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Practice Pointers on P2P Lending: How It Works, Current Regulations and Considerations

What Is P2P Lending?

Peer-to-peer, or person-to-person, lending ("P2P lending") is a type of crowdfunding that involves the facilitation of loan originations outside of the traditional consumer banking system by connecting borrowers directly with lenders, or investors, through an Internet platform. P2P lending's use of Internet platforms reduces costs by eliminating many operational expenses associated with traditional consumer bank loans, such as the cost of maintaining and staffing physical branches. Some cost savings are passed along to borrowers through lower interest rates than those offered by traditional banks.

Although the majority of P2P lending is for mortgages and credit card refinancing, some P2P lending platforms focus on particular segments of the consumer lending market, including small-business lending (OnDeck, Funding Circle, Quicken Loans, Kabbage), student loans (SoFi, Kiva), low income entrepreneurs (Kiva), and younger borrowers (Upstart). P2P lending is also being used to raise capital through real estate crowdfunding platforms (Fundrise, CrowdStreet).

P2P lending platforms typically issue loans in amounts ranging from $1,000 to $35,000 with fixed interest rates and maturities of three to five years. P2P lending platforms also set minimum FICO credit scores (e.g., 660 and 640). The P2P lending platform that makes the loan then receives origination fees (usually 1% to 2% of the loan balance) and servicing fees (typically 1% of the outstanding loan balance).

How Does P2P Lending Work?

The P2P lending process can vary by platform, but it generally involves the following steps:

- Before a loan is posted on a platform's website, a prospective borrower submits an application to the platform for consideration;
- The platform obtains a credit report on the applicant and uses this information, along with other data (e.g., loan characteristics), in proprietary models to assign a risk grade to the proposed loan and set an interest rate corresponding to the assigned risk grade;
- If accepted, a loan request is posted on the platform's website, where investors can review all loans or search for specific loans that meet their desired risk/return characteristics;
- If there are enough investors to fund the loan (a single loan is typically divided into many pieces to allow investors to diversify their portfolio and distribute the default risk among multiple investors), the loan is then originated by a bank (the "originating bank"), the deposits of which are insured by the Federal Deposit Insurance Corporation (FDIC);
- The originating bank then sells the notes associated with the specific loan to the platform, which at the same time, sells the notes to each lender that has agreed to fund the loan in the principal amount of that commitment. The notes issued by the platform are specific to each borrower, and some notes may be registered with the Securities and Exchange Commission (SEC);
- The notes issued by the platform (sometimes referred to as "borrower payment dependent notes") are guaranteed by the underlying loan, which means that investors are only due payment by the platform if the underlying borrower repays the loan; and
- The platform receives a fee on the loan, as well as origination and servicing fees, before lending the remaining proceeds to the underlying borrower.

Advantages of P2P Lending

P2P lending platforms have grown in popularity, due to advantages offered to both borrowers and investors. The advantages to borrowers include the following:

- Lower interest rates on average than those charged by traditional banks for credit cards or installment loans;
- Ease of use of online platforms;

- Transparency of platforms through uniform and clearly disclosed loan terms;[1] and
- Efficient decision-making through the use of technology to quickly assess and assign risk grades and interest rates to loan applicants.

The advantages to investors include the following:

- High risk-adjusted returns;
- Access to a high yield investment class (traditionally reserved for institutional investors) in investment increments as low as $25;
- Transparency and autonomy in selecting which loans to invest in (through the ability to examine each loan at a granular level before investing, and monitor loan performance in real time); and
- Ready access to credit profile data for each approved loan.

P2P lending platforms themselves enjoy cost savings through more efficient use of technology. P2P lending can in fact be viewed as a form of securitization where efficiencies of automation permit P2P lending platforms to divide individual loans (with individual borrowers) into numerous notes issued to numerous investors. Although there are significant cost savings from the resulting elimination of a physical branch network, the more enduring cost savings stem from the fact that P2P loans are not carried on the books of the originating banks or the P2P lending platforms and are not subject to bank capital requirements. For more information regarding regulatory considerations, see "Consumer Credit Regulatory Considerations" below.

