



Financial Fraud Law Report

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SEC Proposes Rules for Crowdfunding Intermediaries

LANNY A. SCHWARTZ AND ZACHARY J. ZWEIHORN

This article provides an overview of the proposed crowdfunding exemption, focusing on the obligations under the proposed Securities and Exchange Commission rules applicable to crowdfunding intermediaries, as well as the proposed regulatory scheme for funding portals.

The Securities and Exchange Commission (“SEC”) recently proposed rules¹ under the JOBS Act (the “Proposed SEC Rules”) that would permit certain private issuers to raise investment capital through “crowdfunding” — a process of enabling a large number of investors to each make relatively small investments in an issuer via the Internet.

To facilitate crowdfunding, the Proposed SEC Rules provide a limited exemption from the registration requirements of the Securities Act of 1933 (the “Securities Act”), subject to limitations on the offering size, dollar amount per investor, issuer disclosure, and other requirements. The Proposed SEC Rules also create a regulatory framework for crowdfunding intermediaries (“intermediaries”), which must either be registered broker-dealers or a new type of SEC registrant called “funding portals.” As the JOBS Act and the Proposed SEC Rules require funding portals to become members of the Fi-

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nancial Industry Regulatory Authority (“FINRA”), FINRA has also proposed rules² (the “Proposed FINRA Rules”) that would apply to future funding portal members.

This article provides an overview of the crowdfunding exemption, focusing on the obligations under the Proposed SEC Rules applicable to all intermediaries, as well as the proposed regulatory scheme for funding portals.

While the crowdfunding exemption under the JOBS Act was intended to make it less costly for small businesses to raise relatively small amounts of capital, the statutory requirements and Proposed SEC Rules would condition the exemption on compliance by issuers and intermediaries with a significant number of potentially costly regulatory obligations. With a proposed limit of \$1 million on the amount that an issuer may raise via the crowdfunding exemption in any 12-month period, we expect many commenters to question whether the benefits of raising capital through crowdfunding or acting as a crowdfunding intermediary would be great enough to justify the compliance costs and potential liability risks. This is particularly true in light of other potentially available funding mechanisms, including another JOBS Act liberalization: the so-called “Regulation A Plus,” which, when implemented through separately proposed SEC rules, will have a \$50 million offering limit.

Comments on the Proposed SEC Rules and the Proposed FINRA Rules are due by February 3, 2014.

OVERVIEW OF PROPOSED CROWDFUNDING EXEMPTION

Under the Proposed SEC Rules, U.S. companies other than investment companies, companies required to file reports under the Securities Exchange Act of 1934 (the “Exchange Act”), blank check companies, companies without a specific business plan and certain bad actors, may be eligible to rely on an exemption from Securities Act registration under the JOBS Act crowdfunding exemption (Section 4(a)(6) of the Securities Act) to issue up to \$1 million during a 12-month period in crowdfunding transactions. In applying the \$1 million limit, an issuer must aggregate the amount of securities that it proposes to issue with any securities sold by its affiliates in reliance on the exemption during the same period. There is no limitation on investor sophistication or financial wherewithal, other than limits on each investor’s

maximum annual investment in offerings relying on the crowdfunding exemption. The maximum annual individual investor amount per issuer for all crowdfunding transactions relying on the exemption:

- Investors with annual income and net worth that are both less than \$100,000 may invest up to \$2,000 or five percent of the investor's annual income or net worth, whichever is greater; and
- Investors with either annual income or net worth of \$100,000 or more may invest up to 10 percent of the investor's annual income or net worth, whichever is greater, up to a maximum of \$100,000.

Any form of security may be eligible for the exemption, including equity or debt. Use of the crowdfunding exemption is not exclusive; an issuer may also engage in other exempt offerings provided that the issuer complies with the requirements of each exemption relied upon.

An exempt crowdfunding offering may only be conducted through a registered broker-dealer or registered funding portal, and each offering may only be conducted through a single intermediary. All crowdfunding transactions must occur exclusively through the intermediary's Internet website or similar electronic medium (a "platform"), and such offerings must be "electronic-only."

