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Re: Proposed Model Crowdfunding Exemption

Gentlemen:

This letter is submitted on behalf of the Business Law Section (the "Section") of the American Bar Association (the "ABA"), including its Committee on State Regulation of Securities, Committee on Federal Regulation of Securities, and Committee on Middle Market and Small Business (the "Committees"), concerning the proposed Model Crowdfunding Exemption circulated to NASAA members on January 23, 2012 (the "Proposal"). This comment letter was prepared by a drafting committee consisting of the members of the Committees and the Section listed below.

The views expressed in this letter are presented on behalf of the Section's Committees only. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the position of the ABA.

Introduction

The Proposal references three bills that have been introduced in Congress that would provide for simplified regulation of the small business capital raising mechanism known as "crowdfunding." Congress views crowdfunding in these bills as an internet-based solicitation mechanism conducted through an appropriately regulated intermediary which, under the circumstances, can substitute for more direct federal and state regulation of issuers.

At the outset, we note that the views of our drafting committee members vary, with some viewing state regulatory preemption as necessary to any meaningful use of

crowdfunding and others viewing the nature of crowdfunding as being inherently incapable of adequate investor protection. We are not taking a position that is either *pro* or *con* regarding crowdfunding, but, rather, recognize it as an alternative mechanism for raising capital if investor protection concerns can be adequately addressed. A fundamental policy underlying the adoption of crowdfunding is to provide small businesses with access to capital with which they may create jobs within the U.S. Like the NASAA Small Business Capital Formation Committee, we assume that Congress may enact a form of crowdfunding bill that does not include state preemption so that state securities regulators may play a direct role in crowdfunding regulation, and it is based upon this assumption that our comments are grounded.

Use of the Proposal, if adopted by NASAA, will be feasible only if a meaningful number of states in turn adopt it as part of their securities regulatory scheme. Interest in the mechanism appears to be sufficiently high at the moment to suggest that there might be public impatience with material delays in broad state adoption, and some assurance by NASAA upon inquiry of its members that a meaningful number of states would adopt it would appear appropriate at an early stage. In this context, we respectfully submit the comments to the Proposal set forth below based upon our expertise and experience as business lawyers advising early-stage business ventures, with a view towards making the Proposal more usable by small businesses while providing adequate protection to investors.

Rule XXX. Model Crowdfunding Exemption. Paragraph (a) Definitions. Subparagraph (5) Qualified custodian.

This definition should require that the principal place of business of the qualified custodian be located within a State or possession of the United States. This would appear necessary in order for the various interested regulatory authorities to have adequate access to and jurisdiction over the qualified custodian.

We are not aware of a bank or savings association that would be willing to serve as a qualified custodian for a fee that would be sufficiently low under the circumstances to be cost effective, and we would not expect that an eligible broker-dealer would be willing to serve as a qualified custodian under any circumstances. Although, we would hope that, as more crowdfunding offerings are made, the market would respond with services that are better tailored for small issuers and that the costs would adjust appropriately, there is no assurance that such would in fact occur. We view this as potentially a significant impediment to the use of a separate independent qualified custodian, and, accordingly, we suggest that you consider allowing an intermediary to serve as qualified custodian if the intermediary were insured or bonded through an insurance company licensed in the intermediary's principal place of business in an amount of at least 125% of the maximum amount of funds that the intermediary would hold at any one time. The intermediary would hold the funds in its capacity as qualified custodian in escrow in a trust account that is separate from the intermediary's operating account with a bank insured by the FDIC, into which trust account the funds would be directly transmitted electronically by investors. If the intermediary were also to serve as qualified custodian, its monitoring of the status of the offering and compliance with individual investment limits and the maximum limit for the offering would be facilitated, as would the tracking of the investment by each investor. Under these circumstances, the recordkeeping requirements for the intermediary would include records relating to the intermediary's function as qualified custodian and would presumably include for each issuer the same full list of all investors, including name, address, phone number,

e-mail address, investment amount and date, and method of payment, required of the issuer. (Please see below.)

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraphs (1) and (2) Aggregate Sales Limit and *Individual investment limitation.*

We recommend that the limitation to an aggregate offering amount of $500,000 over a 12 month period be raised to $1 million. This amount coincides with both current Regulation D Rule 504 and the pending Senate bill (S.1970).

