June 1, 2020

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090

Re: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets [File Number S7–05–20]

Dear Ms. Countryman:

I am pleased to provide these comments regarding the proposed rule entitled the 'Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets.'[1]

Request for Comment 1. Should we adopt a comprehensive integration framework for registered and exempt offerings, as proposed? Is the proposed general principle of integration, which requires an issuer to consider the particular facts and circumstances of each offering, appropriate? Should the framework also include provisions applying this general principle to particular fact patterns? If so, are the proposed provisions appropriate? Are there other provisions applying the general principle to specific fact patterns that we should include? In light of the proposed provisions, should the rules define the terms "pre-existing" and "substantive relationship"? Should we instead eliminate the concept of integration altogether and rely on general anti-evasion principles to prohibit the use of multiple closely-timed offerings to evade the securities laws?

Response 1. The Commission's integration doctrine has been problematic in practice for a very long time.[2] It has too many vague factors uncertainly weighted. The proposed cross-exemption safe harbors are an improvement. They will reduce uncertainty and facilitate capital formation without having an adverse impact on investors.

Request for Comment 3. Should we adopt specific safe harbors as part of the proposed integration framework? If so, are the proposed safe harbors appropriate? Are there additional or different safe harbors we should codify? What effect, if any, would the proposed safe harbors

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[1] "Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets," Proposed Rule, *Federal Register*, Vol. 85, No. 62, March 31, 2020, pp. 17956-18051 https://www.federalregister.gov/documents/2020/03/31/2020-04799/facilitating-capital-formation-and-expanding-investment-opportunities-by-improving-access-to-capital (hereinafter "Proposing Release").

[2] See, for example, Stuart R. Cohn, "Keep Securities Reform Moving: Eliminate the SEC's Integration Doctrine," *Hofstra Law Review*, Vol. 44, No. 3 (2015) http://scholarship.law.ufl.edu/facultypub/745; Rutheford B Campbell, Jr., "The Overwhelming Case for Elimination of the Integration Doctrine Under the Securities Act of 1933," *Kentucky Law Journal*, Vol. 89 (2001) https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1149&context=law_facpub.

have on investor protection or on issuers' ability to raise capital in the exempt offering markets? Should any of the integration provisions in proposed Rule 152(a) be reframed as safe harbors in proposed Rule 152(b)? Similarly, should any of the safe harbors in proposed Rule 152(b) be reframed as principles of integration in proposed Rule 152(a)?

Response 3. The proposed safe harbors are the essence of the improvement provided by the proposed rule. The core integration rule in the proposed Rule 152 does not materially improve the situation. Ergo, the Commission definitely should adopt specific safe harbors.

Request for Comment 4. Do the proposed rules make clear the interaction between the integration provisions set forth in proposed Rule 152(a) and the non-exclusive safe harbors set forth in proposed Rule 152(b)?

Response 4. Yes.

Request for Comment 5. Should we include an integration safe harbor that would apply to any offering made more than 30 calendar days prior to, or more than 30 calendar days after, another offering, as proposed? Is this time period too short? Would a longer time period such as 45, 90, or 120 days be more appropriate? Would this proposal raise any investor protection concerns?

Response 5. I believe that in practice this safe harbor will become the most important because it is a relatively clear, bright-line rule. 30 days is an appropriate period. It is long enough to provide a clear break between offerings but short enough that the integration rule is unlikely to prove a major barrier to dynamic companies seeking to raise capital using different kinds of offerings over time.

Request for Comment 8. Should we adopt an integration safe harbor for all offerings made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S, as proposed?

Response 8. Yes. The integration doctrine should not be a barrier to compensatory benefit plans and compensatory benefit plans should not be a barrier to raising capital for the issuer.

Request for Comment 9. Is it necessary to reference Rule 701 in proposed Rule 152(b)(2), given the integration provision in Rule 701(f)?

Response 9. No. However, it does no harm and since proposed Rule 152 is a general integration rule adopted after Rule 701(f), having the Rule 701 safe harbor explicitly stated aids clarity and makes it virtually impossible for the Commission's intent to be misconstrued.

Request for Comment 13. Should we adopt the safe harbor in proposed Rule 152(b)(4) that would apply to any offering in reliance on an exemption for which general solicitation is permitted made subsequent to an offering that has been terminated or completed?

Response 13. Yes. The integration safe harbor should be the same whether the new or terminated offering involves general solicitation or not.

Request for Comment 15. Instead of our proposed approach to replace the current integration provisions in Securities Act exemptions with a cross-reference to proposed Rule 152, should we revise the current integration provisions to reflect the provisions of proposed Rule 152? Alternatively, should we revise the current safe harbor provisions in the Securities Act exemptions to reflect the safe harbor provisions of proposed Rule 152(b) and provide cross-references to Rule 152(a) for guidance on integration when these safe harbors are not applicable?

