

CROWDFUNDING IN INDIA: MAJOR ROADBLOCKS AND THE WAY AHEAD.

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Abstract

Crowdfunding is solicitation of funds in small amounts from several unsophisticated investors via web-based platform or social media to fund new business ventures, art, film etc. While India has seen the surge of numerous non-equity crowdfunding platforms step-up for funding art, films, charity in the recent years, there is no equity based crowdfunding platforms yet as it is a grey and murky area and proper reforms are yet to take place facilitating equity crowdfunding model to work. While the consultation paper issued by SEBI in 2014 is definitely a silver lining, still clear rules should be framed by regulators to make the crowdfunding story a success.

Introduction

Crowdfunding is solicitation of funds in small amounts from multiple investors through a web-based platform or social networking site for a specific project, business venture or social cause.¹ Crowdfunding is a way of raising money for funding creative projects like film, art or to support some business venture or some social or public interest causes by means of collecting money from hundreds of unsophisticated investors via a crowd-funding platform or through social media.

In the aftermath of the 2008 financial crisis, small businesses found it increasingly difficult to raise funds. As a response, crowd-funding has emerged as a viable alternative for sourcing capital to support innovative, entrepreneurial ideas and ventures.² Crowdfunding which began as an online extension of traditional financing by friends and family: Communities pool money to fund members with business ideas³ has gained huge momentum in developed economies like USA, UK, Italy, Australia and Netherlands. It has been estimated that Kickstarter, market leader in donation based crowd sourcing has by March 2014 surpassed USD 1 billion.⁴

India is not far behind and already non-equity based crowd-funding platforms exist in India like Wishberry and Fund my Dream which have been successful in crowd funding projects. However the existing Company laws and SEBI (Securities and Exchange Board of India) laws prevent start-up friendly Indians from participating in equity based crowd-funding which was why SEBI released a consultation paper on crowd funding in 2014. The consultation paper though is a huge step taken by the Government for setting up of regulatory framework for managing crowd-funding in India, has received several criticisms as the paper has focused more on investor protection than giving the small and medium enterprises a chance to get their ideas financed. Recently SEBI has put the consultation

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¹ Consultation paper on crowd funding in India, SEBI Press Release PR 62/2014(17/6/14) Available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1403005615257.pdf, last seen on 1/8/15

² P. Belleflamme, T. Lambert, A. Schwienbacher, "Crowdfunding: Tapping the Right Crowd", 29 (5) Journal of Business Venturing 610, 611(2014).

³ S.Nagalaxmi, U.G. Cecilia, Crowd Funding – An Emerging Trend in India, 3(4) IJSR - INTERNATIONAL JOURNAL OF SCIENTIFIC RESEARCH 71, 71(2012), Available at http://theglobaljournals.com/ijsr/file.php?val=April_2014_1397136237_d8bdf_206.pdf, last seen on 21/8/15

⁴ K. Noyes, "Why investors are pouring millions into crowdfunding", Fortune, April 16, 2014 Available at <http://fortune.com/2014/04/17/why-investors-are-pouring-millions-into-crowdfunding/>, last seen on 3/1/15

paper in back burner by citing that such a regulatory framework in India would be premature and the paper has not taken account of cross-border crowd-funding transactions.⁵

This paper discusses about the shortcomings of the proposed SEBI regulation mechanisms and proposes a way ahead which could make crowd funding a successful story in India.

Types of crowdfunding

Crowd funding can be carried out in four ways:

1. Donation Crowdfunding- Donation crowdfunding denotes solicitation of funds for social, artistic, philanthropic or other purpose, and not in exchange for anything of tangible value.⁶ For example Kickstarter and Milaap are donation based crowd funding platforms.

2. Reward Crowdfunding- It is a form of funding where funds are transferred from contributors with an agreement, tacit or otherwise, that fund-raisers would reward contributors in myriad of ways including pre-payment of a future product, free merchandise.⁷ As a variation of the rewards crowdfunding model, fundraisers may also engage a pre-purchase model.⁸ In this type of model the investors receive the product of the invention that the entrepreneur is raising funds to produce. Some of the reward crowd funding are Wish berry and RocketHub.