Risks Associated with P2P Lending

Although P2P lending provides significant advantages to both investors and borrowers, there are certain considerations that should be taken into account. As a general matter, investors are exposed to more risk than borrowers in P2P lending, as typical borrower protections — including usury laws and regulations against unfair collection practices, misleading advertising, and discriminatory practices — generally still apply to P2P lending platforms. Investors in P2P lending, like investors in other types of lending, are exposed to borrower credit risk, interest rate risk, liquidity risk, and regulatory risk.

Specific risks associated with P2P lending for investors include the following:

- Inefficiencies in the proprietary risk-scoring models of P2P lending platforms;
- Increased potential for fraud due to the anonymity associated with Internet lending;
- Limited operating history of P2P lending platforms;
- Limited diversification of funding sources for P2P lending platforms;
- Dependency of P2P lending platforms on low interest rates to stimulate high transaction volumes;
- P2P lending platforms do not carry any portion of the underlying loans they originate on their balance sheet (in contrast to traditional lending);
- P2P lending platforms are not obligated to make any payments to investors if borrowers do not make payments on the underlying loans; and
- The "regulatory purgatory" in which P2P lending currently operates (which we discuss in more detail below).

Since P2P lending platforms profit the moment the underlying loans are originated and serviced, they do not share the downside of potential borrower defaults with investors. Investors only receive payments from P2P lending platforms if borrowers make payments on the underlying loans.[2] Furthermore, once an underlying loan enters default, any monies recovered from the borrower and paid to the investor are subject to an additional servicing fee by the collection agency to which the P2P lending platform assigns the underlying loan. However, P2P lending platforms have taken some steps to mitigate borrower credit risk, including providing credit scores for each borrower, offering collection services for delinquent loans, and offering diversification through the purchase of fractional loans.

[1] Standard program loans are three- to five-year personal loans made to borrowers with a FICO score of 660 or above, and meet other strict credit criteria.
[2] The notes issued by P2P lending platforms and the underlying loans are not backed by any collateral or guaranteed by any governmental authority or other third party.

Consumer Credit Regulatory Considerations

P2P lending platforms may be subject to certain consumer banking and related regulations. Consumer credit, whether bank-originated or otherwise, is subject to an extensive web of federal and state laws, and participants in consumer credit markets are subject to the authority of numerous federal and state regulators. This web of federal and state law regulates all aspects of the credit life-cycle, including advertisements and solicitations, underwriting, agreements and disclosures, payment terms, and debt collection practices. Federal and state laws also prohibit credit discrimination and unfair or deceptive acts or practices. Other bodies of law that regulate relationships between financial institutions and consumers — e.g., privacy and data security and anti-money laundering laws — would also apply. Because of this complex web of regulation, and to take advantage of banks' powers with respect to interest rates, non-bank creditors often partner with banks that have existing compliance infrastructure. However, bank partnerships with non-bank consumer lenders in other contexts (e.g., payday lending) have drawn scrutiny from courts, banking regulators and state Attorneys General with respect to their lending practices and compliance with state usury laws.

Below is a summary of key federal statutes to which banks and non-bank credit providers alike may be subject:

- Truth in Lending Act — Prescribes uniform methods for computing the cost of credit, disclosing credit terms, and resolving errors on certain types of credit accounts;[3]
- Equal Credit Opportunity Act — Prohibits creditors from discriminating against credit applicants, establishes guidelines for gathering and evaluating credit information, and requires written notification when credit is denied;[4]
- Fair Credit Reporting Act — Requires a permissible purpose to obtain a credit report, requires "furnishers" to report information to credit reporting agencies (*i.e.*, credit bureaus) accurately, requires notice by creditors who take adverse action based on credit reports, and requires creditors to develop and maintain an identity theft prevention program;[5]
- Gramm-Leach-Bliley Act — Restricts disclosure to nonaffiliated third parties of nonpublic personal information about a consumer, and requires financial institutions to notify their consumers about their information-sharing practices and inform consumers of their right to "opt out," in certain circumstances, if they do not want their information shared with certain nonaffiliated third parties;[6]
- Electronic Fund Transfer Act — Establishes the rights, liabilities, and responsibilities of parties in electronic funds transfers (EFTs), and protects consumers when they use EFT systems;[7]
- Bank Secrecy Act — Requires financial institutions to implement anti-money laundering procedures, implement a customer identification program, and screen names against certain government watch lists; and[8]
- Fair Debt Collection Practices Act — Restricts third-party debt collectors' conduct in connection with the collection of consumer debts.[9]

