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The New Crowdfunding Registration Exemption: Good Idea, Bad Execution

Stuart R. Cohn
cohn@law.ufl.edu

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THE NEW CROWDFUNDING REGISTRATION EXEMPTION:
GOOD IDEA, BAD EXECUTION

*Stuart R. Cohn**

Abstract

Title III of the JOBS Act, signed by President Obama on April 5, 2012, sets forth a new exemption from federal and state securities registration for so-called “crowdfunding” promotions. Crowdfunding is an increasingly popular form of raising capital through broad-based internet solicitation of donors. Many promotions simply seek charitable or other donations. But the lure of raising funds through the internet has also led to promotions for potentially profitable ventures that offer an economic return to donors. These efforts invoke the federal and state securities laws, as there are no *de minimis* standards protecting even the smallest of offerings. Registration exemptions under the 1933 Securities Act and those created by the Securities & Exchange Commission have not been useful for such small offerings and certainly cannot be used for internet-based offerings. In the face of SEC inaction with regard to such small-scale promotions, Congress took it upon itself to create a new exemption. Unfortunately, as described in this Essay, despite good intentions, the newly-created exemption is fraught with regulatory requirements that go beyond even existing exemptions and raise transaction costs and liability concerns that may substantially reduce the exemption’s utility for small capital-raising efforts.

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* John H. & Mary Lou Dasburg Professor of Law, University of Florida Fredric G. Levin College of Law; Honours Degree in Jurisprudence, Oxford University, LL.B. Yale Law School. I would like to thank Professor Tom Lin and Mi Zhuo, Esq. for their helpful review and comments.

I. INTRODUCTION

In the garb of the proverbial idea whose time has come, the “crowdfunding” phenomenon swept through both chambers of an otherwise contentious Congress as an essential element of the acronymous JOBS legislative package and was signed by President Obama on April 5, 2012.¹ Although the JOBS Act covered several distinct issues related to federal securities laws, a principal element from the beginning was the creation of a registration exemption for crowdfunding, a growing form of internet-based financing for small businesses and other projects. Without regulatory authorization, crowdfunding promotions that offered a potential economic return to donors were in danger of violating both federal and state securities laws, hence creating the need for authorization. Unfortunately, however, Congress’s rush to action resulted in a statute that appears to have failed in its primary purpose to assist entrepreneurs and others seeking to raise small amounts of capital through broad-based solicitation and may have made matters worse through its heavy-handed regulatory action.

A. *What Is Crowdfunding?*

The crowdfunding concept is not new. Politicians, charities, and local non-profit organizations all engage in raising funds from broad swaths of the population for specific purposes and generally in relatively low dollar amounts. The term has become synonymous with efforts to raise funds from numerous donors, usually in small amounts through internet sources.² Often the solicitations seek donations, political, charitable, or otherwise. In recent years, however, there has been a growth in the use of such technique to provide start-up or seed capital for small businesses as well as other ventures that are promoted on the basis of a potential economic return to the donors.³

1. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012). The Act consists of seven titles and includes several congressional modifications of existing securities laws and regulations. Crowdfunding is covered in Title III, §§ 301 through 305.

2. See, e.g., Joan MacLeod Heminway & Sheldon Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 881 (2011) (“Crowdfunding includes a variety of business financing models that use the Internet . . . [C]rowdfunding involves using a web-based business enterprise to seek and obtain incremental venture funds from the public using a website . . . to connect businesses or projects in need of funding . . . with potential funders.”).

3. For a colorful description of the crowdfunding phenomenon as applied to a wristwatch maker who sought to raise \$100,000 and wound up with over seven million dollars, see Jenna Wortham, *Start-Ups Look to the Crowd*, N.Y. TIMES, Apr. 29, 2012, at B1, available at <http://www.nytimes.com/2012/04/30/technology/kickstarter-sets-off-financing-rush-for-a-watch-not-yet-made.html>.

