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Implementing a Portable Reciprocity Passport to Crowdfund Real Estate Across Borders

Raymond Tran

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IMPLEMENTING A PORTABLE RECIPROCITY PASSPORT TO CROWDFUND REAL ESTATE ACROSS BORDERS

RAYMOND TRAN*

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I. FINTECH OPENED WALL STREET TO THE CROWD

Advances in financial technology (FinTech) like crowdfunding made exclusive investment information and opportunities accessible to anyone with internet access. Crowdfunding outgrew its early philanthropic and entrepreneurial roots and quickly became a trendy vehicle for capital formation and investment for a variety of industries. It evolved from a technology that enabled peer-to-peer lending into a powerful tool for people to invest in early-stage ventures, small to medium sized enterprises, and complex securities transactions.¹ This evolution married accessible internet technology with traditional securities transactions, which democratized opportunities for profit and capital returns. But this evolution also subjected more ventures to registration and disclosure obligations under the Securities Act, and the reporting requirements under the Exchange Act.²

Crowdfunding poked a regulatory hornet nest, simultaneously driving the success of ventures and charities while increasing the complexity of related legal issues.³ These legal issues are based on two points of tension: one point is caused by technological development rapidly outpacing regulations; the second point is caused by the lack of cross-border regulations that reconcile jurisdictional differences and limits.⁴ These two points are aggravated by the increasing access to information on crowdfunding, which conflicts with the confining nature of the securities laws.⁵ Securities laws create limits for information and safe harbors from registration requirements, while crowdfunded transactions do not consistently and neatly fit into these defined limits or safe harbors.⁶

Crowdfunding was applied to the real estate industry around 2013 (creating REtech), disrupting the norms of the real estate capital formation market.⁷ Purchasing and selling real estate, whether domestically or across borders, is not a new phenomenon. Traditionally, real estate investment involved identifying the

¹ See generally C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 1 (2012).

² Chris Brummer, *Disruptive Technology and Securities Regulation*, 84 FORDHAM L. REV. 977, 1017 (2015).

³ Zachary Fialkow, *Crowd-Fundamentals: Balancing Rapidly Advancing Crowdfunding Innovation with Protections for Consumers*, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 391, 391 (2017).

⁴ Sara Hanks, *Towards a proposed framework for cross border regulation of crowdfunding offerings*, CROWDCHECK (Sept. 18, 2016), <https://www.crowdcheck.com/blog/towards-proposed-framework-crossborder-regulation-crowdfunding-offerings>.

⁵ *Id.*

⁶ *Id.*

⁷ See Patrick J. Kiger, *The Power of Crowdfunding in Real Estate*, URBAN LAND MAGAZINE (Apr. 29, 2016), <https://urbanland.uli.org/capital-markets/staying-power-crowdfunding-real-estate/>.

target property in a certain location and moving capital to purchase it. Over time, the investor hoped to earn income generated from the property that would be greater than the expenses incurred from its acquisition, maintenance, and operation. As investment, transactional, and commercial instruments evolved, so did the level of sophistication of the lending, capital formation, and equity exchange pieces in real estate transactions. Historically, access to lucrative real estate investments were restricted; complex investments were not marketed publicly, rather they were reserved for more sophisticated investors.⁸ The introduction of crowdfunding drove entrepreneurs to create platforms that linked lucrative real estate deals to a new class of investors and influenced the development of policies such as the Jumpstart Our Business Startups Act (the JOBS Act). Increased access to investment opportunities and sources of capital made crowdfunded real estate an attractive vehicle for domestic and international investors, driving the growth of REtech throughout major financial markets.

REtech platforms serve as portals and networks for different market segments.⁹ Each platform determines who gets to invest, at what level they may invest, and how proceeds are distributed.¹⁰ These determinations affect the type of deals platforms curate, whether debt or equity investments will be offered, and whether unaccredited investors will be invited to participate.¹¹

The ability to invest in real estate from across the ocean with a click of a button through REtech thrusts lawmakers into a new regulatory frontier rife with legal land mines.¹² One jurisdiction is unlikely to kowtow its real estate regulations and standards to make capitalizing on its real property easier for foreigners.

This comment proposes implementing a portable reciprocity passport system as the first step towards regulating cross-border REtech.¹³ First, it discusses the development and impact of REtech.¹⁴ Second, it discusses the application of portable reciprocity to cross-border REtech.¹⁵ Finally, it concludes with suggestions necessary to refine the contours of a portable reciprocity passport to crowdfund real estate across borders.¹⁶

⁸ *How the JOBS act impacts real estate investing?*, REALTYMOGUL.COM, <https://www.realtymogul.com/resource-center/articles/how-the-jobs-act-impacts-real-estate-investing> (last visited Jan. 25, 2018).

⁹ *See id.*

¹⁰ The passage of the JOBS Act allows all investors to access these investments through general solicitation; but some investments are reserved for accredited investors. *Id.*

¹¹ *Id.*

¹² Tom Zanki, *Cross-Border Crowdfunding Boom Would Test EU Regulators*, LAW360 (May 9, 2016, 5:53 PM), <https://www.law360.com/securities/articles/793016/cross-border-crowdfunding-boom-would-test-eu-regulators>.

¹³ Portable reciprocity refers to the proposal by Stephen Choi and Andrew Guzman. *See generally* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 903–21 (1998).

¹⁴ *See infra* Part II.

¹⁵ *See infra* Parts III & IV.

¹⁶ *See infra* Part V.

II. REtech MAY STEER LAWMAKERS INTO A NEW REGULATORY WILD WEST

REtech is changing the relationship between services and players in the real estate capital formation space.¹⁷ To understand REtech's development and impact, this Part first looks at the development of crowdfunding, and then at the cross-border crowdfunding issues mutually shared by crowdfunding and REtech. These technological developments increased the level of sophistication in private markets, revealing structural flaws in outdated measures and challenging the reach of securities laws.¹⁸

A. Crowdfunding Outgrew Traditional Regulatory Confinements

The earliest crowdfunding sites, such as ArtistShare¹⁹ or Kickstarter,²⁰ focused on facilitating the offering of rewards in exchange for donations, with rewards increasing based on the amount of money donated to a project or artist.²¹ The success of the rewards model led to the development of debt-based crowdfunding in 2010, such as GoFundMe, where investors would provide unsecured loans to borrowers in exchange for loan repayment plus interest.²² Equity crowdfunding platforms, such as ProFounder and GrowthVC, began to emerge between 2009 and 2011,²³ and experienced an annual growth rate that doubled through 2016.²⁴ As equity crowdfunding platforms and activities expanded, some companies began selling securities, triggering prohibitively expensive registration requirements and exposing platforms to broker or adviser liability.²⁵ This rapid leap from rewards and debt to equity got too far ahead of regulations, which forced some of these platforms to shut down.²⁶

In response to pressures from FinTech entrepreneurs, Congress passed the JOBS Act in 2012 to facilitate access to capital for startups and small businesses, to increase participation in investment opportunities, and to create more jobs.²⁷ Four titles were passed under the JOBS Act, each aimed to support businesses

¹⁷ See generally Brummer, *supra* note 2, at 977.

