

In the Senate of the United States,

March 22, 2012.

Resolved, That the bill from the House of Representatives (H.R. 3606) entitled “An Act to increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”, do pass with the following

AMENDMENT:

Strike title III and insert the following:

1 ***TITLE III—CROWDFUNDING***

2 ***SEC. 301. SHORT TITLE.***

3 *This title may be cited as the “Capital Raising Online*
4 *While Deterring Fraud and Unethical Non-Disclosure Act*
5 *of 2012” or the “CROWDFUND Act”.*

6 ***SEC. 302. CROWDFUNDING EXEMPTION.***

7 *(a) SECURITIES ACT OF 1933.—Section 4 of the Secu-*
8 *rities Act of 1933 (15 U.S.C. 77d) is amended by adding*
9 *at the end the following:*

1 “(6) transactions involving the offer or sale of se-
2 curities by an issuer (including all entities controlled
3 by or under common control with the issuer), pro-
4 vided that—

5 “(A) the aggregate amount sold to all inves-
6 tors by the issuer, including any amount sold in
7 reliance on the exemption provided under this
8 paragraph during the 12-month period preceding
9 the date of such transaction, is not more than
10 \$1,000,000;

11 “(B) the aggregate amount sold to any in-
12 vestor by an issuer, including any amount sold
13 in reliance on the exemption provided under this
14 paragraph during the 12-month period preceding
15 the date of such transaction, does not exceed—

16 “(i) the greater of \$2,000 or 5 percent
17 of the annual income or net worth of such
18 investor, as applicable, if either the annual
19 income or the net worth of the investor is
20 less than \$100,000; and

21 “(ii) 10 percent of the annual income
22 or net worth of such investor, as applicable,
23 not to exceed a maximum aggregate amount
24 sold of \$100,000, if either the annual in-

1 *materials, as the Commission shall, by rule, deter-*
2 *mine appropriate;*

3 *“(4) ensure that each investor—*

4 *“(A) reviews investor-education informa-*
5 *tion, in accordance with standards established by*
6 *the Commission, by rule;*

7 *“(B) positively affirms that the investor un-*
8 *derstands that the investor is risking the loss of*
9 *the entire investment, and that the investor could*
10 *bear such a loss; and*

11 *“(C) answers questions demonstrating—*

12 *“(i) an understanding of the level of*
13 *risk generally applicable to investments in*
14 *startups, emerging businesses, and small*
15 *issuers;*

16 *“(ii) an understanding of the risk of*
17 *illiquidity; and*

18 *“(iii) an understanding of such other*
19 *matters as the Commission determines ap-*
20 *propriate, by rule;*

21 *“(5) take such measures to reduce the risk of*
22 *fraud with respect to such transactions, as established*
23 *by the Commission, by rule, including obtaining a*
24 *background and securities enforcement regulatory his-*
25 *tory check on each officer, director, and person hold-*

1 *ing more than 20 percent of the outstanding equity*
2 *of every issuer whose securities are offered by such*
3 *person;*

4 “(6) not later than 21 days prior to the first day
5 *on which securities are sold to any investor (or such*
6 *other period as the Commission may establish), make*
7 *available to the Commission and to potential inves-*
8 *tors any information provided by the issuer pursuant*
9 *to subsection (b);*

10 “(7) ensure that all offering proceeds are only
11 *provided to the issuer when the aggregate capital*
12 *raised from all investors is equal to or greater than*
13 *a target offering amount, and allow all investors to*
14 *cancel their commitments to invest, as the Commis-*
15 *sion shall, by rule, determine appropriate;*

16 “(8) make such efforts as the Commission deter-
17 *mines appropriate, by rule, to ensure that no investor*
18 *in a 12-month period has purchased securities offered*
19 *pursuant to section 4(6) that, in the aggregate, from*
20 *all issuers, exceed the investment limits set forth in*
21 *section 4(6)(B);*

22 “(9) take such steps to protect the privacy of in-
23 *formation collected from investors as the Commission*
24 *shall, by rule, determine appropriate;*

1 “(10) not compensate promoters, finders, or lead
2 generators for providing the broker or funding portal
3 with the personal identifying information of any po-
4 tential investor;

5 “(11) prohibit its directors, officers, or partners
6 (or any person occupying a similar status or per-
7 forming a similar function) from having any finan-
8 cial interest in an issuer using its services; and

9 “(12) meet such other requirements as the Com-
10 mission may, by rule, prescribe, for the protection of
11 investors and in the public interest.

