

MEMORANDUM

TO: File S7-11-13

FROM: Jessica Dickerson
Attorney-Adviser
Division of Corporation Finance
U.S. Securities and Exchange Commission

RE: Meeting with Representatives of Guzik & Associates and Seyfarth Shaw LLP

DATE: February 19, 2014

On February 19, 2014, Commission staff met with a representative of Guzik & Associates and a representative of Seyfarth Shaw LLP to discuss the proposed rules to implement Titles III and IV of the Jumpstart Our Business Startups Act.

The following Commission staff representatives participated: Sebastian Gomez Abero, Jessica Dickerson and Brandon Kinnard from the Division of Corporation Finance; Joseph Furey, Timothy White, Carla Carriveau and Zachary Davis from the Division of Trading and Markets; and Vladimir Ivanov from the Division of Economic and Risk Analysis.

The following representative of Guzik & Associates participated: Samuel Guzik.

The following representative of Seyfarth Shaw LLP participated: Georgia Quinn.



The Matrix: Crowdfunding and other JOBS Act Exemptions

By December 18, 2014 the Securities and Exchange Commission (SEC) had proposed or adopted regulations mandated by Titles II, III and IV of the Jumpstart Our Business Startups Act of 2012. Those regulations impact crowdfunding in many ways. Issuers will now have a menu of options when deciding what type of offering they want to conduct and what exemption from securities registration they want to use. Title II allows for crowdfunding targeting accredited investors only “Accredited Crowdfunding”, Title III allows for crowdfunding targeting the general public but with a \$1 million annual fundraising cap “Retail Crowdfunding” and Title IV allows for crowdfunding targeting the general public but subject to several restrictions including SEC approval of the offering “Registered Crowdfunding.” Of course there are benefits and burdens to each type of offering and fortunately the SEC has opened a comment period where interested parties can provide feedback and suggestions regarding the proposed rules.ⁱ Below is a matrix depicting key provisions of SEC regulations promulgated or proposed.ⁱⁱ

	Title II (506(c)) Accredited Crowdfunding	Title III (Reg. CF) (proposed) Retail Crowdfunding	Title IV (Reg. A+) (proposed) Registered Crowdfunding	
			Tier 1	Tier 2
Offering Cap	None	\$1 million	\$5 million	\$50 million
Type of Securities	No limitations	No limitations	Equity, debt, or debt convertible into equity (or guarantees thereof)	
Transferability	Restricted securities subject to Rule 144 holding periods (one year for non-affiliates) or other exemption	Restricted securities for one year	Freely transferable	
State Preemption	State preemption subject to state notice filings	State preemption	Required to comply with all applicable state securities laws ⁱⁱⁱ	State preemption
Investor Qualification	Accredited Investors only	General public	General public	
Investor Limits	No limitation	Greater of \$2k or 5% of annual income or net worth if < \$100k; 10% of annual income or net worth if \$100k or greater; capped at \$100k	No limitation	10% of annual income or net worth
Section 12(g) Reporting Cap	Up to 500 general public and 2,000 accredited investors before SEC reporting required	Reporting requirements do not apply	Up to 500 general public and 2,000 accredited investors before SEC reporting required ^{iv}	



	Title II (506(c)) Accredited Crowdfunding	Title III (Reg. CF) (proposed) Retail Crowdfunding	Title IV (Reg. A+) (proposed) Registered Crowdfunding	
			Tier 1	Tier 2
Sales Disclosure	No requisite offering document – usually a PPM (subject to anti-fraud rules)	Form C	Form 1-A Offering Circular	
Ongoing Disclosure	None	Form C-AR ^v	Form 1-Z within 30 days after termination or completion of offering	Annual, semi-annual and current reporting requirements ^{vi}
Financial Statements	No requisite financial statements (subject to anti-fraud rules)	GAAP financial statements for past two years; tax returns if raising \$100k or <; reviewed if raising > \$100k up to \$500k; audited if raising > \$500k ^{vii}	GAAP financials for past two years (only need to be audited if already available)	Audited GAAP financial statements for past two years
SEC Approval	None required	None required	SEC must affirmatively qualify offering prior to any sales ^{viii}	
Testing the Waters	Not applicable	Sales disclosure must go through the funding portal, limited advertising of portal offerings allowed outside of portal	Solicitation of interests permitted prior to offering as long as solicitation materials filed with the SEC at time of sale	
Bad Actor Disqualification	Bad actor participation disqualifies offering	Bad actor participation disqualifies offering	Bad actor participation disqualifies offering	
Accredited Investor Verification	Must take “reasonable steps” to ensure investor is accredited	Not applicable	Not applicable	
Electronic Filing on EDGAR	Only Form D required after initial close	Form C and ongoing disclosure requirements	Form 1-A	Form 1-A and ongoing disclosure requirements
Portal BD Registration	Funding portal must be registered broker-dealer in order to receive transaction based compensation	Can be registered funding portal or broker-dealer in order to receive transaction based compensation	Compensated solicitors must be registered broker-dealers to receive transaction based compensation	
12(a)(2) Liability	Private civil fraud liability	Private civil fraud liability	Private civil fraud liability	
10b-5 Liability	SEC/private anti-fraud liability	SEC/private anti-fraud liability	SEC/private anti-fraud liability	



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- ⁱ Comments relating to Title III Regulation CF are due by February 3, 2014 and comments relating to Title IV Regulation A+ are due by 60 days from the time the proposed rules are published in the Federal Register, so likely around the end of February.
- ⁱⁱ Potential showstoppers in the proposed regulations which may make them cost-inefficient or inoperable in a crowdfunding setting are in bold.
- ⁱⁱⁱ This is arguably what has made the old Regulation A unusable in the past as compliance with each state's regulatory regime is an expensive and lengthy process.
- ^{iv} Limiting the number of holders to 500 non-accredited investors will limit the ability to use crowdfunding which utilizes small investments from many people.
- ^v Ongoing disclosure requirements once the offer is complete will add substantial costs to an issuer's operating budget.
- ^{vi} Ongoing annual, semi-annual and current event reporting will be costly and is much closer to the SEC's reporting requirements under the Securities Exchange Act of 1934 than the old Regulation A required.
- ^{vii} Audited financial statements will be costly to prepare and may not be justified by the amount of money that may be raised under the offer limitation.
- ^{viii} Guidance from SEC is required as to the amount of time and expense this process will take.