Response 15. Having one cross-exemption integration rule improves clarity. The approach adopted by the proposed rule is superior to having them spread among multiple rules. It also makes it more likely that a future Commission will think about integration rules holistically and not adopt piecemeal and different changes for specific exemptions.

Request for Comment 16. Should we codify in Regulation Crowdfunding the Commission's existing integration guidance providing that offers and sales made in reliance on Regulation Crowdfunding will not be integrated with other exempt offerings made by the issuer, provided that each offering complies with the requirements of the applicable exemption that is being relied upon for the particular offering in Rule 100 of Regulation Crowdfunding, as proposed?

Response 16. The Crowdfunding non-integration provisions should be added as an additional safe harbor to the proposed Rule 152. Rule 152 is meant to be a cross-exemption general integration rule. Including crowdfunding will aid clarity.

Request for Comment 19. Should we, as proposed, provide a specific exception for communications in connection with a "demo-day" or similar event so that it would not be considered general solicitation if certain conditions are met? Should we permit organizations other than those listed in proposed Rule 148 to act as sponsors of such events? An instruction to the proposed rule provides that the term "angel investor group" means a group that is composed of accredited investors that holds regular meetings and has written processes and procedures for making investment decisions, either individually or among the membership of the group as a whole, and is neither associated nor affiliated with brokers, dealers, or investment advisers. Does this definition appropriately cover the types of groups that sponsor such events, or are there changes that should be made to the definition? Should we include, as proposed, accelerators and incubators as organizations that may act as sponsors of these events? Should we define the terms "accelerator" and "incubator" for this purpose? Alternatively, should we specify only the types of groups that would be prohibited from acting as sponsors of these events, such as broker-dealers, investment advisers, or others? Are the proposed conditions to this exception, such as limitations on the sponsor's fees and the types of information an issuer may provide at the event appropriate? If not, how should those conditions be revised? Are there additional conditions that we should specify with respect to this exception, such as a requirement that certain disclosures be provided to event attendees, or limitations on the characteristics of the entities that may avail themselves of this exception (*i.e.*, entities formed for the purposes of sponsoring events in order to engage in general solicitation)?

Response 19. Proposed Rule 148 has a similar objective to the provisions of the Helping Angels Lead Our Startups Act (the "HALOS Act") [3] and would help entrepreneurs seeking capital to find investors.

The Commission should be reluctant to create artificial regulatory barriers to entrepreneurial capital formation unless there is a very sound policy reason to do so. It is also problematic to afford special advantages to governments or tax-exempt organizations. Paying taxes and running a business should not be disfavored. Thus, I would recommend allowing any business or organization to hold "demo days" unless the sponsor of the event is in a prohibited class (which in the proposed rule would include broker-dealers and investment advisers).

Request for Comment 20. Should we provide a definition of "general solicitation" and "general advertising"? If so, how should those terms be defined? Should we instead eliminate all prohibitions on "general solicitation" and "general advertising" and focus investor protections at the time of sale rather than at the time of offer?

Response 20. There is a very strong rationale for moving the focus of investor protection to sales (or purchases) rather than focusing on offers and solicitation. An investor who merely heard or received a solicitation or offer but does not purchase a security cannot be harmed to any material degree since none of the investor's money is at risk. Such a shift of focus would simplify the analysis of many issues since it is much easier to determine whether a sale or purchase occurred than whether an offer occurred.

Request for Comment 21. Should we move the existing list of examples provided in Rule 502(c) to a new rule? Do the current examples in Rule 502(c) pose any particular challenges we should consider in formulating a new rule? Are there different or additional examples that we should provide? For example, should we include any form of direct mail, telephone, e-mail, text messaging, or similar method of communication, if the issuer (or any underwriter, broker, dealer, or agent acting on behalf of the issuer) does not have a pre-existing, substantive relationship with the offerees, or cannot otherwise demonstrate the absence of a general solicitation?

Response 21. It is apparent when reading Rule 502(c) that it was written before the internet and electronic communication became ubiquitous. It effectively defines 'general solicitation or general advertising" as "[a]ny advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio." It would seem that email or text messages, publicly available web sites, social media and similar means should be included in the definition.

Request for Comment 24. Should we, as proposed, permit generic solicitations of interest in advance of an exempt offering of securities under any exemption from registration? Are there any investor protection concerns with doing so? Should we limit the ability to provide testing-the-waters materials to IAIs and QIBs?

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[3] This bill passed the House in the 115th Congress (H.R.79, 115th Congress). In the 116th Congress it is H.R. 1909.