B. *What's the Problem?*

What has turned the crowdfunding concept into a political issue is its growing use by promoters of for-profit ventures. Thus, for example, the website SellaBand.com promotes artists looking for funds to record albums, go on tours, or engage in other potentially profitable artistic ventures.⁴ If the artists ask for nothing more than donations, or offer minimal thank you's such as T-shirts or albums, federal and state securities laws are not implicated. The rub comes when donors are offered the opportunity to share in potential profits. The Sellaband website alerts potential donors that "artists might even let you get a cut of their revenues."⁵ The potential profit element is a red flag inviting regulators to examine whether the offer of an economic return has turned the transaction into a securities offering subject to federal and state laws and regulations. The answer may well be yes, given the broad definition of a security under the venerable *Howey* test,⁶ a federal standard also widely adopted at state levels. If the answer is affirmative, the offering must either be registered with the SEC, an enormously costly and time-consuming process, or find an exemption from registration among the various federal statutes and regulations.⁷

C. *Was Legislation Necessary?*

The uninitiated may wonder why a small band of musicians seeking to raise funds for a recording session and promising to potential donors a small cut of any potential profits could run afoul of securities laws.

4. *About Us*, SELLABAND.COM, http://www.sellaband.com/en/pages/about_us (last visited July 4, 2012) ("Since its launch in August 2006, SellaBand has coordinated recording sessions for more than 80 artists or acts who had their albums funded by their fans. Over \$4,000,000 have been invested in independent bands via www.sellaband.com.").

5. *How It Works*, SELLABAND.COM, http://www.sellaband.com/en/pages/how_it_works (last visited July 4, 2012). Other websites devoted to crowdfunding for small enterprises include MicroVentures (<http://www.microventures.com>), Profounder (<http://www.profounder.com>), and SeedUps (<http://www.seedups.com>). See *Crowdfunding and Crowdsourcing Are Becoming More Sophisticated*, THE ECONOMIST, Mar. 17, 2012, at 78, available at <http://www.economist.com/node/21550295?fsrc=scn/tw/te/ar/nazisinspace> ("Crowdfunding and crowdsourcing have been slowly on the rise for independent films over the past few years. . . . [M]ost of the money raised via the website was in the form of equity investments That is allowed in Europe but not yet in America, where any such investment must be filed with the Securities and Exchange Commission.").

6. SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (holding that the purchase of a real estate interest in a citrus grove couple with an optional management package was an investment contract, being an investment in a common enterprise with an expectation of profits to be derived from the efforts of the promoter).

7. Although the focus here is on federal registration and exemptions, state securities laws are equally applicable in each state in which an offer is made, similarly requiring either state registration or the use of a state registration exemption. Unless there are specific disclaimers in the website, the offering could be deemed to be made in every state.

The offer involves no stock certificates, no listing of any security for trading, amounts sought from donors are small, the total amount raised is relatively small, and the risk of the investment makes the donors' profit expectations minimal at best. Why should this transaction be subject to the rigors of the securities laws? That is both a legal and a policy question. As a legal question, the answer lies in the definition of a security,⁸ as a policy question the answer lies in the notion of investor protection, the foundational purpose of the Securities Act of 1933.

The uninitiated might also wonder whether there is an appropriate exemption from registration for such rather insignificant transactions as a band seeking to raise \$75,000 to finance a proposed tour, or a small business seeking \$100,000 in start-up funding. As securities professionals know, the answer is regrettably not. Neither the federal nor state securities laws provide for a *de minimis* exemption. If a security is being offered, it does not matter whether the promotion seeks \$1,000 or \$1 million, from 10 or 10,000 people.

If no registration exemption exists, yet crowdfunding is taking place in notorious manners over internet sites, was there a need for protective legislation? Apparently so. Whatever judgments enforcement authorities previously made that constrained regulatory actions or prosecutions, the crowdfunding phenomenon is growing at a rate that does not allow for continued benign sweeping under the enforcement radar screen.⁹ Inevitably there will be occasions when dissatisfied donors seek redress, even for their relatively small donations, and plaintiff attorneys will have a slam dunk case based on violation of registration requirements. Crowdfunding needed to be either acknowledged as a potential violation of the securities laws, or, better yet, some kind of registration exemption needed to be created. The SEC has authority to create such exemption for crowdfunding,¹⁰ but the SEC has historically been both slow and parsimonious in creating exemptions from registration.¹¹ Thus the legislative push.

8. The investment contract analysis, derived from the *Howey* case, *supra* note 5, applies quite easily to crowdfunding promotions that contain even a slight element of potential economic return to donors, regardless of the high risk involved and low amounts being raised.