Where a non-bank platform has partnered with a bank to originate consumer loans, the platform may still be subject to regulatory oversight and examination. For example, in the context of P2P lending platforms, the platform provider may be viewed as a service provider with respect to its origination or servicing activities.[10] The Consumer Financial Protection Bureau (CFPB) would have unfair, deceptive, or abusive acts or practices (UDAAP) enforcement authority over bank originators of P2P loans if the bank has assets of greater than $10 billion, and the same authority with respect to a service provider to such a bank. The CFPB could also adopt UDAAP rules applicable to all banks and platforms involved in P2P lending. In addition, the Federal Trade Commission can investigate and enforce consumer protection statutes as applied to non-bank platforms under its authority under Section 5 of the Federal Trade Commission Act[11] and state Attorneys General have similar authority.

Notwithstanding that a non-bank platform has partnered with a bank to originate consumer loans, a court may nonetheless determine that, based on the nature of the loans and the structure of the partnership, the non-bank platform is the "true

[3] 15 U.S.C. §§ 1601 *et seq.*; *see also* 12 C.F.R. Part 1026.
[4] 15 U.S.C. §§ 1691 *et seq.*; *see also* 12 C.F.R. Part 1005.
[5] 15 U.S.C. §§ 1681 *et seq.*
[6] 15 U.S.C. §§ 6801 *et seq.*; *see also* 12 C.F.R. Part 1016.
[7] 15 U.S.C. §§ 1693 *et seq.*; *see also* 12 C.F.R. Part 1010.
[8] 12 U.S.C. §§ 1951-1959.
[9] 15 U.S.C. §§1692 *et seq.*
[10] A platform provider may also be viewed as a "service provider" subject to the CFPB's jurisdiction if it provides a material service to "covered persons" in connection with the covered persons' offering or provision of a consumer financial product or service, as those terms are defined in the Dodd-Frank Act of 2010 (the "Dodd-Frank
Act"), Pub. Law No. 111-203, 124 Stat. 1955, §§ 1001 *et seq.*
[11] 15 U.S.C. § 45.

lender."[12] In some cases, courts will examine whether the non-bank platform has the "predominant economic interest" in the loan and, if so, that partner is deemed to be the "true lender." [13] If the non-bank platform is determined to be the true lender, the loan would be subject to state usury restrictions as well as other state licensing or consumer protection laws. However, even if the bank is determined to be the "true lender," the Second Circuit's decision in *Madden v. Midland Funding, LLC* held that Section 85 of the National Bank Act, which allows national banks to charge the rate of interest permissible in the state where the national bank is located, did not allow a purchaser of the loan for collection purposes to charge the same rate of interest.[14] This decision has cast a cloud over higher interest rate loans purchased from a bank where the borrower is located in the Second Circuit (New York, Connecticut and Vermont); however, legislative fixes for this uncertainty are under consideration.[15]

