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Don't Let Them Fool Ya: An Examination of Regulation Crowdfunding as a Framework for Federal Protection Against Online Dating Risks

By NAZGOLE HASHEMI* and TANNAZ H. HASHEMI**

I. Introduction

COULD YOU BE LOVED OR COULD YOU BE TARGETED? Since the launch of Match.com in 1995,¹ online dating has grown in popularity and become socially acceptable, with the stigma of meeting a stranger on the Internet quickly dissipating. While it is true that online dating was “[o]nce considered a taboo practice, [it] now stands as the third most popular form of matchmaking in the United States, trailing only introductions through friends and meeting at social gatherings.”² However, there have also been many horror stories involving sexual misconduct against users and minors, as well as identity theft.³ Despite this increase in the online dating market and its inherent

* Nazgole Hashemi is an attorney in California and the co-founder of LegalAxxis, Inc. She primarily practices general civil litigation and business transactions, and also serves as an adjunct Associate Professor of Securities Regulation at Southwestern Law School.

** Tannaz H. Hashemi is an attorney in California and the co-founder of LegalAxxis, Inc., where she primarily practices civil litigation and business transactions. The authors thank Professor Michael M. Epstein at Southwestern Law School for all of his guidance and support.

1. *About Match.com*, MATCH, <https://www.match.com/help/aboutus.aspx?lid=4> [<https://perma.cc/2L68-BQP4>].

2. Lindsey A. Datte, Comment, *Chaperoning Love Online: Online Dating Liability and the Wavering Application Of CDA § 230*, 20 CARDOZO J.L. & GENDER 769, 769 (2014).

3. Ryan D. O’Day, Comment, *Rapists, Sexual Offenders, and Child Molesters: Who Is Your Romantic “Match”? Why Dating Websites Should Perform Criminal Background Checks*, 48 VAL. U. L. REV. 329, 334 (2013) (example of a woman being sexually assaulted by a date she met on Match.com); Phyllis Coleman, *Online Dating: “Murderers, Rapists, and Con Artists, Oh My”*, 13 APPALACHIAN J.L. 147, 166–67 (2014) (statistics of romantic scam filings); Trenton E. Gray, Comment, *Internet Dating Websites: A Refuge for Internet Fraud*, 12 FLA. COASTAL L. REV. 389, 389 (discussing how users may have sexual relations with a minor).

risks, there are currently no federal laws to protect users from online dating predators.⁴ While some states have enacted online dating laws, the current statutes fail “to prevent or lessen recent attacks.”⁵ The state laws merely help to “increase the users’ awareness about possible criminal attack stemming from online dating,”⁶ but are even insufficient in that sense. Those states that do have laws only require “a website to state whether it performs criminal background checks, identify whether it allows users with criminal backgrounds to use the site, and also . . . warn users that criminal background checks fail to flag all dangerous individuals.”⁷

The current status of the law is especially troubling given the immunity provided to online dating platforms by the Communications Decency Act (“CDA”),⁸ which serves “to promote the development and preserve the free market of the Internet.”⁹ Holding dating platforms liable for third-party misconduct is virtually impossible at this time, although they are responsible for facilitating connections. The CDA grants websites immunity from tort liability, such as negligence claims, for content published by others.¹⁰ Section 230 of the CDA states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹¹ Some commentators have proposed to amend the CDA to remove immunity for, at the

4. Maureen Horcher, Comment, *World Wide Web of Love, Lies, And Legislation: Why Online Dating Websites Should Screen Members*, 29 J. MARSHALL J. COMPUTER & INFO. L. 251, 256 (2011).

5. O’Day, *supra* note 3, at 353. Some states such as Arizona, California, Connecticut, Illinois, Iowa, New Jersey, New York, North Carolina, Ohio, Rhode Island, and Wisconsin, have enacted contract laws regulating the agreement between the online dating site and user. Depending on the state, such laws include the right to a written copy of the contract, to rescind the contract and obtain a refund, to have the profile removed upon death, and to recover damages, attorneys’ fees, and costs arising from injury via unfair practices. Phyllis Coleman, *Online Dating: When “Mr. (Or Ms.) Right” Turns Out All Wrong, Sue The Service!*, 36 OKLA. CITY U. L. REV. 139, 144–57 (2011). However, as to claims in contract, there is great difficulty in pinning the dating website to a contractual term, i.e., the promise to perform or not perform a particular action, and therefore such actions too are not viable. Quasi-contract claims also raise difficulties for the plaintiff in showing unjust enrichment or non-receipt of the benefit for which the plaintiff paid. Jay M. Zitter, *Civil Liability of Internet Dating Services*, 48 A.L.R.6th 351, §5 (Originally published in 2009).