¹⁸ Donald C. Langevoort & Robert B. Thompson, "Publicness" in *Contemporary Securities Regulations After the JOBS Act*, 101 GEO. L.J. 337 (2013); Steven M. Davidoff, *Paradigm Shift: Federal Securities Regulation in the New Millennium*, 2 BROOK. J. CORP. FIN. & COM. L. 339 (2008).

¹⁹ *about us*, ARTISTSHARE, <http://www.artistshare.com/v4/about> (last visited Jan. 29, 2018). Artistshare was founded in 2001. *Id.*

²⁰ *About us*, KICKSTARTER, <https://www.kickstarter.com/about> (last visited Jan. 29, 2018). Kickstarter emerged in 2009. *Id.*

²¹ Fialkow, *supra* note 3, at 392.

²² GoFundMe raised a total of \$1 billion between 2010 and 2015. *Id.*

²³ *Id.* at 392–93.

²⁴ Chance Barnett, *The Surprising State of Equity Crowdfunding Post-JOBS Act*, FORBES (Nov. 17, 2016), <https://www.forbes.com/sites/chancebarnett/2016/11/17/the-surprising-state-of-equity-crowdfunding-post-jobs-act/1>.

²⁵ Bradford, *supra* note 1.

²⁶ Fialkow, *supra* note 3, at 393.

²⁷ *Id.*

with less than one billion dollars that were not public.²⁸ Practically, these titles end the ban on general solicitation for private offerings, subject companies to report to the Securities and Exchange Commission (SEC), and facilitate intrastate and regional securities offerings.²⁹

B. Titles III and IV of the JOBS Act Laid the Foundation for REtech to Emerge

The JOBS Act requires the SEC to generate rules and to issue studies on capital formation, disclosure, and registration requirements.³⁰ The Act details whether platforms are exempt from certain SEC registrations and rules,³¹ shifting the responsibility to protect crowdfunding investors from the investors to the funding portals.³²

Title III specifically recognizes online funding portals, which allows equity crowdfunding for small businesses and makes online capital fundraising from ordinary people recognizable under U.S. securities law.³³ The passage of Title III enabled companies to build a technological gateway for investing: companies could raise up to one million dollars in a twelve-month period from the general public through an Internet portal overseen by a broker or dealer.³⁴ Under Title III, issuers must be a U.S. entity, use an online intermediary, and meet certain disclosure, reporting, and auditing requirements to raise up to one million dollars from accredited and non-accredited investors.³⁵ Although the portal must still be registered with the SEC, Title III created a new exemption to the Securities Act of 1933 by permitting the offer and sale of securities through crowdfunding to the public without registration with the SEC.³⁶

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Jumpstart Our Business Startups Act Frequently Asked Questions About the Exemption from Broker-Dealer Registration in Title II of the JOBS Act*, U.S. SEC. & EXCH. COMM'N (Feb. 5, 2013), <https://www.sec.gov/divisions/marketreg/exemption-broker-dealer-registration-jobs-act-faq.htm>.

³¹ *Id.*

³² Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Protecting Investors in an Innovative Financial Marketplace, Keynote Address at the SEC and Stanford Rock Center's Silicon Valley Initiative, in *HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION* April 6, 2016, <https://corpgov.law.harvard.edu/2016/04/06/protecting-investors-in-an-innovative-financial-marketplace/>.

³³ Amy Wan, *Title III Crowdfunding Became Legal on May 16: What It Does & What's Still Lacking*, CROWDFUND INSIDER (May 17, 2016), <https://www.crowdfundinsider.com/2016/05/85696-title-iii-crowdfunding-became-legal-on-may-16-what-it-does-whats-still-lacking/>; *see also* Press Release, U.S. Securities and Exchange Commission, SEC Adopts Rules to Permit Crowdfunding, Proposes Amendments to Existing Rules to Facilitate Intrastate and Regional Securities Offerings (Oct. 30, 2015), <https://www.sec.gov/news/pressrelease/2015-249.html>.

³⁴ Brummer, *supra* note 2, at 1018.

³⁵ *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Permit Crowdfunding, Proposes Amendments to Existing Rules to Facilitate Intrastate and Regional Securities Offerings (Oct. 30, 2015), <https://www.sec.gov/news/pressrelease/2015-249.html>.

³⁶ *See id.*

Practically, Title III permits funding portals to operate so long as they serve as registered gatekeepers. It allows portals to be created to serve as platforms for equity crowdfunding while simultaneously mandating that equity crowdfunding only occur through those portals.³⁷ Its main intention was not to protect investors by requiring disclosure mechanisms, but instead to limit the general amount of risks investors would be exposed to.³⁸ Companies that made a crowdfunded equity offering still had to disclose the price of securities, target amount, and financial statements and conditions to the SEC under Title III.³⁹

Following Title III, the enactment of Title IV drove crowdfunded real estate ahead of regulators. Title IV (Regulation A+ reforms) allows portals to permit additional inspection and examinations by the regulators in exchange for selling securities to unaccredited investors and increasing the offering limit.⁴⁰ Issuers are permitted to sell securities to both accredited and unaccredited investors, provided issuers take an additional registration step with the SEC and comply with relevant state law requirements in each jurisdiction where funds are solicited.⁴¹ The additional registration step enables the SEC to coordinate with Financial Industry Regulatory Authority (FINRA) to monitor the funding portal with inspections and examinations.⁴² Funding portals are permitted to increase their offering limit to fifty million dollars, provided that relevant filings and audited financial statements are made available to investors.⁴³

As these regulations were enacted, crowdfunding platforms and real estate companies collaborated to carve a REtech niche within the industry. These budding REtech platforms were completely new companies—departing from their traditional counterparts, gambling on the hope that the newly enacted regulations would allow them to access a new pool of investors. Their gamble paid off when the JOBS Act was successfully modified by the enactment of Titles III and IV—permitting REtech platforms to present a diverse pool of commercial real estate investments to accredited and non-accredited investors.⁴⁴

Although some real estate portals offered investment opportunities by individual project, others offered a pool of investment opportunities through a single investment in the form of a real estate investment trust (REIT).⁴⁵ In a short time after the passage of the JOBS Act, REtech companies, like Los Angeles based RealtyMogul, moved quickly into the REIT space by providing technological access on a crowdfunding platform to eager investors and

³⁷ *Id.* at 396.

³⁸ Brummer, *supra* note 2, at 1018.

³⁹ Fialkow, *supra* note 3, at 395.

⁴⁰ Brummer, *supra* note 2, at 1019.

⁴¹ *Id.*

⁴² White, *supra* note 32.

⁴³ Brummer, *supra* note 2, at 1019.