9. The SEC could not totally disregard crowdfunding efforts that were notorious and substantial. A cease and desist order was entered in 2011 against a fundraising promotion for Pabst Blue Ribbon Beer that provided ownership certificates plus a quantity of beer equal to the donor's contribution. *See In re Migliozi*, Sec. Act. Rel. No. 33-9216, 2011 WL 2246317 (SEC June 8, 2011).

10. SEC authority to create registration exemptions for limited offerings exists in both § 3(b) and § 28 of the Securities Act of 1933, 15 U.S.C.A. 77c(b) and 77z-3. It must be emphasized that a registration exemption does not exempt the offering from antifraud enforcement based on materially misleading disclosures or omissions.

11. *See, e.g.,* Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns*, 4 N.Y.U. J. L. & Bus. 1 (2007) ("Despite years of criticism from small business advocates, the Securities & Exchange

D. *The Congressional Process*

A rather simple registration exemption could have been developed if Congress had focused on the small entrepreneurs and promoters seeking relatively small amounts. For example, registration exemptions for offerings for not more than \$250,000, or offerings up to \$500,000 with investments limited, for example, to no more than \$1,000, would have addressed many if not most crowdfunding situations. Such an exemption could appropriately have mandated minimum disclosure obligations.¹² Existing registration exemptions could apply from there to more extensive offerings.

Initially Congress moved towards a rather simple exemption. An early bill approved by the House provided for a registration exemption up to five million dollars with quite minimal additional requirements.¹³ The more extensive bill that eventually passed the lower chamber lowered the limit to one million dollars (two million dollars if audited financials were provided) and was similarly rather light on any additional requirements.¹⁴ However, simplicity was not to carry the day. Concerns regarding investor protection were strongly voiced in the Senate, resulting in substantial additional requirements imposed on issuers and intermediaries.¹⁵ What came out of the Senate was a bill that is difficult to characterize as anything other than an overwhelming mishmash of regulatory requirements. Yet, the momentum to pass a bipartisan bill allowed for little time for reflection or comment, and the

Commission has made little effort to ameliorate the severe burdens on small companies seeking to raise capital in compliance with the Securities Act of 1933 and SEC regulations.”); David B.H. Martin, Jr. & L. Keith Parsons, *The Pre-Existing Relationship Doctrine Under Regulation D: A Rule Without Reason*, 45 WASH. & LEE L. REV. 1031 (1988).

12. See, e.g., Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why Any Specially Tailored Exemption Should Be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1954040> (“A crowdfunding exemption conditioned on meaningful disclosure would strike a proper balance between the desire to encourage small business financing while at the same time giving due attention to investor protection.”).

13. Entrepreneur Access to Capital Act, H.R. 2930, 112th Cong. (2011). Investments by individual investors were limited to the lesser of \$10,000 and 10% of the investor’s annual income.

14. Entrepreneur Access to Capital, H.R. 3606, 112th Cong. (2012). Investments by individual investors were limited to the lesser of \$10,000 and 10% of the investor’s annual income. If the company chose to use an intermediary to market the securities, the Bill imposed obligations on the intermediary regarding investor suitability and other investor protection measures.

15. Andrew Ackerman & Corey Boles, *Senate to Add Protections to JOBS Bill*, WALL ST. J. (Mar. 22, 2012), <http://online.wsj.com/article/SB10001424052702304636404577297432738184576.html> (“Federal regulators would oversee websites that allow start-ups to tap thousands of investors in exchange for very small shares of stock under changes the Senate is poised to adopt Thursday to a House-approved bill pitched as a way to boost jobs.”).

Senate version carried the day. Securities experts who warned that the crowdfunding issue needed substantial study to assure that there was both an effective exemption as well as assurance of investor protection were right.¹⁶ The legislation signed by President Obama is seriously deficient in both purpose and effect. Promoters seeking to raise small amounts from small investors are now subject to such a wide range of disclosure and regulatory requirements that it is hard to imagine typical crowdfunding promotions being carried out under such conditions. To make matters worse, now that an exemption has been formally created for so-called crowdfunding, small promotions can no longer be under the enforcement radar screen. In other words, typical crowdfunding efforts may now be worse off as a result of the legislation.