Response 24. Generic solicitations of interest or "test the waters" provisions enable an issuer to more accurately price an offering or even determine whether the expense of an offering is warranted. They pose little downside to investors since no sale of securities can be made until the requisite disclosure documents are provided to investors. There is no good reason to afford a special advantage to qualified institutional buyers and institutional accredited investors, since sales cannot be effected.

Request for Comment 26. Should we, as proposed, require an issuer to provide the generic solicitation materials to non-accredited investors in a subsequent Rule 506(b) exempt offering if such Rule 506(b) offering is within 30 days of the generic solicitation? Should we require such materials to be provided to the Commission? Should we require such material to be provided to investors or the Commission even outside of the 30-day period proposed?

Response 26. The Commission should not require generic solicitation material to be provided to Rule 506(b) investors or the Commission outside of the 30-day period. The offering documents should govern. Rule 506(b) works well. The Commission should not try to fix something that is not broken. It should not start bureaucratizing Rule 506. It should not adopt rules that are at cross purposes to the proposed Rule 152.

Request for Comment 27. Should we require an issuer that uses generic solicitation materials and subsequently relies on Rule 506(c), Rule 504, Rule 147, Rule 147A, or an exemption other than Regulation A, Regulation Crowdfunding, or Rule 506(b) within 30 days to provide the generic solicitation materials to such investors? Should we require such materials to be provided to the Commission? Should we require such material to be provided to investors or the Commission even outside of the 30-day period proposed?

Response 27. The Commission should not require generic solicitation material to be provided to investors or the Commission even outside of the 30-day period. The offering documents should govern. It should not adopt rules that are at cross purposes to the proposed Rule 152.

Request for Comment 28. Should we, as proposed, amend Regulation Crowdfunding to permit testing-the-waters for a Regulation Crowdfunding offering, similar to the current testing-the-waters provision of Regulation A? Should we impose additional restrictions on the manner or content of such communications? For example, should we permit testing-the-waters in Regulation Crowdfunding only if any such communications are only conducted through an intermediary's platform, or only if the testing-the-waters materials are required to direct investors to the funding portal (or broker-dealer) for more information on the offering?

Response 28. Yes. The proposed rule would aid issuers in better determining price and interest. No additional restriction are warranted since investors may not invest until they have received the offering statement.

Request for Comment 29. As proposed, the rules would not preempt state securities law registration and qualification requirements for offers made under the proposed Rule 241 exemption. Should we adopt Rule 241 as proposed? Would the lack of state preemption make it less likely that issuers will use proposed Rule 241? If so, should we preempt state securities law

registration and qualification requirements for offers made under the proposed Rule 241 exemption? If not, should we limit preemption to materials provided to accredited investors or QIBs and IAIs?

Response 29. Experience repeatedly has shown that state registration and qualification requirements increase expenses, introduce delays, and do virtually nothing to protect investors (and in some cases objectively harm investors).[4] All of this is particularly true in merit review states. Unless preempted, they will make any federal provision largely ineffective.

The Commission had very nearly killed Regulation A.[5] In 2011, the year before the JOBS Act, only one Regulation A offering was completed.[6] Title IV of the JOBS Act gave it new life with what has come to be known as Regulation A plus. Yet the amount raised using Regulation A is a disappointment – albeit a predictable one.[7] Two Commission decisions have been the primary reason. Probably the most important reason – and the factor relevant to this discussion – was the Commission's decision to not preempt Blue Sky registration and qualification requirements for Tier 1 offerings or Tier 2 secondary offerings. Tier 2 primary offerings are not subject to Blue Sky qualification requirements. This decision has meant that secondary markets have largely failed to develop, making the exemption relatively unattractive because investors have no cost-effective means of selling their investment. The failure to preempt Blue Sky laws for Tier 2 secondary offerings makes it harder for investors to sell their securities and realize a fair price. This decision has objectively and demonstrably harmed investors. The Commission's failure to preempt blue sky laws has had a very substantial negative impact on Tier 1 offerings (only $61 million in 2018) and hurt Tier 2 ($675 million in 2018).[8] The fact that even relatively small offerings use Tier 2, that 2/3 of the offerings are Tier 2 and that about 90 percent of the capital is raised using Tier 2 all point to the negative impact of the Commission's decision regarding Blue Sky laws.[9] The NASAA coordinated review program is a failure and should be acknowledged as such. A secondary reason for Regulation A's lackluster performance is the Commission's decision to add, on its own initiative, bureaucratic and costly rules limiting the amount an investor may invest in a Regulation A offering by income or net worth.