To be eligible for the exemption, issuers must file a Form C through the SEC's public EDGAR system and disclose a broad range of information, which includes the issuer's business, officers, directors, principal existing shareholders, offering risk factors, target offering size, description of the securities being offered, the issuer's capitalization and any existing debt, intended use of the proceeds, and the compensation to be paid to the intermediary. In addition, issuers must provide financial statements prepared in accordance with GAAP that, depending on the amount of securities that the issuer is offering and has offered via crowdfunding in the preceding 12 months, must be certified by the issuer's principal executive, or reviewed by or audited by an independent accountant. A narrative discussion of financial results must also be provided. So long as the securities issued in the crowdfunding offering remain outstanding and the issuer is not an Exchange Act reporting company, the issuer will be required to file annual reports providing updated

disclosures and financial statements. An issuer also must file regular updates on its progress in meeting the target offering under cover of Form C, which the intermediary must make available to investors and potential investors through its platform.

No advertising would be permitted for crowdfunding offerings (and no compensation may be paid by an issuer for promotional activities to be conducted) other than through the platform or limited “tombstone”-type notices directing investors to the platform. Issuers must take reasonable steps to ensure that any person who receives compensation to promote an offering of its securities in a crowdfunding transaction through an intermediary’s platform discloses its compensation in all communications.

Resales of securities issued in an exempt crowdfunding offering would be restricted for one year, subject to certain exceptions such as sales to the issuer or an accredited investor, but freely tradable thereafter.

PROPOSED REQUIREMENTS APPLICABLE TO INTERMEDIARIES

Intermediaries that facilitate crowdfunding transactions must be registered with the SEC either as a broker-dealer or as a funding portal, and in either case, be a member of FINRA. Unlike registered broker-dealers, however, funding portals are prohibited from:

- offering investment advice or recommendations;
- soliciting purchases, sales or offers to buy the securities displayed on its platform;
- compensating employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its platform; or
- holding, managing, possessing, or otherwise handling investor funds or securities (“Activities Prohibited for Portals”).

Because funding portals are limited to acting as intermediaries in crowdfunding transactions, funding portals cannot effect secondary market transactions in securities issued in reliance on the crowdfunding exemption. As discussed below, the Proposed SEC Rules would, however, provide a non-

exclusive safe harbor for funding portals that engage in limited activities that may otherwise trigger a violation of these prohibited activities.

In addition, the Proposed SEC Rules would impose restrictions and obligations on both registered broker-dealers and funding portals acting as intermediaries in connection with a crowdfunding offering.

Prohibition Against Financial Interests

To protect investors from conflicts of interest, the Proposed SEC Rules would prohibit an intermediary and its directors, partners, and officers from having a financial interest in an issuer or receiving a financial interest in an issuer as compensation for services provided in connection with the crowdfunding transaction. Prohibited financial interests would include a direct or indirect ownership of, or economic interest in, any class of the issuer's securities. An intermediary also must disclose any compensation it receives each time it makes a promotional communication.

Measures to Reduce Risk of Fraud

The Proposed SEC Rules would require an intermediary to take steps to reduce the risk of fraud in the crowdfunding transactions it intermediates. This includes having a reasonable basis to believe that the issuer:

- is complying with rules applicable to crowdfunding transactions; and
- has established means to keep accurate records of holders and transfers of the securities sold through the offering.

In each case, the intermediary may rely on representations from the issuer, unless it has reason to question the reliability of a representation. With respect to maintaining shareholder records, the SEC does not propose to require a particular form or method of recordkeeping, but noted that an issuer may develop its own methods or engage a third party, such as a broker or transfer agent. Funding portals may not provide this service because they are prohibited from holding, managing, possessing or handling investors' securities.

