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SEC No Action guidance for sale of securities on an internet web site / platform for Regulation D, Rule 506 private placement offerings to accredited investors

Following are synopses of selected SEC no action letters granted to applicants during the past fifteen years. This information may be helpful to you in structuring your business model.

AngelList LLC and AngelList Advisors LLC (2013 – Division of Trading and Markets)

AngelList Advisors, a wholly-owned subsidiary of AngelList, intends to register as an investment adviser with the SEC or states and establish an internet-based platform (or dedicate part of its existing website) for accredited and angel investors to identify companies (called Portfolio Companies) seeking capital. Investors can submit non-binding indications of interest in an investment opportunity. When a target level of interest is reached, AngelList Advisers and the Portfolio Company will review and accept the subscription agreement and direct the investor to forward capital to a bank or financial institution where the investment fund for the Portfolio Company has an account. The no action letter is consistent with prior SEC guidance that unregistered parties cannot receive commissions or transaction-based compensation for the sale of securities.

In granting relief from registration as a BD, the SEC noted, in part, that:

- ✓ AngelList Advisors will be a registered investment adviser with the Commission or one or more states;
- ✓ AngelList Advisors will operate an internet-based platform that will be exclusively available to accredited investors;
- ✓ Investments in each Investment Vehicle will be offered and sold in compliance with Rule 506;
- ✓ AngelList Advisors and any Lead Angel (if applicable), will receive compensation equal to a portion of the increase in value, if any, of the investment as calculated at the termination of the investment in the Investment Vehicle *(i.e.,* carried interest), and will not receive any transaction-based compensation related to the sale of the investment;
- ✓ No officer, director or employee of AngelList Advisors or any Lead Angel will receive any transaction-based compensation in connection with interest in any investment vehicle or any portfolio company; and
- ✓ The specific terms of any compensation to be paid to AngelList Advisors and/or any Lead Angel will be described in the relevant offering document.

FundersClub, Inc. and FundersClub Management LLC (2013 – Division of Trading and Markets)

FundersClub and FundersClub Management LLC operate a platform through which its members can participate in private offerings. FundersClub identifies and does due diligence on start-up companies, and then posts information about the start-up companies on its website. This information is available only to FundersClub members, all of whom were pre-qualified as accredited investors. The FundersClub members may submit non-binding indications of interest in an investment fund created to invest in a particular start-up company. When a

target level of interest is reached, the indication of interest process is closed and FundersClub reconfirms investors' interest and accredited investor status, and negotiates the final terms of the investment fund's investment in the start-up company. Members may withdraw their indications of interest at any time. The sales of investment fund interests are conducted in compliance with Rule 506. FundersClub and FundersClub Management do not receive any compensation, but may charge administrative fees. FundersClub and FundersClub Management intend to be compensated through their role in organizing and managing the investment funds.

The SEC noted that FundersClub's and FundersClub management's described activities appear to comply with Section 201 of the JOBS Act, in part because they and each person associated with them receive no compensation in connection with the purchase or sale of securities. However, once FundersClub, FundersClub Management or persons associated with them receive compensation or the promise of future compensation, as described in their incoming letter, they will no longer be able to rely on Section 201 of the JOBS Act.

In granting no action, the SEC noted that:

- ✓ FundersClub and FC Management are advisers solely to venture capital funds as defined in Rule 203(1)-(1) under the Investment Advisers Act of 1940.
- ✓ FC Management manages investment funds, which are venture capital funds as defined by Rule 203(1)-1 under the Investment Advisers Act of 1940. FC Management's management services include: exercising any rights negotiated with the start-up company; providing the start-up company with strategic advice and networking assistance; voting investment fund shares; offering or selling its securities in the start-up company; deciding on any tender offers; and winding up the investment funds.
- ✓ FundersClub and FC Management receive compensation *(i.e.,* carried interest) for their services, the nature of which are traditional advisory and consulting services, and not transaction-based compensation.
- ✓ The officers, directors and employees of FundersClub and FC Management personally do not receive transaction-based compensation for their efforts in raising investments for the investment funds.
- ✓ The amount and terms of any compensation to be paid to FundersClub and FC Management by any investment fund, as well as the amount of any administrative fee to be used to reimburse third-party expenses of any investment fund, are fully and fairly disclosed to investors in the investment fund at the time the interests in the investment fund are offered.
- ✓ None of the administrative fees is paid to FundersClub, FC Management, or any of their affiliates or principals.
- ✓ Any portion of the administrative fee remaining in the custody account at the time an investment fund is wound up will be distributed to investors along with the other assets of the fund.
- ✓ Neither FundersClub nor FC Management is able to withdraw any deposited funds from the custody account for its own use, and while an investor's funds will pass through an escrow account or similar account established for the benefit of the investor, the only permitted withdrawals from such account are either to an investment fund's custody account to purchase fund interests for the investor or back to the investor if a proposed investment fund does not close.