Regulators have also taken an active interest in marketplace lending developments. On May 10, 2016, the U.S. Treasury Department issued a report entitled "Opportunities and Challenges in Online Marketplace Lending," which outlined its findings from its 2015 request for information and provided recommendations to federal government and privacy sector marketplace lending participants to encourage safe growth and access to credit.[16] The Office of the Comptroller of the Currency (OCC) has also expressed interest in marketplace lending and other financial technology developments. On May 13, 2016, the OCC released a white paper on financial technology innovation (the "White Paper"), which lays out a preliminary framework for "responsible innovation."[17] The White Paper articulates eight principles that the OCC will follow when evaluating innovative products, services, and processes that require regulatory approval and identifying associated potential risks.[18] The White Paper also sought feedback on the challenges banks face with respect to marketplace lending and how the OCC can facilitate innovation, including by issuing guidance to banks and non-banks and by establishing formal channels for communication with stakeholders. On September 12, 2016, Comptroller of the Currency Thomas J. Curry discussed marketplace lending's risks and associated policy questions at the inaugural Marketplace Lending Policy Summit, raising five policy and regulatory questions regarding marketplace lending and reiterating the eight principles enumerated in the White Paper guiding the OCC's regulatory efforts.[19]

On October 26, 2016, the OCC announced the creation of the Office of Innovation, which is dedicated to responsible innovation and implement a formal framework to improve the OCC's ability to identify, understand, and respond to financial innovation affecting the federal banking system.[20] On December 2, 2016, Mr. Curry announced that the OCC would move

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[12] *See, e.g.*, *Consumer Financial Protection Bureau v. CashCall, Inc., et al.*, CV 15-7522-JFW (C.D. Cal., August 31, 2016) (granting plaintiff's motion for summary judgement and concluding that the non-bank partner, and not the bank partner, was the "true lender").

[13] *Id.* *7.

[14] *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015), *cert denied*, No. 15-610 (June 27, 2016) (hereinafter, *Madden*).

[15] Then acting Comptroller of the Currency Keith A. Noreika has expressed support for federal legislative action to reaffirm the "valid when made" doctrine, which was called into question by *Madden*. *See* Remarks by Keith A. Noreika, Acting Comptroller of the Currency, Before the Online Lending Policy Summit (Sept. 25, 2017), available at: https://www.occ.gov/news-issuances/news-releases/2017/nr-occ-2017-110.html.

[16] The recommendations in the report include supporting a more robust small business borrower protections and effective oversight, ensuring sound borrower experience and back-end operations, promoting a transparent marketplace for borrowers and investors, expanding access to credit through partnerships that ensure safe and affordable credit, supporting the expansion of safe and affordable credit through access to government-held data, and facilitating interagency coordination through the creation of a standing working group for online marketplace lending. For more information regarding the report, *see* our client alert, "Treasury Issues White Paper on Online Marketplace" (May 13, 2016), *available at*: https://media2.mofo.com/documents/160513treasuryonlinemarketplacelending.pdf.

[17] The OCC defines "responsible innovation" as the use of new or improved financial products, services, and processes to meet the evolving needs of consumers, businesses, and communities in a manner that is consistent with sound risk management and is aligned with the bank's overall business strategy.

[18] The eight principles are as follows: (1) support responsible innovation; (2) foster an internal culture receptive to innovation; (3) leverage internal experience and expertise; (4) encourage responsible innovation that provides fair access to financial services and fair treatment of consumers; (5) further safe and sound operations; (6) encourage banks of all sizes to integrate responsible innovation into their strategic planning; (7) promote ongoing dialogue through formal outreach; and (8) collaborate with other regulators. For more information regarding the White Paper, *see* our client alert, "OCC Announces Preliminary Framework on FinTech and Responsible Innovation" (Apr. 6, 2016), *available at*: https://media2.mofo.com/documents/160406occfintechframework.pdf.

[19] The five policy and regulatory questions were as follows: (1) what will be the long-term performance of marketplace lending; (2) do new techniques, technologies, and products raise concerns about compliance with existing laws and regulations; (3) are existing laws and regulations adequate; (4) do innovative activities, products, or services present a need for entirely new regulation or law to protect the public's interest or prevent risk to the broader financial system; (5) should innovation be regulated and, if so, "who" should be responsible for regulating an organization or activity. *See* "Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Marketplace Lending Policy Summit 2016" (Sept. 13, 2016), *available at*: https://www.occ.gov/topics/responsible-innovation/comments/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf.

