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August 17, 2012

By Email (pubcom@finra.org)
Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: **FINRA Regulatory Notice 12-34; Request for Comment on Regulation of Crowdfunding Activities**

Dear Ms. Asquith:

Taylor English Duma LLP appreciates the opportunity to provide this letter in response to FINRA Regulatory Notice 12-34 ("Notice 12-34"), which seeks public comments on the appropriate scope of FINRA rules that should apply to member firms engaging in crowdfunding activities either as funding portals or as brokers pursuant to Title III of the Jumpstart Our Business Startups Act (the "JOBS Act"). This letter also includes our response to FINRA's request for comments regarding the development of proposed rules relating to funding portals that are not registered as broker-dealers and may become subject to FINRA rules pending further regulatory guidance from the Securities and Exchange Commission (the "Commission").

Taylor English Duma LLP is a full-service law firm based in Atlanta, Georgia that regularly advises issuers, investors and securities professionals regarding securities law matters. We submit this letter on our own behalf as attorneys who are actively engaged in securities law matters. The opinions expressed in this letter are our own and do not necessarily reflect the opinions of any of our firm's clients.

As a preliminary matter, we wish to state that we appreciate the task facing FINRA and the Commission to navigate this new territory in the private equity marketplace. FINRA's long-standing motto is investor protection and market integrity. We certainly suggest no lesser standards and support and encourage FINRA's continued efforts to uphold these principles. The challenge that herein lies is paving a path to create new market flexibility that will further Congress' intent with the JOBS Act while preserving investor protection and market integrity. Without any uncertainty, clarity for market participants is the cornerstone, and we believe that new FINRA rules relating to crowdfunding intermediaries will have a significant impact on whether crowdfunding truly will provide new opportunities for market intermediaries and issuers or whether crowdfunding proves to be a labyrinth of regulations and costs that will outweigh any potential benefits. With these considerations in mind, we respectfully offer the following comments in response to the specific questions posed in Notice 12-34:

Application of FINRA Rules to Crowdfunding Activities by Broker-Dealers

In Notice 12-34, FINRA "invites comments from broker-dealers regarding the application of existing FINRA rules to broker-dealers' crowdfunding activities and whether such rules should be relaxed to address a broker-dealer's crowdfunding activities, taking into account, among other things, the extent to which a broker-dealer may be able to isolate its crowdfunding business, or otherwise places limitations on its activities akin to those for registered funding portals." We agree that this issue is of particular importance to any broker-dealer who may choose to act as an intermediary in crowdfunding offerings because the scope of every individual broker-dealer's business can, and does, vary significantly.

In a much grander context and for quite some time, representatives of the broker-dealer community have been requesting FINRA to re-examine a number of its rules to contemplate the different business models of broker-dealers that range from limited use broker-dealers with no retail clients to full-service broker-dealers who offer services ranging from managing individual retail accounts, managing accounts for institutional investors, acting in the capacity of a trader or market maker and providing underwriting, capital markets and/or investment banking services to securities issuers.

We believe that FINRA rules relating to broker-dealers acting as market intermediaries in crowdfunding offerings must accomplish two central purposes: (1) creating a set of standards and obligations that will level the playing field between broker-dealers and funding portals in the context of crowdfunding and (2) providing absolute clarity to broker-dealers regarding their obligations in the crowdfunding context versus any other securities business context. It is impractical to expect that any fully registered broker-dealer will engage solely in activities as a market intermediary in crowdfunding offerings, thus it is imperative for FINRA's rules to assist broker-dealers with understanding and implementing supervisory obligations for their various lines of securities business. Any significant degree of ambiguity will only serve as a disincentive for broker-dealers to engage in crowdfunding activities or, in the alternative, will cause broker-dealers to default to heightened supervisory practices already in place in their normal course of business which, in turn, will likely result in increased costs to crowdfunding issuers.

