RESPONSE TO THE FUTURE OF STARTUP FINANCE: A SYMPOSIUM ON "INVESTMENT CROWDFUNDING"

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At the outset, let me offer my sincere thanks to the scholars who contributed an essay to the present symposium on my book, *Investment Crowdfunding*:[1] Abraham Cable, Douglas Cumming, Mirit Eyal-Cohen, and Todd Zywicki.[2] In this *Response*, I will reply to their thoughtful essays and share some recently reported data on the financial returns for investment crowdfunding in the United Kingdom ("U.K.").[3]

As a preliminary matter, let me set the stage by defining the subject at hand. "Investment crowdfunding" is a method of entrepreneurial finance that was only legally authorized in the past decade or so, both in the United States and around the world. In my book, with the not-very-imaginative title *Investment Crowdfunding*, I define the practice as "the public offering of unregistered securities through an independent online platform."[4] The book is a comprehensive guide to the field, including analysis of the private ordering mechanisms that have grown up around it, as well as comparative reviews of the relevant law in the United States, Canada, the U.K., the European Union, Australia, and New Zealand.

*Professor of Law, University of Colorado Law School. I thank the organizers of *The Future of Startup Finance: A Symposium on* Investment Crowdfunding, which took place at the University of Colorado on September 8, 2023: Silicon Flatirons, especially Nate Mariotti, Christine McCloskey, Sara Schnittgrund, and Shannon Sturgeon, and the *Colorado Technology Law Journal*, especially Symposium Editor Sydney Weigert and Editor in Chief Marlaina Pinto.

1. ANDREW A. SCHWARTZ, INVESTMENT CROWDFUNDING (2023). I also thank my publisher, Oxford University Press.

2. Let me also offer my appreciation to those who participated in the live symposium without contributing an essay for publication: Rabea Benhalim, Brad Bernthal, Sanjai Bhagat, Lolita Buckner Inniss, Allison Herren Lee, Mark Loewenstein, and Jonny Price.

3. *See* SEEDRS, PORTFOLIO REPORT WINTER 2023 (2023).

4. SCHWARTZ, *supra* note 1, at 23.

The essays in the present symposium are all thoughtful complements to my book—with some compliments too.[5] Each one adds a different perspective to the regulation-focused and law-and-economics analysis I presented in my book. Professor Cable brings to the foreground the nonfinancial, or "psychic," benefits of investment crowdfunding.[6] Professor Cumming focuses on the importance of robust intellectual property rights for an effective investment crowdfunding market.[7] Professor Eyal-Cohen addresses the impact of tax law and tax incentives on investment crowdfunding,[8] and Professor Zywicki foregrounds the consumer protection aspects of the market.[9] I will take each in turn.

First, Professor Cable's essay conceives of investment crowdfunding as a form of consumption and suggests that regulation based on securities law may be misplaced in this context.[10] People who buy into crowdfunding offerings are enjoying the experience, just like they might enjoy going out to dinner or riding in a hot air balloon.[11] He concludes that applying principles of securities regulation to this activity is overkill that might snuff it out entirely. His point is well taken and consistent with my advocacy for a "liberal" (light-handed) regulatory approach to investment crowdfunding.[12]

Second, Professor Cumming and his co-authors assert that a strong intellectual property regime is vital to an effective investment crowdfunding system, as it "enable[s] entrepreneurs to confidently leverage [investment] crowdfunding mechanisms and foster the growth of these platforms."[13] They explain that intellectual property ("IP") protection enables entrepreneurs to reap the fruits of their efforts and that a lack of effective IP protection would discourage them from pursuing public investment

5. *E.g.*, Abraham J.B. Cable, *Psychic Income and Democratized Investing*, 22 COLO. TECH. L.J. 203, 212 (2024) ("Professor Schwartz provides the definitive account of investment crowdfunding"); Todd Zywicki, Consumer Protection and Investment Crowdfunding: Comments at The Future of Startup Finance: A Symposium on "Investment Crowdfunding" 22 COLO. TECH. L.J. 259, 259 (2024) ("[T]his is a great book").