II. THE COMPLEXITIES OF THE CROWDFUNDING EXEMPTION

The crowdfunding registration exemption has been embedded as new § 4(6) of 1933 Securities Act.¹⁷ The exemption allows for up to one million dollars to be raised during a twelve-month period, reduced by the amount of any other securities sold by the issuer during that period. The maximum amount that a single investor can invest depends on the investor's financial status. If the investor has either an annual income or net worth less than \$100,000, the maximum investment within a twelve-month period is the greater of \$2,000 or 5% of the investor's annual income or net worth. For investors whose annual income or net worth is \$100,000 or greater, the maximum investment is 10% of annual income or net worth, not to exceed \$10,000.¹⁸ So much for the simple elements. Before turning to the additional exemption requirements, it is worth noting that the one million dollars allowable amount is considerably in excess of what many small entrepreneurs, artists and others raising capital might need. The problem with having selected one million dollars as the authorized amount is that Congress then felt impelled to surround the exemption with numerous requirements that might not have been necessary had an exemption been created for smaller offerings in lieu of or in addition to the one million dollar exemption.

16. See, e.g., Testimony of John C. Coates IV before the Subcommittee on Securities, Insurance, and Investment of the Committee on Banking, Housing, and Urban Affairs, United States Senate, Dec. 14, 2011, available at <http://ssrn.com/abstract=1973258> (noting that legislation should contain a two or three year sunset period in light of the uncertainties regarding the confluence of business needs and investor protection); see also Heminway & Hoffman, *supra* note 2, at 961 (“[T]he exemption process will not be simple. It will require a delicate balancing of interests among the SEC, industry participants, and investors.”).

17. § 4(6), Securities Act of 1933, 15 U.S.C.A. § 77d(6). In an impressive display of linguistic virtuosity, the short title to Title III of the JOBS statute is the “Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012,” or the “Crowdfund Act.”

18. The dollar amounts are subject to inflation adjustments every seven years.

Now comes the heavy-handed additional requirements:

A. *Mandated Intermediary*

The crowdfunding transaction must be conducted through a broker or a registered funding portal. This is not an option, it is a mandate. Thus, small entrepreneurs and persons seeking to raise capital for various other reasons cannot do so on their own. The mandatory use of an intermediary goes beyond any other registration exemption.¹⁹ The “funding portal” concept is new and the crowdfunding legislation added its definition to the 1934 Act.²⁰ Essentially the funding portal is an internet site that lists crowdfunding opportunities and provides a matching service for interested investors. This kind of inter-active bulletin board service for small issuers and potential investors has been going on for years, but now such services have an official name, a “funding portal,” a statutory definition, and an obligation to register with an appropriate self-regulatory organization.²¹ The imposition of the intermediary requirement was motivated by the concern expressed most strongly in the Senate that a regulated intermediary is necessary to limit the potential for fraudulent or otherwise abusive offerings.

Most crowdfunding offers are unlikely to employ registered brokers. The broker’s potential liability engaging in such offerings will generally not be worth the commissions to be obtained. Nor is there likely to be a vibrant secondary market in which the broker might earn further commissions. Instead, most offerings are likely to be offered through funding portals. Although the combination of statutory and regulatory requirements are intended to prevent abusive offerings, the requirements will create transaction costs beyond those imposed by existing

19. Even the proposal of the North American Securities Administrators Association (NASAA), composed of state securities law administrators, did not mandate the use of an intermediary. State securities administrators were generally opposed to a state-preempted crowdfunding exemption and developed a model rule for federal consideration. *NASAA Complete Draft of Model Crowdfunding Rule*, 43 SEC. REG. L. REP. (BNA) 2505 (Jan. 3, 2012).

20. Section 304 of the Act, “Funding Portal regulation,” amends § 3 of the Securities Exchange Act of 1934 by adding subsection 80, defining a funding portal as an intermediary in the § 4(6) transaction (the crowdfunding exemption) that does not (a) offer investment advice or recommendations, (b) solicit purchases, sales or offers to buy the securities offered or displayed on its website or portal, (c) compensate employees, agents or other persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal, (d) hold, manage, possess or otherwise handle investor funds or securities, or (e) engage in such other activities as the Commission determines. What is envisioned by this newly-defined entity is a bulletin board that stays clear of material assistance to the securities transactions themselves. However, as noted, the funding portal is anything but passive as the Act imposes significant affirmative obligations.