6. O’Day, *supra* note 3, at 353.

7. *Id.* at 337.

8. 47 U.S.C. § 230 (1996).

9. O’Day, *supra* note 3, at 338.

10. *Id.* at 347–48.

11. 47 U.S.C. §230 (1996).

very least, negligence claims against online dating websites.¹² However, such proposals are only partial solutions because there is still no legal duty to act, an element required for a negligence claim.¹³

Negligence cases against online dating platforms are subject to dismissal because the law currently imposes no duty on them to conduct criminal background checks or otherwise take steps to ensure the safety of users.¹⁴ As the law stands now, “if one user murders [or assaults] another user on a first date, the dating website is exempt from liability, despite being essentially the proximate cause of that date.”¹⁵

This article advocates for Congress to implement federal regulations of online dating platforms in an effort to prevent or lessen the current risks. While a state-by-state regulatory regime is also possible, it could prove to be too complicated of a framework. Because the matter involves the very mobile world of the Internet, regulation of online dating is more properly a federal issue that should be governed by a single, comprehensive framework. In addition, a state-by-state framework may be too expensive for the dating platforms, thereby hindering economic efforts and advancement. Indeed, the cost to both start-up and established companies for regulatory compliance is not lost upon the authors. Congress should implement federal laws in the context of online dating that sufficiently protect consumers and can thereby effectively call for preemption of state laws on the subject matter.

To better understand what sort of federal authority is appropriate in the context of online dating, this article examines the federal requirements imposed on crowdfunding portals pursuant to the Jumpstart Our Businesses Startup Act (“JOBS Act”) and Regulation Crowdfunding, and it analyzes whether Congress could implement the same protective framework in the context of online dating. “Crowdfunding is a fundraising method where small amounts of capital are raised from a large number of accredited and non-accredited investors to finance a new business venture [or start-up company] through authorized intermediaries, such as funding portals.”¹⁶ Online dating platforms are similar to crowdfunding portals, such as Kickstarter and Angellist, in that they act as virtual intermediaries be-

12. O’Day, *supra* note 3, at 362–63.

13. *Id.* at 362.

14. *Id.* at 357–58.

15. Horcher, *supra* note 4, at 254.

16. Michael M. Epstein & Nazgole Hashemi, *Crowdfunding in Wonderland: Issuer and Investor Risks in Non-Fraudulent Creative Arts Campaigns Under the Jobs Act*, 6 AM. U. BUS. L. REV. 1, 3 (2016).

tween two parties wanting to connect for a particular purpose. While the purpose behind online dating is to make a romantic connection, the purpose behind equity crowdfunding is to make a financial investment in the hopes of a return. In 2012, Congress took steps to protect investors from scammers on the Internet and ensure that they understood the financial risks associated with crowdfunding by passing the JOBS Act.¹⁷ The JOBS Act, in accordance with the rules promulgated thereunder by the Securities and Exchange Commission (“SEC”), which includes Regulation Crowdfunding, mandates funding portals to take certain actions to protect investors from fraudulent campaigns and financial scams.¹⁸ Some may argue against regulating online dating in the same way as crowdfunding based on the emotional versus financial connection being made on the platforms. There could be resistance to creating federal regulation to protect users from the type of non-economic injuries mentioned herein. However, in this respect, it has become clear that “[a]s the number of people looking to meet new people online grows, so does the opportunity for [financial] fraud,” whereby criminals quickly appeal to the victim’s emotions and then exploit the victim for money.¹⁹

Whatever type of injury is within interest, as with crowdfunding, in the online dating context, any real protection will likely have to start with the dating platforms themselves since they cannot necessarily control the conduct of third-parties. By creating requirements for online dating platforms, the law would essentially be imposing a duty of due care on them that would in turn serve as the basis for a negligence claim. In this respect, federal regulations should explicitly discard the immunity provided by the CDA. Alternatively, the new regulations could independently create causes of action, while also imposing statutory damages and penalties for violations of the law. Ultimately, just as Congress created a mechanism to educate and protect investors with online dealings, it should create a mechanism to educate and protect consumers and the public, including minors and other vulnerable individuals, from predators on online dating platforms. Based on the similarities between online dating platforms and funding portals, the federal authorities regulating crowdfunding por-

17. 17 C.F.R. §§ 227.100 *et seq* (2012).

18. Epstein & Hashemi, *supra* note 16, at 3.

19. Online Dating and Romance Scams, OFF. MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/consumer/Publications/OnlineDatingRomanceScams.asp> [<https://perma.cc/768F-ULN8>]; *see also* Davene Butler, *FBI Warns of Online Dating Scams*, FBI SAN DIEGO (Feb. 11, 2016), <https://www.fbi.gov/contact-us/field-offices/sandiego/news/press-releases/fbi-warns-of-online-dating-scams> [<https://perma.cc/99WX-3R5G>].

tals provide a good starting point for imagining a viable and appropriate framework for online dating.