⁴⁴ Jilliene Helman, *Why We Launched a Real Estate Investment Trust ("REIT")*, REALTYMOGUL.COM (Aug. 19, 2016), <https://www.realtymogul.com/resource-center/articles/why-we-launched-a-real-estate-investment-trust-reit>.

⁴⁵ *Id.*

developers.⁴⁶ Groundfloor, an Atlanta based company, began by offering crowdfunding loans as an alternative source of capital for residential real estate investors.⁴⁷ As international investors started looking across their borders to invest in attractive real estate and real estate finance investment instruments in foreign jurisdictions, REtech platforms started to offer senior debt, mezzanine debt, and equity investments internationally.⁴⁸ Global Alternatives, for example, is a London based platform that invites investors to crowdfund real estate finance investments in senior debt, mezzanine debt, and equity.⁴⁹ International platforms, such as REAL, are even marrying cryptocurrency and blockchain technology with REtech. as a means to crowdfund real estate across borders through REtech platforms without the illiquidity issues of traditional real estate investments.⁵⁰ This adds unique twists for regulators to resolve.⁵¹

REtech portals are able to offer the public a variety of real estate investment opportunities, including registered and non-traded REITs.⁵² By leveraging technological developments and federal regulations, REtech platforms aim to streamline the real estate investment process by decreasing costs and fees, maximizing returns for investors, and connecting investors directly to a more diversified commercial real estate investment portfolio.⁵³ The crowdfunding portal grants access to pre-vetted investment properties to a network of potential investors.⁵⁴ These portals give non-accredited investors direct access to participate in large and small scale real estate transactions by purchasing shares of the company that owned or financed them.⁵⁵ Previously, only accredited investors—individuals with an annual income of at least \$200,000, married couples with an annual income of at least \$300,000, or a net worth of at least \$1,000,000—could invest.⁵⁶ Participation from non-accredited investors provided

⁴⁶ *Id.*

⁴⁷ See Brian Dally, *Groundfloor Announces \$100 Million Partnership With Direct Access Capital*, GROUND FLOOR (Sept. 12, 2017), <http://blog.groundfloor.us/groundfloorblog/groundfloor-announces-100-million-partnership-with-direct-access-capital>.

⁴⁸ JD Alois, *Property Crowd Relaunches as Cross-Border Property Crowdfunding Platform*, CROWDFUND INSIDER (Jan. 24, 2017), <https://www.crowdfundinsider.com/2017/01/95122-property-crowd-relaunches-cross-border-property-crowdfunding-platform/>.

⁴⁹ *Id.*

⁵⁰ Darryn Pollock, *Blockchain in Real Estate: You Can Now Buy Fraction of House*, COIN TELEGRAPH (Aug. 14, 2017), <https://cointelegraph.com/news/blockchain-in-real-estate-you-can-now-buy-fraction-of-house>.

⁵¹ *Id.*

⁵² Helman, *supra* note 44.

⁵³ *How to Earn Residual Income by Investing in Real Estate*, FUNDRISE, <https://fundrise.com/education/blog-posts/how-to-earn-residual-income-by-investing-in-real-estate> (last visited Feb. 5, 2018).

⁵⁴ *How the JOBS act impacts real estate investing?*, *supra* note 8.

⁵⁵ Helman, *supra* note 44.

⁵⁶ Wan, *supra* note 33.

real estate companies with an expanded pool and alternative source of capital.⁵⁷ These changing relationships shifted market infrastructures, challenging regulators to design regulations that would work on a practical level as well as a theoretical level.⁵⁸

C. Cross-Border Crowdfunding Activity Is Driving European and Asian Regulators to Collaborate and Reconcile Regulations

Regulators across different jurisdictions must balance the pressure to provide attractive regimes to platform operators with the need to erect appropriate investor safeguards.⁵⁹ Crowdfunding has the potential to benefit national economies by spurring growth and innovation, providing sources of capital for innovative businesses, and competing with retail and capital markets.⁶⁰ These factors enabled crowdfunding to spread globally,⁶¹ evolve rapidly, and emerge as the focus of regulators across different jurisdictions.⁶²

Even after the United States responded to the development of crowdfunding by enacting Titles III and IV under the JOBS Act, the SEC recognized the need to get ahead of FinTech innovation by releasing Regulation Crowdfunding Compliance and Disclosure Interpretations ahead of new crowdfunding regulations.⁶³ Since 2013, U.S. companies have been able to crowdfund from accredited investors under the Rule 506(c) exemption of the SEC Regulation D; Section 4(a)(6) of the Securities Act (Regulation Crowdfunding) provided an additional exemption for crowdfunding securities offerings to non-accredited investors, albeit with certain conditions.⁶⁴ As U.S. regulators foray into crowdfunding, international regulators are also trying to overcome their respective crowdfunding limitations.⁶⁵

⁵⁷ Through exemption Reg. D 506. *How the JOBS act impacts real estate investing?*, *supra* note 8.

⁵⁸ Brummer, *supra* note 2, at 981.

⁵⁹ Lucy Frew, *What Is the Future for Regulation of Crowdfunding?*, LAW360 (Oct. 14, 2016), <https://www.law360.com/articles/839577>.

⁶⁰ *Id.*

⁶¹ David Ahlstrom, Douglas J. Cumming & Silvio Vismara, *Corporate Governance Implications of New Methods of Entrepreneurial Firm Formation*, Volume 25, Issue 2, CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 1 (Mar, 2016).

⁶² Frew, *supra* note 59.

⁶³ *Id.*

⁶⁴ Frank Vargas, Jennifer Dasari & Michael Vargas, *Understanding Crowdfunding: The SEC's New Crowdfunding Rules and the Universe of Public Fundraising*, AMERICAN BAR ASSOCIATION (Dec. 3, 2015), https://www.americanbar.org/publications/blt/2015/12/03_vargas.html.

⁶⁵ Frew, *supra* note 59.

1. *European Activity*

Parallel to the SEC's release of Regulation Crowdfunding Compliance and Disclosure Interpretations, the Financial Conduct Authority of the U.K. (FCA) "issued a call for input to the post implementation review of [its] 2014 crowdfunding rules."⁶⁶ The FCA is preparing to get ahead of EU regulations and build direct regulatory bridges with international regulators through cooperative agreements intended to enable innovative businesses to do deals across borders.⁶⁷ In 2016 alone, the FCA entered into agreements with the Australian Securities and Investment Commission, Monetary Authority of Singapore, and Korean Financial Services Commission.⁶⁸

Also in 2016, "the European Commission issued a Commission Staff Working Document on Crowdfunding in the EU Capital Markets Union" to address existing discrepancies.⁶⁹ EU regulations obstructed the expansion of a funding portal from crossing borders by requiring compliance with a secondary regulatory regime.⁷⁰ Some EU member states permitted crowdfunding portals in their home member states to operate in other jurisdictions using a passport under the Markets in Financial Instruments Directive (MiFID); other member states did not, and required additional approvals from their respective regulatory regimes.⁷¹ Actions from most member states indicate a desire to reconcile different national rules so that companies do not have to deal with a second layer of regulatory compliance; but at the EU level, crowdfunding is viewed as a local activity and does warrant policy intervention.⁷² The EU views cross-border crowdfunding as an activity that can be regulated if cross-border activity increases and the need arises, as opposed to viewing cross-border activities as inevitable and developing regulations with that presumption in mind.⁷³ There remains a need for regulators of EU member states to develop a system that harmonizes and reconciles different national rules without adding regulations that stymie the growth of a maturing and lucrative international phenomenon.⁷⁴

2. *Asian Activity*

In Asia, the Securities and Future Commission of Hong Kong entered into an agreement with the Dubai Financial Services Authority to provide each other a framework for the "fullest possible mutual assistance" on FinTech

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Zanki, *supra* note 12.