Specifically, we provide the following comments with respect to broker-dealer FINRA members:

Potential Changes to Membership Agreements, Item 12 of Form BD and Examination Requirements of Registered Representatives

Because FINRA intends to issue a new set of rules relating to crowdfunding activities, we respectfully suggest that FINRA provide specific guidance with respect to whether FINRA members will be expected or required to amend their Membership Agreements with FINRA to specifically include crowdfunding activities, and which "check-the-box" disclosure in Item 12 of Form BD should be construed to include activities as a crowdfunding intermediary. Will Item 12.W. ("private placements of securities") cover all activities of a broker-dealer relating to its activities as a crowdfunding intermediary? Conversely, does FINRA intend to recommend amendments to Item 12 of Form BD to specifically include activities as an intermediary for

crowdfunding offerings? It is our opinion that a broker-dealer should not be required to amend its Membership Agreement or Form BD if it is currently approved to sell securities in private placements and has disclosed this fact in Item 12 of its Form BD.

We also respectfully suggest that FINRA provide written guidance with respect to examination requirements for registered representatives who may offer or sell securities to investors pursuant to crowdfunding offerings through broker-dealers. Will these activities be covered by the Series 7 examination? Will any examination other than the Series 7 examination be sufficient (e.g., the Series 82)? It is our opinion that imposing a new qualification examination for crowdfunding activities will present an undue burden on existing registered representatives, and to the extent that FINRA deems it necessary and appropriate to amend the scope of any existing examination or, in the alternative, add an entirely new examination, certain existing registered representatives should be "grandfathered in," consistent with past FINRA practices.

Due Diligence Obligations Relating to Issuers and Suitability Obligations Relating to Investors

In Regulatory Notice 10-22 ("Notice 10-22"), FINRA reminds broker-dealers of their due diligence and suitability obligations in the context of private securities offerings exempt from registration pursuant to the safe harbor provisions of Regulation D ("Regulation D") promulgated under the Securities Act of 1933, as amended (the "Securities Act"). The JOBS Act does not suggest that the regulation of crowdfunding offerings should in any way fall within the guise of Regulation D (in fact, the contrary is true). However, in Notice 10-22, FINRA's discussion of various broker-dealer obligations in the context of Regulation D offerings raises issues with respect to due diligence and suitability obligations of broker-dealers in the crowdfunding context that could extend far beyond the intermediary obligations described in the text of the JOBS Act.

Limiting our comments to FINRA rules referenced in Notice 10-22 that arguably could be extended to crowdfunding offerings (and references to a progeny of NASD Notices to Members contained therein), we highlight the following excerpts from Notice 10-22:

- A broker-dealer that recommends a security is under a duty to conduct a reasonable investigation concerning that security and the issuer's representations about it, and a failure to comply with this duty may constitute a violation of FINRA Rule 2010, requiring adherence to just and equitable principles of trade, and FINRA Rule 2020, prohibiting manipulative and fraudulent devices.

- In connection with an enforcement action, FINRA has found that a broker-dealer that prepared a private placement memorandum containing material misstatements and omissions about such matters as the amount and timing of distributions and the targeted return of principal to investors violated FINRA Rule 2010.

- Former NASD Rule 2310 (Suitability) (recently replaced by more exhaustive FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability)) suggests that in connection with Regulation D offerings, broker-dealers should, at a minimum, conduct a reasonable investigation concerning the issuer and its management, the business prospects of the issuer, the assets held by or to be acquired by the issuers, the claims being made and the intended use of proceeds of the offering.

