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February 20, 2014

Via Electronic Mail at rule-comments@sec.gov

Honorable Mary Jo White, Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Comments on SEC Proposed Rule: Crowdfunding; Release Nos. 33.9470, 34-70741; File Number S7-09-13

Dear Chair White:

This letter will supplement my letter to the Commission dated February 11, 2014. The purpose of this supplemental letter is to focus the Commission on additional factors negatively impacting small issuers under Title III, which could be significantly mitigated if the Commission were to follow the recommendations of both the SBA Office of Advocacy and the overwhelming consensus of the participants in the 2012 SEC Government-Small Business Forum held in November 2012, both calling for *an optional simplified Title III disclosure format to be provided by the Commission.*

It appears from the proposed rules that the Commission's solution to complex, burdensome disclosure rules has largely been left to either intermediaries or third party service providers – this is problematic for a number of reasons.

Risk of Litigation

We live in a litigious society. The court dockets are replete with cases of investors suing a company for the return of their invested capital, often because of allegations that statutorily required disclosures were either misleading or materially incomplete. Sometimes these suits are meritorious – often they are not. Unmeritorious lawsuits nonetheless present a significant, and unnecessary cost burden – a burden which disproportionately impacts small businesses with limited resources.

Providing a plain-English optional form of disclosure by the SEC, as opposed to simply a laundry list of "registration statement-like" rules, would be an important step towards mitigating the risk of frivolous litigation against issuers – by removing much of the unnecessary uncertainty of whether full and adequate disclosure had been made.

Moreover, in the absence of effective disclosure guidance by the Commission, many issuers may find themselves forced to go down the same path that SEC registered companies take, by *overdisclosin*g information – something that small issuers can least afford – and something the Commission is publicly stating that it intends to reduce for *all* companies at some time in the future.

Alternatively, some small issuers may choose to not go down the Title III crowdfunding path at all – either foregoing their financing entirely, or pursuing a capital raise under an exemption that requires no disclosure, such as Regulation D. The former solution will not facilitate a robust crowdfunding market. The latter solution will not be available unless the issuer *limits its investors to accredited investors*. In either case, the failure to provide a simplified disclosure format is a potential industry killer for Title III crowdfunding.

Third party service providers, though they may be able to streamline the disclosure process and remove some of the disclosure burden, ***provide no solution to the risk of broad exposure to liability by issuers which uncertain, complex disclosure rules engender.*** Indeed, at the end of the day these solutions may ultimately provide little more than a false sense of security to an issuer.

Other Avoidable Risk Factors

Other factors compound the risk that registration statement-like rules, without strong guidance by the Commission, will unnecessarily lead to disastrous consequences for an issuer. These consequences will ultimately trickle down to, or ultimately drown out entirely, the interests of a small investor. These risk-compounding factors include the following.

- The umbrella of protection afforded by state laws requiring securities disclosure services to be performed by licensed attorneys are effectively *pre-empted* by federal law. Under both Title III and the proposed regulations, third party service providers are entirely unregulated – allowing what one commentator has referred to as a "cottage industry" of legal services which may ultimately be performed by unlicensed, unregulated individuals and entities.

- Though many intermediaries or third party service providers may offer high quality disclosure related advice and services – others may not – especially in a highly cost-sensitive market where disclosure responsibilities may ultimately reside in the hands of the lowest bidder.

- Unlike a non-crowdfunded offering, where the issuer often engages *his own securities counsel*, intermediaries and many of the third party services providing disclosure often will have no attorney-client relationship with the issuer. Indeed, many of these services may ultimately be performed without the involvement of any attorneys. An issuer, when faced with any resulting litigation, may very well learn too late that communications with its intermediary or third party service provider are not covered by the attorney-client privilege. So, for example, should the issuer fail to heed the advice of its disclosure service or intermediary that "more disclosure is better than less," the issuer may find that the communication of this advice is not protected by the attorney-client privilege – thus admissible against the issuer in a subsequent legal proceeding.

In other words, an issuer may face one of two choices: ***either "overdisclose" or "case closed."***

In sum, third party or intermediary solutions to disclosure are *not* a substitute for the Commission providing disclosure guidance through a simplified, optional disclosure format. Indeed, third party solutions will more often than not compound the very risk that could be mitigated by a more proactive Commission.

As noted in my Comment Letter of February 11. 2014, proponents of a simplified disclosure format, perhaps in a "Q and A" format, include:

1. The aggregate consensus of the 2012 SEC Government Small Business Forum
2. The SBA Office of Advocacy.

Moreover, this approach has been followed by NASAA, in conjunction with the American Bar Association, for "SCOR" offerings under $1 million, in over 30 states and for more than 15 years.

Even the SEC has, until recently, been a proponent of this approach for smaller offerings under Regulation A.[1]

Indeed, the only possible reason that this commentator can posit for the Commission not providing an optional form of simplified disclosure would be an administrative decision by the Commission that its limited resources are best utilized, or more needed, elsewhere – a theme which appears to explain the failure of the Commission to proceed with its well publicized 2008 disclosure simplification initiative.

This logic, however, would fly in the face of the Regulatory Flexibility Act of 1980. Indeed, it would suggest that the Regulatory Flexibility Act is a dead letter. As the Commission is aware, the Regulatory Flexibility Act requires the Commission, in rulemaking affecting "small issuers", to consider alternatives which are less burdensome on "small issuers", ***not alternatives which are less burdensome to the Commission.***

[1] The Commission has recently proposed to *eliminate* the question and answer disclosure format for Regulation A offerings on two grounds. One of the grounds, ease of review of disclosure statements for the SEC, is not applicable to Title III, as there is no SEC review of Title III disclosure documents. The other cited ground, that this format has been found by the Commission to be confusing to investors, seems to be lacking in any statistically meaningful factual support –given the paucity of Regulation A offerings which have been consummated, and the absence of reports of investor confusion by NASAA for SCOR offerings.

I would be pleased to discuss these matters further at your convenience.

Respectfully submitted,

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cc: Dillon Taylor, Assistant Chief Counsel
U. S. Small Business Administration
Office of Advocacy