II. Registration with a Federal Agency

Federal law requires crowdfunding portals to register with the self-regulatory organization (“SRO”) and the SEC by filing Form Funding Portal, which is “immediately accessible and searchable by the public.”²⁰ The SEC described this requirement as having the ability to “promote investor confidence” in the “new and emerging market” of crowdfunding, while also providing the Commission with “information integral to effective oversight.”²¹ Form Funding Portal requires information regarding the funding portals, including the following:

[P]rincipal place of business, its legal organization and its disciplinary history, if any; business activities, including the types of compensation the funding portal has received and disclosure of its disciplinary history, if any; FINRA membership with any other registered national securities association; and the funding portal’s website address(es) or other means of access.²²

In the context of online dating, it too seems like a good starting point to require registration of platforms with a federal agency. An example could be the Federal Communications Commission or even the Federal Bureau of Investigation, which has an Internet Crime Complaint Center that provides the public with a reporting mechanism for Internet-facilitated criminal activity, such as Internet harassment and fraud. Legislation could mandate an appropriate federal agency to create a separate division or subdivision that specifically oversees the registration of online dating platforms. As with Form Funding Portal, the online dating platform’s registration statement could list business and legal information and be made “immediately accessible and searchable by the public.”²³ The registration process could also include a statement of the platform’s process for compliance with the safety features described below, including background checks of users and educational materials delivered to users, as well as a statement of actual compliance under penalty of perjury. In this re-

20. Crowdfunding, Securities Act Release No. 33-9974, 80 FR 71387 (Oct. 30, 2015).

21. *Id.*

22. David M. Lynn & Anna Pinedo, *Following the Wisdom of the Crowd? A Look at the SEC’s Final Crowdfunding Rules*, SOCIALLYAWARE (Nov. 12, 2015), <https://www.sociallyaware.com/blog/2015/11/12/following-the-wisdom-of-the-crowd-a-look-at-the-secs-final-crowdfunding-rules/> [https://perma.cc/8FYX-ZELM].

23. Crowdfunding, *supra* note 20, at 253.

spect, registration would serve to inform users as to which platforms are representing compliance with the safety features of federal laws and accordingly guide users to make romantic connections on those platforms only. While registration would not serve as an endorsement of the site by the federal agency, just as it does not in the context of crowdfunding, it would be helpful to promote user confidence and guide users in the continuously developing market of online dating, just as it does in the context of crowdfunding.

Registration, however, for online dating platforms presents certain challenges that are not necessarily present for funding portals. The issue with registration is creating a definition of what constitutes an online dating platform or, in other words, figuring out which online platforms in particular would be subject to the registration requirements. Social media platforms, such as Facebook, Instagram, and Twitter, are all used these days to initiate or make romantic connections. Yet, these platforms do not hold themselves out as dating platforms. Pop culture via rap music, for example, even recognizes the romantic aspect of popular social media platforms with lyrics such as “[i]t goes down in the DM” (referring to Instagram’s direct message feature) and “[t]weet tag technology I turn sexology” (referring to Twitter communications).²⁴ Perhaps a clear definition would distinguish between those platforms where users have followers or friends or can search for followers or friends, such as Facebook and Twitter, and those platforms where users merely have matches and cannot search for others, such as Match.com and Tinder. Alternatively, the definition could focus more closely on how the platform actually holds itself out or advertises its services to the public.

While the issue could also be easily solved by subjecting both online dating and social media platforms to federal law, this article does not advocate for social media platforms to be federally regulated in the same way as online dating platforms. Rather, it focuses on those platforms that specifically hold themselves out as existing to spark a romantic connection, such as Match.com, Bumble, Tinder, OKCupid, and eHarmony. When an individual signs up for these online dating platforms, there is a higher level of vulnerability, given that the very

24. YO GOTTI, *Down in the DM*, on *THE ART OF HUSTLE* (Epic Records 2016); Song: Follow U On Twitter, Twista ft. Camron (2010).

“Down in the DM” is a phrase that refers to direct messaging people on social media, typically for purposes of hooking up. See, e.g., *Down in the DM*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=down%20in%20the%20dm> [https://perma.cc/6LDQ-YCDB].

purpose of these sites is to open oneself up to a romantic connection. Everyone seemingly shares a more common agenda of finding a partner, as opposed to social media platforms, where many of the members have no romantic interest at all, or at least not through that particular platform. Federal authorities should work to create a narrowly tailored definition of what constitutes an online dating platform, and in doing so, should take into account the capabilities granted to the users, and the attributes and advertisements of the platform. With the online dating platforms being registered, users may no longer rely on social media to make a romantic connection. However, if users nonetheless decide to use their social media accounts in this way, they will have an inherent warning that the platforms do not necessarily represent compliance with the safety features granted to online daters by federal law.