3. Peer-to Peer Lending- In Peer-to-Peer lending, an online platform matches lenders/investors with borrowers/issuers in order to provide unsecured loans and the interest rate is set by the platform.⁹ Some Peer-to-Peer platforms arrange loans between individuals, while other platforms pool funds which are then lent to small and medium-sized businesses.¹⁰

Though peer-to-peer lending did not appear to involve securities, loan/notes/contracts can be traded on a peer-to-peer platform or a secondary market and thus, these loans may become securities, with the contract between the lender and the borrower being the security note.¹¹

In this type of model investors are not given any kind of protection because collateral security is not provided by the borrower to cover the default and hence investors may lose on money if borrowers don't pay up.

4. Equity based Crowdfunding- It is a model of crowdfunding where equity shares are issued to the investors in lieu of the money provided to the entrepreneurs to finance their project. Start-up businesses raise money for their projects at the seed stage of the company by advertising in crowd funding or social platforms which also serve as intermediary between investor and the entrepreneur.

⁵ J. P. Uphadhy, Sebi puts crowd funding regulations on the back burner, Business Standard(20/5/2015), Available at http://www.business-standard.com/article/markets/sebi-puts-crowd-funding-regulations-on-the-back-burner-115052001138_1.html, last seen on 22/7/2015

⁶ Supra 1.

⁷ A. B. Majumdar, Regulating Equity Crowdfunding in India - A Response to SEBI's Consultation Paper,1,9(2015), Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621488, last seen on 23/8/2015

⁸ Schwenbacher, Armin, Entrepreneurial Risk-Taking in Crowdfunding Campaigns (August 29, 2014). Available at SSRN: <http://ssrn.com/abstract=2506355>, last seen on 1/8/15

⁹ Supra 7, at 10.

¹⁰ Supra 1.

¹¹ E. Kirby and S. Worner, Crowd-funding: An Infant Industry Growing Fast, IOSCO Staff Working Paper Series 9, Working Paper Number SWP3/2014, IOSCO Research Department (2014)

Investor after reading the advertisement for a certain business will transfer funds from their account electronically to the platform and requisite quota of fund or the fund asked for is fulfilled, the platform will hand-over the money to the investor. Simultaneously, the fundraiser issues securities, in the form of equity, to the contributors. Contributors look to receive a return in the form of a dividend stream or capital gain- similar to buying shares of a public company.¹² Platforms are paid processing fees for the service provided to the entrepreneur.

Benefits and Risks of Crowdfunding

Some of the advantages of the crowdfunding mechanism are that due to less regulatory framework, easy access to capital is possible which boosts the growth of micro, small and medium scale industries and start-ups leading to recovery and boost of economy and enhanced job creation. Unlike banks which have a rigid regimes of raising capital, un-collateralised peer to peer lending leads to higher generation of capital at minimum amount of times and inculcate the habit of saving and investment in public.

The web hosting platforms are cost efficient and hence charge nominal fees for service rendered. The added advantage is the convenience as they are easily accessible to millions of users internationally who surf internet. Platforms are flexible as the entrepreneur can change advertisements as and when it suits them all of which leads to prompt raise of money giving a boost to the economy

Some of the risks related to Crowd funding are that there is no secondary market to dump the equity shares if they turn unproductive or in case of defaults. Companies Act, 2013 prohibits any kind of secondary market for private listing and hence investors are stuck with bad equity shares which are a huge risk as around 86% of crowd funding investment turns out to be bad. The second risk is that in peer-to-peer lending there is a high rate of defaults as borrowers with no collateral as guarantee take the money from the lenders.

Third kind of risk is from the portals which also serve as intermediaries between investor and entrepreneur may temporarily or permanently shut down due to overdue maintenance, hacking etc. When this happens there is a chance that investors will not get their money as the money is kept by the portals for safe keeping until the target amount is reached. One such example is in 2011, Quackle which closed suddenly overnight leaving no information on the borrowers or lenders and consequently the contracts could not be fulfilled resulting in 100% loss.¹³ Also as intermediaries, portals face a significant risk of liability arising out of false disclosures by fundraisers.¹⁴ Since in most countries, the platforms are unregulated and crowd funding are in nature of cross-border transactions, complex legal issues arise in case of recovery of money for defaults. Due to the unsophisticated nature of the platforms, it paves way for serious cyber crimes from overloading the platform's infrastructure, to confusing accounts and/or identity theft.¹⁵

The fourth kind of risk posed to contributors is the lack of transparency and information asymmetry.¹⁶ The information provided in the portal are inadequate many a times and it always requires specialized

¹² Ibid, at 9.

