

June 18, 2014

Autorité des marchés financiers
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Sent via e-mail to: consultation-en-cours@lautorite.qc.ca

RE: Draft Regulation 45-108 respecting Crowdfunding

FAIR Canada is pleased to offer comments on Multilateral CSA Notice of Publication and Request for Comment on Draft Regulation 45-108 respecting Crowdfunding (the “**Notice**”) dated March 20, 2014.

Crowdfunding is a method of funding a project or venture through small amounts of money raised from a potentially large number of people over the internet via an internet portal acting as intermediary.¹ There are numerous models of crowdfunding, including the donation model, the reward model, the pre-purchase model, the peer-to-peer lending model, and the securities-based model. Our comments in this letter focus on the securities-based model, as this is the crowdfunding model that will generally involve a distribution of securities.

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

1. Executive Summary

1.1. FAIR Canada does not support the introduction of a Crowdfunding Exemption. We strongly oppose the proposed Start-Up Exemption.

¹ Policy Statement to Regulation 45-108 Respecting Crowdfunding. Available online at: <http://www.lautorite.qc.ca/files//pdf/reglementation/valeurs-mobilieres/45-108/2014-03-20/2014mars20-45-108-ig-cons-en.pdf>.

- 1.2. We believe both models are flawed and present significant potential for serious investor harm.
- 1.3. We believe that the Crowdfunding Exemption presents serious risks to investors as outlined below. The Start-Up Exemption is even worse – permitting unregistered portals to operate in Canada with no aggregate investment limit for individuals is simply unacceptable.
- 1.4. FAIR Canada is concerned that Canadian securities regulators (and securities regulators around the world) will be unable to regulate crowdfunding. The internet does not abide by jurisdictional borders. The introduction of a crowdfunding exemption will send a message to Canadian investors that investing online in an unknown start-up company is a legitimate investment opportunity.
- 1.5. It is widely accepted that many (possibly most) investors will lose money by investing in crowdfunding. It is unclear whether the purported benefits of crowdfunding will outweigh the costs. The economic benefits of crowdfunding are unproven.
- 1.6. As a result, FAIR Canada believes that it is incumbent upon securities regulators who are intent on implementing such an exemption to do so in a way that affords the highest level of investor protection possible. This is the best chance of serving the interests of both investors and issuers.
- 1.7. FAIR Canada is concerned that investment limits will be of limited effect in reducing the risk of abuse and fraud. We also believe that for legitimate offerings, investment limits are necessary to reduce losses.
- 1.8. The underlying premise of crowdfunding is that SMEs can meet their capital-raising needs by sourcing a small amount of money from a large number of people. We recommend that the Participating Jurisdictions decrease the individual investor limits to \$500 or less per offering and \$5,000 in total under the crowdfunding exemption. The current proposed limits are not small amounts for most retail investors.
- 1.9. FAIR Canada is concerned that adequate mechanisms have not been set out that will ensure adherence to the investor investment limits or the offering limit. FAIR Canada recommends the use of a centralized database to verify aggregate investment amounts rather than reliance upon self-certification.
- 1.10. FAIR Canada notes that, while suitability is a low threshold (we believe a best interest duty is necessary), investors could benefit from some form of advice with respect to crowdfunding offers. This could provide more protection than arbitrary investment limits as proposed, by ensuring that any crowdfunding investments do not make up a disproportionate amount of an investor's portfolio. We recommend that regulators examine whether a suitability element should be added to the exemption in the interests of investor protection and in light of research which demonstrates demand for it.

- 1.11. In light of academic research, FAIR Canada calls into question the “wisdom of the crowd”, and suggests that crowdfunding investors may often fail to properly evaluate a crowdfunding offering, be subject to herding influences, and make ‘impulse-purchase’-like decisions.
- 1.12. FAIR Canada is concerned that many investors will not understand the liquidity constraints of crowdfunding investments and will be ‘squeezed out’ of any profits in the rare event that they happen to invest in a successful equity crowdfunding offering. We recommend that the Participating Jurisdictions prescribe basic mandatory protections for crowdfunding investors, including tag-along and pre-emptive rights.
- 1.13. It is essential that the advertising and marketing be limited to the registered portal so that regulators have some ability to provide oversight and monitoring of the advertising through the portal. While we anticipate there may be significant compliance concerns relating to advertising and soliciting, we view this to be an essential investor protection element of the crowdfunding proposal. FAIR Canada is concerned about the implications of proposed advertising and general solicitation provisions and we make specific recommendations to address these provisions.
- 1.14. FAIR Canada has asked various regulators for their research in respect of risk acknowledgement forms and understands that, despite their widespread use, regulators have not conducted research on investor use, investor understanding, utility or design of risk warning documents. We recommend that regulators test the risk acknowledgement form with investors prior to implementing the proposed crowdfunding exemption to ensure that it serves the purpose for which it was intended.
- 1.15. Additionally, we recommend that all portals have minimum requirements to provide risk warnings to investors prior to the point of sale. We also recommend that portals be required to provide an interactive basic knowledge tutorial that investors must complete in order to view offerings.
- 1.16. FAIR Canada agrees that it is vitally important that an issuer may not (directly or indirectly) pay a commission, finder’s fee, referral fee or similar payment to any person in connection with an offering under the exemption, other than to a portal.
- 1.17. FAIR Canada recommends that concurrent capital raising under other exemptions should be prohibited during a crowdfunding distribution period. We further recommend a cooling-off period between offerings made through different prospectus exemptions.
- 1.18. FAIR Canada is concerned that some of the language proposed for the crowdfunding offering document is unclear or may be misleading. We make specific recommendations below in section 16.
- 1.19. FAIR Canada recommends that the right of action for misrepresentation be available against issuers, management, directors and portals. We also recommend that the

crowdfunding offering document incorporate by reference other marketing material and continuous disclosure (for reporting issuers). We also recommend that the limitation period be two years from the date on which the claim became discoverable.

- 1.20. FAIR Canada also suggests that issuers be required to track employment levels and innovation developments of issuers who use the crowdfunding exemption and report them to securities regulators.
- 1.21. FAIR Canada fully supports the restriction that a registered funding portal will not be permitted to obtain dual registration in another registration category.
- 1.22. FAIR Canada opposes the proposed rule that would allow the portal to accept securities from SMEs and start-ups as payment (even if this payment was limited to 10%). This inevitably gives rise to conflicts of interest and, given the important obligations imposed on portals, we do not believe regulators should condone such conflicts.
- 1.23. FAIR Canada believes that self-regulatory organization (“SRO”) membership should be required for crowdfunding portals.
- 1.24. FAIR Canada supports the proposed requirements for crowdfunding portals to complete due diligence. It is essential that portals be required to conduct background checks on issuers and their directors, executive officers, control persons and promoters. It is also essential that due diligence be conducted on the issuer’s business.
- 1.25. FAIR Canada recommends that funding portals have obligations with respect to investor complaints, including participation in the Ombudsman for Banking Services and Investments. Portals should be required to have a formalized process for receiving complaints and tracking them.
- 1.26. FAIR Canada suggests that funding portals have an obligation to report potential fraud to police and securities regulatory authorities and notify investors on their portals as appropriate.
- 1.27. Additionally, we recommend that portals be required to be transparent about capital raised, success rates, instances of fraud, etc. We are concerned that the rare successful businesses will garner a disproportionate amount of public attention and believe that complete information regarding failure rates and the amount of investor losses must also be reported to the relevant regulators and made publicly available.
- 1.28. In FAIR Canada’s view, finite regulatory resources should be used to focus on initiatives that provide for strong investor protection as these would support true capital formation and fair and efficient markets. Meaningful investor protection initiatives, such as the implementation of a best interest standard and a ban on conflicted sales commissions, are essential protections that are missing from the current regulatory framework for both private and public equity investments.

- 1.29. FAIR Canada is surprised at how quickly the crowdfunding initiative has moved from the idea stage to proposed regulations. Despite a lack of evidence, Canada securities regulators have seen fit to steam forward with unproven rules that are widely acknowledged to cause investor losses. We are concerned that in their haste, securities regulators may have failed to consider how this grand experiment will reflect on the policymaking process a few years down the road.
- 1.30. FAIR Canada notes that crowdfunding has moved abruptly from an idea to concrete rules. We have found some of the comments, rationales, or explanations for certain provisions to be unclear or lacking. The consultation period has not allowed adequate time for a thorough discussion (including in-depth roundtables) to discuss the implications of specific provisions being proposed.
- 1.31. We have difficulty understanding why the thorough, methodical, research-based approach that has been applied in important investor-protection matters has been cast aside with respect to crowdfunding and other exempt market initiatives. If regulatory capacity for swift action exists, it ought to be deployed to address investor-protection concerns rather than capital-raising desires.
- 1.32. Given the experimental nature of equity crowdfunding regulation, if Canadian securities regulators proceed with the introduction of a crowdfunding exemption, we strongly urge that a sunset clause of two years be included.