⁷¹ *Id.* For more on MiFID, see *infra* Part IV.D.

⁷² Zanki, *supra* note 12.

⁷³ *Id.*

⁷⁴ *Id.*

developments.⁷⁵ This pact between Hong Kong and Dubai was patterned after similar agreements Hong Kong entered into with the U.K. and Australia.⁷⁶ These pacts called for more robust information-sharing regimes and a greater commitment to support innovative platforms that want to cross borders and enter into one another's markets.⁷⁷ Though these pacts have yet to produce a method to tame the Wild West of cross-border crowdfunding, they have enabled regulators to start designing systems that address regional needs while preparing platforms to enter into a regulated global marketplace.⁷⁸ These bilateral agreements have been described as creating regulatory "sandbox[es]" where experimentation with products, services, models, and varying degrees of regulations can occur to prepare Hong Kong and its partners to enter into a regulated international market.⁷⁹

In mainland China, the rapid popularization of crowdfunding and positive indications towards international collaboration offer some important considerations. China has developed the largest Internet finance market, with an estimated value of over \$100 billion in 2015.⁸⁰ Its peer-to-peer lending sector is vast while its equity crowdfunding sector occupies a smaller share because it is relatively newer.⁸¹ The rise of mobile technology platforms and marketplaces like Alibaba positioned FinTech to outgrow its peer-to-peer lending needs, creating an appetite for more sophisticated financing platforms such as crowdfunding.⁸²

Crowdfunding activity in China has attracted the attention of Chinese investors and businesses due to its advantages: the Internet's convenience, low cost, interactive environment, efficient exchange of information, alleviation of asymmetric information of the capital market, and decentralized risks of financial transaction.⁸³ The novelty of crowdfunding and young securities market in China means that Chinese securities and criminal laws have not yet clearly identified the rights and obligations of these platforms.⁸⁴ Current laws do not adequately provide guidance on regulating the crowdfunding vehicle.⁸⁵ For example, under Chinese criminal and securities laws, what constitutes fraudulent activity is unclear, and

⁷⁵ Tom Zanki, *Hong Kong, Dubai Regulators Pledge Fintech Collaboration*, Law360 (Aug. 28, 2017), <https://www.law360.com/articles/958231/hong-kong-dubai-regulators-pledge-fintech-collaboration>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ JD Alois, *Nesta Promotes Cross Border Equity Crowdfunding Alliance with China*, CROWDFUND INSIDER (Aug. 16, 2017), <https://www.crowdfundinsider.com/2017/08/120729-nesta-promotes-cross-border-equity-crowdfunding-alliance-china/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Tianlong Hu & Dong Yang, *Twenty-Seventh Annual Corporate Law Symposium: Crowdfunding Regulations and Their Implications: The People's Funding of China: Legal Developments of Equity Crowdfunding—Progress, Proposals, and Prospects*, 83 U. CIN. L. REV. 445, 446 (2014).

⁸⁴ *Id.* at 447.

⁸⁵ *Id.* at 475.

what is considered a public offering, which requires prior approval, may expose existing crowdfunding and fundraising activities to legal risks.⁸⁶ These less efficient markets that are hungry for crowdfunding need to define what is considered legal activity, what is an offering, who has the authority to enforce, and what protections are available for investors.⁸⁷

As Hong Kong did, mainland China looks to collaborate with the U.K., which China considers a leader in regulating online capital formation.⁸⁸ Thus far, knowledge sharing of regulations to govern Internet finance has occurred, with prospects of a “China-U.K. Fintech Bridge” being built to balance the loss of EU allies from BREXIT to enable British small and medium sized enterprises access to alternative sources of growth funding.⁸⁹ These activities are pushing regulators outside of their jurisdictions to start work together to foster economic collaboration, rather than to limit economic growth with outmoded regulations.⁹⁰

III. TO PROTECT INVESTORS, REtech NEEDS TO BE PROPERLY REGULATED

REtech granting new investors access to real estate finance investments raises a new need for investor protections in the real estate industry. This Part discusses some of the shared control issues between crowdfunding and REtech; then it discusses the issues that arise from cross-border crowdfunding activity generally; finally, it closes with a discussion on how cross-border crowdfunding impacts the development and regulation of REtech.

A. Crowdfunded Real Estate Presents REtech with Resolvable Control Issues

Crowdfunding breaks the need to go public for financing purposes, pushing aside traditional exchanges for secondary trading and listing.⁹¹ Crowdfunding portals did away with the traditional need for broker-dealers in transactions, and created room for “financial intermediaries that increasingly provide both venues and liquidity” for securities trading.⁹² These nuances and their diverse impacts on regulatory infrastructures often demand diverse policy responses, making it difficult to develop a coherent, single set of regulatory responses.⁹³

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ ALOIS, *Nesta Promotes Cross Border Equity Crowdfunding Alliance with China*, *supra* note 80.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Brummer, *supra* note 2, at 1020.

⁹² *Id.* Such disruption of regulatory practice, while potentially improving prospects for capital formation and liquidity, presents novel questions of market integrity and fairness outside the scope of this article. *Id.*

⁹³ *Id.* at 980.