¹³ E.Moore & J.Moules, 'Peer-to-peer loans company closes', Financial Times, (8/7/2011) Available at: <http://www.ft.com/cms/s/0/2db417a6-20c1-11e1-816d-00144feabdc0.html#axzz1fstqp4xA>, last seen on 05/11/2014

¹⁴ C.S.Bradford, Shooting the Messenger: The Liability of Crowdfunding Intermediaries for the Fraud of Others, University of Cincinnati Law Review 3,4 (2014)

¹⁵ Supra 11, at 28.

¹⁶ J. Wasik, Crowdfunding, the JOBS Act, and Scams in Your Inbox, Forbes 24, 25 (2012) Available at <http://www.forbes.com/sites/johnwasik/2012/03/23/potential-and-obvious-scams>, last seen on 5/11/15

knowledge to know whether the proposed product will generate revenue or not and since the unsophisticated investors lack such specialized knowledge, they can be duped easily. Similarly, music or visual art related projects involve a high degree of subjectivity as to its revenue generation capability.¹⁷ Since investors have nil background in such ventures, many a times they invest money in movies or music concerts which fail to generate expected revenue. Further, when investing in a crowd-funded project, contributors are reliant solely upon the representations of fundraisers and do not undertake a due diligence on the company that they are investing into.¹⁸ The platforms do not verify or review the veracity of the claims made by the entrepreneurs made in the platforms. The lack of a detailed review on the fundraising company opens up the possibility of fundraising companies to conceal information relevant to the future of the company, whether actively or passively.¹⁹ Hence, many times information may be false or misleading to dupe money out of innocent investors. Also the lack of requirement of a detailed review by a industry specialist opens gateway for more fraud and loss of money.

Equity based Crowd funding Regimes existing around the world

Three regulatory regimes can be identified in equity crowdfunding.²⁰ In the first case, regulation prohibits equity crowdfunding in its entirety while reiterating the existing law on fundraising by companies.²¹ In the second case, the crowdfunding regulation keeps the barrier to entry in the market so high that equity crowdfunding is non-existing in the market. In the third case, even though equity crowdfunding is legal per se but the regulatory framework is stringent as to who can invest and the size of the capital of the company that the market is very small in that particular jurisdiction.

Some examples of such regimes are:

- a. USA- The United States Congress passed the Jumpstart Our Business Start-ups Act (JOBS ACT) in April 2012 which permits sale of securities via crowd-funding platform by amending the existing security laws. Equity crowd-funding has started to develop, boosted by the introduction of the JOBS Act.²² Before introduction of such Act, the entrepreneurs only had the option to raise money via angel funding or venture capital.²³ The present JOBS Act and the CROWDFUND Act has amended the security law to include fund raising activities without prospectus and registration requirement which was mandatory previously.
- b. New Zealand- The Financial Markets Conduct Act of 2013 has been tailored in such a way so that it permits crowdfunding and peer-to-peer lending. Offers made through licensed intermediaries do not require disclosures under Part 3 of the Financial Markets Conduct Act, 2013.²⁴ The Financial market Conduct Act provide for definitions of crowdfunding and peer-to-peer lending services and set out eligibility criteria for portals to seek a license to carry out such services²⁵ The regulations also talk about detailed procedural disclosure statement and upper limit has been set up to NZD 2 million.
- c. Malaysia - The Malaysian Government had issued a consultation paper in 2014 in response to which there was a proposal paper which enumerates the legal framework for carrying out crowdfunding. One such mandatory requirement is registration of crowdfunding platforms. Also the platform is duty bound to verify the claims of the company which is seeking fund. For

¹⁷ Galuszka, P., & Bystrov, Crowdfunding: A Case Study of a New Model of Financing Music Production. 13 (4) Journal of Internet Commerce, 233, 233–252 (2014)

¹⁸ A.K. Agarwal, C. Catalini, & A. Goldfarb. Some simple economics of crowdfunding., 14 Innovation, Policy and the Economy 44, 45 (2013), Available at <http://www.nber.org/papers/w19133.pdf>, last seen on 10/12/15

¹⁹ A. C. Fink, "Protecting the Crowd and Raising Capital Through the Crowdfund Act" 90 University of Detroit Mercy Law Review 1, 10 (2013)

²⁰ Supra 11, at 30.

²¹ Supra 7, at 13.

²² Supra 11, at 30.

