

February 3, 2014

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street NE.  
Washington, DC 20549-1090

**SUBJECT: File Number S7-09-13, Response to Request for Comment 37\***

Dear Secretary Murphy,

With regards to the Proposed Crowdfunding Rules, please: (i) eliminate the requirement for issuers to describe how securities being offered are being valued; or (ii) provide “safe harbor” language that issuers can use to describe how the securities being offered are being valued.

**The § 227.201(m)(4) Requirement**

Pursuant to § 227.201 of the Proposed Crowdfunding Rules:

An issuer offering or selling securities in reliance on Section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with Section 4A of the Securities Act (15 U.S.C. 77d-1) and this part must file with the Commission on the Electronic Data Gathering, Analysis, and Retrieval system (EDGAR), provide to investors and the relevant intermediary, and make available to potential investors the following information:

- ...(m) A description of the ownership and capital structure of the issuer, including:
  - ...(4) How the securities being offered are being valued, and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions...<sup>1</sup>

**The SEC’s Analysis Indicates the § 227.201(m)(4) Requirement is Inappropriate**

In the “Broad Economic Considerations” portion of the “Analysis of Proposed Rules” in the “Economic Analysis” section of the Proposed Crowdfunding Rules, the SEC states that:

For issuers that pursue offerings in reliance on Section 4(a)(6), establishing an initial price might be challenging. Although the statute requires certain issuer disclosures and the proposed rules are intended to help investors evaluate the viability of the issuer and the initial offering, these disclosures may be insufficient for investors to determine an appropriate price since there would be no underwriter of the offering and the issuer may

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\* The comments and opinions expressed herein are those of the author and should not be attributed to his employer.

<sup>1</sup> 78 FED. REG. 66428 (Nov. 5, 2013) [hereinafter “Proposed Crowdfunding Rules”], § 227.201, 66552-66553; this requirement is also in the JOBS Act itself. Securities Act of 1933 § 4A(b)(1)(H)(iv), JOBS Act, Pub. L. No. 112-106, § 302(b), 126 Stat. 306 at 318 (2012) (to be codified at 15 U.S.C.A. § 77d-1(b)(H)(iv)).

not otherwise be skilled in valuation. It is not clear, therefore, how an initial offering price would be reached for many of the securities offered, nor how investors would be protected against poor initial valuations. These potential difficulties might limit investor participation in offerings made in reliance on Section 4(a)(6) and mitigate some of the associated benefits of capital formation.<sup>2</sup>

It seems unproductive and unfair to require issuers to do something (*i.e.*, state how the securities being offered are being valued) that the SEC suggests is impracticable – or even impossible – to do (*i.e.*, since there is no clear way to value many of the securities that will be offered).

Thus, please: (i) eliminate the requirement for issuers to describe how securities being offered are being valued; or (ii) provide safe harbor language that issuers can use to describe how the securities being offered are being valued.

Moreover, if safe harbor language is provided, perhaps such language could reflect the belief that, when valuing entrepreneurial ventures, “[t]he reality is that one might as well stick a finger in the wind, and see which way the breeze is blowing.”<sup>3</sup> In addition to giving issuers some much needed flexibility (and acknowledging the challenges and reality of the situation), such language may help investors better appreciate some of the difficulties and risks involved in investing in startups and other early stage companies. Alternatively, perhaps such language could state that the offering price is simply a function of (i) how much the issuer desires to raise and (ii) the amount of shares the issuer is willing to issue to raise that amount (as opposed to an estimate of the economic value of said shares).

Thank you, Secretary (and other members of the Securities and Exchange Commission) for your hard work on this matter. It is no doubt important and challenging to balance the goal of protecting investors with the goal of making it easier for companies to raise funds they desperately need to grow. I hope the suggestions in this letter support both of these important goals.

Please feel free to contact me at 773-895-1305 if I may be of assistance.

Sincerely,

Jeff Thomas

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<sup>2</sup> Proposed Crowdfunding Rules, *supra* note 1, at 66518.

<sup>3</sup> Paul Broude & Joseph Levangie, *Entrepreneurial Financing-Alternatives for Raising Capital*, New England Journal of Entrepreneurship, Vol. 9 Nbr. 2 (Oct. 2006), 55 at 58.