

Board Of Contributors: Oculus Sale Angers Crowdfunding Supporters

David Seifer and Taylor White, Daily Business Review

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In September 2012, Oculus VR Inc. ran a Kickstarter campaign to raise money to build development kits for its virtual reality headset for video games.

That campaign raised \$2.4 million from 9,522 backers. Many of the backers who pledged that \$2.4 million to Oculus a mere 18 months ago are now upset to learn that they will receive absolutely nothing when Oculus is sold to Facebook for \$2 billion in a transaction that was announced last week.

Notwithstanding some common misconceptions, the money Oculus received from these backers through the Kickstarter campaign is structured as a gift, donation or pre-order of a product, and not an investment in securities. These backers will receive a 0 percent return on their contribution to Oculus.

In contrast, the venture capital firms who made investments in Oculus during mid- and late-2013 through private placements, which are a more traditional method of raising capital, will reportedly receive a 2,000 percent return on their money.

While a Kickstarter campaign may be commonly known as crowdfunding because many people are giving small increments of money, it is certainly not crowdfunding as contemplated by the Jumpstart Our Business Startups, or JOBS, Act or the rules proposed by the Securities and Exchange Commission under which companies would raise capital from a large number of investors who would make small investments in the company's securities in a transaction that is exempt from registration under the Securities Act, subject to the numerous limitations contained in these rules.

However, these limitations and associated costs may render crowdfunding significantly less desirable when compared to more traditional means of raising capital.

In a crowdfunding transaction under the JOBS Act and the rules proposed by the SEC, a company would be permitted to raise up to \$1 million during any 12-month period.

During any 12-month period, an investor with annual income and net worth of less than \$100,000 could purchase securities valued up to the greater of \$2,000 and 5 percent of the investor's annual income or net worth, and an investor with an annual income or net worth of at least \$100,000 could purchase securities valued up to 10 percent of the investor's annual income or net worth, whichever is greater (but not to exceed an investment of \$100,000).

All crowdfunding transactions would have to be conducted through an intermediary's Internet funding portal. Advertising would not be allowed, except to refer investors to the appropriate intermediary. Intermediaries would not be permitted to offer investment advice, solicit investments or compensate based on sales.

The company raising money would be required to file with the SEC and provide investors and the intermediary an offering statement containing disclosure about the company and the offering.

The company would also be required to provide financial disclosures containing audited financial statements for offerings of more than \$500,000, reviewed financial statements for offerings of more than \$100,000 and up to \$500,000, and financial statements certified by an executive officer as true and complete in all material respects and income tax returns for the most recently completed year for offerings of \$100,000 or less.

Compared to the traditional methods of conducting a private placement to raise capital from accredited investors, the limitations and costs of crowdfunding under the JOBS Act and the rules proposed by the SEC could make the reality of crowdfunding into a burdensome process that will not be feasible for most companies.

Companies may find that the \$1 million per 12-month limit may be too restrictive, or that managing hundreds, or possibly thousands, of investors could be very difficult. Further, companies may find that the costs associated with drafting the required offering statement and hiring an accounting firm for the required financial statements would result in an unreasonably high cost compared to the \$1 million maximum offering size.

The backers who generously funded Oculus through a Kickstarter campaign will not have any financial payoff when Facebook completes its acquisition of Oculus.

But that was not a crowdfunding transaction as envisioned by the JOBS Act or the rules proposed by the SEC, and any of those backers who are now disgruntled may have simply misunderstood the terms on which they were giving money to Oculus.

Even after crowdfunding under the JOBS Act and the rules proposed by the SEC is permitted, many companies may find that capital raising through crowdfunding is not worth the hassle and that the traditional methods of conducting a private placement to raise capital from accredited investors will continue to be preferred.

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