²³ G.P. Rutledge, Overview of Crowdfunding in US, Westlaw India, 2, 4 (12/8/2015)

²⁴ Crowdfunding in New Zealand, Available at <http://www.fma.govt.nz/assets/a-guide-to-the-financial-markets-conduct-act-reforms-november-2013.pdf>, last seen on 20/1/2016

²⁵ Regulation 186 and 187, Financial Markets Conduct Regulations, 2014, (New Zealand)

offerings below MYR 300,000, there is no requirement to file financial information but for offerings between MYR 300,000 and MYR 500,000, audited financial statements for 12 months prior to the offering must be disclosed.²⁶ Investors has been divided into various groups and while a professional investor has no cap of investment, a retail investor can only contribute MYR 3000 Per issue and a total of MYR 30,000 over the 12 month period.

- d. Italy - Italian Government was one of the first jurisdictions to pass a comprehensive legislation on crowd funding to fund innovative start-ups. The law is specifically designed to support start-ups which use innovation and technology to invent new products. The regulation is known as CONSOB regulation which provides for collection of fund through online portals. These platforms have been given the duty to protect the risk of investors. Portals must register themselves with the CONSOB²⁷ and must integrity and professional requirements on a continuous basis²⁸ Platforms has been given the given the onus to warn the non-sophisticated investors of the risks of crowdfunding investment and to verify the veracity of the claims made by the entrepreneur. CONSOB allows the investors liquidity of investments by selling them to third party. Further at least 5% of the financial instruments offered must be underwritten by professional investors or by banking foundations or by innovative start-up incubators.²⁹
- e. Australia- Corporation Act which governs fund raising activities in Australia has two exemptions when disclosure need not be made in form of prospectus- offers made to sophisticated investors and small-scale offering³⁰ Offers may be made without a disclosure document to investors who can show least AU \$2.5 million in net assets or AU \$250,000 in annual income³¹ Small scale offerings are restricted to AUD 2 million and the number of investors is restricted to 20³² The exemptions do not favour crowdfunding and hence in 2012 guidelines were issued by Australian securities commission which reiterates the existing Corporation Act. However, guideline provides that the hosting platforms must be registered and they will responsible for providing complete disclosures about the product to the investors and will be held liable for fraud done on the investors.
- f. Singapore- Monetary Authority of Singapore has issued a consultation paper in 2015 regarding security based crowdfunding. It suggests that only institutional and accredited investors can take part in such type of financial activities and also talks about lessening of entry barriers for dealing licensees in order to promote the growth of crowdfunding platforms, provided that Dealing Licensee that does not handle, hold or accept customer monies, assets or positions.³³ Registration of prospectus is not needed if the money raised is less than SGD 5 million and number of investors are restricted to fifty persons. The authorities has taken a firm stand that such crowd funding offer should only be available to restricted number of people and hence crowdfunding portals cannot publicly advertise and attract general public to invest in the start-ups.
- g. United Kingdom- In 2013 UK Financial Conduct Authority has issued a consultation paper on regulation framework of crowdfunding. It brings the lending platforms within the ambit of FCA and all lending platforms must be registered with FCA.³⁴ Lending platforms having more than 20000GBP so that they can cover the loss of the investor in case of default. Only

²⁶ Securities Commission Malaysia, Proposed Regulatory Framework For Equity Crowdfunding, Public Response Paper No 2/2014, available at http://www.sc.com.my/wpcontent/uploads/eng/html/consultation/140925_PublicResponse_2.pdf , last seen on 3/11/15

²⁷ Art. 4-7, CONSOB Regulation No. 18592 of 2013, (Italy)

²⁸ Art. 8-11, CONSOB Regulation No. 18592 of 2013 , (Italy)

²⁹ Art. 24 (2), CONSOB Regulation No. 18592 of 2013, (Italy)

³⁰ Matt Vitins, "Crowdfunding and Securities Laws: What the Americans Are Doing and the Case for an Australian Crowdfunding Exemption", 22 Journal of Law, Information and Science, 46, 92 (2013)

³¹ S. 728, The Australian Corporation Act, 2001, (Australia)

³² S. 208, The Australian Corporations Act, 2001, (Australia)

³³ Monetary Authority of Singapore, Facilitating Securities Based Crowdfunding, Consultation Paper, 5 (2015) Available at <http://www.mas.gov.sg/~media/MAS/News%20and%20Publications/Consultation%20Papers/Facilitating%20Securities%20Based%20Crowdfunding> , last seen on 26/11/16

³⁴ The FCA's regulatory approach to crowdfunding, Financial Markets Authority 6,10 (2013), Available at <http://www.fca.org.uk/static/documents/consultation-papers/cp13-13.pdf> , last seen on 5/11/16

sophisticated investors or accredited having net worth of £100,000 can take part in crowdfunding.