We also recommend that "accredited" investors, within the meaning of Rule 501(a), be excluded from the limit on the aggregate offering amount, if and to the extent that such may be permitted under federal law, in order to not inhibit Rule 505 or 506 offerings. Rule 505 and 506 limited offerings are typically pitched towards accredited investors, but those offerings presumably would not be permitted under the Proposal for at least six months prior to or following a crowdfunding offering because the two offerings might be deemed "integrated." In this regard, early-stage companies may well have an accredited investor private offering before undertaking crowdfunding (and perhaps to finance the crowdfunding offering), and it is not practical to force them to wait six months before proceeding with the crowdfunding offering. The policy sensitivities built into the Proposal to protect small crowdfunding investors would not appear necessary to protect wealthy accredited investors, who, with their advisors, are deemed able to protect themselves in the offering and bargain for their own desired terms. Thus, accredited investors should be allowed to piggyback a crowdfunding offering to provide meaningful additional funding if the issuer's business plan should appear to justify it, without having to wait for six months before or after a separate Rule 505 or 506 offering to accredited investors for a greater amount.

Also, while expansion of the limitation of the aggregate offering amount is not provided for in certain versions of the bills currently pending before Congress, if and to the extent that such may be permitted under federal law, we recommend that the aggregate offering amount be increased to $2 million in the circumstance in which the issuer has filed with Form CF, Part 1, audited financial statements because the increase in disclosure and the provision of another gatekeeper, i.e. the auditor, would serve as a reasonable counterbalance to any increased propensity for fraud. While we do believe that small amounts of money from many investors does not present less of an investor protection threat than more significant amounts of money from fewer investors, we note that the more likely risk to investors in start-up companies is the companies' inability to properly capitalize. Because the expenses required to launch the funding process, including website sufficiency, intermediaries, accountants, and most likely lawyers, a limitation of $500,000 may increase the risk to investors that the company will not succeed as compared with a higher dollar limitation. In addition, we note that Form CF, Part 1 requires the issuer's financial statements to be filed with the securities administrator, also an expense to the issuer. If the financial statements must be audited, the expense would be even greater. An issuer needs sufficient capital, after these expenses, to implement its initial business plan, and $500,000 might be insufficient, depending upon the issuer's operations and business plan. We also note that, in the absence of some relief with respect to integration, the use of crowdfunding would likely preclude an issuer from making a private offering in reliance upon the safe harbor of Rule 506 until six months have elapsed from the date the crowdfunding offering is terminated, so

that some funding cushion following a crowdfunding offering would be prudent to reduce the risk that the company's operations would be interrupted for lack of funds.

These limitations should apply to all crowdfunding efforts by the issuer within any 12 months period, and the issuer should be required to certify to this effect to the intermediary in establishing the above limits.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (5) Disclosure to investors.

The requirement for information in subsection (B) describing the issuer's financial condition should specify that assets be compiled on an historical cost basis (less depreciation or other amortization, to the extent appropriate) and that all liabilities be included, all at the date at which it speaks. If any operations, including organizational ones, have occurred, a statement of operations on a cash basis should be included so that, among other things, the rate (burn rate) at which costs are incurred will be shown. This subsection should not require preparation in accordance with generally accepted accounting principles (GAAP) but only that a fair presentation be made in accordance with whatever accounting method is used – tax or cash-basis accounting, for example. Whatever accounting method is used should be specified. Notes to the financial statements are generally necessary for the reader to be able to understand the numbers displayed; however, the detailed notes required under GAAP should not be mandated. Nevertheless, if the issuer should otherwise have financial statements compiled, reviewed or audited by an accounting firm, these should be included.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (6) Restrictions on advertising and communications.

Although perhaps implicit from the language used that indicates that the intermediary's role is to serve as a portal for disclosures by the issuer, and to provide a forum for discussion by the issuer and investors, we recommend that this subparagraph specifically state that the intermediary may not offer investment advice or recommendations to potential investors concerning the securities being offered.

Also, because the word "immediately" in an internet communications regulation might be ambiguous to some, we suggest use of the word "promptly" instead.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (7) Target amount, offering period, and escrow requirements.