GENERAL COMMENTS

2. FAIR Canada Opposes Crowdfunding and the Start-up Exemption

*Crowdfunding of equity capital for start-ups is one of a handful of jewels in the crown of the JOBS Act....But the crowdfunding jewel is fool's gold ...As a savvy tech entrepreneur told me the other day, "I love crowdfunding: it is cheap money for me. I know it is not good for the investors". That is the problem: **crowdfunding will at best be good only for the entrepreneurs and middlemen, paid for by unwitting consumers who simply cannot know enough about the highly risky ventures or the highly complex venture investing process to make informed investment decisions.***²

- 2.1. **FAIR Canada does not support the introduction of a Crowdfunding Exemption. We strongly oppose the proposed Start-Up Exemption.**
- 2.2. We believe both models are flawed and present significant potential for serious investor harm. The expected return of a crowdfunding investment is extremely low due to the

² Daniel Isenberg, "The Road to Crowdfunding Hell" (April 23, 2012), available online: <http://blogs.hbr.org/cs/2012/04/the_road_to_crowdfunding_hell.html> [emphasis added].

many barriers small investors face: high business risk; low survival rate of SMEs/new firms; absence of professional support often provided to new entrants by venture capitalists; incompetent management; bad ideas; poor valuation; bad luck; lack of exits; potential dilution; and outright fraud and misappropriation. It is an understatement to say that the deck is stacked against crowdfunding investors.

- 2.3. **The start-up exemption is even worse – permitting unregistered portals to operate in Canada is simply unacceptable.** All the problems inherent in the crowdfunding exemption exist in the proposed start-up exemption, but the lack of registration for portals would make it that much more harmful to investors. Unregulated portals would impede effective regulatory oversight over portals. Issuers would not be subject to ongoing disclosure, which severely limits the information that will be received by investors and reduces the accountability of issuers. Further, the lack of a limit on the total amount an investor is permitted to invest in a calendar year exposes investors to potentially unlimited risk.
- 2.4. In FAIR Canada’s view, finite regulatory resources should be used to focus on initiatives that provide for strong investor protection as these are the initiatives that support true capital formation and fair and efficient markets. FAIR Canada made submissions to this effect to the Autorité des marchés financiers and the Ontario Securities Commission in March 2013.
- 2.5. Such initiatives also foster investor confidence in those markets. Meaningful investor protection initiatives, such as the implementation of a best interest standard and a ban on conflicted sales commissions, would provide stronger investor protection. These are essential protections that are missing from the current regulatory framework for both private and public equity investments. These protections would confer real benefits to investors and the Canadian economy by providing optimal outcomes (through the receipt of unconflicted advice in investors’ best interests) at a lower cost to investors.
- 2.6. FAIR Canada is surprised at how quickly the crowdfunding initiative has moved from the idea stage to proposed regulations. Despite a lack of evidence, Canada’s securities regulators have seen fit to steam forward with unproven rules that are widely acknowledged to cause investor losses. We are concerned that in their haste, securities regulators may have failed to consider how this grand experiment will reflect on the policymaking process a few years down the road.
- 2.7. We have difficulty understanding why the thorough, methodical, research-based approach that has been applied in important investor-protection matters has been cast aside with respect to crowdfunding and other exempt market initiatives. The need to foster capital raising for fledgling businesses is no more urgent or important than the need to protect investors. If anything, regulatory capacity for swift action should be deployed in response to investor protection concerns. FAIR Canada recommends that the Participating Jurisdictions apply a consistent approach to policy-making.

- 2.8. Given the experimental nature of equity crowdfunding regulation, if Canadian securities regulators proceed with the introduction of a crowdfunding exemption, **we strongly urge that a sunset clause of two years be included**. This would ensure that the appropriateness of and experience with the crowdfunding exemption is reconsidered once some insight has been gained into its operation and effect.
- 2.9. FAIR Canada notes that crowdfunding has moved abruptly from an idea to concrete rules. While the Participating Jurisdictions have provided detailed rules, we have found some of the comments, rationales, or explanations for certain provisions to be unclear or lacking. The consultation period has not allowed adequate time for a thorough discussion (including in-depth roundtables) to discuss the implications of specific provisions. FAIR Canada has attempted to canvass the proposals, academic research, investor advocates' positions (both in Canada and internationally), and other sources but have felt this process to be rushed.
- 2.10. An absence of comments on particular proposed rules in this comment letter should not be construed as support. We have attempted to comment on those aspects of the proposed crowdfunding exemptions that are of greatest importance to investor protection, but have not commented on every aspect relevant to retail investors. We reserve the right to make further submissions regarding the very detailed proposed rules going forward. We are concerned that the speed at which this initiative is progressing is providing inadequate time for reflection and consideration of the implications of the proposals.

3. The Internet

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind.... You have no sovereignty where we gather.

...You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

... Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.³

- 3.1. The results of the CSA's BlueHedge Investments campaign demonstrated Canadians' vulnerability to online investment fraud. Bill Rice, Chair of the CSA, was quoted as saying "Our recent campaign showed us that people are willing to click on online ads and open emails touting investment opportunities from unknown sources... Potential investors need

³ John Perry Barlow, "A Cyberspace Independence Declaration" (February 9, 1996), available online: <https://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration>.

to be more wary when dealing with investment opportunities they see advertised online.”⁴

- 3.2. FAIR Canada is concerned that Canadian securities regulators (and securities regulators around the world) will be unable to regulate crowdfunding. The proposed crowdfunding rules are premised upon regulated registered portals operating online and facilitating investments by retail investors. But what ability do regulators have to prevent unregistered portals from also offering (or purportedly offering) investments to Canadians? And what assurance is there that Canadians will know they should make crowdfunding investments only through registered portals?
- 3.3. Will Canadian regulators know who is behind the operation of unregulated portals or other issuers who offer securities on the internet offside the rules? What jurisdiction (if any) do Canadian regulators have over websites hosted in other countries? How speedily can they be shut down? Are Canadian police forces equipped to assist? In the event securities regulators are unable to prevent online offerings from issuers who do not meet the qualification criteria, what are their options for enforcement action? The practical implications make success in these cases highly unlikely. How will regulators prevent these offerings from being sold to Canadians? Do securities regulators have sufficient enforcement power to deter non-compliance?
- 3.4. The internet does not abide by jurisdictional borders. Equity crowdfunding offerings will not be limited to the rules prescribed in the Notice. While we expect that public education is a planned element of this initiative, FAIR Canada is aware that investor education takes considerable time and presents challenges, and we do not believe that investor education will be able to address these real and pressing concerns.
- 3.5. FAIR Canada believes, therefore, that it is extremely naïve to think the proposed crowdfunding rules will have any real effect at all. In fact, the only thing they are likely to accomplish is a watering down of the critical message that the internet is not a safe place for investors.
- 3.6. The introduction of a crowdfunding exemption will send a message to Canadian investors that investing online in an unknown start-up company is a legitimate investment opportunity. Given the limited effect of noble investor education efforts to date, we seriously question whether securities regulators will be able to convey to ordinary investors the delineation between regulated crowdfunding offerings (for example, through registered portals) and non-compliant offerings. Canadians are generally uninformed about securities regulation (many do not know of their provincial or territorial

⁴ Financial and Consumer Affairs Authority, Press Release: Online Fraud Awareness Campaign Confirms Investors' Vulnerability (March 6, 2012), available online: <<http://www.sfsc.gov.sk.ca/Default.aspx?DN=4dbd3b54-b532-4a90-9658-a8c97bc03b80>>.

securities regulator and the majority do not check registration⁵). We have no reason to believe that the situation will be any different with respect to the proposed exemptions and this will lead to susceptibility to fraudulent offerings.