III. Verification and Background Check Procedures

A. Requirements for Funding Portals

A big requirement for crowdfunding portals is conducting background checks on the start-up company's management and twenty-percent beneficial owners.²⁵ This is to view their financials and look for past non-compliance with securities laws and regulations prior to any offering being displayed publicly on the portal.²⁶ The funding portal must deny access to its platform if it has a "reasonable basis" for believing that any of these individuals are subject to a disqualification, present the potential for fraud, or otherwise raise concerns about investor protection.²⁷ Disqualifying events include, but are not limited to, felony or misdemeanor convictions or an injunction within the last five years in the context of securities or business, and cease and desist letters from the SEC relating to scienter-based anti-fraud provisions of the securities laws.²⁸ The SEC stated:

The requirement to deny an issuer access to a crowdfunding platform under the final rules based on fraud or other investor protection concerns is important to the viability of crowdfunding, and the legitimacy of the intermediary. This obligation is the responsibility of each intermediary, which must make a determination about whether to deny access to an issuer.²⁹

25. Lynn & Pinedo, *supra* note 22, at Part Three.

26. Epstein & Hashemi, *supra* note 16, at 6; 17 C.F.R. § 227.301 (2018).

27. Crowdfunding, *supra* note 20, at 166.

28. *Id.* at 340.

29. *Id.* at 179.

The SEC, however, declined recommendations for a database of denied issuers on the basis that it would not significantly increase investor protection.³⁰ According to the SEC:

While a third party may decide to create a database of denied issuers at some point and an intermediary could use such a database to help make its determination as to whether it was required to deny access to an issuer, such a database could not be used as a substitute for an intermediary making its own determination.³¹

B. Cases Illustrating the Current Shortcomings of Dating Platforms

In the context of online dating, one of the biggest pitfalls right now is the lack of background checks and verification processes. As the law currently stands, “[d]ating websites are not legally required to ask subscribers if they are convicted felons, screen members through a criminal database, or boot convicts from their websites.”³² Individuals without any knowledge could be chatting with a convicted sexual predator, violent individual, or identity thief. Various stories and cases filed throughout the nation are demonstrative of the current risks of online dating and concurrent shortcomings of the law in terms of sexual assault, violence, and identity theft.³³

In the case of *Doe v. Match.com*,³⁴ brought before the United States District Court for the Central District of California, Carole Marlin met a man named Alan Wurtzel on Match.com, and she had no idea “he was hiding a dark, violent side” that would eventually lead to him brutally raping her in her apartment.³⁵ Carole did not know that Alan was a convicted sex offender.³⁶ In her suit against Match.com, Carole alleged that she would not have been raped if Match had screened its members.³⁷ Following her lawsuit, “[t]he website experienced further public relations embarrassment when it discovered the criminal history of another user, Abraham Fortune,” who was a convicted murderer.³⁸ At that time, Match.com had been openly opposing criminal background checks for its members, stating that the company’s opposition was based on the occasional inaccuracy of such

30. *Id.*

31. *Id.* at 179–80.

32. Horcher, *supra* note 4, at 253.

33. *See id.* at 251.

34. *Doe v. Match.com*, 789 F.Supp.2d 1197 (C.D. Cal. 2011).

35. Horcher, *supra* note 4, at 251–52.

36. *Id.* at 252.

37. *Id.*

38. *Id.*

screenings.³⁹ According to the site, “[s]creening would thus expose users to greater safety risks because it would provide them a false sense of security.”⁴⁰ However, one year later, the company changed its position.⁴¹ In August 2011, the company reached a settlement with Carole Markin wherein it agreed to screen its members via criminal background checks.⁴² Less than one year later, in March 2012, Match, eHarmony, and Spark publicly agreed to crosscheck users against national sex registries.⁴³ However, their agreements were “not legally binding or enforceable.”⁴⁴