The issuer should be required to certify to the qualified custodian as a condition to the release of the proceeds that, upon inquiry, none of the target amount of offering proceeds contains any funds directly or indirectly deposited by or on behalf of either the issuer or its affiliates.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (9) Disqualification.

Reflecting the provisions of S. 1970, which is one of the bills now pending before Congress and does not preempt state securities regulation, we suggest that the persons subject to a disqualifying event include each person holding 20 percent of the shares of the issuer. Also, the intermediary should be required to represent on its website that neither it nor its management is subject to any "bad actor" disqualification, and issuers should not be disqualified from

crowdfunding under this subparagraph by relying in good faith upon this representation by the intermediary if it should subsequently turn out that the intermediary or its management had in fact been subject to a "bad actor" disqualification.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (10) Restricted securities.

Reflecting the provisions of S. 1970 now pending before Congress, we suggest that resales should be restricted for 2 years from the date of purchase. See Section 4A(e) of S. 1970. Resales prior to the lapse of those 2 years should be allowed to be made to accredited investors, as provided in S. 1970, which presumably might include resales in response to a cash tender offer made by an accredited investor. It is unclear whether intermediaries are intended to be involved in any resales, which will likely seem logical and efficient to them, and this should probably be addressed, if only to alert intermediaries of the possibility that such activity might render them broker-dealers or securities "exchanges" requiring registration under the Securities Exchange Act of 1934.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (11) Exclusions.

This subparagraph should indicate that the exemption is available only to an issuer that has its principal place of business within a State or possession of the United States. As would be the case for a qualified custodian, this would appear necessary in order for the various interested regulatory authorities to have adequate access to and jurisdiction over the issuer.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (12) Sales Reports.

We recommend that the sales reports include the actual use of the proceeds from the offering, that the sales reports be posted on the issuer's website, and that the sales reports be updated quarterly for the 12 months following the release of the proceeds of the offering. The issuer should also be required to keep a full list of all investors, including name, address, phone number, e-mail address, investment amount and date, and method of payment, which should not be posted on the issuer's website but should be made available to the Securities Administrator upon request.

Rule XXX. Model Crowdfunding Exemption. Paragraph (b) Transactional exemption from securities registration requirements. Subparagraph (13) Offering Price.

An alternate procedure that should be acceptable if the offering price should be lowered would be for the previous investors to be notified of the lowered price and then, after the lapse of 5 business days, for the issuer to issue additional shares to them so that all shares would be sold at the lowered price. Under paragraph (b)(7), investors have the right to withdraw their investment before the release of the proceeds by the qualified custodian, which for the previous investors would include this 5-day period, and this right should be stated in the notice to them of the lowered price.

Rule XXX. Model Crowdfunding Exemption. Paragraph (c) Requirements for intermediaries in connection with offerings of securities pursuant to this exemption.

There should be a separate paragraph requiring that the principal place of business of the intermediary be located within a State or possession of the United States. As would be the case for a qualified custodian and the issuer, this would appear necessary in order for the various

interested regulatory authorities to have adequate access to and jurisdiction over the intermediary.

Rule XXX. Model Crowdfunding Exemption. Paragraph (c) Requirements for intermediaries in connection with offerings of securities pursuant to this exemption. Subparagraph (1) Investor screening.

The requirement that the intermediary "ensure" that the investor reviews information and affirms that the he understands the risks is not the sort of standard that intermediaries can be comfortable that they meet. A better standard would be that the intermediary "reasonably believes" that the investor reviews information and affirms that the he understands the risks. This is the standard under SEC Rules 505 (that there are no more than 35 purchasers) and 506 (same, as well as that the investor with his purchaser representative is capable of evaluating the merits and risks of the offering). Such a reasonable belief would presumably result from a representation by the investor to that effect in connection with the offering, assuming that the intermediary is not aware of any "red flags."

Rule XXX. Model Crowdfunding Exemption. Paragraph (c) Requirements for intermediaries in connection with offerings of securities pursuant to this exemption. Subparagraph (2) Reduction of fraud risk.

