

Venture Capital & Emerging Companies Alert

MAY 16, 2012

Recent SEC Guidance on Crowdfunding

BY DANIEL I. DEWOLF, EVAN M. BIENSTOCK, SAMUEL EFFRON, AND GARRETT JOHNSTON

On May 7, 2012, the Securities and Exchange Commission (SEC) Division of Trading and Markets issued guidance to prospective crowdfunding intermediaries under the Jumpstart Our Business Startups (JOBS) Act (H.R. 3606) in the form of Frequently Asked Questions (FAQs). The [FAQs are set forth on the SEC's website](#). While much of the JOBS Act was intended to make capital raising easier for young companies, the SEC's guidance makes it clear that the SEC remains concerned about crowdfunding. As such, the final rules are likely to create a fair amount of "friction" for young companies to raise capital for equity through crowdfunding.

The guidance provides that any entities proposing to serve as crowdfunding intermediaries, either as brokers or funding portals, must first register with the SEC and the Financial Industry Regulatory Authority (FINRA), even if such entity is already a registered broker-dealer. The SEC, however, has not yet released the rules to implement the crowdfunding provisions or the registration of intermediaries, and the rules are not due to be released until January 2013. So, until the SEC releases rules on the crowdfunding process (which may or may not be before January 2013), no one can act as an intermediary or take advantage of the crowdfunding statute. The rules, once released, will set forth the process to register with the SEC as an intermediary and become members of a national securities association that is registered under Section 15A of the Exchange Act (FINRA is currently the only national securities association that satisfies this criterion).

In addition to reiterating and confirming that all crowdfunding intermediaries must register with the SEC and FINRA, and that such a process can't commence until the final rules have been released, the SEC addresses various limitations and prohibitions that each intermediary must be aware of (including prohibitions on providing investment advice and recommendations, and on soliciting purchases and sales on its website). Further, the FAQs stress that there will be certain duties that crowdfunding intermediaries should be familiar with, including the legal implications to acting in that capacity.

While the ability of companies to use pure crowdfunding for equity remains uncertain, we believe the biggest impact of the JOBS Act will be the allowance of general solicitations under Rule 506, which is anticipated to be effective as of July 5, 2012. As the legislation is enacted, if sales are limited to "accredited investors," companies and funds will be able to solicit capital directly and on-line under the new Rule 506. Ironically, it looks like the JOBS Act may have created "crowdfunding for the affluent." We are concerned, however, that the SEC may issue additional rules that will place limitations on general solicitations under the new Rule 506.

If you have questions about the details of the crowdfunding provision or acting as an intermediary, or the JOBS Act in general, please contact one of the authors of this article and we will be happy to discuss it with you.

* * *

View Mintz Levin's Venture Capital & Emerging Companies attorneys.

Follow Us



Copyright © 2012 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

1916-0512-NAT-VC