As another means to reduce the risk of fraud, an intermediary must deny an issuer access to its platform if it (i) believes that the issuer or offering pres-

ents the potential for fraud or raises other investor protection concerns, or (ii) has a reasonable basis for believing that an issuer or certain of its directors, officers, or principal shareholders are subject to certain disqualifying events. Intermediaries are required to conduct background checks and securities enforcement regulatory history checks in order to satisfy this requirement.

Opening an Account

An intermediary cannot accept an investment commitment from an investor unless an investor has opened an account with the intermediary and provided consent to electronic delivery of materials.

In establishing an account, an intermediary must provide the investor with certain disclosures and “educational materials,” which contain information about crowdfunding and the intermediary’s platform, including the process for investing through the platform and the risks involved in crowdfunding transactions. An intermediary also must disclose the manner in which it will be compensated in connection with crowdfunding transactions.

Disclosure of Issuer Information

An intermediary must make the issuer’s required disclosures available to the SEC and potential investors, and cannot require that a person open an account in order to review these materials. Under the Proposed SEC Rules, this information must be publicly available on the intermediary’s platform for at least 21 days before any securities are sold and remain publicly available on the intermediary’s platform until the offer and sale is completed or canceled.

Investor Qualifications

Before accepting any investment commitment, an intermediary must have a reasonable basis for believing that the investor would not be exceeding its annual crowdfunding investment limitations described above. An intermediary may satisfy this requirement by relying on an investor’s representations regarding its prior crowdfunding investments, income and net worth, absent reason to question the reliability of the representations.

In addition, before accepting an investment commitment, an intermediary

also must obtain certain representations from an investor and confirm, through answers to a questionnaire, that the investor understands certain information about crowdfunding offerings, including a representation that the investor:

- has reviewed the intermediary’s educational materials;
- understands that the investment may be lost; and
- can bear the loss of the investment.

An intermediary also must obtain responses to questions demonstrating the investor’s understanding that:

- there are restrictions on the investor’s ability to cancel an investment commitment;
- it may be difficult for the investor to resell the securities; and
- the investor should not invest funds unless he or she can afford to lose his or her entire investment.

Communication Channels

Though not required by the JOBS Act, the Proposed SEC Rules would require an intermediary to provide communication channels on its platform that enable investors to communicate with each other and with representatives of the issuer about offerings, subject to specified conditions. Because funding portals are prohibited from providing investment advice or recommendations, a funding portal would be prohibited from participating in any communications in these channels, apart from establishing guidelines for communication — such as the length or size of individual postings — and removing abusive or potentially fraudulent communications.

While the communication channels would be publicly available for viewing, only investors that have opened accounts with the intermediary would be permitted to post comments. A person posting a comment would be required to prominently disclose whether he or she is a founder or employee of an issuer or is otherwise compensated to promote the offering.

Notice of Investment Commitment

Upon receipt of an investment commitment, an intermediary must promptly provide the investor an electronic notification disclosing specified information concerning the offering.

Maintenance and Transmission of Funds

The Proposed SEC Rules would require that offering proceeds are only provided by an intermediary to an issuer when the aggregate capital raised equals or exceeds a target offering amount. Proceeds cannot be transmitted to an issuer earlier than 21 days after the intermediary makes the issuer information publicly available on its platform. Proceeds must be returned if an investment commitment has been cancelled or an issuer does not complete an offering.

Because funding portals may not handle investor funds, they must direct investors to transmit funds to a “qualified third party,” defined as a bank that has agreed in writing either to:

- hold the funds in escrow for the persons who have the beneficial interests in the funds; or
- establish a bank account (or accounts) for the exclusive benefit of investors and the issuer.

Confirmation of the Transaction

At or before completion of a crowdfunding transaction, an intermediary must provide each investor with an electronic notification disclosing:

- the date of the transaction;
- the type of security;
- the identity, price and number of securities purchased by the investor, and the number of securities sold by the issuer in the transaction and the price(s) at which the securities were sold;
- certain specified terms of the security; and

- remuneration received or to be received by the intermediary in the transaction.