12 “(b) *REQUIREMENTS FOR ISSUERS.*—For purposes of
13 section 4(6), an issuer who offers or sells securities shall—

14 “(1) file with the Commission and provide to in-
15 vestors and the relevant broker or funding portal, and
16 make available to potential investors—

17 “(A) the name, legal status, physical ad-
18 dress, and website address of the issuer;

19 “(B) the names of the directors and officers
20 (and any persons occupying a similar status or
21 performing a similar function), and each person
22 holding more than 20 percent of the shares of the
23 issuer;

1 “(C) a description of the business of the
2 issuer and the anticipated business plan of the
3 issuer;

4 “(D) a description of the financial condi-
5 tion of the issuer, including, for offerings that,
6 together with all other offerings of the issuer
7 under section 4(6) within the preceding 12-
8 month period, have, in the aggregate, target of-
9 fering amounts of—

10 “(i) \$100,000 or less—

11 “(I) the income tax returns filed
12 by the issuer for the most recently com-
13 pleted year (if any); and

14 “(II) financial statements of the
15 issuer, which shall be certified by the
16 principal executive officer of the issuer
17 to be true and complete in all material
18 respects;

19 “(ii) more than \$100,000, but not more
20 than \$500,000, financial statements re-
21 viewed by a public accountant who is inde-
22 pendent of the issuer, using professional
23 standards and procedures for such review or
24 standards and procedures established by the
25 Commission, by rule, for such purpose; and

1 “(iii) more than \$500,000 (or such
2 other amount as the Commission may estab-
3 lish, by rule), audited financial statements;

4 “(E) a description of the stated purpose and
5 intended use of the proceeds of the offering sought
6 by the issuer with respect to the target offering
7 amount;

8 “(F) the target offering amount, the dead-
9 line to reach the target offering amount, and reg-
10 ular updates regarding the progress of the issuer
11 in meeting the target offering amount;

12 “(G) the price to the public of the securities
13 or the method for determining the price, provided
14 that, prior to sale, each investor shall be pro-
15 vided in writing the final price and all required
16 disclosures, with a reasonable opportunity to re-
17 scind the commitment to purchase the securities;

18 “(H) a description of the ownership and
19 capital structure of the issuer, including—

20 “(i) terms of the securities of the issuer
21 being offered and each other class of security
22 of the issuer, including how such terms may
23 be modified, and a summary of the dif-
24 ferences between such securities, including
25 how the rights of the securities being offered

1 *may be materially limited, diluted, or*
2 *qualified by the rights of any other class of*
3 *security of the issuer;*

4 “(ii) *a description of how the exercise*
5 *of the rights held by the principal share-*
6 *holders of the issuer could negatively impact*
7 *the purchasers of the securities being offered;*

8 “(iii) *the name and ownership level of*
9 *each existing shareholder who owns more*
10 *than 20 percent of any class of the securities*
11 *of the issuer;*

12 “(iv) *how the securities being offered*
13 *are being valued, and examples of methods*
14 *for how such securities may be valued by*
15 *the issuer in the future, including during*
16 *subsequent corporate actions; and*

17 “(v) *the risks to purchasers of the secu-*
18 *rities relating to minority ownership in the*
19 *issuer, the risks associated with corporate*
20 *actions, including additional issuances of*
21 *shares, a sale of the issuer or of assets of the*
22 *issuer, or transactions with related parties;*
23 *and*

1 “(1) *such other information as the Commis-*
2 *sion may, by rule, prescribe, for the protection of*
3 *investors and in the public interest;*

4 “(2) *not advertise the terms of the offering, ex-*
5 *cept for notices which direct investors to the funding*
6 *portal or broker;*

7 “(3) *not compensate or commit to compensate,*
8 *directly or indirectly, any person to promote its offer-*
9 *ings through communication channels provided by a*
10 *broker or funding portal, without taking such steps as*
11 *the Commission shall, by rule, require to ensure that*
12 *such person clearly discloses the receipt, past or pro-*
13 *spective, of such compensation, upon each instance of*
14 *such promotional communication;*