Existing Fund Raising Regime in India

a. Sahara Case and its aftermath

Two companies of the Sahara Group SHICL and SRIECL floated OFCD and collected 19000 crores from investors by way of private placement. The Red Herring Prospectus (RHP) declared that the companies do not intend to list with the Security Exchange Board of India. The RHP also provided that the unsecured OFCDs would be raised by way of private placement to friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara Group of Companies without giving any advertisement to general public.³⁵ The prospectus was not registered with the Registrar of Companies and SEBI as the Sahara Group had intended to raise money in a private placement basis.

One of the group company Sahara Prime City Limited intended to raise funds for its various housing projects across the country. As part of its draft red herring prospectus, it was required to disclose fundraising details of its group companies, including the Sahara companies mentioned above.³⁶ While processing the prospectus, SEBI received complaint from one Roshan Lal alleging that Sahara group was issuing Housing Bonds without complying with Rule/Regulation/Guideline by RBI/MCA/NHB, SEBI also received complaint from "Professional Group of Investors Protections" dated 25.12.2009 and 4.1.2010 which prompted SEBI to ascertain the correct factual position.³⁷

The Whole Time Member of SEBI while taking cognizance of the matter passed an order dated 23rd June, 2011 thereby directing the two companies to refund the money so collected to the investors and also restrained the promoters of the two companies including Mr. Subrata Roy from accessing the securities market till further orders.³⁸ Sahara appealed against the order in SAT and SAT confirmed the order of SEBI and then Sahara preferred an appeal from SAT order in Supreme Court of India.

One of the questions which arose before the Supreme Court of India was whether the fund raised through OFCD was a private placement or not?

Court said that even though Sahara group had wanted the placements to be private but however since they had issued to more than 50 persons, it was violative of Section 67(3) of the Companies Act³⁹ as this section specifically provides that in case of subscription of more than 50 members, it will be deemed to be a public offer. Supreme Court also observed that since introducers were needed for

³⁵ Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India, (2013)1SCC1

³⁶ Draft Red Herring Prospectus dated September 29, 2009 issued by Sahara Prime City Limited, Sebi.gov.in, Available at <http://www.sebi.gov.in/dp/saharaprime.pdf>, last seen on 12/1/15

³⁷ Supreme Court Judgement in Sahara India Real Estate Corporation Ltd. Vs. SEBI, Top CA Firms, Available at <http://www.topcafirms.com/index.php/white-paper/4486-case-laws-supreme-court-judgement-in-sahara-india-real-estate-corp-ltd-a-ors-vs-sebi>, last seen on 25/8/2015

³⁸ D.V.Swahney, S.Mukherjee, Sahara vs. SEBI-An In-Depth Analysis Of The Landmark Supreme Court Ruling, Mondaq(31/10/12), Available at <http://www.mondaq.com/india/x/203796/Shareholders/Sahara+vs+SEBI+An+InDepth+Analysis+Of+The+Landmark+Supreme>, last seen on 25/8/2015

³⁹ S. 67(3), The Companies Act, 1956

someone to subscribe to the OFCDs, it is clear that the issue was not meant for persons related or associated with the Sahara Group because in that case an introducer would not be required as such a person is already associated or related to the Sahara Group.⁴⁰ Court observed that almost million agents were dispatched all over the country to invite people to subscribe to their OFCD and hence it was a public placement in garb of private placement done to bypass relevant rules and regulations.

Another question which arose was whether mandatory listing under Section 73(1)⁴¹ can be avoided if the company intends the placement of securities to be private.

Sahara group argued that no company can be forced to list itself in the stock exchange. However Supreme Court said that if offer is made to more than 49 persons, then Section 67(3) is attracted and then it does not matter whether the company whether the company wanted it to be a private placement or not and they would have to follow section 73 mandatorily without choice. The Supreme Court observed that Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities.⁴²

In the aftermath of the Sahara Case, to avoid companies in future from taking the plea of 'intention of private placement', Ministry of Corporate Affairs introduced a new section in the Companies Act, 2014.