[20] The Office of Innovation will serve as the central point of contact and clearinghouse for requests and information related to innovation and will implement other aspects of the OCC's framework for responsible innovation, including (1) establishing an outreach and technical assistance program for banks and nonbanks, (2) conducting awareness and training activities for OCC staff, (3) encouraging coordination and facilitation,(4) establishing an innovation research function, and (5) promoting interagency collaboration. *See* Press Release, "OCC Issues Responsible Innovation Framework" (Oct. 26, 2017), *available at*: https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-135.html. *See also* "Recommendation and Decisions for Implementing a Responsible Innovation Framework" (Oct. 2016), *available at*: https://www.occ.gov/topics/responsible-innovation/comments/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf.

forward with considering applications from fintech companies to become special purpose national banks.[21] In response, the New York Department of Financial Services (NYDFS) and the Conference of State Bank Supervisors filed complaints challenging the OCC's authority to grant special purpose charters to fintech companies.[22] On December 12, 2017, the court granted the OCC's motion to dismiss the NYDFS complaint, in part because the OCC had not yet decided whether it will offer special purpose charters, and therefore the complaint failed to establish any injury in fact or standing.[23]

On March 15, 2017, OCC released a Draft Supplement to its existing licensing manual laying out its framework for evaluating fintech companies that apply for a special purpose national bank charter.[24] On September 25, 2017, Acting Comptroller of the Currency Keith A. Noreika discussed online lending and responsible innovation at the 2017 Online Lending Policy Summit and reaffirmed the OCC's authority to issue special purpose national bank charters to nondepository fintech companies.[25] There has also been increasing interest in marketplace lending at the state level.[26]

Regulation of Funding Side of P2P Lending

In addition to consumer credit regulations, the funding side of P2P lending platforms is subject to SEC regulation. In November 2008, the SEC issued a "cease and desist" order to P2P lending platform Prosper Marketplace, Inc. ("Prosper"), indicating that notes issued by Prosper were unregistered securities.[27] In finding that the notes were unregistered securities, the SEC applied the analysis used in *Reves v. Ernst & Young*.[28] To determine whether a note is a security, the *Reves* analysis begins with the rebuttable presumption that every note is considered a security. When there is a question, a determination needs to be made whether the notes offered bear a "family resemblance" to cases where notes have been deemed not to be securities. The following four-part balancing test must be applied to determine whether this resemblance exists:

- The motivation of the buyer and seller;
- The plan of distribution of the notes;
- The expectations of the investing public;[29] and
- Whether some factor, such as the existence of another regulatory scheme, significantly reduces the risk of the instrument, thereby rendering application of the Securities Act unnecessary.

Although the exact application of these factors is somewhat ambiguous and fact-dependent, when applying the test, the *Reves* court emphasized that the presumption is that notes should be treated as securities.[30] Applying the *Reves* analysis to the notes in question, the SEC indicated that the notes are securities because:

- Lenders are motivated by an expected return on their funds;
- Prosper loans are offered to the general public;
- A reasonable investor would likely expect that the loans are an investment; and

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[21] *See* "Remarks by Thomas J. Curry, Comptroller of the Currency, Regarding Special Purpose National Bank Charters for Fintech Companies at Georgetown University Law Center" (Dec. 2, 2016), available at: https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html.

[22] *See Vullo v. Office of the Comptroller of Currency, et al.*, No. 1:17-CV-03574-NRB (S.D.N.Y. Aug. 18, 2017) ("NYDFS Complaint") and *Conf. of State Bank Supervisors v. Office of the Comptroller of Currency*, Case 1:17-cv-00763-JEB (D.D.C. Apr. 26 2017) ("CSBS Complaint").

[23] *Vullo v. Office of the Comptroller of Currency, et al.*, No. 1:17-CV-03574-NRB (S.D.N.Y. Dec. 12, 2017) (order granting motion to dismiss NYDFS Complaint). There is a similar motion to dismiss the CSBS Complaint pending before the D.C. federal district court. *See Conf. of State Bank Supervisors v. Office of the Comptroller of Currency*, Case 1:17-cv-00763-JEB (D.D.C. Aug. 2, 2017) (motion to dismiss CSBS Complaint).