- 3.7. Permitting capital-raising by SMEs on the internet will increase the pool of unsuspecting investors vulnerable to frauds. The North American Securities Administrators Association (“NASAA”) listed crowdfunding as its top new threat to investors in 2012.⁶ The following year, crowdfunding was listed as one of NASAA’s new top threats to small business and increased actions or enforcement efforts relating to crowdfunding were noted.⁷

4. Economic Benefits Uncertain

- 4.1. Crowdfunding is hailed as a tool to boost the economy and create jobs, by providing financing to small- and medium-sized entities⁸ which then will create jobs and spur innovation. According to the Notice, both the proposed crowdfunding and start-up exemptions are “intended to facilitate capital raising for all issuers.”
- 4.2. Failure rates of SMEs are high. Recent Canadian data shows that while approximately 70% of SMEs survive for two years^{9,10} only about 50% of small businesses (fewer than 250 employees) survive for five years.¹¹ Other research has found that the average (mean) survival time for new firms (not necessarily SMEs) is six years, while the median survival time is three years.¹² We expect businesses that use equity crowdfunding (rather than bank loans or self-funding) could have even lower odds of success due to moral hazard and other factors. Odds of survival, let alone profit, are against SMEs. We recognize that owners and principals of start-ups and SMEs take considerable risk in trying to create successful businesses. However, we are concerned that small investors who invest in crowdfunded offerings will be exposed to extreme risk without having the same access to information and decision-making power.

⁵ The CSA’s 2012 Investor Index found that 39% of Canadians know that there is a provincial or territorial government agency responsible for regulating financial investments in their province or territory. It also found that 60% of people with a financial advisor had never done any form of background check on their advisor.

⁶ North American Securities Administrators Association, “NASAA Enforcement Report” (October 2012), available online: <<http://www.nasaa.org/wp-content/uploads/2012/10/2012-Enforcement-Report-on-2011-Data.pdf>>.

⁷ North American Securities Administrators Association, “NASAA Enforcement Report 2013 Report on 2012 Data” (October 2013), available online: <<http://www.nasaa.org/wp-content/uploads/2013/10/2013-Enforcement-Report-on-2012-data.pdf>>.

⁸ An SME is a business establishment with 1 to 499 paid employees, more specifically: a small business has 1 to 99 paid employees and a medium-sized business has 100 to 499 paid employees. See <<http://www.ic.gc.ca/eic/site/061.nsf/eng/02834.html>>.

⁹ Industry Canada, “Key Small Business Statistics – August 2013” (Date modified: 2013-09-13), available online: <<http://www.ic.gc.ca/eic/site/061.nsf/eng/02808.html>>. See also Business Development Bank of Canada, “SMEs at a Glance” (August 2011), available online: <<http://www.bdc.ca/EN/Documents/other/SMEsAtAGlance-Summer%202011.pdf>>.

¹⁰ Industry Canada, “Archived - Key Small Business Statistics – July 2012” (Date modified: 2013-09-20), available online: <<http://www.ic.gc.ca/eic/site/061.nsf/eng/02717.html>>.

¹¹ *Ibid.*

¹² Statistics Canada, “Failure Rates for New Canadian Firms: New Perspectives on Entry and Exit” (2000), available online: <<http://publications.gc.ca/Collection/Statcan/61-526-XIE/61-526-XIE1999001.pdf>>.

- 4.3. It is widely accepted that many (possibly most) investors will lose money by investing in crowdfunding. It is unclear whether the purported benefits of crowdfunding will outweigh the costs. A preliminary academic exploration of the underlying economics of crowdfunding notes that:

Despite the best efforts of policy makers and platform designers, there will surely be spectacular failures. Funders will lose significant sums, not only to fraud, but also to incompetent managers, bad ideas, and bad luck... The growing pains experienced by the equity-based crowdfunding industry will be even more dramatic and severe than in the non-equity setting. Throughout the mayhem, policy makers will be faced with the question of whether, in the long term, the benefit from the private gains from trade (cash for equity) as well as from the social gains due to spillovers and other externalities will outweigh these significant costs.¹³

- 4.4. **The economic benefits of crowdfunding are unproven.** As stated by a Deutsche Bank report, "...it remains to be seen whether crowdfunding will achieve a scale that results in positive macro-economic spillover effects, such as a rising number of company start-ups and an attendant increase in positive employment effects."¹⁴
- 4.5. The introduction of equity crowdfunding is very much an experiment, one with uncertain outcomes and real, clear risks. **As a result, FAIR Canada believes that it is incumbent upon securities regulators who are intent on implementing such an exemption to do so in a way that affords the highest level of investor protection possible. This is the best chance of serving the interests of both investors and issuers,** by attempting to foster a sufficient level of confidence in investors to encourage them to continue to supply capital to SMEs. If inadequate protections are implemented, retail investors will be harmed and eventually SMEs will be forced to find other willing providers of capital.

5. Can Crowdfunding Investors Afford to Lose Their Investment?

- 5.1. FAIR Canada is concerned that investment limits will have little effect in reducing the risk of abuse and fraud. Firstly, such limits will be difficult if not impossible to police and, to FAIR Canada's knowledge, no method of enforcing the limits has yet been put forward by Canadian regulators. Secondly, "...fraud in small packages can be just as effective and damaging to the victims, many of whom may be least able to bear the risk of even a small investment in a speculative business."¹⁵ Thirdly, limiting offerings to small amounts per investor will not deter scammers from taking advantage of investors via crowdfunding,

¹³ Ajay Agrawal, Christian Catalini, Avi Goldfarb, "Some Simple Economics of Crowdfunding" (June 1, 2013) at pages 37-38.

¹⁴ Thomas F. Dapp and Christoph Laskawi, "Crowdfunding - Does crowd euphoria impair risk consciousness?" (May 23, 2014), at page 13.

¹⁵ Thomas Lee Hazen, "Crowdfunding or Fraudfunding? Social Networks and the Securities Laws – Why the Specially Tailored Exemption Must be Conditioned On Meaningful Disclosure" (May 20, 2012), at page 1766, available online: <<http://ssrn.com/abstract=1954040>>.

particularly since fraudsters will have no reason to comply with the offering size limits of the Proposed Exemptions.

- 5.2. We believe that for legitimate offerings, investment limits are necessary to reduce potential investor losses. We recommend that the Participating Jurisdictions **decrease the individual investor limits to \$500 or less per investment and \$5,000 in total under the crowdfunding exemption**. There is no reason to believe limits of this size will be ineffective in meeting the goal of raising capital for SMEs; but such limits may be the best available means of mitigating the risk of harm that crowdfunding poses if regulators insist on implementing such exemptions.
- 5.3. According to a National Crowdfunding Association of Canada (“**NCFA**”) survey of representatives of start-ups and/or SMEs, 85% of respondents agreed or strongly agreed that the statement “Investors can lose all their money” accurately states an investor risk inherent in crowdfunding.¹⁶ FAIR Canada questions where retail investors will draw funds from in order to invest in equity crowdfunding. We do not believe that equity crowdfunding is intended to attract funding that would otherwise have been invested as retirement or other long-term savings. However, it is unclear whether investors’ funds will be redirected from other discretionary spending or will come from funds that could otherwise have been directed to less-risky retirement savings or paying down debt.
- 5.4. Thomas Lee Hazen at the University of North Carolina has examined the JOBS Act legislation and has commented on who it would attract: “...the solicitation of small investors is likely to attract more unsophisticated investors who are in need of the investor protection provisions generally found in the securities laws. It also is likely to attract investors with limited funds who cannot tolerate high investment risk, even for small amounts of money.”¹⁷
- 5.5. We are concerned that, currently, many retail investors do not understand the risks associated with crowdfunding. The OSC’s Exempt Market Study on Crowdfunding found that “[w]hile it is clear that investing via crowdfunding is more likely as risk tolerance increases, we are concerned with the high proportion of low risk people who might potentially invest via crowdfunding. In our view, the survey made the risks quite visible and explicit leaving us to wonder how they concluded that crowdfunding was appropriate for them.”¹⁸ We question whether investor education efforts (on portals or elsewhere) could effectively address this concern. We are not optimistic that they can or will.
- 5.6. The 2012 CSA Investor Index also found that 58% of Canadians do not understand the fundamental principle of risk-reward tradeoff and found that only 12% of Canadians have

¹⁶ National Crowdfunding Association of Canada, “National Crowdfunding Survey Data Results – Summary of raw results” (April 24, 2013), available online: <<http://ncfacanada.org/national-crowdfunding-survey-data-results-summary-of-raw-results/>>.

¹⁷ *Supra* note 15 at page 1766.