Intermediaries would be exempt from the confirmation disclosure requirements under Exchange Act Rule 10b-10, which are more extensive than those under the Proposed SEC Rules.

Completion of Offerings, Cancellations, and Reconfirmations

Under the Proposed SEC Rules:

- investors would have an unconditional right to cancel investment commitments for any reason until 48 hours prior to the deadline in the issuer's offering materials;
- an issuer is permitted to close an offering prior to the deadline if it has met its target offering amount, subject to specified conditions;
- a notification of any material changes to the terms of the offering must be sent to investors stating that their investment commitment will be canceled if not reconfirmed in five business days of receipt of the notice; and
- an issuer that does not complete an offering because the target is not reached or it decides to terminate the offering, must notify investors, direct the refund of funds and prevent further investment commitments from being made.

Payments to Third Parties

An intermediary may only compensate a person for directing issuers or potential investors to its platform if:

- the person does not provide the intermediary with any "personally identifiable information" concerning potential investors; and
- the compensation, unless it is paid to a registered broker or dealer, is not based, directly or indirectly, on the purchase or sale of a security offered in reliance on the Proposed SEC Rules on or through the intermediary's platform.

Disqualification

An intermediary that is subject to a “statutory disqualification” under the Exchange Act is prohibited from intermediating crowdfunding transactions, absent relief from the SEC.

REGULATION OF FUNDING PORTALS

As noted above, crowdfunding offerings may be intermediated either through registered broker-dealers or registered funding portals. Because funding portals would be engaged in the business of effecting transactions in securities on behalf of others, they would technically meet the definition of “broker” under the Exchange Act. However, they would not be required to register as a broker-dealer so long as they register as a funding portal, become a member of FINRA, limit their brokerage activities to acting as a crowdfunding intermediary and do not engage in Activities Prohibited for Portals, as described above.

Funding Portal Safe Harbors

Many pre-proposal commenters raised concerns that the strict limitations on the activities in which funding portals are permitted to engage — particularly the prohibitions on engaging in solicitations, providing advice or recommendations — could effectively preclude funding portals from operating their platforms. For example, simply maintaining a website could be viewed as solicitation, and selecting which issuers’ offerings are made available could be viewed as making a recommendation. To address this, the Proposed SEC Rules include certain non-exclusive safe harbors that clarify certain limited activities that a funding portal *may* engage in without running afoul of the limitations on their activities.

Consistent with the proposed safe harbors, a funding portal may, among other things:

- limit offerings made on or through the funding portal’s platform, highlight certain offerings, or provide search functions, in each case based on certain objective eligibility requirements;
- provide communication channels for potential investors and issuers subject to restrictions;

- advise issuers on the structure of offerings and content of disclosures;
- compensate others for referring persons to the funding portal and for other services, subject to restrictions; and
- advertise the funding portal's existence, including identifying available offerings.

SEC Registration Process

A funding portal must register with the SEC by the filing of a Form Funding Portal, which is similar to Form BD — the SEC form used to register broker-dealers. Form Funding Portal would require information regarding the funding portal's ownership and management and any disciplinary histories and similar disclosures regarding the funding portal and its affiliates. In addition, Form Funding Portal would require disclosure of the funding portal's escrow arrangements, compensation arrangements, and fidelity bond, discussed below.

Registration is effective on the later of (i) 30 calendar days after the date that the registration is received by the SEC, or (ii) the date the funding portal is approved for membership in FINRA.

FINRA Registration Process

The Proposed FINRA Rules (which have not yet been approved by the SEC) would require a funding portal applicant for FINRA membership to file a Form FP-NMA. Similar to the process for broker-dealers seeking FINRA membership, FINRA will have a period of time after receipt of the Form FP-NMA to review the application and request additional information or documentation, and conduct one or more interviews.