[24] In conjunction with the release of the Draft Supplement, the OCC released its Summary of Comments and Explanatory Statement ("Summary of Comments"), in which the OCC responded to criticisms of its charter initiative. Significantly, the OCC stated that, for purposes of the Draft Supplement, a "special purpose national bank" is limited to a national bank that engages in a limited range of banking activities (including at least one of the core banking functions) but does *not* take deposits and is not insured by the FDIC. The limited non-deposit-taking feature of the fintech charter does not prevent fintech companies that want to take deposit from applying for a traditional national bank charter. For more information, *see* our client alert, "OCC Releases Draft Supplement and Response to Comments for Special Purpose National Bank Charter for Fintech Companies" (Mar. 20, 2017), available at: https://media2.mofo.com/documents/170320-occ-draft-supplement-fintech.pdf.

[25] However, Mr. Noreika did not say whether the OCC would, in fact, exercise that authority. *See* Remarks by Keith A. Noreika, Acting Comptroller of the Currency, Before the Online Lending Policy Summit (Sept. 25, 2017), available at: https://www.occ.gov/news-issuances/news-releases/2017/nr-occ-2017-110.html.

[26] For example, in December 2015, the California Department of Business Oversight began an inquiry into the marketplace lending industry, which included survey questions sent directly to certain marketplace lenders. *See* Press Release, "California DBO Announces Inquiry into 'Marketplace' Lending Industry" (Dec. 11, 2015), *available at*: http://www.dbo.ca.gov/Press/press_releases/2015/DBO%20Inquiry%20Announcement%2012-11-15.pdf.

[27] *See* Securities Act Release No. 8984 (Nov. 24, 2008).

[28] *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

[29] The *Reves* court indicated that notes could be treated as securities on the basis of public perception, even where the actual economics of the notes would suggest otherwise (for example, when the notes are non-interest-bearing).

[30] The *Reves* court also indicated that where the notes being offered are interest-bearing, absent a countervailing factor, the notes are considered securities.

- There is no alternate regulatory scheme that reduces the risks to investors presented by the P2P lending platform.

As a result of the SEC action, Prosper registered its notes with the SEC. Lending Club Corporation, another P2P lending platform, also has registered its notes with the SEC. The costs and administrative burdens associated with registering notes with the SEC have potentially reduced the number of platforms in the P2P lending space. Furthermore, P2P lending platforms are still subject to blue sky registration requirements because the notes may not be "covered securities" under the National Securities Markets Improvement Act of 1996.[31]

A report issued in 2011 by the U.S. Government Accountability Office (GAO) pursuant to requirements under the Dodd-Frank Act acknowledged the confusing overlapping jurisdiction of multiple regulatory agencies, including the SEC, state securities regulators, state banking regulators, the FDIC, and the CFPB, with respect to P2P lending.[32] The GAO report outlined two approaches to the future regulation of P2P lending on the federal level:

- An **SEC-centered approach**, whereby potential risks to investors are regulated at the federal level by the SEC. Under this approach, there would be broad exemptions to individual state-level securities regulations for P2P lending platforms that are in compliance with federal regulations. However, borrower protections would remain under the jurisdiction of state regulators.[33]
- A **CFPB-centered approach** that would bring together the monitoring of investors and borrowers under the CFPB. Instead of being federally regulated securities, P2P loans and investments in P2P loans would be "consumer financial products" and the CFPB would regulate the relationship between investors and P2P lending platforms.[34]

Despite the GAO's thorough analysis, due to the infancy of the industry and expected evolution of P2P lending over time, the GAO did not make any firm recommendations as to which of these regulatory models was best. Subsequently, the SEC remains the primary regulatory agency for the funding side of P2P lending.

