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CrowdFunding American Businesses

December 6, 2013

Securities and Exchange Commission
Washington, DC

RE: Comments on S7-09-13 Crowdfunding
II.C. "Requirements on Intermediaries" Responses to Questions

Dear Staff:

We would like to respond to select questions under Section II.C. "Requirements on Intermediaries" of the Proposed Rules:

Q.122. Should we permit an intermediary to receive a financial interest in an issuer as compensation?
Answer: Yes. A 4(a)(6) offering is an exemption under the Act. And BD's commonly receive warrant coverage and other types of equity compensation from issuers when assisting them in raising capital via private securities exemptions. So precedent would support a BD being able to receive the same type of compensation here as in any other sale of private securities under exemptions to the Act.
Furthermore: In instances where a BD is servicing a particularly cash strapped issuer, one who cannot afford to cover even the basic costs of background checks, legal reviews, accounting review, etc, but who the BD believes to be an extraordinary opportunity, then the BD, by the ability to accept a financial interest in the issuer, could choose to absorb those costs directly and provide assistance to the issuer with their offering to help them obtain funding and create jobs. Something which seems solidly in the public interest.

Q123. If an intermediary receives a financial interest in an issuer, should it be permitted to provide future services (whether it retains the financial interest or not)?
Answer: Yes, absolutely. Many BD's provide a wide variety of services to issuers, including banking, treasury management, 401K plans, future capital strategy, etc.

Q.128. Are there other less costly services (than an RTA) an issuer can use to assist with recordkeeping?
Answer: Yes, the eco-system will grow to include software applications that address this need. An example is www.CapSchedule.com – which is a low cost, software-as-a-service solution which fills the gap between an issuer managing records themselves using Excel and Outlook, and the time when they grow to a point where it makes sense for them to use an expensive RTA.

Q.133. Should we specify that an intermediary check various specific databases for background checks?
Answer: So long as the BD checks comply with the Patriot Act, which is already a requirement they must satisfy, then no other checks should be mandated.

Q.138. Should we specify the types of information that an intermediary must obtain at account-opening?
Answer: No. BD's already have millions of accounts open, and open thousands more every day. The 4(a)(6) platform will often be incorporated into their operations and not operate as a separate, remote, detached system. The existing requirements for KYC and other items which BD's collect when they open investor accounts should be sufficient. When an investor desires to participate in a 4(a)(6) offering via the BD's website they may then need to enter into some additional agreements, such as Consent to Electronic Delivery and other things, just as they would need to do if they wanted to invest in options, or upgrade their cash account to a margin account, or any of countless other things.

Q.142. Should any of the proposed (educational) requirements be modified or deleted?
Answer: Yes! First, the rules should state that education must be done "prior to an investors first investment in a 4(a)(6) offering" and not at "account opening". The majority of a BD's customers will not necessarily participate in these offerings, and may be opening accounts to buy mutual funds or make investments unrelated to crowdfunding, and thus requiring a BD to force the investor through a crowdfunding educational course is not appropriate.
Furthermore: The rules should state that this education applies to "unaccredited investors" and not to accredited investors. Forcing venture capitalists, institutions, fund managers, wealthy individuals and other accredited investors to go through an elementary private-securities investment course would discourage their participation in offerings under this exemption.

Q.145. Should we require SEC/FINRA review of educational materials?
Answer: No, the rules are fine as stated and provide BD's with the flexibility to design their systems. To require regulatory review would just burden the SRO's staff. It could also hamper an intermediary's ability to launch as reviewing these materials may be highly subjective and staff could dictate unnecessary changes depending upon their personal interpretations. If an intermediary is out of compliance then that will come to light via either customer complaints or periodic SRO audits.

Q.146. Should we require intermediaries to provide educational materials at a different time other than account-opening?
Answer: Yes! As discussed above, it would be far more appropriate that a BD be required to ensure an unaccredited investor has gone through the educational process prior to their being able to make an initial investment in a 4(a)(6) offering. Not all accounts being opened (or which are currently open) at a BD are for crowdfunding.

Q.148. Should the proposed disclosures to investors be required to be made at some time other than account opening?
Answer: Yes! As with educational materials, compensation, and other items, not all accounts at a BD are for crowdfunding. We propose that the requirement state that the disclosure be made prior to any participant on the platform being able to post comments, reviews, ratings, or other promotional activities.

Q.150. Is the requirement regarding compensation disclosure appropriate? And would a time other than at account-opening be more appropriate?
Answer: The best way to disclose compensation is in the online offering memorandum and accompanying subscription agreement. BD's may negotiate different compensation arrangements for different offerings, and thus it is impossible to make a blanket statement with any specificity outside of each unique offering.
Furthermore: As discussed above, not all accounts open or being opened at a BD are for crowdfunding, thus it would be more appropriate to require compensation disclosure in each offering.