In *Carafano v. Metrosplash.com, Inc.*, an unknown person using a computer in Berlin posted a trial personal profile of Christianne Carafano, a famous actress, in the Los Angeles section of Matchmaker, a commercial Internet dating service.⁴⁵ Carafano appeared in numerous films and television under her stage name, Chase Masterson.⁴⁶ “Pictures of the actress . . . [were] widely available on the Internet, and the false Matchmaker profile ‘Chase529’ contained several of these pictures.”⁴⁷ The profile included “fairly innocuous responses to questions about interests and appearance,” and “selected ‘Playboy/Playgirl’ for ‘main source of current events’ and ‘looking for a one-night stand’ for ‘why did you call.’”⁴⁸ There were also open-ended responses indicating “that ‘Chase529’ was looking for a ‘hard and dominant’ man with ‘a strong sexual appetite’ and that she ‘liked sort of be[]ing controlled by a man, in and out of bed.’”⁴⁹ The profile also included her home address, email address, and telephone number.⁵⁰ Carafano was unaware of the posting and profile, but soon became aware as people started messaging her in response to the profile.⁵¹ For example, she discovered that several individuals had left her sexually explicit messages when she checked her voicemail while traveling.⁵² Later, when she returned home, she contacted the police

39. *Id.*

40. *Id.* at 252–53.

41. *Id.* at 253.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

upon finding a “highly threatening and sexually explicit fax that also threatened her son.”⁵³ During this time, “she also received numerous phone calls, voicemail messages, written correspondence, and e-mail from fans through her professional e-mail account.”⁵⁴ Several men who expressed an interest in meeting her also showed concern that she had provided her address and phone number.⁵⁵ Because she felt unsafe in her home, Carafano and her son either did not sleep in their home or left Los Angeles for several months.⁵⁶

Carafano filed suit against Matchmaker, alleging invasion of privacy, misappropriation of the right of publicity, defamation, and negligence.⁵⁷ The Ninth Circuit, however, held that the website was statutorily immune pursuant to the CDA because the information was provided by another party.⁵⁸ The court reasoned that because “increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services,” it was the country’s policy to “promote the continued development of the Internet and other interactive computer services,” “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,” and to “remove disincentives for the development and utilization of blocking and filtering technologies.”⁵⁹ The court concluded that as long as a third party willingly posted the content, the website provider received full immunity regardless of the specific editing or selection process.⁶⁰ Although the court recognized the gravity of the consequences, as demonstrated by Carafano’s case alone, it nevertheless concluded that Congress intended to afford immunity to service providers.⁶¹

In *Herrick v. Grindr, LLC*, the plaintiff brought suit against Grindr, a dating application for gay and bi-sexual men, after his ex-boyfriend used the platform to impersonate him and represented that he was interested in fetishistic sex, bondage, role playing, and rape fantasies, which encouraged potential suitors to go to the plaintiff’s home or workplace for sex.⁶² The gist of the plaintiff’s claims were that “Grindr

53. *Id.* at 1121–22.

54. *Id.* at 1122.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1122–23.

60. *Id.* at 1122.

61. *Id.* at 1125.

62. *Herrick v. Grindr, LLC*, 306 F.Supp.3d 579, 584 (S.D.N.Y. 2018).

is a defectively designed and manufactured product because it lacks built-in safety features; that Grindr mislead [the plaintiff] into believing it could interdict impersonating profiles or other unpermitted content; and that Grindr refused to search for and remove the impersonating profiles.”⁶³ Grindr moved to dismiss the lawsuit pursuant to section 230 of the CDA, arguing that it had immunity for content created by other users.⁶⁴ The United States District Court for the Southern District of New York agreed, reasoning that the CDA barred all of the plaintiff’s claims since they were premised on holding Grindr responsible for content created by another user.⁶⁵

The case of *Doe v. Myspace* also provides a good example of the current legal shortcomings. Although this case was not against an online dating platform, the issues of deceit surrounding the user’s age and the following sexual assault exist beyond the context of social media and have manifested on the dating platforms, too. In this case, Julie Doe (“Julie”), who was thirteen-years-old at the time, created a profile on Myspace.com, representing that she was eighteen-years-old.⁶⁶ Because she did not sign up as a minor, she was able to list her profile publicly.⁶⁷ Thereafter, when she was just fourteen, a nineteen-year-old named Pete Solis (“Solis”) initiated contact with her.⁶⁸ After communicating several times, Julie provided him with her telephone number and they eventually met in person, at which time Solis sexually assaulted her.⁶⁹ Julie’s mother, Jane Doe, then sued Myspace, “alleging that Myspace failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site.”⁷⁰ The claims against Myspace included fraud, negligent misrepresentation, negligence, and gross negligence.⁷¹ The Fifth Circuit “barred the claims via the CDA because the Does’ failure-to-protect argument merely rephrased a claim that attempted to hold Myspace liable for publishing third-party content.”⁷² The court reasoned that “[p]arties complaining that they were harmed by a Web site’s publication of user-generated content have recourse; they may sue the third-

63. *Id.*

64. *Id.*

65. *Id.*

66. *Doe v. Myspace*, 528 F.3d 413, 416 (5th Cir. 2008).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. O’Day, *supra* note 3, at 348.

party user who generated the content, but not the interactive computer service that enabled them to publish the content online.”⁷³ While the predator himself was subject to criminal and civil liability, there was no such liability for the website.