21. A funding portal is obligated to register with the SEC and with “any applicable self-regulatory organization” as defined in the 1934 Exchange Act. Section 301(b), the JOBS statute.

registration exemptions and undercut the availability of the exemption for legitimate small businesses.

B. *Intermediary Requirements*

It is not enough that crowdfunding issuers must now find and employ regulated intermediaries. The intermediary is charged with the statutory obligation to ensure that each investor:

- receives disclosures, including those related to risk and investor education, as prescribed by the SEC;
- reviews investor-education information material prescribed by the SEC;
- affirms that he or she understands the potential risk of loss of the entire investment;
- affirms that he or she can bear the risk of such an entire loss; and
- answers questions demonstrating an understanding (a) of the risk applicable to investments in start-ups and small issuers, (b) the risk of illiquidity, and (c) such other matters to be determined by the SEC.

Is this enough to convince any broker or funding portal to stay away from such offerings? If not, the statute also requires that the intermediary:

- do a background and securities enforcement history check on each officer, director and 20% shareholder of the issuer;
- send to the SEC and potential investors not later than 21 days prior to the first sale disclosure information provided by the issuer (as required and noted below);
- ensure that no offering proceeds are provided to the issuer unless the target offering amount (described below) has been met;
- allow investors to cancel their commitments pursuant to SEC rules to be developed;
- ensure that no investor exceeds the maximum allowable investment limit from all crowdfunding investments within a 12-month period, pursuant to a process to be established by the SEC;
- protect the privacy of investor information pursuant to SEC rules; and
- take such further measures as the SEC will determine to reduce the risk of fraud regarding the transaction.

What intermediaries will be willing to undertake these obligations?²² Will crowd-funded offerings generate compensation commensurate with costs and potential liabilities?²³ Perhaps some websites will be sufficiently compensated through advertising and participation fees. This remains to be seen, particularly in light of whatever additional requirements are imposed by the SEC and the regulatory SRO to which funding portals will be registered.

C. *Issuers*

Having created a formidable scenario for potential intermediaries, Congress then added rigid requirements on crowdfunding entities. Ironically, these requirements are not present in other registration exemptions that are not intended to be as user friendly as the crowdfunding exemption. The statutory requirements (which may yet be augmented by SEC requirements) are extraordinarily detailed and substantial.

1. Disclosure Requirements

The new exemption requires a disclosure document filed with the SEC and given to each potential investor and to brokers and funding portals. Some of the required information is basic, such as identities of the directors and officers, issuer's business plan, pricing of the securities and intended use of proceeds. Beyond these basics, the disclosure document requires:

- (A) *Financial Information*: A description of the issuer's financial condition and:
 - (1) for offerings up to \$100,000, issuer's (i) income tax return for the most recent completed year and

22. At least one crowdfunding site committed to small business development, Profounder, shut down as a result of the new regulations. The announcement of its demise stated that "the current regulatory environment prevents us from pursuing the innovations we feel would be most valuable to our customers." See blog.profounder.com/2012/02/17/profounder-shutting-down. A more optimistic report was given by Rafe Needleman in *JOBS Act: 5 Things to Look Forward to (and 5 Things to Dread)*, http://news.cnet.com/8301-19882_3-57409949-250/jobs-act-5-things-to-look-forward-to-and-5-to-dread/ ("I've been talking . . . to many (too many) people who are running or launching crowdfunding portals (everyone wants to have the Kickstarter of investing).") Time will tell whether there is enthusiasm for the development of funding portals once the costs and potential liabilities associated with the panoply of statutory and regulatory requirements are considered.

23. The crowdfunding provisions do not refer to any potential civil liabilities for intermediaries. However, potential liability under Rule 10b-5 exists for any failure that may be deemed "reckless." Moreover, the exemption does not preclude state law remedies either at common law, e.g. negligence, or by statute. Most state securities statutes authorize civil actions against issuer's agents, which could include brokers and funding portals that undertake the direct responsibilities imposed.