Q.153. Should we require intermediaries to continue to display issuer materials…after completion of the offering?
Answer: Yes, we believe an offering should be a permanent part of the public record so it can easily be referenced in the future. Thus it should be retained and displayed indefinitely.

Q.154. Should we require an intermediary to make efforts to ensure that an investor has actually reviewed the relevant issuer information?
Answer: No. All the information is online, including crowd vetting, and the issuer will have to sign risk disclosures and a subscription agreement. To require a BD to attempt to verify that an investor has reviewed, and therefore understands, "relevant issuer information" would open the BD and potentially the entire eco-system of professionals, including lawyers and accountants, to unnecessary liability (e.g. an issuer's business fails, not due to fraud or any nefarious reason, but tort attorney's jump on nuances of the offering that the BD did not "test" investors on and use that as a basis for claims). It is good there isn't such a requirement in the rules, as it could make things incredibly messy and expensive.

Q.155. Should we require intermediaries to deliver information to investors?
Answer: Only a .pdf of the signed subscription agreement and risk disclosures (via email). Everything else can be referenced by the investor online at any time.

Q.159. Is it an appropriate approach to allow intermediaries to rely on representations of investors?
Answer: Yes. To burden a BD with a requirement to vet someone who may only want to invest, say, $25 would be cost prohibitive and counter to the intent of the JOBS Act.

Q.160. Should we require an intermediary to (use) a centralized database to ensure investor compliance?
Answer: Only if this database is created and managed by the SEC, and platform participation is universally mandated. Most firms would not be comfortable sharing their customer information with a commercial provider and in an environment where there isn't a single, centralized standard.

Q.162. Should we require intermediaries to have investors acknowledge issuer or security-specific risks?
Answer: No, the proposed rules work well enough and give BD's appropriate flexibility in working with their customers.

Q.173. Are the proposed requirements for fund maintenance and transmission appropriate?
Answer: Yes, they are perfectly articulated and appropriate as is already the standard for other exempt offerings.

Q.176. Should we expressly incorporate into the rules prior guidance on 15c2-4?
Answer: No. The rules state compliance with 15c2-4 and thus prior guidance is already applicable. No need to restate or elaborate.

Q.179. Should we prohibit certain methods of payment?
Answer: Yes. Unfortunately credit cards have a chargeback period of up to 6 months, which will be far beyond the timeframe of closing an offering and remitting funds to the issuer. In the likely event of chargebacks, it may be impossible to recover the funds, and is a risk that escrow trustees would not want to assume, and that FP's with no net-capital requirement would not be in a position to cover. Plus, it could theoretically cause a funded offering to then be under-funded and at risk of causing the already-paid offering to be out of compliance and in need of recession. In other words…a mess. No other method of payment presents these issues.
Furthermore: We would propose that BD's, which have net capital requirements, be permitted to accept credit card payments from investors so long as the BD directly and unconditionally guaranty's the amounts obtained thereby to both the issuer and the escrow agent. Chargebacks should hit the BD's P&L, and thus their net-cap computations. This would solve all potential problems and enable this convenient form of transmission of funds by investors. Though it does open up the argument that the BD would be entitled to the ownership interests in the securities purchased by investors whose credit cards were charged back.

Q.183. Should an investor be required to reconfirm his investment after a material change?[A] Is the five business day period appropriate?[B]
Answer A: Yes, investors' status should change from "confirmed" to "pending" until they have reviewed the material changes and decided to either reconfirm or rescind their commitment. HOWEVER, there needs to be a statement or safe harbor that escrow is permitted to retain the investors' funds until the earlier of the investors' decision or the closing of the offering (at which time unconfirmed investors would <u>not</u> be included in the closing and their funds would be returned from escrow).
Answer B: 5 business days is not enough time. We would advocate that this be "indefinite" so as to give investors more time to consider the changes, and to give issuers more time to answer questions of individual investors and provide clarifications or make subsequent changes as needed.

Q.184. Should the proposed rules require that an offering be cancelled upon a material change?
Answer: Absolutely not! We anticipate that many offerings will undergo material changes, especially as investors work with issuers to negotiate or change the terms and make the deal more attractive. The costs of cancelling an offering, breaking escrow and refunding investors, recreating an offering, re-doing due diligence,

reestablishing escrow, and other costs would make the entire process unwieldy while annoying investors to the point where they just don't want to go through all the hassle. Plus it would lose all the crowd vetting, status updates and related information that had been posted to the offering, thereby doing a disservice to investors and the public.

Respectfully,

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