Title III of the JOBS Act

When President Obama signed Title III of the Jumpstart Our Business Startups Act (the "JOBS Act") in April 2012, it was thought that the long-awaited federal crowdfunding exemption of the JOBS Act would offer relief to P2P lending platforms. Title III of the JOBS Act addresses crowdfunding — of which P2P lending may be considered a type — by providing an exemption from registration, provided that:

- The aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the crowdfunding exemption during the 12-month period preceding the date of the transaction, is not more than $1 million;
- The aggregate amount sold to any investor by the issuer, including any amount sold in reliance on the crowdfunding exemption during the 12-month period preceding the date of the transaction, does not exceed:
    - The greater of $2,000 or 5% of the annual income or net worth of the investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000, or
    - 10% of the annual income or net worth of the investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000;
- The transaction is conducted through a registered broker or funding portal that complies with the requirements of the exemption; and
- The issuer complies with a number of specific informational and other requirements specified under the exemption.

Final Rules

On October 30, 2015, the SEC adopted final rules to implement the crowdfunding exemption (referred to as "Regulation Crowdfunding"), which went into effect on May 16, 2016. Below we briefly summarize some of the principal requirements of Regulation Crowdfunding.[35] Rule references below are to those under Regulation Crowdfunding.

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[31] "Covered securities" include: (i) securities listed or authorized for listing on the New York Stock Exchange or NASDAQ; (ii) securities registered under the Investment Company Act of 1940, as amended (the "Investment Company Act"); (iii) securities offered pursuant to Rule 506 of Regulation D under the Securities Act; and (iv) securities exempt under Section 3(a) of the Securities Act (with certain exceptions).

[32] *See* U.S. Gen. Accounting Office, GAO Report to Congressional Committees 11-613: "PERSON-TO-PERSON LENDING: New Regulatory Challenges Could Emerge as the Industry Grows" (July 2011), *available at:* http://www.gao.gov/new.items/d11613.pdf.

[33] *See id.*

[34] *See id.*

Limit on Capital Raised

Consistent with the statutory limitations, Rule 100(a) provides that an issuer may sell up to $1.07 million[36] in any 12- month period to investors in an offering made pursuant to the exemption. Of course, an issuer may consider conducting other exempt offerings in close proximity with its crowdfunded offering. In calculating the amounts sold for purposes of the threshold, amounts sold by a predecessor or by an entity under common control with the issuer will be aggregated with the amounts sold by the issuer.

Individual Investment Limits

The SEC modified the investor limits from those included in its proposed rules. The final rules make clear that the individual investor limit is an aggregate limit, which applies to all investments made by the individual over a 12-month period in crowdfunded offerings and not to a specific offering. An investor will be limited to investing:

(1) The greater of: $2,200[37] or 5% of the lesser of the investor's annual income or net worth if either annual income or net worth is less than $107,000;[38] or

(2) 10% of the lesser of the investor's annual income or net worth, not to exceed an amount sold of $107,000,[39] if both annual income and net worth are $107,000[40] or more.

The issuer can rely on the intermediary's calculation of the investment limit; provided that the issuer does not have knowledge that the investor has exceeded, or would exceed, the investment limits as a result of participating in the issuer's offering.

Offering Through an Intermediary

An issuer would only be able to engage in an offering through a registered broker-dealer or through a funding portal, and an issuer can only use one intermediary for a particular offering or concurrent offerings made in reliance on the exemption. The offering must be conducted online only through the intermediary's platform so that the "crowd" has access to information, and there is a forum for an exchange of information among potential offering participants. A "platform" is defined as a program or application accessible via the Internet or other similar electronic communication medium through which a registered broker or a registered funding portal acts as an intermediary in a transaction involving the offer or sale of securities in reliance on Section 4(a)(6) of the Securities Act ("Section 4(a)(6)").

Eligible Issuers

The ability to engage in crowdfunding is not available to all issuers. By statute, the following issuers cannot rely on crowdfunding transactions under Section 4(a)(6):

- issuers not organized under the laws of a state or territory of the United States or the District of Columbia;
- issuers already subject to the Exchange Act reporting requirements;
- investment companies as defined in the Investment Company Act or companies that are excluded from the definition of "investment company" under Sections 3(b) or 3(c) of the Investment Company Act; and
- any issuer that the SEC, by rule or regulation, determines appropriate.