The requirement that the intermediary take "reasonable measures to reduce the risk of fraud" is too vague a standard for most intermediaries to be able to administer with any reasonable degree of confidence that the standard will have been met. The requirement that it "include" criminal background and securities enforcement regulatory checks on the issuer and its management does not define the boundaries of what is to be done. If the wording of the requirement of making the criminal background and securities enforcement regulatory checks (together with any additional procedures, such as perhaps obtaining management and major owner credit reports, issuer UCC checks, evidence of corporate good standing, and verification of any necessary business or professional licenses – e.g., contractor, beautician, etc) were to indicate that doing so would of itself cause the intermediary to be deemed to have taken such "reasonable measures," then an intermediary would have a reasonable idea of what it would be expected to do in order to be in compliance. In any event, because the intermediary will not provide investment advice or recommendations concerning the offering of a particular issuer to investors, the purpose of a "fraud-risk" check should only be a relatively inexpensive and simple screening to make sure that the issuer does not have some major easily-detectible flaw, and should not involve the sort of detailed due diligence procedures to independently verify an issuer's representations of the type outlined in FINRA's Regulatory Notice 10-22 that is required of registered broker-dealers that offer investment advice and recommendations concerning the securities in the course of actively selling Regulation D offerings to their customers.

One problem in this particular circumstance is that, to our knowledge, there exists no data base by which an intermediary may conduct criminal background and securities enforcement regulatory checks with any reasonable assurance that all past criminal and regulatory history would be uncovered. The criminal justice system of British Columbia, for example, as a matter of policy will not release information concerning criminal sanctions imposed upon persons who have "paid their debt to society" by serving out their punishments. Data bases that may be available to law enforcement agencies, including those charged with enforcing national security,

are not available to the general public and could not be accessed by intermediaries in performing these due diligence functions.

That said, we are advised that www.intelius.com, for example, will provide a non-Fair Credit Reporting Act-compliant nationwide criminal check on a U.S. person for around $40 and a more detailed, FCRA-compliant background check for a higher fee. However, the more that is known about a person (e.g., date of birth, middle initial, address history, etc.) the more helpful such checks are, so that they would have to be administered by an experienced natural person, with attendant costs. The uniqueness of a person's name is important and would need to be reviewed with a discerning eye. Such a data base apparently could not be used as a non-thinking "one stop shop" *via* computer, especially considering the possible use of aliases and whether the subject of the inquiry might be intentionally trying to hide records. In any event, this "criminal check" by a commercial data service does not include a regulatory check, so at best it might be just one part of an intermediary's due diligence review. We are not aware of any central public data base that would provide regulatory information. If such a publicly-available data base exists, it should be specified as part of the requirements of paragraph (c)(2). Otherwise that particular requirement should be limited to a commercially available criminal check based upon information supplied pursuant to a written inquiry of the persons involved, which should be deemed sufficient compliance with this requirement.

One check that could be undertaken by an intermediary rather simply is determination of whether or not either the issuer or any of its affiliates has directly made a crowdfunding investment in the issuer's own offering that would allow the issuer to reach the target amount before the expiration of the offering period in order to cause the proceeds to be released from escrow and not be returned to investors, the assumption being that any such investment would not be genuine and would be returned in some manner after the proceeds had been released from escrow. See NASD Notice to Members 87-61. A requirement that the intermediary, in coordination with the qualified custodian, monitor such investments before the proceeds are released could be included in paragraph (c)(2).

The intermediary should also be required to obtain a certification by the issuer as to any amounts raised *via* crowdfunding within the previous 12 months through other intermediaries, and these amounts should be included within the limits of the offering through the intermediary.

The intermediary should be required to keep in its permanent records documentation of all of the fraud-prevention checks undertaken for each issuer's crowdfunding offering for at least three years from the time the offering ends.

Rule XXX. Model Crowdfunding Exemption. Paragraph (c) Requirements for intermediaries in connection with offerings of securities pursuant to this exemption. Subparagraph (3) Enforcement of investment limits.