15 “(4) *not less than annually, file with the Com-*
16 *mission and provide to investors reports of the results*
17 *of operations and financial statements of the issuer,*
18 *as the Commission shall, by rule, determine appro-*
19 *priate, subject to such exceptions and termination*
20 *dates as the Commission may establish, by rule; and*

21 “(5) *comply with such other requirements as the*
22 *Commission may, by rule, prescribe, for the protec-*
23 *tion of investors and in the public interest.*

24 “(c) *LIABILITY FOR MATERIAL MISSTATEMENTS AND*
25 *OMISSIONS.—*

1 “(1) *ACTIONS AUTHORIZED.*—

2 “(A) *IN GENERAL.*—Subject to paragraph
3 (2), a person who purchases a security in a
4 transaction exempted by the provisions of section
5 4(6) may bring an action against an issuer de-
6 scribed in paragraph (2), either at law or in eq-
7 uity in any court of competent jurisdiction, to
8 recover the consideration paid for such security
9 with interest thereon, less the amount of any in-
10 come received thereon, upon the tender of such se-
11 curity, or for damages if such person no longer
12 owns the security.

13 “(B) *LIABILITY.*—An action brought under
14 this paragraph shall be subject to the provisions
15 of section 12(b) and section 13, as if the liability
16 were created under section 12(a)(2).

17 “(2) *APPLICABILITY.*—An issuer shall be liable
18 in an action under paragraph (1), if the issuer—

19 “(A) by the use of any means or instru-
20 ments of transportation or communication in
21 interstate commerce or of the mails, by any
22 means of any written or oral communication, in
23 the offering or sale of a security in a transaction
24 exempted by the provisions of section 4(6), makes
25 an untrue statement of a material fact or omits

1 to state a material fact required to be stated or
2 necessary in order to make the statements, in the
3 light of the circumstances under which they were
4 made, not misleading, provided that the pur-
5 chaser did not know of such untruth or omission;
6 and

7 “(B) does not sustain the burden of proof
8 that such issuer did not know, and in the exer-
9 cise of reasonable care could not have known, of
10 such untruth or omission.

11 “(3) *DEFINITION.*—As used in this subsection,
12 the term ‘issuer’ includes any person who is a direc-
13 tor or partner of the issuer, and the principal execu-
14 tive officer or officers, principal financial officer, and
15 controller or principal accounting officer of the issuer
16 (and any person occupying a similar status or per-
17 forming a similar function) that offers or sells a secu-
18 rity in a transaction exempted by the provisions of
19 section 4(6), and any person who offers or sells the se-
20 curity in such offering.

21 “(d) *INFORMATION AVAILABLE TO STATES.*—The Com-
22 mission shall make, or shall cause to be made by the rel-
23 evant broker or funding portal, the information described
24 in subsection (b) and such other information as the Com-
25 mission, by rule, determines appropriate, available to the

1 *securities commission (or any agency or office performing*
2 *like functions) of each State and territory of the United*
3 *States and the District of Columbia.*

4 “(e) *RESTRICTIONS ON SALES.*—*Securities issued pur-*
5 *suant to a transaction described in section 4(6)—*

6 “(1) *may not be transferred by the purchaser of*
7 *such securities during the 1-year period beginning on*
8 *the date of purchase, unless such securities are trans-*
9 *ferred—*

10 “(A) *to the issuer of the securities;*

11 “(B) *to an accredited investor;*

12 “(C) *as part of an offering registered with*
13 *the Commission; or*

14 “(D) *to a member of the family of the pur-*
15 *chaser or the equivalent, or in connection with*
16 *the death or divorce of the purchaser or other*
17 *similar circumstance, in the discretion of the*
18 *Commission; and*

19 “(2) *shall be subject to such other limitations as*
20 *the Commission shall, by rule, establish.*

21 “(f) *APPLICABILITY.*—*Section 4(6) shall not apply to*
22 *transactions involving the offer or sale of securities by any*
23 *issuer that—*

1 “(1) is not organized under and subject to the
2 laws of a State or territory of the United States or
3 the District of Columbia;

4 “(2) is subject to the requirement to file reports
5 pursuant to section 13 or section 15(d) of the Securi-
6 ties Exchange Act of 1934;

7 “(3) is an investment company, as defined in
8 section 3 of the Investment Company Act of 1940, or
9 is excluded from the definition of investment company
10 by section 3(b) or section 3(c) of that Act; or

11 “(4) the Commission, by rule or regulation, de-
12 termines appropriate.