¹⁸ The Brondesbury Group, “Exempt Market Study on Crowdfunding” (May 28, 2013) at page 34.

realistic expectations of market returns. Only 9% of low knowledge investors were found to have realistic market expectations.¹⁹

- 5.7. The proposed crowdfunding investment limits per investor are \$2,500 in a single investment and \$10,000 in total under the exemption per calendar year. These limits are stated to be “low” in the Notice²⁰, but they may be too high for many of the investors targeted by crowdfunding. Given that there are numerous other prospectus exemptions available to wealthy investors²¹, we believe that serious consideration should be given to lowering these limits.
- 5.8. We note that in 2012, “...the median contribution [to registered retirement savings plans] was \$2,930...”²² The average contribution was approximately \$6,000.²³ The average net contribution per tax free savings account was \$2,741 in 2011.
- 5.9. Research commissioned by the Ontario Securities Commission found that Canadians’ median savings and investments (including RRSPs but excluding home) are about \$45,000.²⁴ Almost 6 out of 10 respondents were found to have less than \$50,000 in savings and investments.²⁵ The investment of \$10,000 in crowdfunding investments would represent a significant portion of these individuals’ savings.
- 5.10. In addition to relatively low savings rates, “[o]ne-quarter of family units had lines of credit in 2012... The median line of credit debt was \$15,000 in 2012.”²⁶ Further, “[a]bout 40% of Canadian family units carried an outstanding balance on their credit cards in 2012... The median amount was \$3,000 in 2012...”²⁷
- 5.11. While the \$2,500 per investment and \$10,000 total annual crowdfunding limits per investor are intended to limit the amount individuals could lose, we question whether most Canadians can, in fact, afford to lose this much.
- 5.12. Given that the underlying premise of crowdfunding is that SMEs can meet their capital-raising needs by sourcing a small amount of money from a large number of people, FAIR

¹⁹ Innovative Research Group, “2012 CSA Investor Index” (October 16, 2012), available online: <https://www.securities-administrators.ca/uploadedFiles/General/pdfs/2012%20CSA%20Investor%20Index%20-%20Public%20Report%20FINAL_EN.pdf>.

²⁰ Key Provisions of the Proposed Crowdfunding Prospectus Exemption at page D-14.

²¹ We note that FAIR Canada opposes certain prospectus exemptions that rely on wealth as a proxy for sophistication. We refer readers to other submissions we have made in response to other exempt market consultations, most recently the accredited investor exemption. See <http://faircanada.ca/wp-content/uploads/2011/01/FAIR-Canada-comments-re-Proposed-Amendments-to-AI-MA-Exemptions.pdf>.

²² Statistics Canada, “Registered retirement savings plan contributions, 2012” (Date modified: 2014-03-25), available online: <<http://www.statcan.gc.ca/daily-quotidien/140325/dq140325b-eng.htm>>.

²³ Statistics Canada, “Table 1 – Registered retirement savings plan contributors – Canada, provinces and territories” (Date modified: 2014-03-25), available online: <<http://www.statcan.gc.ca/daily-quotidien/140325/t140325b001-eng.htm>>.

²⁴ *Supra* note 18 at page 9.

²⁵ *Ibid.*

²⁶ Statistics Canada, “Survey of Financial Security, 2012” (Date modified: 2014-02-25), available online: <<http://www.statcan.gc.ca/daily-quotidien/140225/dq140225b-eng.htm>>.

²⁷ *Ibid.*

Canada suggests that the proposed limits be lowered. If crowdfunding works as intended, and the good ideas are in fact identified by the crowd, we expect that the good ideas would draw an adequate number of investors to meet their capital-raising goals using small investment limits. In addition, lower limits per investment could discourage concentration in one SME and may result in some diversification of crowdfunding investments by purchasing offerings from more SMEs. While crowdfunding is very risky, less concentration could have benefits for both investors and SMEs.

- 5.13. As noted above, FAIR Canada recommends that the individual investment limits be lowered to \$500 or less per investment and \$5,000 in total under the crowdfunding exemption. \$5,000 is greater than 10% of the value of median savings and investments of Canadians. Even a limit of \$5,000 could result in over-concentration in high-risk SME investments for the nearly 6 out of 10 respondents found to have less than \$50,000 in savings.
- 5.14. The experience of Kickstarter shows that large fundraising goals can be met through small donations from a large number of funders.²⁸ The goal of the Participating Jurisdictions in proposing crowdfunding rules is to provide capital to SMEs. Investors will lose their money in many (perhaps most) cases. The Kickstarter experience suggests that fundraising goals can be met through crowd contributions in amounts only a fraction of the investment limits being proposed, without exposing individual Canadian investors to losses they cannot afford.

6. Enforcement of Investment Limits

- 6.1. FAIR Canada is concerned that adequate mechanisms have not been set out that will ensure adherence to the investor investment limits or the offering limit. The current proposal calls for (1) self-certification from investors, as well as (2) verification by the portal of the total investment through that portal. Given that numerous portals are expected to offer crowdfunding distributions, we are concerned that the proposed rules do not address the problem that investors may unintentionally (or intentionally) exceed the individual limits.
- 6.2. Investment limits are the main protection – and perhaps the only potentially effective protection - afforded to investors by this exemption (i.e. limiting their losses). Therefore, it is essential that regulators find a way to ensure issuers, portals and investors adhere to the limits imposed.
- 6.3. FAIR Canada recommends the use of a centralized database to verify aggregate investment amounts.

²⁸ As of June 13, 2014 over 1,300 Kickstarter projects had each raised between \$100,000 and \$1 million, yet Kickstarter had an average pledge of just \$73.60.

7. Advice and Suitability

- 7.1. FAIR Canada notes that, while suitability is a low threshold (we believe a best interest duty is necessary), investors could benefit from some form of advice with respect to crowdfunding offers. This could provide more protection than the arbitrary investment limits as proposed (or added protection if lower investment limits are adopted), by reducing the chance that any crowdfunding investments will make up a disproportionate amount of an investor's portfolio.
- 7.2. A survey by the NCFCA found that SMEs supported the imposition of a suitability requirement for portals (62% agreed or strongly agreed), but this was noted by the NCFCA in its summary of the raw results to be "...a surprising statistic and not feasible for many portal business models"²⁹. FAIR Canada questions why this would be said to be infeasible, as 75% of survey respondents identified as either a planned portal or service provider.
- 7.3. Research conducted by the Brondesbury Group for the OSC also suggested that advice through a financial advisor was one of five strong influences on willingness to invest in crowdfunding.³⁰
- 7.4. **We recommend that regulators examine whether a suitability element should be added to the exemption in the interests of investor protection and in light of research that supports demand for it.**

8. Investment Evaluation

- 8.1. Valuing a crowdfunding distribution by an SME, particularly a start-up, is notoriously difficult.

For an interested investor it is a huge challenge to gain a proper assessment of the business model including all of its opportunities and risks. After all, given the only short existence of a start-up as a company there is only a small amount of valuation-relevant data available. However, for an investment decision it is precisely the communicated valuation that plays a key role as an indicator of the start-up's prospective returns and risk profile.³¹

According to the NCFCA's survey of representatives of start-ups and/or SMEs, 80% of respondents agreed or strongly agreed that "limited disclosure at the time of purchase and on an ongoing basis" was an investor risk inherent in crowdfunding.³²

²⁹ *Supra* note 16.

³⁰ *Supra* note 18 at page 3.

³¹ *Supra* note 14 at page 8.

³² *Supra* note 16.

8.2. Valuation is even more difficult for unsophisticated retail investors who are inexperienced at performing such valuation and at a large information disadvantage relative to issuers. While there are significant risks inherent in investing in start-up companies, "...information asymmetry (i.e., creators have more information about risks than funders) may significantly increase the cost of these risks to investors."³³

8.3. Technological advances have enabled quick investment decisions. According to a report by Deutsche Bank,

a current funding record in which EUR 250,000 was raised in only 7 hours and 18 minutes shows that investment decisions in crowdfunding are taken in an extremely short space of time. In fact, the first EUR 50,000 was collected in only 38 minutes. This raises the question of the extent to which it is at all possible to perform an appropriate valuation and calculate all the related opportunities and risks in this short timespan. Funding issues are usually fraught with complexity, risks and uncertainty. It is no doubt possible to estimate and calculate risks with a certain degree of probability following due diligence. By contrast, the black swans will remain unpredictable.³⁴

We do not believe that retail investors have the capacity to complete adequate due diligence prior to investing.