C. Subjecting Dating Platforms to Background Checks and Verification Procedures

Because of the foregoing issues, similar to funding portals, online dating platforms could be required to conduct background checks and engage in user verification procedures to prevent dangerous users, underage users, and also multiple user profiles. Multiple user profiles permit a single user to manipulate the system so that they reappear to users who have already swiped left on them, rejected, or blocked them. Requiring background checks would not be unusual in the dating realm, as even “the International Marriage Broker Regulation Act requires a U.S. citizen seeking a foreign fiancé to undergo a criminal background check before he or she can fly the fiancé to the United States.”⁷⁴ Requiring background screenings in the context of online dating would help to prevent violence and potentially save lives.⁷⁵

Moreover, it has been suggested that “[t]he dating website industry believes the cost of requiring criminal background checks outweighs the benefits . . . [and] requiring background checks will reduce the privacy of users and may reduce the amount of self-checking that users perform before meeting another user.”⁷⁶ “[I]ndustry leaders advocate for increasing the promotion of safety guidelines to improve safety, rather than relying on background checks that are not 100% accurate.”⁷⁷ However, in the context of crowdfunding, despite understanding concern about the costs associated with background checks, the SEC stated that it would not eliminate or limit the requirement because it “is an important tool for intermediaries to employ when determining whether or not they have a reasonable basis to allow issuers on their platforms.”⁷⁸ Even in the context of employment and hiring, other industries advocate for criminal background checks and believe that they provide safety benefits.⁷⁹ In addition, while the

73. Myspace, 528 F.3d at 419.

74. Horcher, *supra* note 4, at 276.

75. *Id.*

76. O’Day, *supra* note 3, at 351.

77. *Id.*

78. Crowdfunding, *supra* note 20, at 179.

79. O’Day, *supra* note 3, at 351.

cost of a single background check could prove to be pricey for the dating platform, many background check providers offer “a volume or corporate discount, which generates a lower price per check for large orders.”⁸⁰

Further, the verification procedure could require some form of government-issued identification, from any country, to be linked to the particular user account. While this could isolate undocumented people or those who do not have identification, this is not a sufficient basis to forgo such protections for the country as a whole. Moreover, some dating websites, such as Bumble, already provide a verification feature in terms of physical appearance. After an individual uploads their photos to Bumble, he or she can send a live picture using the application. Bumble then compares the live picture to those that were uploaded. If the individual in the uploaded photos resembles the individual in the live photo, Bumble will then place a check mark in the upper left-hand corner of the user’s profile, confirming the individual’s appearance.⁸¹ This sort of process could be implemented as a requirement for all dating platforms and not be limited to just photos, but also include other information, such as education and work. Verification of such information could be achieved by requiring the user to upload a diploma or certificate, or other proof of the accuracy of the information in the user’s profile. Accordingly, any updates to such information could also be subject to a verification process by the dating platform.

Some may argue that these verification procedures could destroy what they attempt to regulate in that they will deter even non-violent, law-abiding users who simply do not wish to have their privacy invaded. Some may resist verification procedures that take place outside the context of, for example, employment, where it is said that the employer has a legitimate need for the information prior to making hiring decisions. However, for users who are legitimately interested in finding a significant other online, any invasion of privacy concerns are likely outweighed by the need for protection and safety. In this respect, any invasion of privacy would be reciprocal between the users and would serve to provide confidence in the online dating system.

As to disqualification, while crowdfunding regulations mandate disqualifying events, this sort of requirement for online dating plat-

80. *Id.* at 350–51.

81. Bumble Photo Verification – KISS CATFISH GOODBYE, BUMBLE, <https://bumble.com/the-buzz/the-end-of-catfishing-introducing-photo-verification/> [<https://perma.cc/J8RX-76P5>] (last visited Apr. 15, 2019).

forms may prove to be unconstitutional and therefore would have to be modified. In the context of securities law, the government has broad authority pursuant to the Securities Act, Securities Exchange Act, and Commerce Clause to regulate interstate offerings and transactions. In the context of online dating, the federal government too likely has authority to regulate the phenomenon under the Commerce Clause. However, allowing the federal government to disqualify individuals from dating or social platforms or to limit speech on such platforms and thereby thwart or control romantic or social interactions between adults could raise constitutional issues related to the freedom of association and freedom of speech. Adults generally have the right to associate with whomever they want free of government intervention, whether on a romantic or social level. This includes associations with those convicted of misdemeanors or felonies, whether in the sexual or financial context. Individuals also have the right to free speech, including posting profile and information on the Internet. Perhaps a more appropriate route would be to leave the effect of background check to the dating platforms themselves, rather than mandate the platforms to take a particular action following the background check. The federal law could be written more broadly so as to generally require the platforms to conduct background checks and thereafter incorporate safety features related to such checks, while leaving the specifics within the purview of the platforms themselves. For example, the platforms could create filters by which users have the option to include or eliminate matches with certain types of convictions or issues, or the platforms could themselves choose to disqualify certain users from their community.