13 “(g) *RULE OF CONSTRUCTION.*—Nothing in this sec-
14 tion or section 4(6) shall be construed as preventing an
15 issuer from raising capital through methods not described
16 under section 4(6).

17 “(h) *CERTAIN CALCULATIONS.*—

18 “(1) *DOLLAR AMOUNTS.*—Dollar amounts in sec-
19 tion 4(6) and subsection (b) of this section shall be
20 adjusted by the Commission not less frequently than
21 once every 5 years, by notice published in the *Federal*
22 *Register* to reflect any change in the *Consumer Price*
23 *Index for All Urban Consumers* published by the *Bu-*
24 *reau of Labor Statistics.*

1 “(2) *INCOME AND NET WORTH.*—*The income and*
2 *net worth of a natural person under section 4(6)(B)*
3 *shall be calculated in accordance with any rules of the*
4 *Commission under this title regarding the calculation*
5 *of the income and net worth, respectively, of an ac-*
6 *credited investor.”.*

7 *(c) RULEMAKING.*—*Not later than 270 days after the*
8 *date of enactment of this Act, the Securities and Exchange*
9 *Commission (in this title referred to as the “Commission”)*
10 *shall issue such rules as the Commission determines may*
11 *be necessary or appropriate for the protection of investors*
12 *to carry out sections 4(6) and section 4A of the Securities*
13 *Act of 1933, as added by this title. In carrying out this*
14 *section, the Commission shall consult with any securities*
15 *commission (or any agency or office performing like func-*
16 *tions) of the States, any territory of the United States, and*
17 *the District of Columbia, which seeks to consult with the*
18 *Commission, and with any applicable national securities*
19 *association.*

20 *(d) DISQUALIFICATION.*—

21 *(1) IN GENERAL.*—*Not later than 270 days after*
22 *the date of enactment of this Act, the Commission*
23 *shall, by rule, establish disqualification provisions*
24 *under which—*

1 (A) *an issuer shall not be eligible to offer securities pursuant to section 4(6) of the Securities Act of 1933, as added by this title; and*

2
3
4 (B) *a broker or funding portal shall not be eligible to effect or participate in transactions pursuant to that section 4(6).*

5
6
7 (2) *INCLUSIONS.—Disqualification provisions required by this subsection shall—*

8
9 (A) *be substantially similar to the provisions of section 230.262 of title 17, Code of Federal Regulations (or any successor thereto); and*

10
11 (B) *disqualify any offering or sale of securities by a person that—*

12
13 (i) *is subject to a final order of a State securities commission (or an agency or officer of a State performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or an agency or officer of a State performing like functions), an appropriate Federal banking agency, or the National Credit Union Administration, that—*

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23 (I) *bars the person from—*

1 (aa) association with an en-
2 tity regulated by such commis-
3 sion, authority, agency, or officer;

4 (bb) engaging in the business
5 of securities, insurance, or bank-
6 ing; or

7 (cc) engaging in savings as-
8 sociation or credit union activi-
9 ties; or

10 (II) constitutes a final order based
11 on a violation of any law or regulation
12 that prohibits fraudulent, manipula-
13 tive, or deceptive conduct within the
14 10-year period ending on the date of
15 the filing of the offer or sale; or

16 (ii) has been convicted of any felony or
17 misdemeanor in connection with the pur-
18 chase or sale of any security or involving
19 the making of any false filing with the
20 Commission.