8.4. The "Pebble" watch, which is one of (pre-purchase model) crowdfunding's great success stories, met its goal of raising \$100,000 in two hours. It is unclear whether investors will be able to make an informed investment decision in the short amount of time often observed in crowdfunding campaigns. We question whether this would result in rational investment decision-making or something more along the lines of an 'impulse' purchase.

8.5. Further, it has been observed that "[f]unders and creators are initially overoptimistic about outcomes"³⁵. Canada's own Wealthy Barber, David Chilton, tweeted to this effect on Twitter recently, saying: "Just looked at 6 start-ups' 1st-year projections and assumed 5-yr growth rates. If they hit their numbers, collectively they'll own Canada."³⁶

8.6. We are not convinced that investors will make informed decisions in respect of crowdfunding. The history of securities regulation is replete with examples of speculative market bubbles and subsequent crashes, illustrative of herding behaviour. Although there are examples of the crowd monitoring and successfully identifying fraud,

...in the context of funding, the crowd is subject to herding behavior. Much of the existing research on crowdfunding has emphasized that funders rely heavily on accumulated capital as a signal of quality... Thus, the sequential

³³ *Supra* note 13.

³⁴ *Supra* note 14 at page 11.

³⁵ *Supra* note 13.

³⁶ Chilton, David (@wealthy_barber). "Just looked at 6 start-ups' 1st-year projections and assumed 5-yr growth rates. If they hit their numbers, collectively they'll own Canada." May 21, 2014. Tweet.

nature of investment has the potential of triggering an information cascade. This path dependence suggests that funding success will only reflect underlying project quality if early funders do a careful job screening projects.³⁷

- 8.7. FAIR Canada questions the purported “wisdom of the crowd”, as do others. As stated by Daniel Isenberg:

I did my Ph.D. degree in social psychology studying the behaviour of groups, and group irrationality is well-documented – crowds are “wise” only in a very limited set of circumstances. As often as not, crowds bring us tulip crazes, subprime meltdowns, the Kitty Genovese ...scandal, Salem witch trials and other tragedies. Crowdfunding advocates claim that social media will self-correct the madness of crowds, but this seems to me highly suspect.³⁸

- 8.8. While proponents of crowdfunding tout the “wisdom of the crowd” (which is also referred to in the Notice on page D-12), **the wisdom of the crowd remains questionable.**

9. Lack of Exits and Minority Rights

- 9.1. According to the NCFA’s survey of representatives of start-ups and/or SMEs, 85% of respondents agreed or strongly agreed that “May not be able to resell or redeem their investment” is an investor risk inherent in crowdfunding.³⁹
- 9.2. FAIR Canada is concerned that many investors will not understand the liquidity constraints of crowdfunding investments. As noted below in section 16, we suggest that the required wording of the offering document be modified to make clear to investors that they would be prohibited from selling their non-reporting issuer securities indefinitely unless they can rely on another exemption. Suggesting that the securities are “difficult to sell” may be interpreted to mean that they are permitted to be sold but it could be challenging to find a buyer.
- 9.3. FAIR Canada is concerned that retail investors will be ‘squeezed out’ of any profits in the rare event that they happen to invest in a successful equity crowdfunding offering. We recommend that the Participating Jurisdictions prescribe basic mandatory protections for crowdfunding investors, including tag-along and pre-emptive rights.
- 9.4. We do not believe that it will be possible for the offering document to sufficiently educate retail investors about minority investor rights (or lack thereof) and the risks associated with being a minority security holder. Disclosure of what rights investors have (or do not have) is far inferior to requiring the provision of basic protections. At a minimum, we

³⁷ *Supra* note 13.

³⁸ *Supra* note 2.

³⁹ *Supra* note 16.

believe that the dilution statement must include a warning about potential dilution by existing securities issued by the issuer.

10. **Fraud**

- 10.1. According to the World Bank, "...as the [crowdfunding] market expands, there will inevitably be attempts to circumvent regulations and defraud investors."⁴⁰
- 10.2. The CSA's brochure on avoiding fraud and scams notes that "[y]ou don't have to be wealthy to be scammed. One-third of fraud victims are scammed for less than \$1,000. Another 28% are taken for between \$1,000 and \$5,000."⁴¹
- 10.3. Anticipating an increase in online fraud stemming in part from passage of the JOBS Act, NASAA created a task force on Internet fraud investigations shortly after the enactment of the JOBS Act to monitor crowdfunding and other Internet offerings. The group is currently coordinating multi-jurisdictional efforts to scan various online offering platforms for fraud, and, where authorized, will coordinate investigations into online or crowdfunded capital formation fraud.⁴²
- 10.4. In late 2012, NASAA noted a significant increase in internet domain names with "crowdfunding" in the name. A press release stated that "[m]any of these sites appear to have been formed by large credible organizations while others appear to be created by individuals that may be operating out of their basements... The pure volume suggests that the wave is about to overtake the dam." It also warned that "[i]nvestors soon can be expected to be inundated with crowdfunding pitches, legitimate or otherwise..."⁴³
- 10.5. Crowdfunding provides opportunities for fraud. According to economic research,

[i]nexperienced and overly optimistic investors may not only channel capital towards bad projects but also subject themselves to outright fraud. It is relatively easy to use false information to craft fraudulent pages that look like authentic fundraising campaigns. While platforms try to filter out such cases of manipulation, crowdfunding may become an appealing target for professional criminals. Furthermore, because investments are small, the risk is exacerbated by weak individual-level incentives to perform due diligence. To the extent that the cost of performing due diligence is high and the individual benefit low, the crowdfunding community may systematically underinvest in due diligence; instead, funders may free-ride on the investment decisions of others, which is feasible to do since funding

⁴⁰ The World Bank, "Crowdfunding's Potential for the Developing World" (2013), at page 10.

⁴¹ Canadian Securities Administrators, "Protecting your money: Avoiding frauds and scams" (undated), available online: <http://www.securities-administrators.ca/uploadedFiles/General/pdfs/Protect_your_money_EWeb_2012.pdf> at page 2.

⁴² North American Securities Administrators Association, Press release: "NASAA Sees Sharp Spike in Crowdfunding Presence on the Internet" (December 5, 2012), available online: <<http://www.nasaa.org/18951/nasaa-sees-sharp-spike-in-crowdfunding-presence-on-the-internet/>>.

⁴³ *Ibid.*

information is public and funders usually cannot be excluded. Moreover, relative to platforms such as eBay and Airbnb, where sellers have an incentive to build a reputation to signal against fraud, the lack of repeated interaction over a short period of time increases the potential for fraud.⁴⁴

10.6. As noted in the Notice, “[t]he registration requirement is also intended to serve as a safeguard against funding portals being used to facilitate fraudulent offerings of securities through the internet.”⁴⁵ As noted above, we question how broadly securities regulators will be able to disseminate the message to use registered portals and whether investors will understand and follow this advice and be able to distinguish between legitimate registered portals and fraudulent ones. Permitting the use of unregistered portals exacerbates this problem.

CROWDFUNDING EXEMPTION COMMENTS

ISSUER REQUIREMENTS

11. Advertising/Soliciting Restrictions

- 11.1. It is essential to ensure that all pertinent information is provided to investors in one place. This is the rationale for having a crowdfunding portal. Advertising and solicitation through social media may have the effect of priming investors to buy, causing them to think they have been educated about the investment by the crowd, and thus causing them to disregard or scroll through the disclosure information on the portals without reading it.
- 11.2. It is essential that the advertising and marketing be limited to the registered portal so that regulators have some ability to provide oversight and monitoring of the advertising through the portal. Allowing advertising and solicitation via social media would present significant resource challenges to securities regulators. While we anticipate there may be significant compliance concerns relating to advertising and soliciting, we view this to be an essential investor protection element of the crowdfunding proposal.
- 11.3. FAIR Canada is concerned about the implications of proposed advertising and general solicitation provisions. We are also sceptical about whether issuers (and others) will comply with these rules and whether securities regulators have the ability and capacity to ensure an acceptable level of compliance.
- 11.4. In particular, proposed clause 18(2)(a) provides that issuers, the registered funding portal, and others involved with a distribution may “...make the [offering document and other related materials] available to potential purchasers...” In our view, **this defeats the intention of requiring that the materials be made available through the portal’s website and the prohibition against advertising and soliciting. Advertising and soliciting should**

⁴⁴ *Supra* note 13 at pages 19-20.

