rules further indicate that a funding portal "would likely" be considered an "Issuer" for these purposes.

This has several adverse and potentially unintended consequences:

1. Insurmountable Costs. A Funding Portal will have to conduct an independent investigation on every statement in every offering document by every issuer in order to limit any potential future liability. Broker-dealers largely refuse to assist issuers with sub-$2 million raises as it is uneconomical given the costs of conducting a reasonable level of due diligence. Including Funding Portals in the definition of "Issuer" effectively subjects them to the same due diligence requirements as broker-dealers while also prohibiting them from declining extremely risky issuers (unless it suspects fraud) as this would be deemed "investment advice."

2. Strike Lawsuits. It is important to note that the burden of proof is on the Funding Portal to prove that they could not have known about any material misstatements. This could lead to rampant strike suits against funding portal for any deal that loses money.

3. Portal Insurance. In light of the high risks associated with being deemed to be an issuer of every offering on the funding portal, it will likely be cost prohibitive to get appropriate insurance coverage (if coverage can be obtained at all).

4. Exponential Personal Liability to Portal Directors and Officers. The funding portal, as well as each of its directors, principal executive officers and any other employees involved in the offering personally, now have liability where they have to bear the burden of proof for every transaction conducted through the portal. This means that if the portal does 100 $1 million deals, then each of the affiliates of the portal will have $100M in personal exposure, where they would have to bear the burden of proof and be subject to strike suits.

5. Adverse Selection of Market Participants. In light of the foregoing, those considering becoming a funding portal will have to look long and hard at these liability provisions. Each employee will have to make a decision on whether or not they can expose themselves and their family to this type of liability and the potential to be named personally in hundreds of lawsuits. The Proposed Rules on liability could lead to adverse selection, where conservative market players are scared away and aggressive players are the only ones willing to take on these risks.

In light of the foregoing, we request the following revisions to Regulation Crowdfunding:

1. Funding Portal Safe Harbor; Interpretative Language.
    a. In light the Funding Portal's status as a limited facilitator (not an offeror) of securities transactions, we believe that the SEC should adopt a specific safe harbor excluding funding portals and their directors and officers from the definition of "Issuer" for purposes of Section 4A(c)(2) of the Securities Act.

b. Alternatively, if the SEC believes that it does not have authority to adopt such a safe harbor,[3] it should, at a minimum, strike the following interpretive language on page 280 of the Proposed Rules "On the basis of this definition, **it appears likely** that intermediaries, including funding portals, would be considered issuers for purposes of this liability provision."

c. Further, it should adopt interpretative language indicating that the new entity "Funding Portal" was designed and intended by Congress to not "offer or sell securities" but rather to function as a platform for Issuers to offer and sell their own securities and thus is likely not an "Issuer."

2. Reasonable Procedures to Prevent Fraud. In lieu of being deemed an "Issuer" and taking on liability for each offering, a Funding Portal should be required to implement policies and procedures reasonably designed to prevent fraud as a regulatory requirement (but not a condition to an exemption). This flexibility will allow the market to use technology and experience to implement appropriate controls without subjecting themselves to either excessive due diligence requirements or liability costs.

Broker-Dealer Crowdfunding Offerings

Similarly, clarifications are needed for crowdfunding offerings conducted through registered broker-dealers. In short, registered broker-dealers should not be penalized for their decision to become a more regulated entity.

1. Suitability Requirements. The logistics of doing an individual suitability analysis on hundreds or thousands of small investments (potentially at $50 or $100 each) would preclude a broker-dealer from conducting crowdfunding offerings. Therefore, we request a safe harbor whereby an investment occurring pursuant to Regulation Crowdfunding is deemed suitable to an investor where the amount of the investment is within the individual limits set forth in Section 4(6)(B) of the Securities Act of 1933.

2. "Do-it-Yourself" Offerings. A registered broker-dealer should be able to conduct "funding portal" style crowdfunding transactions under the following conditions:

   a. the broker-dealer does not make any investment recommendation or give investment advice;
   b. the broker-dealer does not solicit investments in such offering
   c. there is clear disclosure that the broker-dealer has not vetted the investments and that all material is being presented by the Issuer; and
   d. where the Issuers are primarily responsible for marketing their offering

[3] See Pinter v. Dahl - 486 U.S. 622 (1988) (holding that a non-owner of securities **must solicit the purchase**, motivated at least in part by a desire to serve his own financial interests or those of the securities owner, in order to qualify as a "seller" within the meaning of § 12(1)). We believe that funding portals would not be deemed to be a "seller" under this ruling because they **will not solicit for**, recommend or advocate particular offerings, as further reinforced by the limitations on curation in the Proposed Rules.

These “do-it-yourself” style offerings would be subject to the same requirements as a funding portal with no specific due diligence or suitability requirements.

Conclusion

We believe that the foregoing revisions to proposed Regulation Crowdfunding are necessary to create an orderly and efficient crowdfunding marketplace and that, with the appropriate regulatory regime, crowdfunding can be a driving force for innovation and job creation.

Again, we’d like to thank the Commission and the Staff for all their efforts in proposing Regulation Crowdfunding and look forward to continuing the conversation as the regulations and market develop.

Respectfully,

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