Verrill Dana LLP
Attorneys at Law

GREGORY S. FRYER
[redacted]
direct dial: [redacted]

ONE PORTLAND SQUARE
PORTLAND, MAINE 04112-0586
207-774-4000 • FAX 207-774-7499

February 5, 2014

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

Re: Release No. 33-9470
Crowdfunding Proposal

Dear Ms. Murphy:

I appreciate the opportunity to comment on the proposed Crowdfunding Rule contained in Release No. 33-9470.[1]

Many have expressed concerns that the Proposed Rule does not go far enough to protect unsophisticated purchasers. At the same time, many others have expressed concerns that the regulatory burdens of the Proposed Rule make this exemption too expensive to be useful. Conflicting objectives are inherent in the statute, and the Commission is in the difficult position of needing to strike an acceptable balance. In this letter, I offer my own views about an acceptable balance.

1. Overall Approach: Construe Investor Limits Narrowly but Scale Back Regulatory Complexities

In its January 16, 2014 comment letter, the SBA Office of Advocacy argues that the Proposing Release grossly underestimates the true cost of complying with the Commission's proposals. I agree with that assessment, and I worry about the implications. If the Crowdfunding Rule is too complex and too expensive to be practical, then securities crowdfunding will never be a meaningful source of capital for small businesses. Continued inefficiency of capital markets at the small business level imposes costs and risks on us all, even if more diffusely allocated than the risk of an individual investor losing his or her entire amount invested in a particular company.

I favor the approach advocated by the Cornell Securities Law Clinic in their February 3, 2014 comment letter – adopt a *lower* of net worth or income standard in order to further limit the investment risk that can be assumed by any one person, and then strip away as much complexity

[1] *Crowdfunding*, 78 Fed. Reg. 66427 (Nov. 5, 2013) (the "Proposing Release").

and cost from the Proposed Rule as seems tolerable. Such an approach would lend support to arguments for, *e.g.*, eliminating audit requirements for issuer financial statements, requiring only one year of accountant reviews for offers exceeding $100,000, carving back the mandatory content of offering materials and of post-offering reports, and narrowing the scope of the funding portal's or broker's due diligence obligations to evaluate issuer-prepared content in the offering materials.

2. Construe Narrowly the Statutory Restrictions on Advertising

Section 4A(b)(2) of the JOBS Act provides that an issuer shall not "advertise the terms of the offering," except for notices which direct investors to the funding portal or broker. The Commission's Proposed Rule 204 would only allow stylized advertisements similar to the tombstone notices under Securities Act Rule 134. A rigid tombstone approach is inconsistent with the structure and informality of modern social media communication tools.

I encourage the Commission to construe narrowly what it means to advertise "the terms of the offering." I believe Rule 204 should be rewritten to allow an issuer broad leeway to publicize its business or its offering on its own website, Facebook page, LinkedIn posting, etc., so long as the specific terms of the offering can be found only through the funding portal or broker. In my view, the Crowdfunding Rule should allow even the following: "Interested in becoming a shareholder? Good news - we are in the process of conducting an offering of our stock. For details, go to ____." If a reader is referred to the funding portal or broker in order to find out the terms of the offering, the requirements of Section 4A(b)(2) have not been violated. This flexible approach would also make it more practical to conduct a contemporaneous Rule 506(c) offering to accredited investors.[2]

3. Allow Issuer-Specific Funding Vehicles

The Commission should state affirmatively that a sole purpose funding vehicle is an eligible issuer under Section 4(6) of the Securities Act, will not be regulated as an investment company, and for securities law purposes will be treated as an instrument of the underlying issuer.

A successful crowdfunding offering can result in large numbers of holders. This poses challenges for the issuer. Given that the JOBS Act did not purport to regulate the terms of securities sold, the Crowdfunding Rule should permit the sale of interests in an LLC or trust whose sole purpose is to purchase and hold stock or notes of one issuer. This could allow an issuer to deal with one representative instead of dozens of small holders, and could also have the effect of aggregating the voting power or other negotiating or enforcement leverage of a multitude of small holders. A similar result could be achieved through some special class of

[2] See Proposing Release, at text accompanying Note 33: "[I]n light of Section 4A(g) and the reasons discussed above, we believe that an offering made in reliance on Section 4(a)(6) should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the applicable exemption that is being relied upon for the particular offering."

stock or other contractual means – but with greater complexity and cost, to no good purpose. The Commission should instead confirm that these funding vehicles are permissible if limited to the securities of a single issuer. I believe that would quickly result in the development and widespread use of simple, standardized vehicles for that purpose.

* * *

The Proposing Release is an impressive piece of work by the Commission's Staff, setting out an interesting mix of the familiar and the new. However, the Staff's work will be for naught if the Crowdfunding Rule strays too far from practicality. I encourage the Commission to act boldly to simplify the Crowdfunding Rule wherever feasible, in return for scaling back the permitted per-purchaser investment limitations.

At the same time, I would encourage the Commission to look hard at Tier 1 of Regulation A. Currently that exemption involves an inordinate level of Staff review[3], rendering it all but useless. These offerings also generally entail State securities commission review, further complicating the process. If Regulation A received more expeditious treatment from regulators, the result would be a high quality disclosure platform on which to conduct a broad-based offering, even through social media outlets. That, in turn, could free up the Crowdfunding Rule to focus on providing an efficient platform for offerings where a more rigid distribution process and smaller per-investor purchases allow for more abbreviated disclosures.

The Commission is to be commended for the series of JOBS Act rules it has published over the past six months. These have the potential to greatly expand access to capital by small businesses throughout this country, and thus are well worth the amount of effort devoted to them.

Very truly yours,

Gregory S. Fryer

GSF/ddm

5089254_1

[3] The Commission recently published statistics that (depending on which of three permitted disclosure formats an issuer chooses) the average time to qualify a Regulation A offering is 301 days or 220 days or 167 days. The format that takes longest to qualify is "Model A" of SEC Form 1-A, which was the original NASAA-designed Q&A format, intended to be more issuer- and reader-friendly. (In 1999, NASAA published what it considered to be an improved version, but the Staff still refuses to accept that format for reasons it has never announced.) The format that receives the "quickest" qualification is Form S-1, the same form used for full-blown registered offerings. The other permitted format is "Model B," which is essentially a shortened version of Form S-1.