⁴⁵ Key Provisions of the Proposed Crowdfunding Portal Requirements, at D-30.

be limited to the portal's website and this provision completely hollows out this restriction. In so doing, this provision essentially reduces the portal to a transactional site. We question whether in practice materials will be made available to potential purchasers without additional advertising and soliciting. FAIR Canada believes that regulators would be naïve to expect that to be the case.

- 11.5. If a prohibition against advertising and soliciting is to be asserted, FAIR Canada also recommends that subsection 18(1) apply to any person, not just persons involved with a distribution, or that persons involved with a distribution be broadly defined. It is unclear how far the prohibition extends, and we believe that the prohibitions against advertising and soliciting should preclude any and all advertising and solicitation outside the portal.
- 11.6. Further, proposed clause 18(2)(b) allows issuers, the registered funding portal, and others to “advise potential purchasers, including customers and clients of the issuer, that the issuer is proposing to distribute securities under the crowdfunding prospectus exemption and refer potential purchasers to the website of the registered funding portal...” In our view, this provision is likely to be subject to misinterpretation. The policy statement makes clear that the advice must be limited to directing attention to the portal's website, but we recommend that clause 18(2)(b) expressly provide that no other representations or solicitation is permitted.
- 11.7. Further, we anticipate low levels of compliance with the advertising and soliciting limits. There does not appear to be a meaningful provision to encourage compliance with the proposed rules and we question the securities regulators' capacity (and ability) to ensure compliance.
- 11.8. FAIR Canada is aware that comments have been made regarding the importance of advertising and soliciting on social media to successful crowdfunding campaigns. As noted above, FAIR Canada agrees with the Participating Regulators' proposals that limit this activity. If broader advertising and soliciting is considered to be necessary to a successful crowdfunding model, FAIR Canada believes that this would raise a fundamental question about the appropriateness of a crowdfunding exemption for retail investors.

12. Risk Warnings and the Risk Acknowledgement Form

- 12.1. FAIR Canada has asked various regulators for their research in respect of risk acknowledgement forms and understands that, despite their widespread use, regulators have not conducted research on investor use, investor understanding, utility or design of risk warning documents.
- 12.2. FAIR Canada is surprised that regulators include the risk acknowledgement form as an important investor protection safeguard in the Proposed Exemptions. Very little is known about whether investors understand the information presented and how they use such

information. Behavioural sciences widely acknowledge that design and delivery of information significantly affects how it is interpreted and how it is used and understood.

- 12.3. We recommend that regulators **test the risk acknowledgement form with investors prior to implementing the proposed crowdfunding exemption to ensure that it serves the purpose for which it was intended.**
- 12.4. Additionally, we recommend that information regarding risks be provided to portal users at various stages of the crowdfunding investment process (not just in the risk acknowledgement form). Although there may be a significant amount of investor education material that builds up (both inside and outside the portals), it would be imprudent to assume that all individuals interested in crowdfunding will be aware of the risks. We expect that the most forward-thinking portals will build such information and warnings into their platform, but believe that **all portals should have minimum requirements to provide risk warnings to investors prior to the point of sale.**
- 12.5. Risk warnings should not be vague, such as the statement in proposed form 45-108F1 that states “[m]any start-ups and small businesses fail.” FAIR Canada recommends that specific failure rates be provided (such as, the success/failure rate of small business and the success/failure rate of crowd-funded offerings). Proposed language to the effect that “some will fail, and some will succeed” is highly inappropriate and is not reflective of actual success and failure rates.
- 12.6. Potential investors should be provided an overview of the risks and other limitations of crowdfunding prior to viewing potential offerings. Investors should be reminded of these when they indicate interest in investing. The warnings should not be limited to the risk acknowledgement form, which we understand is to be provided at the time of the investment transaction, since that occurs after the investor makes their decision to invest. It is essential that the investor is made aware of the risks prior to their evaluation of the investment so that they can attempt to factor the risks into their decision.
- 12.7. We also recommend that portals be required to provide an interactive basic knowledge tutorial that investors must complete in order to view offerings.
- 12.8. FAIR Canada believes that the form should be modified to include information for investors regarding their two day right of withdrawal and any statutory or contractual right in the event of a misrepresentation where the form mentions the investor’s legal rights. While we question the utility of these protections in practice, we believe that investor should be provided with this information where they are advised their legal rights are reduced.
- 12.9. FAIR Canada questions whether “...and I will find it very difficult to sell this investment” appropriately sums up resale restrictions. We suggest that more appropriate language might be “I understand that the sale of these securities is legally restricted and I may not ever be able to sell this investment or it may be difficult to sell it. I also understand these

securities are subject to an indefinite hold period and can only be resold under another prospectus exemption or under a prospectus.” For a reporting issuer we suggest language that makes clear that the securities are subject to a four month hold period.

13. Compensation of Persons Promoting the Offering

- 13.1. FAIR Canada agrees it is vitally important that an issuer may not, directly or indirectly, pay a commission, finder’s fee, referral fee or similar payment to any person in connection with an offering under the exemption, other than to a portal.
- 13.2. All information about the offering should be provided on the portal’s website. The payment of compensation to salespeople for soliciting potential investors would cause great harm to retail investors. We encourage regulators to ensure compliance with this provision, as it is essential to investor protection.

14. Exclusion of Non-reporting Real Estate Issuers

- 14.1. FAIR Canada agrees with the proposed restriction that precludes real estate issuers from using the Crowdfunding Exemption. We believe that the Participating Jurisdictions’ concerns with the sale of real estate securities by non-reporting issuers in the exempt market are a valid reason for excluding these issuers from using this exemption.

15. Concurrent Offerings

- 15.1. Proposed Regulation 45-108 would allow an eligible crowdfunding issuer to rely on other prospectus exemptions to distribute securities at the same time as conducting a crowdfunding offering. FAIR Canada is concerned that allowing issuers to rely on the crowdfunding exemption and raise money concurrently under other exemptions would cause confusion for issuers and investors. The crowdfunding model relies on the portal to deliver information to potential investors and is intended to limit advertising and solicitation. Allowing issuers (and potentially other intermediaries such as exempt market dealers (“EMDs”) to sell securities outside of the registered portal defeats the purpose of the advertising restriction in the crowdfunding exemption.
- 15.2. FAIR Canada recommends that concurrent capital raising under other exemptions should be prohibited during a crowdfunding distribution period. We further recommend a cooling-off period between offerings made through different prospectus exemptions.
- 15.3. Similar suggestions have been made in the U.S. in response to proposed crowdfunding regulation. According to the Consumer Federation of America, provisions that allow for concurrent offerings will undermine regulatory efforts:

[a]ll of the Commission’s efforts to ensure that all crowdfunding activities occur through the intermediaries will be undermined if issuers can engage in

a simultaneous offering under a different exemption. We therefore support the Commission's proposed approach to requiring transactions to be conducted through an intermediary but urge the Commission to safeguard that approach by strengthening its policy with regard to integration. As noted above, we believe the best approach is for the Commission to require a one-to-two-month cooling off period between offerings made subject to different exemptions.⁴⁶

- 15.4. The CFA Institute made similar recommendations, stating “[w]e are concerned, however, that promotional activities of simultaneous offerings may not be clearly distinguishable and will lead to investor confusion or cross-selling by issuers or intermediaries. We therefore recommend that the Commission impose a “quiet period” between offerings relying on allowable exemptions, and suggest consideration of a three- month period.”⁴⁷
- 15.5. We note that in the U.S., the JOBS Act limit issuers’ aggregate amount sold to all investors irrespective of the exemption(s) relied upon.⁴⁸ If the Participating Jurisdictions reject our recommendation to prohibit concurrent offerings and introduce a cooling off period, we suggest that the aggregate amount that can be raised by an issuer under any prospectus exemption during a crowdfunding distribution period be the crowdfunding aggregate limit (i.e. \$1.5 million on a rolling 12-month basis).

16. Crowdfunding Offering Document

- 16.1. FAIR Canada is concerned that some of the language proposed for the crowdfunding offering document is unclear or may be misleading.
- 16.2. Specifically, we believe that the statement “[m]any start-ups and small businesses fail” does not provide sufficient information to convey to retail investors the risks inherent in SME investments, particularly the proportion that fail within a relatively short period of time (see section 4.2 above where we discuss some statistics relating to SME success and failure rates). FAIR Canada recommends that this language be updated to provide specific information relating to the large proportion of SMEs that fail.
- 16.3. FAIR Canada also notes above in section 9.2 that stating that securities are “difficult to sell” does not clearly convey that the sale is restricted by securities regulations. The sale is not difficult, rather resale is prohibited (absent reliance on another exemption). We suggest that this language be modified to be more clear and accurate.
- 16.4. FAIR Canada suggests that the prescribed statement regarding dilution also include a requirement to outline any rights and characteristics of other securities already issued by the issuer that may dilute or negatively affect the rights of purchasers under the offering.