The final rules also exclude:

- issuers disqualified from relying on Section 4(a)(6), or "bad actors";
- issuers that have sold securities in reliance on Section 4(a)(6) and have failed to make ongoing reports required by Regulation Crowdfunding during the two-year period immediately preceding the filing of the required new offering statement; and

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[35] For more information regarding the SEC's final crowdfunding rules, *see* our client alert, "Following the Wisdom of the Crowd?: A Closer Look at the SEC's Final Crowdfunding Rules" (Nov. 2, 2015), *available at:* https://media2.mofo.com/documents/151102seccrowdfunding.pdf.
[36] Updated for inflationary adjustments (from original amount of $1 million) and effective beginning April 12, 2017. *See* Securities Act Release No. 33-10332 (Apr. 5, 2017).
[37] Updated for inflationary adjustments (from original amount of $2,000) and effective beginning April 12, 2017. *See* Securities Act Release No. 33-10332 (Apr. 5, 2017).
[38] Updated for inflationary adjustments (from original amount of $100,000) and effective beginning April 12, 2017. *See* Securities Act Release No. 33-10332 (Apr. 5, 2017).
[39] *See id.*
[40] *See id.*

- any issuer that is a development-stage company that has no specific business plan or purpose, or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

Disclosure Requirements

The statute sets out a number of required disclosures in any Section 4(a)(6) offering. An issuer that elects to engage in a crowdfunding offering must comply with disclosure requirements, including: an initial disclosure about the offering on Form C, amendments to Form C to report material changes (Form C-A), periodic updates on the offering on Form C-U and ongoing annual filings until a filing obligation is terminated. The annual filing must be made on Form C-AR and a termination notice on Form C-TR.

Considerations and the Future of P2P Lending

There are some considerations that should be taken into account when assessing the current state of P2P lending and its future. The long-term viability of the P2P lending model that relies on the efficient use of technology as a cost savings mechanism is unclear. Although there are significant cost savings from the elimination of a physical branch network, the more enduring cost savings stem from the fact that P2P loans are not carried on the books of the originating banks or the P2P lending platforms and are not subject to bank capital requirements. However, this will depend on the long-term viability of the partnership model with the originating banks and whether the quality of the underwriting is sufficient to survive an economic downturn. In addition, it remains to be seen whether the cost advantages from P2P lending platforms' efficiencies will persist if banks adopt a more cost efficient business model that better utilizes technology. P2P lending platforms thus far have been enjoying a "first to market" advantage that may be impacted by new entrants to the P2P lending space. Heightened competition in the short- and long-term could raise the marketing costs of P2P lending platforms and force the platforms to expand further into new market sectors and geographic areas. This would likely cut into the cost savings that P2P lending platforms currently enjoy.

Despite these considerations, there are still growth opportunities for P2P lending. P2P lending is among the fastest growing segments in the financial services space. A report published by Transparency Market Research indicated that the global P2P lending market will grow to $897.85 billion by the year 2024 from $26.16 billion in 2015, which reflects a compound annual growth rate of 48.2%, while another report published by Research and Markets estimated that the global P2P lending market will grow at a compound annual growth rate of 53.06% from 2016 to 2020.[41] P2P lending continues to represent just a fraction of the outstanding balance of consumer credit in the United States. P2P lending platforms also have expanded their product offerings and expanded into new sectors of consumer lending in order to capture greater market share. P2P lending is also being used for corporate, real estate and construction loans, as well as secured loans, although the success of such expansion remains to be seen.

Contacts

Ze'-ev Eiger
New York
(212) 468-8222
zeiger@mofo.com

Jeremy Mandell
Washington, D.C.
(202) 887-1505
jmandell@mofo.com

About Morrison & Foerster

[41] *See* Prableen Bajpai, "The Rise of Peer-To-Peer (P2P) Lending," NASDAQ (Sept. 27, 2016), *available at*: http://www.nasdaq.com/article/the-rise-of-peertopeer-p2p-lending-cm685513.