IPONET – (1996 - Division of Corporation Finance)

IPONET wanted to establish a web-based database where persons would become members and complete questionnaires related to their status as accredited investors. IPONET would present on its website private placement documents related to various private placements in which W.J. Gallagher & Company, an NASD (predecessor to FINRA) member firm was often, but not always, a placement agent. Access to the website was password protected solely to members.

IPONET would not allow persons to actually invest in any private placement until a "sufficient period" of time had elapsed after joining as a member and establishing their status as accredited. Members could not join and immediately participate in a private placement. The parties stated to the SEC that this time interval would be invoked to establish that the registration as a member was not "deemed to be a solicitation for a particular offering."

In granting no action relief from registration as a BD to IPOnet, the SEC noted:

- ✓ site was administered by a registered principal of a BD who was subject to supervision by firm – including all activities conducted by site;
- ✓ site pre-qualified accredited status of "member" investors and assigned passcodes to qualified persons;
- ✓ cooling-off period (no specific time required) before investor could access any private offering material;
- ✓ investors were eligible to invest in deals posted after the investor was deemed qualified as an accredited; and
- ✓ generic advertising regarding site, no current or pending deal information available to the public.

Lamp Technologies – (1997 & 1998 – Division of Investment Management)

Lamp was engaged in the business of data processing, software development and the creation and maintenance of web sites. Lamp proposed to establish and administer a website that would contain information concerning private investment funds offered under Reg D. Neither Lamp nor any of its affiliates would operate or provide investment advisory services to any of the funds listed on the site and neither the owners nor employees of site had any affiliation with a BD and were not licensed personnel.

In order to obtain access to the private fund information available on the website, potential subscribers were required to (i) complete a questionnaire designed to allow Lamp to form a reasonable basis for determining that the subscriber is an "accredited investor", and (ü) pay a subscription fee of approximately $500 per month. Pre-qualified investors who paid the subscription fee received a password permitting them access to the website.

In granting no action relief to Lamp, the SEC cited:

- ✓ Lamp employees would not effect transactions or negotiate transactions;
- ✓ all investors must be pre-qualified as accredited;
- ✓ only generic information was available to the public; specific information about an investment opportunity was available only to pre-qualified investors via a password protected portion of the website; and
- ✓ 30 day cooling-off period was imposed before investors could access offering information because the investments related to ongoing, open-end funds so it was impractical to limit investments only to opportunities posted after the investors were qualified (as in IPONET).

Angel Capital Electronic Network (1996 - Divisions of Market Regulation (now Trading and Markets) and Investment Management)

The SEC determined that the Angel Capital website did not raise BD, securities exchange or investment adviser registration issues. The Angel Capital website was designed to list small private companies that were seeking capital in private transactions, and to permit accredited investors to view those companies and their offering materials. Investors could use the Angel Capital website's search engine to find companies that met specified criteria, and the search engine would notify the accredited investor when a new company on the website matched the specified criteria. No transactions were executed on the Angel Capital website, but the Angel Capital Website did charge participants flat fees to cover administrative costs.

In granting no action relief, the SEC noted that the Angel Capital Website would not:

- ✓ provide advice about the merits of a particular opportunity or venture;
- ✓ receive compensation other than nominal, flat fees to cover administrative costs (and such fees are not contingent upon the outcome or completion of any securities transaction);
- ✓ participate in any negotiations;
- ✓ directly assist investors with the completion of any transaction;
- ✓ handle funds or securities involved in completing a transaction; or
- ✓ hold themselves out as providing any securities-related services other than a listing or matching service.