However, in the context of crowdfunding, the SEC expressly denied a requirement “to make publicly available the results of the background checks or the sources consulted.”⁸² The SEC reasoned:

[T]he goal of the background check is sufficiently served by the exclusion of an issuer from the intermediary’s platform. We do not believe that making the results or sources publicly available adds a significant degree of investor protection under these circumstances, given the potential problems that could arise from such public disclosure of the results, such as the risk of disclosing personally identifiable information or other information with significant potential for misuse.⁸³

The SEC also shared concern that “such requirements could add to the cost of administration and could expose the individuals . . . that

82. Crowdfunding, *supra* note 20, at 180.

83. *Id.*

are subject to a background check to harm, for example, if there were errors in the information made publicly available.” Indeed, the misuse of information is a legitimate concern in any context, including on-line dating. While the background check requirement is one of the greatest pitfalls of the current status quo, crafting a framework that protects consumers without compromising user rights and integrity involves overcoming many hurdles.

IV. User Educational Materials

Crowdfunding portals “must ensure that investors understand the risk of the loss of their entire investment by requiring each to read education materials that comply with SEC standards before accepting any commitment, which must be subject to cancellation until 48 hours prior to the campaign’s deadline.”⁸⁴ The SEC also indicated that the educational materials must meet the following requirements:

The educational materials must communicate “effectively and accurately” and explain in plain language the mechanism for purchasing stock of the issuer; the risks of purchasing stock; the types of securities offered on the platform and the risks of each type; the restrictions on resale imposed by law or contract; the kinds of information the issuer is required to provide; the per-investor limitations on investment; the investor’s right to cancel the investment, and the limitations on those rights; the need for the investor to think about whether the investment is appropriate; and that following the investor’s purchase of stock, there might be no further relationship between the investor and the portal.⁸⁵

Similarly, there could be federal regulations requiring online dating platforms to ensure that users understand the risks of their membership by reading and accepting educational materials prior to taking their profile public. The materials should communicate effectively and accurately and explain in plain language the inherent risks associated with online dating. In this respect, Match.com already has a section on its website titled “How to Date Safely,” which provides advice to its community of users.⁸⁶ Advice includes getting to know the person on the platform itself before meeting, meeting and staying in public, informing friends or family members of plans, transporting oneself to and from the meeting, and staying sober during the meeting.⁸⁷ eHarmony also has a similar section that is useful.⁸⁸

84. Epstein & Hashemi, *supra* note 16, at 6.

85. *Id.* at 6–7.

86. *How to Date Safely*, MATCH.COM, <https://www.match.com/help/safetytips.aspx?lid=4> [<https://perma.cc/2EDW-63JA>].

87. *Id.*

In addition to these sorts of safety tips, the educational materials should warn users not to share financial or personal information, such as banking information, or to enter into loan/investment agreements without fully investigating the individual and the proposed arrangement. With online dating growing in popularity, it has become common for scammers to “search chat rooms, dating sites, and social networking sites . . . for vulnerable people who hope to find companionship or love online.”⁸⁹ Indeed, in 2011, the Internet Crime Complaint Center received more than 5,600 romance scam filings.⁹⁰ On February 5, 2018, the Federal Trade Commission (“FTC”) released a statement titled “Beware online dating scams, FTC warns.”⁹¹ The FTC stated:

Millions of Americans use dating sites, social networking sites, and chat rooms to meet people. And many forge successful relationships. But scammers also use these sites to meet potential victims They create fake profiles to build online relationships, and eventually convince people to send money in the name of love. Some even make wedding plans before disappearing with the money.⁹²

The FTC warned that:

[A]n online relationship may not be all it’s cracked up to be if one’s partner wants to: Leave the dating site immediately and use personal email or instant messaging; claims love immediately; claims to be from the United States but is traveling or working overseas; and plans to visit, but is prevented by some traumatic event or a business deal gone sour.⁹³

In an effort to avoid meeting in person, “[s]cammers may also say they are out of the country for business or military duty.”⁹⁴

The educational materials should also include information regarding the shortcomings of criminal background checks and the possibility of identity theft in the event that savvy predators circumvent federal protections. For example, those states that do have laws currently require a warning that “criminal background checks fail to flag all dangerous individuals.”⁹⁵ As to identity theft, platforms should in-

88. eHarmony Customer Care, *safety tips*, EHARMONY, <https://www.eharmony.com/safe-online-dating/> [https://perma.cc/682B-6FKU].