Other than requiring investors to represent that they have not exceeded the prescribed investment limits in some indirect fashion, and to coordinate with the qualified custodian to determine that each investor has not done so directly using the intermediary's internet-based system, and to cause any excess to be returned, there is little that an intermediary could do to enforce the investment limits of subsection (b)(2), and accordingly, in doing so an intermediary should be deemed to have met its obligations under paragraph (c)(3), and that provision should so indicate. In particular, the intermediary should not have any obligation to attempt to determine whether the investor is making other crowdfunding investments through the facilities

of some other intermediary, other than to have the investor so represent in connection with the investment. We recommend that the offering limits for multiple offerings specified in paragraph (c)(3) apply to any 12 months period, and that paragraph so state.

Rule XXX. Model Crowdfunding Exemption. Paragraph (c) Requirements for intermediaries in connection with offerings of securities pursuant to this exemption. Subparagraph (5) Administrator access.

The intermediary should also be required to provide federal and state law enforcement agencies with continuous investor-level access to the intermediary's website upon request.

Rule XXX. Model Crowdfunding Exemption. Paragraph (d) Registration requirements for intermediaries.

In addition to the exemptions from the requirements imposed upon state registered broker-dealers set forth in the Proposal, we recommend that this paragraph indicate that intermediaries are exempted from minimum financial requirements (Section 411(a) of the 2002 USA) and that insurance or a suitable bond in a specified amount would be required instead.

We also recommend that this paragraph indicate that the staff of intermediaries will not be required to register as agents (securities salespersons) under state securities laws (Section 402(a) of the 2002 USA) because the intermediary is to function merely as a portal for disclosures by the issuer, and to provide a forum for discussion by the issuer and investors, and presumably would not be analyzing or recommending the securities offered. There would thus be no need for any of such staff to take the examinations typically required in the registration of securities salespersons.

We note that no exemption from the recordkeeping requirements for broker-dealers has been included in the Proposal, so that intermediaries will be required to prepare and maintain appropriate books and records as required by separate rule. See Section 411(c) of the 2002 USA. We assume that any such rule applicable to crowdfunding intermediaries will at some point be reviewed by a NASAA Committee and tailored appropriately if necessary to reflect their special nature.

Form CF, Notice of Exempt Offering of Securities Under the NASAA Model Crowdfunding Exemption.

Form CF is an abbreviated question-and-answer disclosure form. We recommend that issuers should have the option of using the more expanded question-and-answer Form U-7 if they should desire to do so as a guide for a more detailed presentation that is adequately balanced, and the instructions to Form CF should so state.

The information in Form CF is to be provided primarily by the issuer. However, the term "issuer" is regulatory jargon that, while reasonably clear to securities professionals, may not be so clear to the issuer, and certainly not to ordinary investors. We recommend that the term "company" be used instead of the term "issuer" throughout this form and that the identity of the terms "company" and "issuer" be indicated in the introductory paragraph to the form.

Form CF, Part 2, Disclosure Document. Item 2. Information about Offering. Paragraph C.

We suggest that the requirement that the physical address of the qualified custodian in a State or possession of the United States be indicated in Item 2(C).

Form CF, Part 2, Disclosure Document. Item 2. Information about Offering. Paragraph I.

Investors should know whether any of the proceeds are to be paid immediately to management for past services or advances, and, accordingly, we recommend that something akin

to the following be added to paragraph I of Item 2: "Indicate whether any of the proceeds are to be paid to members of management for past services or prior advances to the issuer, and if so, to whom and how much." See NASAA Form U-7, Question 109.

Form CF, Part 2, Disclosure Document. Item 3. Information about the Company. Paragraph A.

To provide focus on the job-creating policy behind the crowdfunding mechanism, and in order to distinguish existing from planned business operations of the company, we recommend that paragraph A be amended to read essentially as follows: "Describe the business and the anticipated business plan of the company, clearly distinguishing between existing and planned operations, and indicate the number of full-time employees or other staff the company is expected to engage within the ensuing 12 months."

Form CF, Part 2, Disclosure Document. Item 3. Information about the Company. Paragraph D.

Because the prior experience of management is so important to the success of a new business venture, we recommend that something akin to the following be added to paragraph D of Item 3: "Indicate whether members of management have had prior experience in managing early-stage, or any other, business enterprises, and if so, provide details." See NASAA Form U-7, Questions 87 and 88.

We appreciate the opportunity to submit these comments and are available to meet and discuss these matters with you and other members of the Small Business Capital Formation Committee and to respond to any questions.

Very truly yours,

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