While we would never suggest that any broker-dealer selling securities should be held to anything but the highest moral and ethical standards, specific FINRA rules relating to due diligence and suitability obligations relating to crowdfunding activities must be tempered so as not to impose strict due diligence obligations that may be unnecessarily burdensome in connection with small private issuers or start-up enterprises and that would require the broker-dealer to incur unnecessary due diligence costs that would be disproportionate to a crowdfunding offering with a maximum capital raise of $1 million in a 12-month period. We are sensitive to FINRA's concerns about whether a broker-dealer will be able to "isolate" its activities in connection with crowdfunding activities; however, this delineation in the context of due diligence and suitability requirements is relatively straightforward. Issuers engaged in crowdfunding offerings will operate under a distinct safe harbor provided by new Section 4A of the Securities Act and will be required to make written disclosures and regulatory filings to this effect. Either the offering will be a "crowdfunding offering," or it will not.

To this end, it is our opinion that due diligence and suitability obligations for broker-dealers engaged in the offer and sale of securities pursuant to crowdfunding offerings should be tailored as follows:

- *Due Diligence of Issuers for Broker-Dealer Intermediaries.* If a broker-dealer agrees to act as an intermediary for a crowdfunding issuer, specific FINRA rules regarding the broker-dealer's obligations to conduct an independent due diligence investigation of the issuer should be narrowly tailored to reflect the requirements of new Section 4A of the Securities Act and any requirements established by the Commission. Beyond those specific requirements, broker-dealers should be permitted to reasonably rely upon written representations of the issuer, its duly authorized officers and directors, and to exercise professional judgment for additional due diligence requirements subject to all general anti-fraud provisions.

- *Due Diligence of Issuers for Broker-Dealers Offering Securities of Crowdfunding Offerings Other than in the Capacity of an Intermediary.* Although somewhat unlikely that such occurrences will happen frequently, if at all, new FINRA rules should contemplate situations in which an existing customer of a broker-dealer purchases securities in a crowdfunding offering through such customer's broker-dealer despite the fact that the broker-dealer is not engaged by the issuer as the primary market intermediary. In any such

instance, the broker-dealer with the customer relationship should have no greater obligations to conduct due diligence regarding the issuer than a review of information required to be made publicly available by the issuer and the primary intermediary.

- *Investor Suitability Obligations.* Whether a broker-dealer offers or sells securities in a crowdfunding offering as the primary intermediary or otherwise, obligations to determine investor suitability should be determined by the overall relationship between the broker-dealer and the customer. If the customer has purchased, or is expected to purchase, other securities through the broker-dealer, then all suitability and know-your-customer obligations under FINRA Rules 2090 and 2111 apply to the overall relationship, including securities purchased through crowdfunding offerings. On the other hand, if the relationship between the broker-dealer and the customer is limited to one or more purchases of securities pursuant to crowdfunding offerings, requirements to determine investor suitability should be narrowly tailored to reflect the requirements of new Section 4A of the Securities Act and any requirements established by the Commission. Beyond those specific requirements, broker-dealers should be permitted to reasonably rely upon representations of the investor, and to exercise professional judgment subject to all general anti-fraud provisions.

Advertising/Communications with the Public

In addition to the foregoing discussion, we further highlight the following text from Notice 10-22 that could be construed to apply to crowdfunding offerings:

> "A [broker-dealer] that assists in the preparation of a private placement memorandum or other offering document should expect that it will be considered a communication with the public by that [broker-dealer] for purposes of NASD Rule 2210, FINRA's advertising rule. If a private placement memorandum or other offering document presents information that is not fair and balanced or that is misleading, then the [broker-dealer] that assisted in its preparation may be deemed to have violated NASD Rule 2210. Moreover, sales literature concerning a private placement that a [broker-dealer] distributes will generally be deemed to constitute a communication by that [broker-dealer with the public, whether or not the [broker-dealer] assisted in its preparation."

To further complicate the issues raised in Notice 10-22 as they may relate to broker-dealers' activities as intermediaries in crowdfunding activities, the Commission has recently approved FINRA's proposal to adopt NASD Rule 2210 and 2211, and related interpretive materials, as FINRA Rules 2210 and 2212 through 2216, and to delete portions of NYSE Rule 472 and related supplementary materials. The new "Communications Rules" (as termed in FINRA Regulatory Notice 12-29) will not become effective until February 4, 2013.