Similarly, REtech allows platforms to serve as intermediaries and bypass broker-dealer relationships to access real estate development investment opportunities and non-accredited investors.⁹⁴ This leap makes platforms legally distinct from broker-dealers, which exempts them from undergoing the same registration requirements.⁹⁵ “Although the portals will be subject to supervision by FINRA, . . . there are no ‘know the customer obligations.’”⁹⁶

Risks increase on crowdfunding and REtech platforms if the loose control structure and internal control mechanisms do not mature with a platform’s market size and impact.⁹⁷ Platform users may have a hard time obtaining the information necessary to price securities involved or to ensure that operators are solvent.⁹⁸ This passes risks on to investors who may have no exit route if they do not understand whether there is a secondary market, or whose private information may be breached by cyberattacks or illicit activities.⁹⁹

The development and increased sophistication of crowdfunding and REtech also presents potential governance issues to the real estate industry. Although real estate is traditionally resistant to governance and control risks relative to other investments, the fact that unaccredited investors may now participate in deals through crowdfunding increases the likelihood of takeover and control issues.¹⁰⁰ Collective action problems limit investors’ monitoring incentives, and entrepreneurs can be tempted to shirk their obligations and engage in self-dealing.¹⁰¹ A more diverse investor pool of accredited and non-accredited investors would require governance regimes to deal with conflicts of interest between issuers, operators, and investors.¹⁰² Agency costs arising from the separation between ownership and control between controlling and minority shareholders in crowdfunding markets needs to be addressed.¹⁰³ On the investor side, investors may overestimate the viability of the investment and lose expected returns.¹⁰⁴ On the platform side, engaging in crowdfunding may dilute capital and equity distribution.¹⁰⁵

B. Cross-Border Crowdfunding Activity Presents Issues Requiring

⁹⁴ *Id.* at 1035.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Mary Jo White, Chairperson, SEC, Keynote Address at the SEC and Stanford Rock Center’s Silicon Valley Initiative: Protecting Investors in an Innovative Financial Marketplace (Mar. 31, 2016), <https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html> (last visited Jan. 30, 2018).

⁹⁸ Frew, *supra* note 59.

⁹⁹ *Id.*

¹⁰⁰ *See* Ahlstrom, *supra* note 61.

¹⁰¹ *Id.*

¹⁰² *Id.*; Frew, *supra* note 59.

¹⁰³ Ahlstrom, *supra* note 61.

¹⁰⁴ Frew, *supra* note 59.

¹⁰⁵ *Id.*

International Coordination

The effectiveness of a regulatory framework relies on how well it reflects the development of cross-border crowdfunding.¹⁰⁶ The movement of capital across borders is largely a trade issue, solvable by a multinational agreement; however, not only do these agreements take years to negotiate, but legislation in one jurisdiction will not necessarily have power over another.¹⁰⁷ These bilateral and multinational agreements also tend to focus on disclosure standards at the expense of inconsistencies with other rules.¹⁰⁸ Crowdfunding's ability to cross borders and increase access to industries like real estate investment is why widespread regulatory collaboration is important.¹⁰⁹ Combined with less-experienced investors, this increases the risk for companies, and presents a challenge for regulators.¹¹⁰ Without a consistent cross-border regime, platforms and portals inconsistently accept foreign investors.¹¹¹ The alternative is to allow antiquated regulations and the slow pace of regulators to stymie technological development.¹¹²

The need to increase economies of scale and make the pipeline of potential investors and businesses seeking capital more efficient makes increased cross-border crowdfunding and REtech activity inevitable.¹¹³ Current developments in blockchain, cryptocurrency, and global real estate investment alternatives are already underway, expanding access to willing accredited and unaccredited investors across multiple markets, and increasing the stakes for regulators and platforms alike.¹¹⁴ This presents yet another issue: a more diverse investor pool of accredited and non-accredited investors requires reconciling governance regimes, which vary in different countries.¹¹⁵

1. Cross-Border Crowdfunding Issues Impact REtech

Cross-border activity adds two complications to crowdfunding that implicate REtech. First, crowdfunding portals rely on mobile based technology that transcends borders, which may cause users to inadvertently breach the laws of

¹⁰⁶ Zanki, *Cross-Border Crowdfunding Boom Would Test EU Regulators*, *supra* note 12.

¹⁰⁷ JD Alois, *We Need a Regulatory Framework for Cross-Border Crowdfunding Offerings*, CROWDFUND INSIDER (Feb. 21, 2017, 8:58PM), <https://www.crowdfundinsider.com/2017/02/96380-need-regulatory-framework-cross-border-crowdfunding-offerings/>.

¹⁰⁸ See Hal S. Scott, *The Future Content of the U.S. Securities Laws: Internationalization of Primary Public Securities Markets*, 63 LAW & CONTEMP. PROB. 71, 81–82 (2012).

¹⁰⁹ Frew, *supra* note 59.

¹¹⁰ Alois, *We Need a Regulatory Framework for Cross-Border Crowdfunding Offerings*, *supra* note 107.

¹¹¹ *Id.*

¹¹² See generally Fialkow, *supra* note 3, at 391.

¹¹³ Frew, *supra* note 59.

¹¹⁴ See *infra* Part V.

¹¹⁵ Ahlstrom, *supra* note 61.

jurisdictions throughout the world.¹¹⁶ Individual jurisdictions generally impose their own restrictions and requirements on the sales and marketing of financial investments without considering whether what is permitted in one jurisdiction may violate the law in others.¹¹⁷ Second, securities laws underlying real estate are different for every jurisdiction, and crowdfunding platforms do not always recognize these distinctions. This further exposes participants to the risk of violating securities laws.¹¹⁸ Traditionally, securities regulations are premised on sales of securities to the public, which is not necessarily congruent with the crowdfunding world.¹¹⁹

These complications impact REtech because they reflect a dynamic shift from traditional real estate finance deals. Real estate finance deals typically rely on private transactions between the real estate company and its network that are financed through an exemption under Rule 506 of Regulation D.^{120, 121} After the enactment of the JOBS Act and the growth of equity crowdfunding, every real estate company can market its properties and projects to a new pool of investors online.¹²² Cross-border activity in REtech means that companies can now open projects to new pools of investors globally.

IV. A PORTABLE RECIPROCITY PASSPORT ENABLES CROSS-BORDER RETECH AND CROWDFUNDED REAL ESTATE TRANSACTIONS

Immediately implementing REtech harmonization is hindered by practical concerns regarding disclosure, distribution, and enforcement.¹²³ For example, jurisdictions would need to reconcile whether issuers should be subject to the rules of their jurisdiction of incorporation,¹²⁴ or based on the nationality of their businesses.¹²⁵ REtech presents us with a unique opportunity to apply a system of portable reciprocity. REtech is nascent, niche, and exists online, which makes harmonization of cross-border REtech rules and regulations possible because of its novelty and small size. Because of its underlying security in real estate and basis in crowdfunding, it also presents similar issues to that of cross-border securities transactions.

¹¹⁶ Frew, *supra* note 59.

¹¹⁷ *Id.*

¹¹⁸ Sara Hanks, *Towards a proposed framework for cross border regulation of crowdfunding offerings*, CROWDCHECK BLOG (Sept. 18, 2016), <https://www.crowdcheck.com/blog/towards-proposed-framework-crossborder-regulation-crowdfunding-offerings>.

¹¹⁹ Brummer, *supra* note 2, at 980.

¹²⁰ 17 C.F.R. § 230.506 (2018).

¹²¹ *See How the JOBS act impacts real estate investing?*, *supra* note 8.

¹²² *See id.*

¹²³ *See* Scott, *supra* note 108, at 104.

¹²⁴ *See generally* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2418–20 (1998).