The newly introduced section, Section 42 says that private placements can be made by companies by issuance of private placement offer letter. The offer of securities or invitation to subscribe securities shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed⁴³ and issue and allotment of shares upto two hundred persons in a financial year except institutional buyers and employees of the company.⁴⁴

Explanation I to Section 42 says that if a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public.⁴⁵ This explanation has been deliberately inserted to prevent another Sahara debacle in the future.

The section also says that even if the subscription does not exceed the prescribed limit and it is a private placement for all purposes yet it shall file with the Registrar a return of allotment in such manner as may be prescribed, including the complete list of all security-holders, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.⁴⁶

b. Other mechanism of Fund Raising

1. SME- SEBI has framed a regulatory framework where Small and Medium Scaled Enterprises can list their securities⁴⁷ Company having face value of less than ten crore rupees can list in SME Platform whereas companies having face value of more than ten of crore rupees but less than twenty crore rupees have an option to list their securities with the SME platform. Companies listed in SME platforms are given relaxations like draft document can be directly filed with the exchange. Other relaxation includes exemption from publishing of annual results and no need to furnish financial results in quarterly basis.

⁴⁰ Supra 38.

⁴¹ S. 73, The Companies Act, 1956

⁴² Supra 35.

⁴³ S.42(2), The Companies Act,2013

⁴⁴ Rule 14(2)(b), Companies (Prospectus and Allotment of Securities) Rules, 2014

⁴⁵ Explanation I to S.42, The Companies Act, 2013

⁴⁶ S.42(9), The Companies Act, 2013

⁴⁷ Supra 1.

2. ITP Platform- SMEs and Start-ups can list themselves with this platform. Companies who have not listed their companies with any recognized stock exchange can get themselves listed. One advantage of such listing is that the start-up companies at their seed stage can get visibility without any public issue of their prospectus. In addition his framework also provides a trading platform for the scrips of Start-up Companies held by Alternative Investment Funds (AIFs), VCFs etc. and enhances the liquidity in such scrips, which in-turn provide enabling environment for SME and start-up enterprises to flourish.⁴⁸
3. Venture Capital Funds- VCFs can be in form of company, trust or a body corporate but they must register with SEBI and they must disclose their capital and investment strategy to SEBI. Every investor must contribute 500,000 rupees and the total fund collected should be of minimum of 500 million rupees.
4. AIF- SEBI (Alternative Investment Funds) Regulations, 2012 outlines the regulatory framework that has to be observed for raising of private funds from national and international investors. They can be in the form of trusts, LLP, companies but they should be registered with SEBI. They can be of three categories, Class I which includes SME funds, VCF funds, Infrastructure fund etc. Class II comprises of private equity funds and Class III fund include hedge funds. Like VCFs they are prohibited from issuing securities to public and only can raise fund through private offer letter. Every investor should invest a minimum of Rs 1 crore and the total fund collected shall not be less than Rs.20 crore. Also AIFs should submit their investment and capital strategy to SEBI.

Proposed crowdfunding regime in India

The Securities and Exchange Board of India (SEBI) in June, 2014 came out with a Consultation Paper on Crowd Funding in India to provide a brief background of crowdfunding and a regulation framework which can be adopted to make crowdfunding mechanism workable in India. The Consultation Paper discusses about the different types of crowdfunding and the types of crowdfunding model which has been adopted in foreign countries. It talks about the existing fundraising models in India and a possible crowd funding model which India might adopt. However, the Consultation Paper has lot of pitfalls and causes confusion in the mind of the reader. The Consultation Paper proposes an orthodox crowdfunding model which will strangle the innovative ideas of entrepreneurs and will ensure that such ideas never see the light of the day. We will discuss the shortcomings of the consultation paper in the next section.

Loopholes in the proposed crowd-funding regime in India

Section 2(68)(iii) of the Companies Act⁴⁹ prevents private companies to invite public to subscribe to their shares. Whereas Section 42(2) of the Companies Act limits the investors who can subscribe to such shares upto two hundred persons. Crowdfunding is a unique and unconventional model and it has both the characteristics of both public and private placement. The question that arises is whether equity crowdfunding should be treated as public offer or not and unfortunately the consultation paper is silent about it.

The next issue that arises is the question of jurisdiction as crowdfunding lies in the middle of extremes, private placement and public offer. SEBI claims by issuing the Consultation Paper that it can make regulations on crowdfunding but however it is based on a shaky premise. MCA has the power to make rules on residuary matters but the scope of such application has been limited to matters which have been specifically provided in the Act. Since crowdfunding is a new concept, it has excluded from the scope of Section 24 of the Act⁵⁰ and hence MCA cannot exert jurisdiction over

⁴⁸ Ibid.