6. Cable, *supra* note 5, at 203.

7. Douglas J. Cumming et al., *Crowdfunding and Intellectual Property*, 22 COLO. TECH. L.J. 215 (2024).

8. Mirit Eyal-Cohen, *Tax Incentives for Investment Crowdfunding: A Comparative Analysis*, 22 COLO. TECH. L.J. 235 (2024).

9. Zywicki, *supra* note 5, at 259.

10. Cable, *supra* note 6, at 210.

11. *See* Andrew A. Schwartz, *The Nonfinancial Returns of Crowdfunding*, 34 REV. BANKING & FIN. L. 565 (2015).

12. SCHWARTZ, *supra* note 1, at 185 ("I believe all jurisdictions should emulate the liberal model of regulation.").

13. Cumming, *supra* note 7, at 218.

through crowdfunding. They also provide data that is generally consistent with this thesis, showing that the investment crowdfunding market is larger in jurisdictions with stronger IP laws. Although there are certainly confounding factors, their idea is sound, sensible, and adds a new perspective to the comparative analysis I present in the book.

Third, Professor Eyal-Cohen picks up on my comments regarding the tax incentives that various jurisdictions—especially the U.K.—grant to crowdfunding investors.[14] In her essay, she reports on these U.K. tax benefits. She goes on to explore whether they might explain, at least in part, the success of U.K. investment crowdfunding relative to the United States and the other jurisdictions I examine in my book.[15] In this regard, one of the leading investment crowdfunding platforms in the U.K. recently reported that a person would have made 7.8 percent annualized returns if she invested the same amount in every offering on the platform since its launch in 2012—but that she would have made double that amount (15.6 percent) if she also took full advantage of the U.K.'s tax incentives for startup investing![16]

In the end, however, Professor Eyal-Cohen concludes that "the rules in the U.K. and the U.S. [regarding tax incentives for startup companies] are quite similar," and observes that one state, Virginia, even has a special tax benefit that only applies to investment crowdfunding.[17] Thus, it appears that the U.K.'s status as a world-leader in investment crowdfunding does not arise primarily from tax benefits. Hence, I continue to credit the U.K.'s "liberal" regulatory approach as the key factor in its relative success, a point I reiterate throughout the book.[18]

14. SCHWARTZ, *supra* note 1, at 36–37 (observing that "the United Kingdom has special tax benefits (known as EIS and SEIS) for people who invest in startup companies" and that "other countries have begun to adopt special tax incentives that are specific to investment crowdfunding, [such as] Malaysia").

15. Eyal-Cohen, *supra* note 8, at 238.

16. SEEDRS, *supra* note 3, § 6.2.

17. Eyal-Cohen, *supra* note 8, at 243.

18. *E.g.*, SCHWARTZ, *supra* note 1, at 6 ("[T]he liberal approach followed in . . . the United Kingdom is, with a few tweaks, what I would recommend for any country designing or reforming a regulatory scheme for investment crowdfunding."); *id.* at 174 (asserting that "the United Kingdom has an ultra-liberal approach to investment crowdfunding, with few rules and ample room for discretion by platforms and companies—and it has served it well").

Finally, Professor Zywicki's essay looks at investment crowdfunding through the lens of consumer protection.[19] Since he largely agrees with the arguments I set forth in my book, it should come as no surprise that I found his essay compelling.[20] When looking at how to regulate investment crowdfunding, he and I concur that one should "start with the market, figure out how far the market takes us, think about what the market failure is, think about whether the common law solves that, and then what's left over at the end [is] for regulation."[21] That is my book in a nutshell—so maybe it didn't have to run to nearly 200 pages.

In closing, I want to reiterate my appreciation for all the scholars who participated in the present symposium for taking the time to read and react to my first book, *Investment Crowdfunding*. They have given me food for thought—and perhaps a second edition.

19. Zywicki, *supra* note 5, at 259.

20. Zywicki, *supra* note 5, at 260 ("I think this is such a profound book about consumer protection and consumer financial protection and . . . it deserves to be read by anybody who's thinking about consumer protection.").

21. Zywicki, *supra* note 5, at 262.