It is our opinion that the "Communications Rules" for broker-dealers may present the greatest challenges with respect to tailoring FINRA rules that will accommodate broker-dealers acting as crowdfunding intermediaries and will also put such broker-dealers on even footing with funding portals.

New Section 4A of the Securities Act requires crowdfunding issuers to file with the Commission and provide certain information such as identifying information, the offering price of the securities, a description of the business and financial condition of the issuer and a description of the stated purpose and intended use of the proceeds of the offering. Very likely, this information will be produced in a somewhat simplified version of private placement memoranda currently used in Regulation D offerings. It would be beneficial, and not detrimental, for registered broker-dealers to assist crowdfunding issuers with the preparation of offering documents. However, the purpose of the JOBS Act is to provide simplified access to capital in the marketplace, and onerous FINRA "Communications Rules" as applied to broker-dealers acting as placement agents in Regulation D offerings would serve as a significant barrier to broker-dealers furthering the purpose of the JOBS Act.

We believe that it is incumbent upon FINRA to carefully examine the new FINRA "Communications Rules" that have yet to be implemented in the context of crowdfunding and in light of some of the general comments relating to broker-dealers engaged in private placements discussed in Notice 10-22. If FINRA rules for broker-dealers acting as crowdfunding intermediaries will effectively require broker-dealers to act as the first line of defense to "police" all information provided by small, emerging crowdfunding issuers, then the future for broker-dealers acting as crowdfunding intermediaries in offerings limited to $1 million per 12-month period likely will be limited significantly. As stated throughout this comment letter, we would never suggest that crowdfunding should become an invitation for bad actors to take advantage of relaxed regulations; however, FINRA (and the Commission) must carefully consider how much obligation will rest on the shoulders of broker-dealers to "supervise" information provided by crowdfunding issuers and incur individual liability in connection therewith. As discussed above, if the intent of crowdfunding under the JOBS Act is to be implemented, FINRA must provide a regulated broker-dealer with some degree of flexibility to reasonably rely upon issuer's representations and its professional judgment, subject to all general anti-fraud provisions.

Proposed Application of FINRA Rules to Crowdfunding Activities by Funding Portals

Although it has not yet been confirmed whether FINRA will act as the governing SRO for the newly created class of crowdfunding "funding portals" under the JOBS Act, we respectfully submit the following comments to proposed new FINRA rules relating to funding portals as requested by Notice 12-34:

We are sensitive to the implications of the following statement in Notice 12-34: "Unlike the rules applicable to registered funding portals, the JOBS Act does not limit the FINRA rules applicable to registered broker-dealers engaging in crowdfunding activities." Nevertheless, and as stated above, we believe that FINRA rules relating to market intermediaries in crowdfunding

offerings must create a set of standards and obligations that will level the playing field between broker-dealers and funding portals in the context of crowdfunding.

As an initial matter, and although perhaps a matter of semantics and mechanics, it is our opinion that FINRA should establish a new series of FINRA rules that pertain solely to funding portals for crowdfunding offerings yet make clear that broker-dealers may rely upon this separate set of rules to the extent that they are engaged in activities that are permissible for funding portals. To the extent practical, this new series of rules should avoid voluminous cross-references to other FINRA rules that pertain solely to broker-dealers engaged in activities other than acting as intermediaries in crowdfunding offerings. Due to separate registration requirements with the Commission, "broker-dealers" and "funding portals" should never be terms used interchangeably.

While this may require FINRA to re-state other existing rules in a tailored fashion within the new series of funding portal rules, we believe that this methodology will obviate confusion for both funding portals and broker-dealers that would stem from paging through the entire FINRA manual determining which rules apply to whom and to what extent. This would also assist FINRA with any future modifications to the rules because they would be consolidated into one, isolated series of rules.