¹²⁵ *See generally* Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 MICH. L. REV. 696, 702, 757 (1998).

This article proposes the application of portable reciprocity through an internationally coordinated passport permitting cross-border real estate crowdfunding. Although cross-border crowdfunding regulations are being created,¹²⁶ these are often bilateral agreements that do not keep pace with technological developments. Creating a passport that does not restrict the activity flow across borders while being adaptable to technological and market advances requires two steps: first, implementing a portable reciprocity system; second, coordinating portals.

A. Taking Advantage of Cross-Border Crowdfunding and REtech to Implement Portable Reciprocity

Portable reciprocity overcomes the jurisdictional limits of securities regimes by allowing market participants and issuers to determine the appropriate regulatory regime and jurisdictional reach to apply.¹²⁷ Because REtech is a nascent development, applying a portable reciprocity passport system to it does not present the same practical challenges when trying to apply the system to existing, mature securities markets. REtech exists in its own niche online and presents similar issues to that of cross-border securities transactions because of its underlying security in real estate and basis in crowdfunding. This presents regulators with an opportunity to implement a portable reciprocity passport system as a first step towards harmonization. If successful, it could be imported to other cross-border crowdfunding transaction platforms, and REtech can take the next step towards harmonization; if unsuccessful, it would create a minimum regulatory system for this niche industry.

It is important to first distinguish portable reciprocity from mutual recognition. Both concepts are a familiar part of the real estate industry: reciprocity is an agreement between states that permits a licensee in its home state to practice in a second state without being required to complete the full licensing procedure in the second state; mutual recognition is a contractual agreement between states to recognize each other's licensing criteria.¹²⁸

In a cross-border transactions context, portable reciprocity is a practical extension of mutual recognition.¹²⁹ Mutual recognition is a simple bilateral agreement where efficient markets of one jurisdiction would permit the securities of a company from a second jurisdiction to be purchased and recognized under the home country's regulations and disclosure rules, provided that this relationship was reciprocated.¹³⁰ Markets from these reciprocal jurisdictions would reconcile their minimum disclosure standards, reporting requirements,

¹²⁶ Hanks, *supra* note 118.

¹²⁷ Choi & Guzman, *supra* note 13, at 921.

¹²⁸ Wycombe, *Mutual Recognition Versus Reciprocity*, VALUE HOMES (July 2, 2017), <http://valuhomesrealestateschool.com/2017/07/02/mutual-recognition-versus-reciprocity/>.

¹²⁹ See Scott, *supra* note 108, at 86.

¹³⁰ *Id.*

market capitalization requirements, trade volume requirements, market transparency rules, and standards to prevent market manipulation.¹³¹ A jurisdiction seeking mutual recognition in the United States, for example, would need to make sure material developments about its company was publicly available and reflected in the price that its shares trade for in its home jurisdiction.¹³² On a REtech platform, a jurisdiction seeking mutual recognition in the United States would also ensure its material developments were publicly available and reflected in the price for which the underlying properties that secure its investment products or properties are offered.¹³³ A portable reciprocity system would extend the mutual recognition agreement to multiple participants, so that participants within the system would recognize each other's rules and regulations to purchase and sell amongst each other.¹³⁴

A few factors will keep portable reciprocity in check. First, only so many regulatory regimes may realistically exist.¹³⁵ The minimum, common disclosure and registration standards are likely to be reconciled because platforms are still driven by competition.¹³⁶ Second, investors and platforms would retain the ability to determine the value of the security of the underlying real estate transaction.¹³⁷ This retains a platform's home field advantage by allowing it to set the value of its real estate against its home jurisdiction's norms. Finally, the online nature of REtech platforms would enable them to educate their investors on their regulatory status.¹³⁸ For example, platforms will have to include clear, distinguishable identifiers to clarify which jurisdiction it is subject to.¹³⁹

B. Mechanisms of the Portable Reciprocity Passport

The portable reciprocity system would be manifested through an internationally coordinated passport that serves as a license to operate across borders. Obtaining a cross-border REtech passport should require registration, qualification, and information mechanisms that have been reconciled between the major investment markets. This single regulatory license that enables a crowdfunding platform to operate across borders serves as a first step towards harmonizing rules across countries by allowing a crowdfunding platform that complies with the formed internationally coordinated regulations to operate in other participating jurisdictions.¹⁴⁰

¹³¹ *Id.*

¹³² *Id.*

¹³³ Choi & Guzman, *supra* note 13, at 938.

¹³⁴ *Id.*

¹³⁵ *Id.* at 925.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Zanki, *Cross-Border Crowdfunding Boom Would Test EU Regulators*, *supra* note 12.

REtech portals that want to invite cross-border investments will need to establish certain control and governance mechanisms simultaneously. These portals will need to define acceptable practices and operating principles, chief of which is to make clear what is considered illegal or unacceptable activity. Each portal that invites cross-border activity should also establish risk management committees to properly curate and control cross-border real estate transactions. These risk management committees should be managed by their platforms and be responsible not only for approving the transactions on their platforms, but also for setting risk criteria and providing adequate information to investors and potential investors on their portals with special care to their home jurisdictions. Portals would then have points of contact to determine what constitutes illegal activity, a public offering, and procedures for securing real estate investments, and can begin moving towards determining broadly accepted practices and operating principles. They should also serve as a testing ground for the regulation of future cross-border crowd-funded real estate transactions without requiring nations to change their domestic regulations. If little reconciliation is needed, then these platforms would be free to move towards harmonization; otherwise, they could further define the contours and limits of the portable reciprocity passport system.

This mechanism can be more broadly applied to crowdfunding platforms. Operation on a crowdfunding platform should be deemed compliant with the rules and customs of that jurisdiction. A portal that lists an offering from its home jurisdiction and accepts investments from other jurisdictions subjects investors to its home registration and qualification requirements.¹⁴¹ Global portals that make offerings on the platform should establish guidelines regarding communication, provide platform documentation and procedures, and adequately communicate information of offerings to target potential investors.¹⁴²

Incorporating, reconciling, and fulfilling the rules of most mature markets should provide a common starting point for an internationally coordinated regulatory system. This should clarify whether investors are subject to the liability of a target jurisdiction.¹⁴³ As part of the investment process for each platform, investors would be required to affirm that they understand the registration and disclosure provisions of the platform's jurisdiction, whether the protections provided to investors in the platform's jurisdictions apply, and whether they are subject to the home jurisdiction's reach regarding fraud or other activities.¹⁴⁴

C. A Portable Reciprocity Passport is Enforceable and More Practical

¹⁴¹ Alois, *We Need a Regulatory Framework for Cross-Border Crowdfunding Offerings*, *supra* note 107.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Than Creating an Offshore No-Man's Land

Critics of portable reciprocity and mutual recognition solutions have proposed establishing an offshore free zone as an alternative solution to resolve cross-border securities issues.¹⁴⁵ An offshore free zone requires a jurisdiction to permit its investors to participate in the offshore market for primary distributions with minimal disclosure requirements and restrictions.¹⁴⁶ Establishing an offshore free zone for cross-border crowdfunding and REtech may seem appealing because cross-border crowdfunding transactions do not need to occur in a particular jurisdiction and can be done over the world wide web.¹⁴⁷ Real estate, however, is a fixed asset in an investment portfolio, which is not served well by an offshore free zone. The lack of an enforcement mechanism, undefined jurisdictional reach, lack of competition, and risks to consumers make it less attractive than portable reciprocity in practice.