⁴⁶ Consumer Federation of America, Letter Re: File Number S7-09-13 Crowdfunding (February 2, 2014).

⁴⁷ CFA Institute, Letter re: Crowdfunding (File No. S7-09-13) (3 February 2014), available online: <<http://www.cfainstitute.org/Comment%20Letters/20140203.pdf>>.

⁴⁸ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 302, 124 Stat. 1376 (2010).

17. Liability for Misrepresentation

17.1. We do not believe that extending the right of action under section 130.1 of the *Securities Act* (or a comparable contractual right of action) to misrepresentations in a crowdfunding offering document would provide an adequate level of investor protection.

Right of Action Must Be Against Issuers, Management, Directors and Portals

17.2. The key provisions of the proposed crowdfunding prospectus exemption (at page D-20) suggest that the right of action was intended to be available against the issuer, management, directors, and portals (subject to a due diligence defence). However, this is not provided for in section 130.1, nor is it reflected in the contractual right of action addressed in section 22.

17.3. In light of the high risks faced by crowdfunding investors, and the kinds of businesses that securities regulators intend to assist in raising capital under the Crowdfunding Exemption (start-ups and SMEs), FAIR Canada believes that rights of action should be available against issuers, management, directors, and portals. In particular, a right of action against the issuer may of little to no value to investors if the issuer fails, in which case the issuer will likely have no or insufficient assets to satisfy a judgment in favour of investors (assuming that litigation can be economically pursued at all).

17.4. FAIR Canada recommends that the management, directors, and portals have responsibility for the accuracy and completeness of the issuer's information. The NCFAs survey results suggest that there is considerable support for a requirement for portals to undertake full due diligence on each issuer that seeks to raise capital (only 21% disagree and 62% agree or strongly disagree).⁴⁹ Additionally, the NCFAs found that 60% of respondents agree or strongly agree that a portal should certify (and incur liability if it is wrong) that there are no misrepresentations in any document posted by an issuer on the portal's website.⁵⁰

17.5. We suggest that if a portal does not vouch for the accuracy or completeness of the issuer's information, this be clearly explained (in specific plain language) so that the investor knows that they may not have recourse to the portal for inaccuracies or omissions.

Incorporate Marketing Materials

17.6. FAIR Canada recommends that the crowdfunding offering document incorporate by reference other marketing materials (as contemplated by section 16 of proposed Multilateral Instrument 45-108) and, for reporting issuers, their continuous disclosure. This would be consistent with the approach taken for the OM Exemption.

⁴⁹ *Supra* note 16.

⁵⁰ *Ibid.*

Limitation Period

17.7. The limitation period applicable to actions under section 130.1 is unduly limiting for crowdfunding. That limitation period is the lesser of three years from the date of the transaction and 180 days from the date of the discovery by the plaintiff of the facts underlying the claim. Crowdfunding will target less-sophisticated investors, and in our view, they should have the benefit of the same limitation period as is generally available under section 4 of the *Ontario Limitations Act*, which is two years from the date on which the claim became discoverable, subject to an ultimate limitation period of 15 years.

Practical Benefit of Right of Action for Misrepresentation

17.8. Although investors have a right to sue for a misrepresentation, the practical benefit of this is questionable given the small investment amounts and the cost of litigation. Given that, in many cases, the crowdfunding efforts will be modest and there will be modest potential damages, the economics of bringing such a claim and the adequacy of the economic incentives available to plaintiff law firms to bring suits will limit the ability to obtain a remedy.⁵¹

17.9. FAIR Canada notes that the language at proposed clause 22(1)(c) states that a right of action against the issuer would be subject to “the defence that the purchaser had knowledge of the misrepresentation”. In our view, this clause is meant to provide a defence only where the purchaser made the purchase with knowledge that the representation was untrue or incorrect, but the proposed language is imprecise.

18. Reporting by Issuers

18.1. FAIR Canada also suggests that issuers who use the Crowdfunding Exemption be required to report their employment levels and innovation developments. The purpose of the crowdfunding exemption is to facilitate capital-raising for SMEs; presumably the longer-term intention is to spur economic growth, including job creation. It would be of assistance for policy makers to know whether new rules were having the intended longer-term effect.

CROWDFUNDING EXEMPTION COMMENTS

FUNDING PORTAL REQUIREMENTS

19. Funding Portal Registration

19.1. FAIR Canada fully supports the restriction that a registered funding portal will not be permitted to obtain dual registration in another registration category. Specifically, discount

⁵¹ *Supra* note 15 at page 1759.

brokerages and EMDs should not be permitted to distribute securities in reliance on the proposed new crowdfunding prospectus exemption.

- 19.2. Crowdfunding portals are intended to be a specialized type of restricted dealer to facilitate only distributions of securities in reliance upon a crowdfunding prospectus exemption. The proposed regulation sets out specific requirements of crowdfunding portals, including prohibitions against making recommendations or providing advice and soliciting purchases or sales of securities offered on its platform. Portals are also prohibited from collecting know-your-client information other than that which is necessary for other purposes.
- 19.3. If EMDs and other registrants were permitted to register and carry on the activities of crowdfunding portals, this would result in conflicts between their EMD and restricted dealer registration requirements. EMDs have suitability obligations, while crowdfunding portals are prohibited from providing specific recommendations or advice to investors. In FAIR Canada's view, these registration obligations are at odds and could result in confusion or unintentional non-compliance. Other conflicts could arise as well. For example, EMDs could be incented to provide preferential treatment to their existing issuer clients through the portal they operate. Fees and commissions earned from these EMD clients could influence treatment on an EMD's portal, even if commissions or fees were not paid 'directly' or 'indirectly'. Given the restricted intermediary role intended to be fulfilled by crowdfunding portals, we believe it is appropriate to limit their registration to the restricted dealer category.

20. Portal Payment – Issuer Securities

- 20.1. FAIR Canada opposes the proposed rule that would allow the portal to accept securities from SMEs and start-ups as payment (even if this payment was limited to 10%). This inevitably gives rise to conflicts of interest and, given the important obligations imposed on portals, we do not believe regulators should condone such conflicts.
- 20.2. Crowdfunding portals are intended to act only as an intermediary in connection with a distribution of securities made in reliance on the crowdfunding prospectus exemption. If the portal receives, or is expected to receive, an ownership interest, this would cause a conflict of interest. Additionally, disclosure of an ownership interest by the portal could be construed by investors as an endorsement or recommendation.
- 20.3. It is important to prevent conflicts of interest to the greatest extent possible, because the portal is permitted to 'curate', highlight, or match an issuer to potential investors. The portal should be prohibited from taking an ownership interest in an issuer to prevent inappropriate or imbalanced information to investors as a result of its interest.
- 20.4. As an aside, FAIR Canada understands that non-equity crowdfunding portals often accept credit card payments for donations- and rewards-based funding. FAIR Canada strongly opposes the use of borrowed funds (by credit card or otherwise) to purchase securities

under the crowdfunding exemption. Leverage magnifies risk, which we view to be wholly inappropriate for retail investors, particularly in inherently risky crowdfunding investments.

21. SRO Membership

21.1. FAIR Canada believes that SRO membership should be required for crowdfunding portals. Compliance by and oversight of portals is essential to ensuring that the investor protections built into the proposed crowdfunding exemption operate as intended. In our view, SRO oversight would ensure more frequent compliance reviews and would thus identify potential problems earlier.

22. Background Checks

22.1. FAIR Canada supports the proposed requirements for crowdfunding portals to complete due diligence. It is essential that portals be required to conduct background checks on issuers and their directors, executive officers, control persons and promoters. It is also essential that due diligence be conducted on the issuer's business.

22.2. It is very important that the liability for incomplete or incompetent due diligence be sufficient to ensure that this responsibility is taken seriously and completed properly and thoroughly. Regulators should ensure that investors have recourse against crowdfunding portals for inadequate background checks. A funding portal's reputation should not be the only motivating factor to ensure this responsibility is fulfilled, as this will not protect investors adequately, particularly when problems arise.