89. Coleman, *supra* note 3, at 168.

90. *Id.* at 166–67.

91. Henry Kenyon, *Beware Online Dating Scams, FTC Warns*, CQ ROLL CALL, Feb. 5, 2018, 2018 WL 702991.

92. *Id.*

93. *Id.*

94. *Id.*

95. O’Day, *supra* note 3, at 337.

form users of ways to recognize a “catfish,” a form of identity theft.⁹⁶ For example, common signs of a catfish may include making excuses about emergencies, or personal or familial problems to prevent an in-person meeting, creating profiles with no photos followed by unrealistic comments such as no access to a webcam, becoming very close very quickly, or otherwise moving along the emotional aspect of the relationship quickly.⁹⁷

Mandating user educational materials may be the most easily applicable aspect of Regulation Crowdfunding to online dating, and may also yield great benefits to users in terms of awareness and protection. While background checks and verification procedures will mitigate overall user risk, there can never be an absolute guarantee that such risks will not materialize. Therefore, individuals must hold themselves accountable for making responsible decisions and engaging in appropriate human interactions. Similar to crowdfunding, the purpose of the educational materials would be to help users realize the risks of online dating and learn how to protect themselves.

V. Creation and Maintenance of User Records

The SEC expressed the importance of subjecting funding portals to recordkeeping requirements to “create a meaningful record of crowdfunding transactions and communications.”⁹⁸ The SEC stated:

[R]equirements . . . enable regulators to more effectively gather information about the activities in which a funding portal has been engaged, as well as about the other parties involved in crowdfunding (*e.g.*, issuers, promoters, and associated persons), to discern whether the funding portals and the other parties are in compli-

96. “Catfishing” is a term used to define someone who pretends to be someone that they are not by creating a false persona online. It is a scam where the “catfish” creates a false identity and seeks out online relationships. While catfishing can take a more social approach toward a friendship, it typically involves romantic relationships. Catfishing is not the mere fudging of weight and height or use of a younger picture. *What Is ‘Catfishing’?*, FINDLAW, <https://consumer.findlaw.com/online-scams/what-is-catfishing.html> [<https://perma.cc/Q97D-Z548>]. Often, the catfish uses someone else’s photo, while consuming their personal details, such as occupation, education, wealth, and health. *Id.* The catfish invents an “entirely fictitious life” based off of the “fictitious identity.” *Id.* “Estimates for catfishing victims are in the thousands,” but this number is likely under representative since victims can be deeply embarrassed and thereby refrain from coming forward and sharing their stories. *Id.*

97. *Id.*; Melanie Schilling, *10 ways to catch out a catfish*, eHARMONY, <https://www.eharmony.com.au/dating-advice/trust-and-safety/10-ways-to-catch-out-a-catfish#.W4gW9C-ZP-Y> [<https://perma.cc/4SQ3-FS8H>].

98. Crowdfunding, *supra* note 20, at 318.

ance with the requirements of Regulation Crowdfunding and any other applicable federal securities laws.⁹⁹

Accordingly, funding portals are required to make and preserve certain records for five years.¹⁰⁰ These records relate to investors who purchase or attempt to purchase securities, issuers who offer and sell or attempt to offer and sell securities, communications that occur on or through the portal, notices provided by the portal to issuers and investors, and agreements entered into by the portal.¹⁰¹

Similarly, online dating platforms also could be required to keep records for a minimum time period. This includes records relating to, at a minimum, the user's profile and any changes made thereto, the user's communications on the platform, and any reports made against the user. By storing this information, the platforms could deter user misconduct, while also implementing technology to detect misconduct or dangerous or fraudulent communications. Also, if litigation is filed, then it would be much easier to discover and use pertinent information.

VI. Conclusion

While the purposes behind online dating and equity crowdfunding are inherently different, the current federal regulations for funding portals provide an effective starting point for implementing federal regulations for online dating platforms. Specifically, to decrease the risks associated with online dating and to create a safer environment, Congress could require online dating platforms to register with a federal agency, conduct background checks, engage in verification procedures, educate users, and maintain user records. Imposing these requirements on the platforms would in effect let users hold the platforms responsible where they fail to fulfill their legal and moral duties to protect users on their platforms, and would also ensure that users understand the risks involved. The goal should be to create a framework that minimizes the risks associated with online dating without stepping on any constitutional rights of adults to enter into romantic relationships with one another or post information on the Internet. Ultimately, users should feel safe and more comfortable when looking for love.

99. *Id.* at 319.

100. *Id.* at 320.

101. *Id.* at 314–16.