An offshore system would be a no-man's land, where it is unlikely that jurisdictions could credibly assure that they will enforce the rules of another jurisdiction.¹⁴⁸ The prospect of permitting offshore participation may require participating jurisdictions to make an additional gamble. The United States, for example, currently restricts offshore primary distributions to U.S. residents; permitting offshore participation would require modifications to Regulation S, Section 4(3), at minimum through Rule 174.¹⁴⁹ If it did so, and participating investors go offshore, it is unclear what the minimum standards would be and what entity would enforce it.

Acceptance of foreign or international rules hinges on the capability of enforcement. But which jurisdiction would enforce regulations for the offshore activities of global participants? Participants require assurance that accepted rules will be enforced.¹⁵⁰ Presently, most jurisdictions reluctantly depend on enforcement of rules by other countries and only expect actual enforcement to occur from the most efficient markets.¹⁵¹ Enforcement from participating markets hoping to provide competitive standards through enforcement is why most countries enter into mutual recognition agreements, and also why a system of portable reciprocity—which extends mutual recognition to multiple parties—is more likely to bear fruit than the creation of an offshore no-man's land.

D. Comparing the Proposed Portable Reciprocity Passport with the

¹⁴⁵ Scott, *supra* note 108, at 104.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 104.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 92, 97; 17 C.F.R. 230.901–905 (2000).

¹⁵⁰ Scott, *supra* note 108, at 92.

¹⁵¹ *Id.*

Current MiFID Passport

The U.K. and EU have produced a version of a passport under the Markets in Financial Instruments Directive (MiFID).¹⁵² The mutual reciprocity passport proposed in this article is narrower than MiFID because it is directed towards cross-border, crowd-funded real estate transactions on REtech platforms, but it would also be broader than MiFID in its membership because it would not be limited to members of the European Economic Area (EEA). The success of MiFID and prospects that it would remain in the U.K. post-BREXIT, and may even be joined by other regimes, are positive indicators that a portable reciprocity passport for cross-border REtech would succeed.

Under MiFID, if a U.K. crowdfunding or REtech platform wanted to serve as a broker, advisor, or perform permitted activity in another country in the EEA, it would need to apply for a passport.¹⁵³ Upon receiving a passport, the crowdfunding platform is regulated by its home-state regulator and works with relevant directive requirements to conduct business and to address risks.¹⁵⁴ Some of the EEA states may require additional domestic authorization. It is important to note that the EEA is distinct from the EU; EEA membership includes: Belgium, Bulgaria, Croatia, Cyprus (Republic of), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.¹⁵⁵

The MiFID passport allows an authorized investment firm in its home member state to offer investment services in a host member state.¹⁵⁶ As a result, the MiFID passport authorizes companies to establish local branches or offer services across the Internet without the need for local authorization.¹⁵⁷ This has made it possible for European crowdfunding platforms to permit cross-border transactions and grow. Currently, regulators are reevaluating MiFID to clarify the framework for companies seeking access to entire markets and are distinguishing requirements for accredited and unaccredited investors.¹⁵⁸

¹⁵² MiFID is scheduled for reform to improve investor protection, increase transparency, and access new trading venues (into MiFID II) on January 3, 2018. See John Mason, *MiFID II countdown: Will markets be ready?*, THOMPSON REUTERS: INSIDE FINANCIAL & RISK (Nov. 6, 2017), <https://blogs.thomsonreuters.com/financial-risk/risk-management-compliance/mifid-ii-countdown-will-markets-ready/>.

¹⁵³ See *Passporting*, FIN. CONDUCT AUTHORITY (last updated Feb. 14, 2018), <https://www.fca.org.uk/firms/passporting>.

¹⁵⁴ See *id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *BREXIT: The MiFID passport, An overview*, STEPHENSON HARWOOD LLP (July 8, 2016), http://www.shlegal.com/docs/default-source/news-insights-documents/07_16_brexit_the_mifid_passport.pdf?sfvrsn=2.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.*

Even in the face of BREXIT, the MiFID passport is likely to stay, demonstrating the utility and resiliency of a passport system. Until the U.K. leaves the EU, MiFID or its scheduled revision (MiFID II) will continue to apply, and even after BREXIT, the U.K. may elect to remain a member of the EEA.¹⁵⁹ Loss of the MiFID passport permitting cross-border services in the EEA would have an adverse effect on U.K. financial institutions.¹⁶⁰ Post-BREXIT, the U.K. may also operate a dual regime, incorporating the MiFID passport for financial institutions that want to use it, and a separate regime for those who want cross-border activity outside of the MiFID system.¹⁶¹

V. NEXT STEPS: MONITORING TECHNOLOGICAL AND REGULATORY ADVANCEMENTS

The proposed portable reciprocity passport would allow platforms to list an offering from one jurisdiction and accept investments from another. Adequate guidelines regarding the extent of communications and solicitation, documentation customs and procedures, and investment and repayment processes need to be developed. Defining the contours of a portable reciprocity passport—and potentially modifying it to a broader mutual recognition system, or importing certain suggestions from other systems—will require additional monitoring and innovation.

A. *Additional Steps to Implement Regulations*

REtech presents a unique opportunity to implement a system of portable reciprocity, but the success of this passport system requires reconciliation of conflicting and evolving regulations. Comparing securities regulations of key jurisdictions will flesh out the nuances. Though reconciliation should be the goal, there remains a need for established mechanisms and exceptions. Just as a traveler may need to obtain a visa for his or her passport when attempting to enter certain countries, platforms may be required to obtain additional permits to operate in certain jurisdictions.

Here, research into the practical and theoretical approaches from the U.K. and EU, and the bilateral agreements between China and other nations should be pursued. Although not examined in this article, it would also be worth researching the relationship between the U.S. and Canadian securities regulators, beginning with the adoption of the bilateral Multi-Jurisdictional Disclosure System (MJDS), through its revision, and concluding with the SEC's response to the revisions.¹⁶²

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² JD Alois, *Does the SEC Want to Create a Regulatory Approach for Cross Border Equity Crowdfunding Offers?*, CROWDFUND INSIDER (Jan. 24, 2016), <https://www.crowdfundinsider.com/2016/01/80667-does-the-sec-want-to-create-a-regulatory-approach-for-cross-border-equity-crowdfun>

As with any regulatory issue or solution, politics come into play. Though the Trump administration has not communicated a clear position on securities transactions or crowdfunding, the administration's rhetoric makes it likely that its appointments would be regulation-averse, and that it would scale back on perceived barriers to innovation and job creation.¹⁶³ If the administration reduces regulations, companies that wish to develop equity crowdfunding could aggressively democratize the capital formation process.¹⁶⁴ On the other hand, if the administration delivers on its rhetoric on international trade or isolationism, it would create less optimistic prospects for implementing a portable reciprocity passport.¹⁶⁵ The flurry of activity in equity crowdfunding and REtech, however, will bend businesses towards cross-border activity and require moving towards the international harmonization of certain regulations.