- (ii) financial statements certified by the principal executive officer to be true and complete in all material respects;
- (2) for offerings more than \$100,000 and up to \$500,000, financial statements reviewed by a public accountant in accordance with standards and procedures to be determined by SEC rule; and
- (3) for offerings in excess of \$500,000, audited financial statements.

During the rush to promote legislation to aid small companies, did anyone point out to Congressional members or staff that the requirement to certify financial statements by the CEO is not required for any other federal or state registration exemption, that financial statements are not required for the Rule 504 small business exemption for offerings up to one million dollars, and that audited financial statements are expensive and rarely available for small businesses? It is difficult to understand how these major practical concerns could have been ignored or so readily dismissed.

(B) *Target Amount*: Issuer must designate:

- (1) a target amount;
- (2) a deadline to reach that amount; and
- (3) provide regular updates (to whom is uncertain) regarding progress reaching that amount.

The target amount limitation is again one that is not found in any other registration exemption. Brokers and funding portals are charged with responsibility to assure that no proceeds are distributed to the issuer unless the target has been reached and, if not achieved, allowing investors to cancel their subscription. This is not a light responsibility. Case law abounds with liabilities imposed upon parties who improperly concluded that triggering events had been satisfied for escrow-release purposes.²⁴ One may appropriately wonder what safeguards brokers and funding portals will impose in order to avoid liability and what additional transaction costs will result from such responsibilities.

24. See, e.g., Svalberg v. SEC, 876 F.2d 181 (D.C. Cir. 1989) (false appearance created that required minimum number of shares had been sold to the public); SEC v. First Pac. Bancorp, 142 F.3d 1186 (9th Cir. 1998) (payment by uncleared check not sufficient payment for closing purposes); The Florida Bar v. Calvo, 630 So. 2d 548 (Fla. 1993) (attorney aware that short term loans were arranged by issuer-client in order to meet closing deadline).

- (C) *Capital Structure*: A description of the ownership and capital structure of issuer, including:
- (1) terms of the securities and how rights might be limited, modified or diluted;
 - (2) name and ownership level of each 20% or more shareholder;
 - (3) how the offered securities are being valued and how they may be in the future;
 - (4) risks of minority ownership and other company-related risks; and
 - (5) other information as required by the SEC.

2. Offering Limitations

As if the obligations imposed upon intermediaries and issuers were not enough to thoroughly discourage the use of the new crowdfunding exemption, Congress added some additional limitations:

- (A) no advertising the offering terms except for notices directing potential investors to brokers or funding portals;
- (B) no compensation to promoters without disclosures to be required by the SEC; and
- (C) not less than annual filings with the SEC and investors as determined by SEC rules.

Is there any regulatory burden left unchecked by this supposedly favorable-to-small-business legislation? If so, Congress put icing on the cake by authorizing the SEC to make such other requirements as the Commission prescribes for the protection of investors. The irony should not be lost, as this delegation of rule-making authority has been given to the same Commission that has long been criticized by advocates of small business for failing to adopt sensible regulations,²⁵ and the same Commission whose unresponsive attitude to the capital-raising problems of small businesses led to the congressional reform effort.

III. OBSERVATIONS

Is there anything to commend the crowdfunding § 4(6) exemption? Only that it preempts state registration laws.²⁶ Without such preemption

25. See Cohn & Yadley, *supra* note 11.

26. Pub. L. No. 112-106, § 305, 126 Stat. 306 (2012). Securities sold under the new exemption are deemed to be “covered securities” pursuant to § 18(b)(4) of the 1933 Act and thus are exempt from state registration. See also Steven G. Calabresi & Nicholas Terrell, *The number of States and the Economics of American Federalism*, 63 FLA. L. REV. 24 (2011).

the exemption would have been dead in the water, as no state exemption is currently geared to such offerings. The Rule 506 exemption also preempts state registration, but that exemption is limited to thirty-five non-accredited yet somewhat sophisticated investors, plus an unlimited number of accredited investors.²⁷

Can this new regulatory-laden exemption be useful to small entrepreneurs? It is difficult to imagine that for offerings under \$250,000 either issuers or intermediaries would be willing to undertake the time, cost and risk of potential liabilities. The mandated use of intermediaries, the significant role that intermediaries are expected to play, and the mandated disclosures all point to an impracticable exemption for relatively small offerings. So much for bands and other artists raising money for a tour on the basis of a proposed division in any profits. So much for small start-ups raising seed capital from friends, family and wider sources without fear of the heavy hands of federal and state regulation.