⁴⁹ S. 2(68)(iii), The Companies Act, 2013

⁵⁰ S. 24, The Companies Act, 2013

crowdfunding matters. Also the Securities Laws (Amendment) Act, 1995 demarcates a clear boundary between the activity of MCA and SEBI and crowdfunding having components of both private placement and public offer fall within the ambit of overlapping jurisdiction of the SEBI and MCA.⁵¹ Hence SEBI cannot have exclusive jurisdiction over crowdfunding activities and framing of any rule to control such activities would be fundamentally flawed.

Another issue which is of deep concern is that crowdfunding platforms can only be set up by Class I entities, Class II entities and Class III entities. While the eligibility criteria of Class I entities are governed by the Securities Contracts (Regulations) Act, 1956 and Depositories Act, 1996, Class II and III entities are defined in the Consultation Paper itself. Such pigeonholing into three distinct entities would curb donation or reward based crowd funding platforms to run equity based crowd funding campaigns.⁵² While such classification will help to prevent frauds, it will nevertheless prevent business from developing as no business entity can develop in an atmosphere of doubt and suspicion. Indian regulators should take a leaf from foreign jurisdictions so that the platforms are given opportunities to explore. Indian regulators should keep in mind that there will always be risks in this kind of investment but wisdom lies in managing the risk well and not altogether stifling the competitiveness of these nascent crowdfunding platforms.

Proposals and Suggestions

There should be internet based crowdfunding platforms to act as intermediaries between investor and companies interested in raising funds. Such crowdfunding platforms must fulfil all the guidelines issued by the regulatory authority and also must get itself registered with SEBI. Platforms must maintain proper book of accounts and do full public disclosure from time to time. Platforms will have the duty to collect the money of the investors and deposit it in suspense account of a bank and will be disbursed at stages as the product reaches completion stage.⁵³

The companies wishing to raise funds via this platform must get itself registered by submitting the proposed plan of action to the platform. It will be the duty of platform to keep the blue prints with utmost secrecy. The Company must also submit the MOA and AOA with the platform. Any investor wishing to invest in the company will be given full access to the documents of the company.

Further, a chat window should be provided in the crowd-funding platform so that the investors can have one to one discussion with the members of the Company and ask them about the business plan and have their doubts cleared.⁵⁴

Also amendment of Section 42 of the Companies Act is required for the smooth functioning of crowd funding regime in India.

Conclusion

A business start-up does not have the option to adopt to equity based crowd-funding model of investment in India despite India seeing a surge in successful start-ups in the last couple of years as the present laws bar such type of crowd funding model. Also there is no regulation at present to regulate cross-border crowd funding schemes. Hence there is a crying need for a new set of reforms in the existing Company and SEBI laws to encourage start-ups in India. In the light of recent notice

⁵¹ J. Soni, K. Bagchi, Crowdfunding in India A Tale of Misplaced Regulations, 49(48) Economic & Political Weekly 14, 15 (2015)

⁵² Ibid, at 16.

⁵³ R. Pahwa, P. Pranjali & A. Mohan, Crowdfunding: Is India Ready?, Company Law Journal 51, 53 (2015), Available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2605329, last seen on 8/8/2015

⁵⁴ Ibid, at 54.

issued by SEBI which has questioned the legality of equity crowd-funding platforms in India, it is a huge set-back for business start-ups relying on such business model for raising capital as half a dozen crowd-funding platforms like Equity Crest, Let's Venture, Term Sheet has been termed unauthorised and illegal.

Also, using the Internet for raising capital to fund business start-ups has its own share of issues. The main concern is safety and Internet security. Lack of proper laws and awareness will lead to possible threats from hackers. Therefore regulators should keep in mind that if Internet platforms are not secured from possible cyber attacks then the benefits of crowd-funding model will never be realised.

Lack of proper regulations in place will keep the investors who wish to invest via crowd-funding model in a limbo. Therefore it is necessary for the regulators to consider what information about founder of the business, the nature of business, how will the money be used in achieving the business goal should be mandatorily provided to the potential investors so that they can take informed decisions. The present Modi Government all set to encourage start-ups in India gives us hope that clear regulatory framework will soon be in place to make such crowd funding platforms work in India.