Whether regulatory regimes are efficiently and effectively reconciled will impact the efficacy of the proposed portable reciprocity passport. Once in place, it will not only be important for the portable reciprocity passport to coexist with other regimes and agreements, but also to adapt to the rapid pace of technological advancements.

B. Regulators Need to Monitor and Adapt to Technological Advancements

Introducing a passport to enable portable reciprocity provides REtech and cross-border crowdfunding companies with a new toolbox.¹⁶⁶ In a short time after the passage of the JOBS Act, REtech companies like RealtyMogul and Fundrise moved quickly into the REIT space.¹⁶⁷ The Atlanta-based company, Groundfloor, has moved from offering crowdfunding as an alternative source of capital in residential real estate to developing increasingly advanced investment products through partnerships with capital providers including individual retirement accounts, balloon products, and larger loan offerings.¹⁶⁸ As Groundfloor moves ahead to introduce monthly interest payment investments and to add income yields for unaccredited investors, other REtech companies across the United States and other countries will follow suit and start looking to healthy real estate markets across their borders to sustain their growth.¹⁶⁹ Already, platforms such as Global Alternatives are developing cross-border investments in real estate, senior

ding-offers/.

¹⁶³ See Kendall Almerico, *How Will Donald Trump's Presidency Affect Crowdfunding?*, ENTREPRENEUR (Jan. 10, 2017), <https://www.entrepreneur.com/article/286940>.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See Kiger, *supra* note 7.

¹⁶⁷ See generally REALTYMOGUL.COM, <https://www.realtymogul.com>; FUNDRISE, <https://fundrise.com>.

¹⁶⁸ See Dally, *supra* note 47.

¹⁶⁹ See Boone Kincaid, *Announcing Monthly Payment Loans*, GROUND FLOOR (Oct. 14, 2017), <http://blog.groundfloor.us/groundfloorblog/monthly-payments>.

debt, mezzanine debt, and equity.¹⁷⁰ Crowdfunding and sophisticated REtech leaders such as REAL are poised to solve the inefficacy and illiquidity of the traditional real estate investment institution by marrying blockchain and cryptocurrency to cross-border crowdfunding and REtech platforms.¹⁷¹

Advances in cryptocurrency and blockchain technology will also impact the need for a cross-border solution in the REtech space. Though nascent, some blockchain-crowdfunding platforms have already entered the arena, signaling that blockchain offerings may outpace venture capital funding as we currently know it.¹⁷² For example, BNP Paribas Securities Services, a subsidiary of French banking conglomerate BNP Paribas, has already produced a platform that enables private companies to issue securities through blockchain technology.¹⁷³ The platform can register transactions on primary and secondary markets across the globe and serve issuers, shareholders, investors, lawyers, notaries, accountants, banks, and crowdfunding platforms.¹⁷⁴ The decentralized nature of blockchain has attracted attention from many crowdfunding platforms and investors for a couple of reasons.¹⁷⁵ First, cryptocurrencies are global; they are not produced by states and are therefore not restricted by borders.¹⁷⁶ Blockchain can be used to raise money from the market, to pay shareholders, and to issue assets—all without triggering regulations due to border restrictions.¹⁷⁷ Second, blockchain-crowdfunding offers a more secure and less cumbersome means for businesses to get funded.¹⁷⁸

Although further regulations will be needed to ensure transparency and adequate enforcement of blockchain-REtech, it represents a legal and less burdensome alternative to the current legal minefield of cross-border crowdfunding. Since blockchain is newer than crowdfunding, and since regulators have more familiarity with cross-border crowdfunding, monitoring developments would help define the nuances of a portable reciprocity passport system.

Technological developments will continue to enable trading to evolve in ways in which traditional industry professionals will find themselves displaced by automation and technology.¹⁷⁹ For many new companies, engaging a securities law firm for an early-stage investment can be costly. In response, equity

¹⁷⁰ Alois, *Property Crowd Relaunches as Cross-Border Property Crowdfunding Platform*, *supra* note 48.

¹⁷¹ Pollock, *supra* note 50.

¹⁷² See Pete Rizzo, *BNP-Backed Blockchain Crowdfunding Effort Completes Initial Stage*, COINDESK (July 5, 2017), <https://www.coindesk.com/bnp-backed-blockchain-crowdfunding-effort-completes-initial-stage/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Naveen Joshi, *5 Ways Blockchain Facilitates Crowdfunding*, THE MARKET MOGUL (Aug. 4, 2017), <https://themarketmogul.com/blockchain-crowdfunding/>.

¹⁷⁶ *Id.* See also Brummer, *supra* note 2 at 998–99.

¹⁷⁷ Joshi, *supra* note 175.

¹⁷⁸ *Id.*

¹⁷⁹ Brummer, *supra* note 2, at 998–99.

crowdfunding platforms are trying to automate the process to lower costs. Although automated guidance to navigate through complex securities law may seem distant, innovators have already started producing these developments. FlashFunders, for example, automated securities law services through technological integrations with Lexis Nexus, DocuSign, IRS, and the SEC Edgar Portal.¹⁸⁰ Companies that engage the FlashFunders platform can now solicit small, early stage deals by crowdfunding their equity from accredited investors, venture capitalists, and private funds automatically with the platform.¹⁸¹ Later stage deals (Series A and beyond) contain nuanced details in its securities process, and has yet to be automated.¹⁸² Monitoring the development of service automation will also be critical to ensuring the soundness of a cross-border portable reciprocity passport system for transactions occurring over Internet based platforms.

VI. CONCLUSION

The regulatory modifications in solicitation and opening offerings to unaccredited investors to invest in private placements allowed crowdfunding platforms to efficiently raise capital across the United States. In turn, borrowers and developers have a new source of capital to fund their projects. Internet crowdfunding platforms have made investing in real estate projects across borders a reality, and regulators should revisit the application of portable reciprocity to properly steer cross-border crowdfunding activity.

¹⁸⁰ Jordan Crook, *Equity Crowdfunding Platform FlashFunders Is Automating Securities Law For Seed-Stage Rounds*, TECHCRUNCH (May 11, 2015), <https://techcrunch.com/2015/05/11/equity-crowdfunding-platform-flashfunders-is-automating-securities-law-for-seed-stage-rounds/>.

¹⁸¹ *Id.*

¹⁸² *Id.*