FINRA will grant membership only upon a determination that the funding portal applicant meets the five standards for membership contained in the Proposed FINRA Rules summarized below:

- the applicant and its associated persons are capable of complying with applicable federal securities laws, rules and regulations and the Proposed FINRA Rules;
- the applicant has established all contractual or other arrangements to initiate and conduct its business activities;

- the applicant has a supervisory system reasonably designed to achieve compliance;
- the applicant has established all sources of funding; and
- the applicant has a sufficient recordkeeping system.

The Proposed FINRA Rules would also implement a system through which FINRA would make certain information about funding portal members publicly available.

Ongoing Funding Portal Obligations

Fidelity Bond

Funding portals would be required to maintain a fidelity bond that has a minimum coverage of \$100,000 and covers any associated person of the funding portal.

Continuing Membership Application

Funding portals would be required to undergo a continuing membership application process by filing with FINRA an application on Form FP-CMA for approval of specified changes in control or of control persons.

Anti-Money Laundering

Funding portals must comply with anti-money laundering and Bank Secrecy Act rules.

FINRA Conduct Rules

The Proposed FINRA Rules would impose conduct standards on funding portal members, which are more limited than those applied to broker-dealer members. The proposed conduct standards for funding portals require that they:

- observe high standards of commercial honor and just and equitable principles of trade;

- not use any manipulative, deceptive or other fraudulent device or contrivance to effect or induce the purchase or sale of any security;
- adhere to specified content standards when communicating with the public, including not making a false or exaggerated claims, and complying with principles of fair dealing and good faith; and
- not include any issuer communication on its website that the funding portal member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

The Proposed FINRA Rules would not impose personnel qualifications or minimum capital requirements on members.

Funding portal members would be subject to disqualification procedures similar to those applicable to broker-dealers and their associated persons who become subject to specified regulatory sanctions.

Other Compliance Obligations

The Proposed SEC Rules and Proposed FINRA Rules would require a funding portal to:

- comply with Exchange Act Rule 17f-2, which requires every broker to require that each of its partners, directors, officers and employees be fingerprinted;
- implement written policies and procedures reasonably designed to achieve compliance with federal securities laws and regulations relating to its business as a funding portal;
- comply with FINRA reporting requirements, including reporting whether the funding portal is the subject of a written complaint involving allegations of fraudulent conduct;
- comply with Regulations S-P, S-AM and S-ID, relating to customer privacy, affiliate marketing and identity theft, just as registered broker-dealers;
- abide by specified requirements concerning arbitration of claims;
- permit the examination and inspection of all its business and business

operations that relate to its activities as a funding portal by SEC and FINRA; and

- keep and preserve an extensive array of records for five years, in a readily accessible place for the first two years.

In releasing the Proposed SEC Rules, the SEC explained that funding portals meet the definition of “broker” under the Exchange Act, even though they are exempt from registration as such. However, it is not clear which “broker” requirements under the Exchange Act and SEC rules will be applicable to funding portals beyond those listed above.

Due Diligence and Potential Liability Considerations

The SEC’s proposing release for the Proposed SEC Rules alludes to the possibility of liability by intermediaries in connection with private lawsuits by investors, including in regard to offering documents that are posted on the intermediary’s platform. The JOBS Act provides that an “issuer” is liable to crowdfunding investors if it makes an untrue statement of material fact, or omits to state a material fact required to be stated or necessary in order to make the statements, in light of the circumstances under which they were made, not misleading — unless the purchaser knew of the untruth or omission, or the issuer did not know, and in the exercise of reasonable care could not have known, about the untruth or omission. Because an “issuer” is defined to include “any person ... that offers or sells a security” in a crowdfunding offering, the SEC stated that “it appears likely that intermediaries ... would be considered issuers for purposes of [the] liability provision.” As a result, intermediaries would need to consider the extent of any due diligence required in order to sustain a defense that, if a material misstatement or omission occurred and is contained in posted offering materials, the intermediary did not know it and reasonably could not have known it.

NOTES

¹ <http://www.gpo.gov/fdsys/pkg/FR-2013-11-05/pdf/2013-25355.pdf>.

² <http://www.finra.org/Industry/Regulation/Notices/2013/P370743>.