Roadshow Broadcast, LLC, - (2011 – Division of Trading and Markets)

In Roadshow Broadcast, the Staff granted no-action relief to the operator of a technology platform that allowed third parties to create and stream video and audio of their road shows over the internet and charged a flat fee. The company, which wished to offer its services through registered broker-dealers, asked for no-action relief with respect to the Exchange Act's registration requirements. In granting this relief, the Staff noted in particular that neither the Company nor its Personnel will:

- ✓ provide any advice, endorsement, analysis or recommendation about the merits of the stock of any issuer for which it transmits an Internet Road Show,
- ✓ receive compensation from its client broker-dealers other than a flat transmission fee and that such fee will not be made contingent upon the outcome or completion of any securities transaction, upon the size of the offering, or upon the number of prospective investors accessing the Internet Road Show,
- ✓ participate in any purchase or sale negotiations between investors or underwriters or issuers arising from any Internet Road Show,
- ✓ have any role in effective securities transactions,
- ✓ receive, transfer or hold any investor funds or securities, or
- ✓ hold itself out as providing any securities related services other than transmitting Road Shows over the Internet for registered broker-dealers acting as underwriters.

Agristar Global Networks, Ltd. – (2004 – Division of Corporation Finance)

Agristar was a satellite-based communications company that sought to develop a database of potential investors who might be contacted in the future when Agristar contemplated undertaking future private placements. Agristar had an existing database of farm owners and ranches, including those who utilized Agristar's satellite services, and the database included information about the ownership of the farms, acreage, and annual estimated gross income. Agristar stated that it had existing meaningful existing communications with over 100,000 of the farm owners and ranches.

Agristar proposed sending investor questionnaires to its database that would not contain any information about a particular capital raise. In its first letter to the SEC, Agristar stated that there would be a "waiting period" between the time of the questionnaire and an actual ability to invest in Agristar. This "waiting period" condition was removed by Agristar in a subsequent letter submitted to the SEC. The SEC denied no action relief to Agristar and declined to provide interpretive guidance that such activities would not be deemed general solicitation within Rule 502(c).

While the SEC did not articulate its reasons for denying the no action request, this guidance can be distinguished because Agristar was reaching out to the contacts in the database to develop an interested group of potential investors as opposed to investors coming to the IPONET and Lamp websites.

E.F. Hutton & Co. (1985 – Division of Corporation Finance)

E.F. Hutton requested no-action relief from the SEC for its activities related to private placements in which it acted or intended to act as placement agent or selling agent. Specifically, Hutton would send to potential offerees investor questionnaires and suitability questionnaires as well as "pre-offering material" related to the proposed private placement. Hutton restricted these activities to three groups of persons:

a. persons who had, within the prior three years, invested in public partnerships through Hutton;
b. persons who had invested in private partnerships through Hutton in the prior three years; and
c. persons who had opened accounts at Hutton and completed the suitability questionnaire, even though they had not consummated any securities transactions through the new accounts at Hutton.

The SEC agreed that substantive relationships were created between Hutton and the previous public and private investors specified in its letter. It stated that it was not necessary that offerees have previously invested in securities offered through Hutton: "[s]ubstantive relationships may be established with persons who have provided satisfactory responses to questionnaires that provide Hutton with sufficient information to evaluate the prospective offerees' sophistication and financial circumstances." However, the SEC noted that "any relationship may have been established as a result of general solicitation or advertising, therefore, it is important that there be sufficient time between establishment of the relationship and an offer so that the offer is not considered made by general solicitation or advertising." In the Division's view, if the relationship was established prior to the time Hutton began participating in the Regulation D offering, an offer could be made to the person with whom the relationship was established without violating the ban on general solicitation.

See generally. Use of Electronic Media, SEC Release 33-7856 (May 4, 2000) at section II.C.2, SEC no action letters and enforcement actions available at www.sec.gov, and FINRA Regulatory Notice 10-22 Due Diligence Requirements for Regulation D Offerings.

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