Although Notice 12-34 does not explicitly request comments relating to several important "housekeeping" items for funding portals, it is our opinion that new FINRA rules should address the following items:

- Will funding portals be required to maintain current information through Web CRD that is akin to information required of broker-dealers on Form BD? Will there be a separate form for funding portals?

- If funding portals will be required to become members of the Securities Investor Protection Corporation ("SIPC"), will they be required to maintain a blanket fidelity bond akin to broker-dealer requirements of FINRA Rule 4360?

- Will associated and/or control persons of funding portals be subject to any qualification examination and continuing education requirements?

- Will associated and/or control persons of a funding portal be required to "register" with such funding portal? If so, will these persons be required to utilize the application on Form U4, or will there be a modified form?

In addition to the somewhat granular considerations addressed above, we respectfully submit the following comments regarding new FINRA rules relating to funding portals:

Supervision

It is our opinion that FINRA must establish a separate set of supervision rules for intermediaries engaged in crowdfunding activities in lieu of relying upon NASD Rule 3010 ("Rule 3010") and

related rules. We do not believe that the scope of Rule 3010 is appropriate for funding portals, and we believe that simply amending Rule 3010 to take into consideration funding portals that are not otherwise fully registered broker-dealers would only cause confusion.

We believe that it is appropriate to require all intermediaries to establish and maintain written supervisory procedures ("WSPs") relating to crowdfunding; however, we ask FINRA to be mindful of the time and cost that will be involved for funding portals to create WSPs (and for broker-dealers to amend their current WSPs to include crowdfunding activities). As FINRA notes in endnote 9 to Notice 12-34, the definition of "funding portal" incorporated into the Securities Exchange Act of 1934, as amended (the "Exchange Act"), pursuant to the JOBS Act prohibits funding portals from actively offering investment advice or recommendations or soliciting purchases or sales. Due to the limited, passive role of funding portals, the scope of their WSPs, if required, should be tailored accordingly. A funding portal's WSPs should be reasonably designed to ensure that its associated persons are limiting their activities to those permitted by the Exchange Act and related Commission rules, but should not be required to include broader considerations applicable solely to broker-dealers outside of the crowdfunding context.

Advertising/Communications with the Public

In the context of advertising and communications with the public, we do not believe that it would be appropriate for FINRA to set different standards for funding portals and broker-dealers acting as crowdfunding intermediaries. We reiterate our comments above relating to broker-dealers and believe that the standards set by FINRA for broker-dealers acting as crowdfunding intermediaries should be applied to funding portals. Additionally, and in light of newly created funding portals who may have limited prior familiarity with FINRA rules, we do not believe that it would be inappropriate for FINRA to apply to funding portals the new member filing requirements of current NASD Rule 2210(c)(5)(A) (as amended and restated by FINRA Rule 2210(c)(1)(A) that will become effective on February 4, 2013).

Anti-Money Laundering

Finally, in Notice 12-34, FINRA specifically requests comments regarding anti-money laundering rules pertaining to funding portals. We respectfully state that FINRA has raised this issue prematurely. FINRA Rule 3310 requires broker-dealers to "develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act (31 U.S.C. 5311, *et seq.*), and the implementing regulations promulgated thereunder by the Department of the Treasury." Due to the significant limitations placed on activities of funding portals as defined in the Exchange Act (and as discussed above), it is questionable that the Bank Secrecy Act will apply to funding portals at all. Until guidance is provided, we do not believe that it would be appropriate for FINRA to address this issue in its proposed new rules relating to funding portals.

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Please do not hesitate to contact Jonathan B. Wilson (678.336.7185) or Dianne L. Trenholm (678.336.7144) if you have any questions regarding the issues addressed in this letter.

Respectfully submitted,

TAYLOR ENGLISH DUMA LLP

By: /s/ Jonathan B. Wilson
/s/ Dianne L. Trenholm