21 **SEC. 303. EXCLUSION OF CROWDFUNDING INVESTORS**
22 **FROM SHAREHOLDER CAP.**

23 (a) *EXEMPTION.*—Section 12(g) of the Securities Ex-
24 change Act of 1934 (15 U.S.C. 78l(g)) is amended by adding
25 at the end the following:

1 “(6) *EXCLUSION FOR PERSONS HOLDING CER-*
 2 *TAIN SECURITIES.*—*The Commission shall, by rule,*
 3 *exempt, conditionally or unconditionally, securities*
 4 *acquired pursuant to an offering made under section*
 5 *4(6) of the Securities Act of 1933 from the provisions*
 6 *of this subsection.”.*

7 (b) *RULEMAKING.*—*The Commission shall issue a rule*
 8 *to carry out section 12(g)(6) of the Securities Exchange Act*
 9 *of 1934 (15 U.S.C. 78c), as added by this section, not later*
 10 *than 270 days after the date of enactment of this Act.*

11 **SEC. 304. FUNDING PORTAL REGULATION.**

12 (a) *EXEMPTION.*—

13 (1) *IN GENERAL.*—*Section 3 of the Securities*
 14 *Exchange Act of 1934 (15 U.S.C. 78c) is amended by*
 15 *adding at the end the following:*

16 “(h) *LIMITED EXEMPTION FOR FUNDING PORTALS.*—

17 “(1) *IN GENERAL.*—*The Commission shall, by*
 18 *rule, exempt, conditionally or unconditionally, a reg-*
 19 *istered funding portal from the requirement to reg-*
 20 *ister as a broker or dealer under section 15(a)(1), pro-*
 21 *vided that such funding portal—*

22 “(A) *remains subject to the examination,*
 23 *enforcement, and other rulemaking authority of*
 24 *the Commission;*

1 “(B) is a member of a national securities
2 association registered under section 15A; and

3 “(C) is subject to such other requirements
4 under this title as the Commission determines
5 appropriate under such rule.

6 “(2) NATIONAL SECURITIES ASSOCIATION MEM-
7 BERSHIP.—For purposes of sections 15(b)(8) and
8 15A, the term ‘broker or dealer’ includes a funding
9 portal and the term ‘registered broker or dealer’ in-
10 cludes a registered funding portal, except to the extent
11 that the Commission, by rule, determines otherwise,
12 provided that a national securities association shall
13 only examine for and enforce against a registered
14 funding portal rules of such national securities asso-
15 ciation written specifically for registered funding por-
16 tals.”.

17 (2) RULEMAKING.—The Commission shall issue
18 a rule to carry out section 3(h) of the Securities Ex-
19 change Act of 1934 (15 U.S.C. 78c), as added by this
20 subsection, not later than 270 days after the date of
21 enactment of this Act.

22 (b) DEFINITION.—Section 3(a) of the Securities Ex-
23 change Act of 1934 (15 U.S.C. 78c(a)) is amended by add-
24 ing at the end the following:

1 “(80) *FUNDING PORTAL*.—The term ‘funding
2 portal’ means any person acting as an intermediary
3 in a transaction involving the offer or sale of securi-
4 ties for the account of others, solely pursuant to sec-
5 tion 4(6) of the Securities Act of 1933 (15 U.S.C.
6 77d(6)), that does not—

7 “(A) offer investment advice or rec-
8 ommendations;

9 “(B) solicit purchases, sales, or offers to buy
10 the securities offered or displayed on its website
11 or portal;

12 “(C) compensate employees, agents, or other
13 persons for such solicitation or based on the sale
14 of securities displayed or referenced on its
15 website or portal;

16 “(D) hold, manage, possess, or otherwise
17 handle investor funds or securities; or

18 “(E) engage in such other activities as the
19 Commission, by rule, determines appropriate.”.

20 **SEC. 305. RELATIONSHIP WITH STATE LAW.**

21 (a) *IN GENERAL*.—Section 18(b)(4) of the Securities
22 Act of 1933 (15 U.S.C. 77r(b)(4)) is amended—

23 (1) by redesignating subparagraphs (C) and (D)
24 as subparagraphs (D) and (E), respectively; and

1 (2) by inserting after subparagraph (B) the fol-
2 *lowing:*

3 “(C) section 4(6);”.