22.3. FAIR Canada understands that there are already service providers vying for business to provide background check services for crowdfunding portals. We support the policy statement provision that makes clear that the responsibility to comply with the criminal record and background check requirements remains with the portal. However, the proposed provisions in respect of criminal record and background checks requires that they be "conducted" and filed on behalf of issuers with the principal regulator. We encourage regulators to consider ensuring minimum standards are mandated in respect of these requirements and that responsibility to meet such requirements cannot be delegated to third parties. The offence of making a false statement to regulators is likely a weak deterrent to anyone who sets out to defraud investors. As a result, complete and thorough background checks are vitally important.

23. Proficiency

23.1. FAIR Canada supports the portal proficiency standards set out in the proposed legislation at section 30(1).

23.2. However, FAIR Canada suggests than an obligation to assess the merits or expected returns of an investment to investors or the commercial viability of a proposed business or offering could assist in the funding portal's responsibility to detect and prevent fraudulent offerings. While the portal does not need to disclose merits or expected returns, business plans that are clearly not viable could be an indication of fraud and should be considered in the performance of the portal's due diligence.

24. Minimum Capital and Insurance Requirements

24.1. FAIR Canada suggests that the minimum capital and insurance requirements be revisited in light of our concerns regarding liability for misrepresentation. FAIR Canada recommends a review of the adequacy of EMD minimum capital and insurance requirements in order to inform whether these limits are adequate for crowdfunding portals.

25. Dispute Resolution

25.1. FAIR Canada recommends that funding portals have obligations with respect to investor complaints, including participation in the Ombudsman for Banking Services and Investments. Portals should be required to have a formalized process for receiving complaints and tracking them. These requirements should be overseen by an SRO or the relevant regulator.

26. Reporting Requirements

26.1. FAIR Canada suggests that funding portals have an obligation to report potential fraud to police and securities regulatory authorities and notify investors on their portals as appropriate.

26.2. Additionally, we recommend that portals be required to be transparent about capital raised, success rates, instances of fraud, etc. We are concerned that the rare successful businesses will garner a considerable amount of attention and believe that complete information regarding failure rates and the amount of investor losses must also be reported to the relevant regulators and made publicly available.

PROPOSED START-UP EXEMPTION COMMENTS

27. Start-Up Exemption Unacceptable

27.1. FAIR Canada believes that the proposed start-up exemption suffers from the same issues and concerns we note above with respect to crowdfunding, but with the additional serious deficiencies of a lack of portal registration, unlimited aggregate investment limits, and limited disclosures to investors.

28. Portal Registration

28.1. As provided in the Notice,

[a] key investor protection element of the new crowdfunding exemption is the requirement for registration of the portal. Registration is necessary to address, among other things, potential integrity, proficiency and solvency concerns that may apply to funding portals and the persons operating them, as well as potential concerns relating to conflicts of interest and self-dealing. The registration requirement is also intended to serve as a safeguard against funding portals being used to facilitate fraudulent offerings of securities through the internet.⁵²

28.2. Registration and regulation of crowdfunding portals is essential to investor protection. Portals must be registered with the relevant securities regulator for there to be adequate oversight and compliance, and to ensure that SMEs use a legitimate intermediary. We believe that permitting equity crowdfunding transactions through unregulated portals would be a complete abandonment of Canadian securities regulators' investor protection missions, and will cause irreparable damage to investor and issuer confidence in Canada's financial markets.

28.3. **FAIR Canada cannot support a prospectus exemption that allows unregulated portals to sell investments to retail investors.** Not only does this present serious potential harm to investors, it also undermines any efforts aimed at informing investors of the need to deal with registrants, including a registered funding portal.

29. Non-registrants and Fraud

29.1. A recent NASAA survey of U.S. state securities regulator members (the "**2013 NASAA Enforcement Report**") noted that the majority of investment fraud cases reported by state securities regulators featured unregistered individuals selling unregistered securities.⁵³ Although detailed statistics regarding the number of reported fraud cases in Canada are not made publically available, we suspect that a similar correlation between unregistered individuals selling unregistered securities and fraud exists in Canada.

29.2. Further, the 2013 NASAA Enforcement Report stated: "Unregistered securities sold by unlicensed individuals continue to attract the most attention from state regulators. These fraudulent offerings are increasingly being marketed through the Internet."⁵⁴ The earlier 2012 NASAA Enforcement Report notes that many U.S. states and Canadian provinces have seen an increase in active investigations and recent enforcement actions related to internet activity.⁵⁵ U.S. state securities regulators' comments regarding "the increased

⁵² Key Provisions of the Proposed Crowdfunding Portal Requirements at page D-30.

⁵³ *Supra* note 7 at page 7.

⁵⁴ *Ibid.*

⁵⁵ *Supra* note 6.

presence of questionable securities offerings made available via the Internet”⁵⁶ and the persistence of affinity fraud is difficult to reconcile with claims about the “wisdom of the crowd” and claims that the internet provides opportunity for better due diligence and more information. While technology has advanced, it has also created a wider net for potential fraud victims and affords considerable anonymity to fraudsters.

29.3. The 2013 NASAA Enforcement Report notes that even regulated portals open issuers up to potential fraud.

Use of crowdfunding portals, while subject to some regulation, also opens the door to scams. Startup businesses, especially small local businesses, should be very careful to verify the legitimacy of a portal before engaging their services. Investors are not alone in their potential to be scammed. Using a fraudulent portal means both the business and the investor stand to lose.⁵⁷

FAIR Canada questions how investors and small businesses are expected to assess the legitimacy of portals absent regulation by the relevant securities regulator.

29.4. The registration of crowdfunding portals is essential to transparency and security. This is the model that has been proposed by the SEC, the Australian Government’s Corporations and Markets Advisory Committee⁵⁸ and the Ontario Securities Commission. Given that equity crowdfunding targets unsophisticated investors, a portal must provide essential services that would provide a minimum level of investor protection, and securities regulators must oversee this function. Regulation and oversight is critical to any hope of proper function for equity crowdfunding portals.

30. Start-up Exemption Investment Limits and Offering Size Limits

30.1. Further, FAIR Canada is of the view that limiting only the amount a person may invest in a given offering is wholly inadequate. The proposed start-up exemption would permit investors to invest up to \$1,500 per offering but does not limit the aggregate amount they can invest under this exemption. **As noted above in section 5.2 we recommend that the Participating Jurisdictions cap the total amount an investor is permitted to invest in equity crowdfunding investments at a total of \$5,000 per calendar year. We suggest that the Participating Jurisdictions cap the total amount an investor is permitted to invest in Start-Up Exemption investments at a total of \$2,000 per calendar year and limit investments to \$250 per offering.** While this is not sufficient to reduce the risk of abuse and fraud, if adhered to, it will limit the potential losses of a given investor.

⁵⁶ *Supra* note 7 at page 8.

⁵⁷ *Ibid.* at page 11.

⁵⁸ Australian Government’s Corporations and Market Advisory Committee, “Crowd Sourced Equity Funding Discussion Paper” (September 2013), at page 39.

30.2. We note again that an offering size limit will not be observed by fraudsters, so it will only limit losses on legitimate, but highly risky, ventures, assuming such limits are adequately enforced.

31. Risk Acknowledgement Form

31.1. FAIR Canada is of the opinion that the Important Risk Warnings provided in Schedule A of will be of little to no assistance to investors. The proposed language appears to be directed more at absolving regulators and portals of responsibility than true, plain-language warnings and information for investors.

31.2. For example, the risk warnings do not include any reference to or explanation of the risks associated with investments in SMEs. The language refers to the investment as an “opportunity”, which has positive connotations. The language does not attest to the fact that the investor has not received advice, but rather that an investor ‘understands’ that they have not received advice, which is confusing.

31.3. Further, attesting to an understanding of legal rights and “prospectus offering” suggests that the investor would have a basic understanding of the difference between the rights attached to a prospectus-qualified investment as compared with an exempt offering. We highly doubt that any unsophisticated investor would understand the difference in legal rights without further information. Specific information must be provided.

31.4. FAIR Canada recommends that, if the Participating Jurisdictions proceed with a start-up exemption, the offering document be required to disclose information relating to the success and failure rates of SMEs and specific information relating to the absence of legal rights in the offering document.

31.5. As we note above in section 12.3, regulators should test any risk acknowledgement form prior to introducing any exemptions to ensure that it meets the need(s) it is intended to address and does not result in any unintended negative effects.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Neil Gross at 416-214-3408 (neil.gross@faircanada.ca) or Lindsay Speed at 416-214-3442 (lindsay.speed@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights