



December 15, 2020

Re: No-Action Request

Dear _____ :

_____ (“Managing Entity”) and _____, an individual, (“Manager”) (collectively the “Managers”) request that the Department take a no enforcement action position (“no-action position”) with regard to the activities related to their business of operating a venture capital online funding platform exclusively for Idaho-based start-up companies and real estate development projects (a “Portfolio Company”) without registering as an investment adviser (“Request”). Absent a no-action position, Managers would be required to register pursuant to Sections 30-14-403 and 30-14-404 of the Idaho Uniform Securities Act (2004) (the “Act”) or qualify for an exemption from registration.

Rule 4 of the Rules Pursuant to the Act authorizes the Department to issue no-action positions, where appropriate and in the public interest, relating to an actual specific factual circumstance on the basis of a concise, written narrative setting out all facts necessary to reach a conclusion.

Your client outlines business activities in the Request¹ which identify Portfolio Companies in need of investment capital financing. Potential investors interested in investing in a Portfolio Company will provide personal financial information to Managers to establish the investor’s “accredited” status. Managers provide accredited investors access to an “investment proposal” for each Portfolio Company posted on the Managing Entity’s website. If an investor decides to participate in an investment proposal for a Portfolio Company, the investor notifies the Manager and delivers investment funds to an escrow account with a registered broker-dealer. If sufficient investors decide to participate and transfer funds to the escrow account, Manager will then direct a third party to create a limited liability company (a special purpose entity or “SPE”) and all necessary documents, including an operating agreement, private placement memorandum, subscription agreement, Form D and blue sky notice filings. The Manager then presents these documents to investors for review and approval. If approved, the investors

¹ A copy of the Request has been attached for reference.

subscribe as equity owners of the SPE and authorize the transfer of their investment funds to the SPE in exchange for an equity interest in the SPE. The investor funds held by the SPE are then invested into a Portfolio Company by the Manager. The Manager manages and administers the investment of investors' pooled funds, including negotiating all SPE investments and management rights in Portfolio Companies. The SPE investment in a Portfolio Company may be an equity or debt investment. Finally, Managers will charge an annual asset management fee of 2% of the value of the SPE's assets under management.

Managers have also provided additional documents related to a specific offering to illustrate some of the business activities described in the Request². Among the documents provided was a private placement memorandum ("PPM"). In the PPM, the Managers disclose the following about the management of the SPE (referred to as the "Fund"):

The Members have no right or power to take part in the management of the Fund. Accordingly, the Members will have no opportunity to control the day-to-day operations, including investment and disposition decisions, of the Fund. The Members will not receive the detailed financial information issued by a Portfolio Company that is typically available to the Manager. Accordingly, no person should purchase Interests unless that person is willing to entrust all aspects of the management of the Fund to the Manager.

The PPM also includes the following waiver of fiduciary duties of the Manager:

The Manager does not, and will not owe any fiduciary duties of any kind whatsoever to the Fund, or to any of the Members, by virtue of its role as the Manager, including, but not limited to, the duties of due care and loyalty, whether those duties were established as of the date of this Agreement or any time in future, and whether established under common law, at equity or legislatively defined.

The Managers seek relief from the requirement to register as an investment adviser and propose that good cause under Rule 100 and Rule 4 such relief is warranted because:

- (1) Only accredited investors will be permitted to invest.
- (2) Investors will be sufficiently protected by Managers compliance with federal and state securities laws, rules, and regulations.
- (3) Sufficient measures are in place – including in the procedures and operations of the Managers' business model and compliance with securities laws – such that there is little to be gained in terms of investor protection from investment adviser registration and the significant burden of registration outweighs any benefit therefrom.

INVESTMENT ADVICE

The Managers do not explicitly acknowledge that their activities require investment adviser registration. Rather, they request a no-action position in the event their activities constitute regulated activity. The Department notes that the Manager will be making all decisions about the investment of the pooled investor funds. Investors will have no control of

² These additional documents have not been included with this response.

the SPE and will not receive detailed financial information about Portfolio Companies. Investors are required to entrust all aspect of management to the Manager. Thus, the Manager has complete authority and discretion to determine the timing, amount, and nature of an investment in a Portfolio Company, including negotiating the number, class and rights of stock exchanged for investor capital. The Managers also charge SPEs an asset management fee based on the value of the assets managed.

Advice regarding the advisability of purchasing or selling securities, including equity investments in start-up companies, for compensation is a core activity that is regulated under the investment adviser provisions of the Act and therefore requires investment adviser registration. The Department views the Managers' activities to include regulated investment advice as set out in Section 30-14-102(15) of the Act.

PUBLIC INTEREST

The remaining question is whether it is appropriate or in the public interest to grant a no-action position waiving the Managers' need to register as investment advisers. The Managers maintain that limiting investments in SPEs to only accredited investors and otherwise complying with securities laws provides adequate protection for investors.

Securities laws relating to the sale of securities are meant, in part, to ensure that investors have access to adequate information about an investment prior to purchase. Investment adviser regulations exist to provide information about advisers to potential clients, provide minimum standards of expertise and conduct, and establish certain duties and obligations to clients.

It is a well-established principle of law that investment advisers have a fiduciary duty to their clients. The SEC interpretive release, effective July 9, 2019, makes clear that the fiduciary duty is enforceable by the antifraud provisions of the Investment Advisers Act of 1940 ("Adviser's Act"), which apply to both federal and state registered advisers, as well as other investment advisers that are exempt from registration.³ The SEC also clarifies that an adviser's fiduciary duty may not be waived, though can be applied in a manner that reflects the scope of the relationship. Further, a general waiver of a fiduciary duty is inconsistent with the Advisers Act, regardless of the sophistication of the client.

As noted above, the Managers disclaim all fiduciary duties to investors and the SPE in the management of the SPE. Investment advisers have a fiduciary duty to clients whether or not the adviser is required to register. The Department also does not find compliance with securities laws related to the offer and sale of securities to be a persuasive basis to waive investment adviser registration. Investment advisers that provide advice to pooled investment funds are either registered or qualify for an appropriate exemption from registration. The Department does not view the fact scenario presented by the Managers to have any intrinsic features that override the protections to clients and to the financial market gained under investment adviser regulations.

³ SEC Release No. IA-5248

Based on the facts presented in the Request, the Department does not view the issuance of a no-action position under these circumstances to be in the public interest. Consequently, the Department hereby denies the Managers' request to take a formal, no-enforcement action position. The Department has based its position on the representations in the Request and the supplemental documents provided. Please contact the undersigned with any questions regarding this response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kurt Merritt", with a long horizontal flourish extending to the right.

Kurt Merritt
Securities Analyst

September 4, 2020

VIA EMAIL AND US MAIL

Kurt Merritt
Securities Analyst
Idaho Department of Finance
800 Park Boulevard, Suite 200
Boise, Idaho 83712

Re: Request for No-Action Letter from

Dear Mr. Merritt:

This request is being submitted by _____, as counsel to and on behalf of _____ a Delaware limited liability company with its principle place of business in Idaho (_____), the sole member and manager of which is _____ pursuant to Section 12.01.08.004 (“**Rule 4**”) of the Idaho Administrative Procedure Act, Rules pursuant to the Uniform Securities Act (2004) (the “**Rules**”).

This request supersedes and replaces that certain Request for No-Action Letter (the “**Previous Request**”), dated as of April 29, 2020, from _____ to the Idaho Department of Finance (the “**Department**”).

On behalf of _____, we respectfully request that the Department take a formal no-action position that the Department will not recommend or otherwise engage in any enforcement action against _____ or _____ if they engage in the certain activities described below without registering as investment advisers in accordance with Section 30-14-403 of the Idaho Uniform Securities Act (2004) (“**IUSA**”).

and _____’ Business and Activities

_____ operates the website, _____ (the “**Website**”), a venture capital online funding platform that connects exclusively Idaho-based start-up companies and real estate development projects seeking financing with accredited investors, as defined in Rule 501 of Regulation D, promulgated under the Securities Act of 1933 (“**Accredited Investors**”).

Upon an Idaho-based start-up company or real estate development project notifying that it desires to seek financing from investor capital, _____ will conduct due diligence on such company or project and assess whether such company or project satisfies

established criteria. Such criteria has been formulated by _____ manager, _____, who has founded several Idaho-based start-up companies and has experience in building, developing, managing, and investing in Idaho start-up companies and real estate development projects. _____ also has considerable experience in investing in syndicated investment opportunities in Silicon Valley, California.

After conducting its due diligence, if _____ determines such start-up company or development project satisfies _____ established criteria, _____ will then develop an investment proposal for an investment in such company or project (hereafter referred to as a “**Portfolio Company**”) and will provide such proposal on the Website for Subscribers (as defined below) to view and assess. Each investment proposal will propose a private offering exempt from registration with the U.S. Securities Exchange Commission (“**SEC**”) under Rule 506 of Regulation D, promulgated under the Securities Act of 1933. No investment proposal is be structured or developed with any specific investor in mind. _____ structures each investment proposal as a proposal generally applicable to any Accredited Investor.

In order to view any investment proposal on the Website, a person must register as a member of the Website. The procedures for such registration include an Accredited Investor verification process whereby each person must certify, pursuant to an online questionnaire, that they constitute an Accredited Investor. The registration and verification processes are administered by a third-party online investment processing services provider that specializes in private capital raising.

Once a person completes the registration and Accredited Investor verification procedures (such person hereafter referred to as a “**Subscriber**”), such Subscriber will then be granted access to the portion of the Website where they can view all investment proposals provided therein. Subscribers then determine, based upon their own assessment and with the advice of their own legal and financial counsel, whether and to what extent to participate in any investment proposal. During the time that Subscribers assess and decide whether to participate in an investment proposal, which is to say, from the time an investment proposal is posted on the Website until the time the Subscriber notifies _____ of its desire to invest, neither _____ nor _____ will provide any advice or further information regarding the investment proposal.

Once a Subscriber has decided to participate in an investment proposal, the Subscriber notifies _____ of its desire to participate in the proposal and delivers its investment funds to a third-party escrow service provider that is a licensed and registered broker-dealer. _____ does not ever possess any Subscriber’s investment funds. If there is not eventually sufficient interest from Subscribers to participate in and sufficiently fund an investment proposal, the third party escrow service provider will return any funds made available to it by interested Subscribers. If there is sufficient interest from Subscribers to participate in and sufficiently fund an investment proposal, _____ will then contract with a third party service provider to form a special purpose entity (“**SPE**”), which will be a limited liability company, and to draft and file all necessary documentation for the organization thereof, including, without limitation, an operating agreement, private placement memorandum, subscription agreement, Form D, and blue sky notice filings, as applicable. Pending the Subscribers’ review and approval of such documentation, the Subscribers

will then subscribe as equity owners of the SPE and authorize the third party escrow service provider to transfer their funds to the SPE as their contribution in exchange for equity interest in the SPE.

will serve as manager of each SPE and will manage and administer each SPE's investment of the Subscribers' pooled funds in the applicable Portfolio Company. will conduct all negotiations regarding the SPE's investment in the Portfolio Company, including any negotiations for management rights of the SPE (i.e. advisory board status, rights to review books and records, access to management, etc.). The SPE's investment in the Portfolio Company may be an equity- or debt-based investment. As compensation for ' services as manager of the SPE, will be paid by the Subscribers holding equity interests in such SPE an annual asset management fee equal to 2% of the value of the SPE's assets under management.

Following the closing of the SPE's investment in the Portfolio Company, will also provide certain mentoring services to the Portfolio Company, such as strategic advice and networking assistance, in an effort to maximize the Portfolio Company's growth and mitigate risk to the SPE's investment.

The total assets under management that will manage in his capacity as manager for all the SPEs will be less than \$25 million.

Request for No-Action Position

In the event the above described activities cause and/or to constitute investment advisers under Section 30-14-102(15) of the IUSA, and acknowledge that neither the IUSA nor the Rules provide an exemption from registration under which and/or would qualify.

Section 12.01.08.100 of the Rules provides that “[t]he Administrator may, either upon request or upon his own motion, waive or modify the application of any particular section to a particular . . . investment adviser when, in his opinion, just and reasonable cause exists for such action and the waiving or modifying of such rule would not be contrary to the provisions of the Act or to the public interest.”

Additionally, Rule 4 provides that “[t]he Administrator, in his discretion, may honor requests from interested persons for formal interpretive opinions and no-action positions, including consideration of waivers, relating to an actual specific factual circumstance where appropriate and in the public interest, on the basis of facts stated and submitted in writing. . . .”

We submit that there is good cause for the Department to take a no-action position in the event and engage in the certain activities described above without registering as investment advisers in accordance with Section 30-14-403 of the IUSA. We base this

submission on the foregoing description of _____ business and activities and, in particular, on the following:

(1) Only Accredited Investors will have access to investment proposals on the Website and only Accredited Investors will be permitted to invest in Portfolio Companies;

(2) _____ and _____' activities will be sufficiently regulated, and investors will be sufficiently protected, by _____ and _____' compliance with the Securities Act, the rules and regulations promulgated thereunder by the SEC, and the IUSA; and

(3) Because sufficient measures are in place, both in the procedures and operations of _____ business model and in _____ required compliance with the Securities Act, Regulation D, and the IUSA, there is little to be gained in terms of investor protection from requiring _____ or _____ to register as investment advisers; and, accordingly, the significant burden of registration on _____ and/or _____ outweighs any benefit therefrom.

In light of the foregoing, we respectfully request that the Department take the formal no-action position that it will not recommend or otherwise engage in any enforcement action against _____ or _____ if each such party engages in the certain activities described herein without registering as an investment adviser in accordance with Section 30-14-403 of the IUSA. Please contact the undersigned with any questions or comments regarding this request.

Very truly yours,

CC:

Patty Highley, Idaho Department of Finance
Nancy Ax, Idaho Department of Finance