4 (b) *CLARIFICATION OF THE PRESERVATION OF STATE*
5 *ENFORCEMENT AUTHORITY.*—

6 (1) *IN GENERAL.*—*The amendments made by*
7 *subsection (a) relate solely to State registration, docu-*
8 *mentation, and offering requirements, as described*
9 *under section 18(a) of Securities Act of 1933 (15*
10 *U.S.C. 77r(a)), and shall have no impact or limita-*
11 *tion on other State authority to take enforcement ac-*
12 *tion with regard to an issuer, funding portal, or any*
13 *other person or entity using the exemption from reg-*
14 *istration provided by section 4(6) of that Act.*

15 (2) *CLARIFICATION OF STATE JURISDICTION*
16 *OVER UNLAWFUL CONDUCT OF FUNDING PORTALS AND*
17 *ISSUERS.*—*Section 18(c)(1) of the Securities Act of*
18 *1933 (15 U.S.C. 77r(c)(1)) is amended by striking*
19 *“with respect to fraud or deceit, or unlawful conduct*
20 *by a broker or dealer, in connection with securities or*
21 *securities transactions.” and inserting the following:*
22 *“, in connection with securities or securities trans-*
23 *actions*

24 “(A) with respect to—

25 “(i) fraud or deceit; or

1 “(i) unlawful conduct by a broker or
2 dealer; and

3 “(B) in connection to a transaction de-
4 scribed under section 4(6), with respect to—

5 “(i) fraud or deceit; or

6 “(ii) unlawful conduct by a broker,
7 dealer, funding portal, or issuer.”.

8 (c) *NOTICE FILINGS PERMITTED*.—Section 18(c)(2) of
9 the Securities Act of 1933 (15 U.S.C. 77r(c)(2)) is amended
10 by adding at the end the following:

11 “(F) **F E E S N O T P E R M I T T E D O N**
12 **C R O W D F U N D E D S E C U R I T I E S**.—Notwithstanding
13 subparagraphs (A), (B), and (C), no filing or fee
14 may be required with respect to any security
15 that is a covered security pursuant to subsection
16 (b)(4)(B), or will be such a covered security upon
17 completion of the transaction, except for the secu-
18 rities commission (or any agency or office per-
19 forming like functions) of the State of the prin-
20 cipal place of business of the issuer, or any State
21 in which purchasers of 50 percent or greater of
22 the aggregate amount of the issue are residents,
23 provided that for purposes of this subparagraph,
24 the term ‘State’ includes the District of Columbia
25 and the territories of the United States.”.

1 (d) *FUNDING PORTALS.*—

2 (1) *STATE EXEMPTIONS AND OVERSIGHT.*—*Sec-*
3 *tion 15(i) of the Securities Exchange Act of 1934 (15*
4 *U.S.C. 780(i)) is amended—*

5 (A) *by redesignating paragraphs (2) and*
6 *(3) as paragraphs (3) and (4), respectively; and*

7 (B) *by inserting after paragraph (1) the fol-*
8 *lowing:*

9 “(2) *FUNDING PORTALS.*—

10 “(A) *LIMITATION ON STATE LAWS.*—*Except*
11 *as provided in subparagraph (B), no State or*
12 *political subdivision thereof may enforce any*
13 *law, rule, regulation, or other administrative ac-*
14 *tion against a registered funding portal with re-*
15 *spect to its business as such.*

16 “(B) *EXAMINATION AND ENFORCEMENT AU-*
17 *THORITY.*—*Subparagraph (A) does not apply*
18 *with respect to the examination and enforcement*
19 *of any law, rule, regulation, or administrative*
20 *action of a State or political subdivision thereof*
21 *in which the principal place of business of a reg-*
22 *istered funding portal is located, provided that*
23 *such law, rule, regulation, or administrative ac-*
24 *tion is not in addition to or different from the*

1 *requirements for registered funding portals estab-*
2 *lished by the Commission.*

3 *“(C) DEFINITION.—For purposes of this*
4 *paragraph, the term ‘State’ includes the District*
5 *of Columbia and the territories of the United*
6 *States.”.*

7 *(2) STATE FRAUD AUTHORITY.—Section 18(c)(1)*
8 *of the Securities Act of 1933 (15 U.S.C. 77r(c)(1)) is*
9 *amended by striking “or dealer” and inserting “,*
10 *dealer, or funding portal”.*

Attest:

Secretary.

112TH CONGRESS
2^D SESSION

H.R. 3606

AMENDMENT