The new exemption may have some value for offerings in ranges upwards of \$250,000, as the issuer and intermediaries may be able to justify transaction costs and employ professionals to allay liability concerns. But as the potential offering amount increases, the use of an alternative federal exemption becomes more plausible. Rule 504, for example, also a federal registration exemption for offerings up to \$1 million, does not require a disclosure document, does not require the use of an intermediary, does not require any investor qualification regarding education or understanding of risks, and does not require annual and other reports to the SEC and investors.²⁸ The principal disadvantage of Rule 504 compared to the new § 4(6) is the latter's preemption of state registration laws. However, given the extent of disclosure mandated by the new exemption, there may not be much additional effort for issuers to register under state laws. A major advantage to a combination of Rule 504 and state registration is that the issuer could broadly engage in advertising the offering, contrary to the more limited advertising permitted by § 4(6). Nor would the securities sold under a state-registered Rule 504 offering be restricted from resale, another limitation imposed by § 4(6).²⁹ Although state registration in each state where the offering takes place would incur more significant costs than a § 4(6) offering, issuers and their advisers will need to carefully consider

27. Regulation D, Rule 506, 17 C.F.R. § 230.506.

28. Regulation D, Rule 504, 17 C.F.R. § 230.504.

29. Securities obtained in a crowdfunding exemption cannot be resold for one year except to the issuer, to an accredited investor, as part of a registered offering, or to a family member and are subject to such other restrictions on resale as the SEC determines. Pub. L. No. 112-106, § 301(b), 126 Stat. 306 (2012).

whether such additional costs outweigh the burdens of the new exemption.³⁰

For the entrepreneurs, artists, project managers, and others seeking to raise relatively small amounts, the crowdfunding exemption is of limited utility. Indeed, the new exemption may have made life more difficult for the truly small promotions by creating an exemption that is impracticable but, having been created with much fanfare, cannot be ignored, unlike the pre-existing situation when crowdfunding existed to some extent beneath regulatory concerns.

IV. CONCLUSION

Opportunity knocked, but what began as a relatively straightforward approach to assist small business capital-formation ended with a regulatory scheme laden with limitations, restrictions, obligations, transaction costs and innumerable liability traps.

The ever-present tension between business needs and investor protection demanded a carefully crafted approach to the use of the internet as an investment raising tool. If history indicated that the SEC could have developed such a balanced approach, the appropriate course would have been for the SEC, through task force or otherwise, to have created a small business exemption that would have been thoroughly vetted administratively and publicly through the rule-making process. Unfortunately, the SEC has a dismal record regarding the interests of small business. Congressional leaders therefore felt compelled to move into the regulatory vacuum.³¹ Yet, for all their good intentions, legislators are not experts in the nuances of securities laws and existing federal and state laws. The results reflected this lack of expertise, with House bills containing too few protective measures, the Senate bills containing too many.

The new § 4(6) exemption is an opportunity missed. Small businesses and promotions needing to raise limited amounts of capital through equity or other forms of investment continue to lack meaningful registration exemptions. If, as may be likely, the new § 4(6) proves to be a failure, perhaps the energy and commitment that motivated the current effort will lead to renewed calls to craft a registration exemption that relies less on extensive regulatory controls and more on disclosure

30. The federal intrastate exemption contained in both § 3(a)(11) of the 1933 Act and SEC Rule 147 are also much less restrictive than the new § 4(6), requiring neither intermediaries, disclosure documents nor purchaser qualification other than state residence. However, the intrastate exemptions are fraught with both technical and subtle traps for issuers and would generally not be suitable for internet-based offerings.

31. Crowdfunding is not the only area where Congress felt obliged to act in the face of SEC inactivity or resistance. Section 201 of the JOBS legislation mandated the SEC to amend its Rule 506 to permit general advertising and solicitation in offers to accredited investors, a measure that could and should have been taken by the SEC years ago.

standards and remedies. Until such time, entrepreneurs and others seeking to raise relatively small amounts of capital will continue to find the federal securities laws to be a significant barrier to their aspirations.