Regulation D is a success because it is a lightly regulated means of raising capital and because of the preemption of state Blue Sky registration and qualification laws with respect to Rule 506

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[4] For a discussion of these issues, see Rutheford B. Campbell Jr., "The Case for Federal Pre-Emption of State Blue Sky Laws," Chapter 6, *Prosperity Unleashed: Smarter Financial Regulation*, Norbert J. Michel, Editor (The Heritage Foundation: 2017) http://thf-reports.s3.amazonaws.com/2017/ProsperityUnleashed.pdf.

[5] See Rutheford B Campbell, Jr., "Regulation A: Small Businesses' Search for a Moderate Capital," *Delaware Journal of Corporate Law*, Vol. 31, pp. 71-123 (2006) https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1125&context=law_facpub; Stuart R. Cohn and Gregory C. Yadley, "Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns," 4 *NYU Journal of Law and Business*, Vol 4, pp. 1-87 (Fall 2007) https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1257&context=facultypub.

[6] "Factors That May Affect Trends in Regulation A Offerings," United States Government Accountability Office, July 2012 (GAO-12-839).

[7] David R. Burton, Comments, "Proposed Rule Amendments for Small and Additional Issues Exemptions under Section 3(b) of the Securities Act," March 21, 2014 https://www.sec.gov/comments/s7-11-13/s71113-52.pdf.

[8] Concept Release, Table 2.

[9] For statistics, see Concept Release, Table 8.

offerings since the enactment of the National Securities Markets Improvement Act of 1996.[10] It is the primary means by which entrepreneurs raise capital. Rule 506 offerings eclipsed others Regulation D offerings because only Rule 506 offerings are Blue Sky exempt.

Request for Comment 34. We note that the vast majority of Regulation D issuers continue to raise capital through Rule 506(b) offerings. Are issuers hesitant to rely on Rule 506(c) (as suggested by the data on amounts raised under that exemption) as compared to other exemptions? If so, why? Is the requirement to take reasonable steps to verify accredited investor status having an impact on the willingness of issuers to use Rule 506(c)?

Response 34. The primary impediment to the use of Rule 506(c) is probably the income verification requirements. The final rule created a safe harbor that inevitably, in practice, became the rule. Thus, "reasonable steps to verify" effectively means obtaining tax returns or comprehensive financial data proving net worth. Many investors are reluctant to provide such sensitive information to issuers with whom they have no relationship as the price of making an investment and doing so involves time and expense. Moreover, given the potential liability, accountants, lawyers and broker-dealers are unlikely to make certifications except perhaps for very large, lucrative clients. Issuers seek to avoid the compliance costs and regulatory risks. This was entirely predictable.[11]

Self-certification is permitted in the United Kingdom both for sophisticated investors and high net worth investors (income of £100,000 or more or net assets of £250,000 or more).[12] Self-

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[10] The National Securities Markets Improvement Act of 1996 (NSMIA) amended section 18 of the Securities Act (15 USC 77r(a)) to exempt from state securities regulation any covered security. 15 USC 77r(b)(4)(E) provides that "[a] security is a covered security with respect to a transaction that is exempt from registration under this subchapter pursuant to … commission rules or regulations issued under section 77d(2) of this title, except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 77d(2) of this title that are in effect on September 1, 1996. Section 77d(2) is the U.S. code reference to section 4(2) of the Securities Act (now section 4(a)(2)), to wit, transactions by an issuer not involving any public offering. Only Rule 506 of Regulation D relied on this provision. See "Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers of Sales," *Federal Register*, Vol. 47 (March 16, 1982), p. 11251. Rule 505 and Rule 504 relied instead on section 3(b) of the Securities Act.

[11] Comment letter of David R. Burton regarding "Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings," October 5, 2012 https://www.sec.gov/comments/s7-07-12/s70712-118.pdf.

[12] See *Conduct of Business Sourcebook*, United Kingdom Financial Conduct Authority, sections 4.12.6-4.12.11. A self-certified sophisticated investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"SELF-CERTIFIED SOPHISTICATED INVESTOR STATEMENT

I declare that I am a self-certified sophisticated investor for the purposes of the restriction on promotion of non-mainstream pooled investments. I understand that this means:

> (i) I can receive promotional communications made by a person who is authorised by the Financial Conduct Authority which relate to investment activity in non-mainstream pooled investments;
> (ii) the investments to which the promotions will relate may expose me to a significant risk of losing all of the property invested.

I am a self-certified sophisticated investor because at least one of the following applies:

certification should be allowed for all Rule 506 offerings and obtaining an investor self-certification should be deemed to constitute taking “reasonable steps to verify that purchasers of the securities are accredited investors” as required by the JOBS Act. Should policymakers choose not to adopt this approach, it would be possible to remove many of the problems associated with the SEC rule while still addressing unease that traditional self-certification (as is routinely done in 506(b) offerings) is inadequate. This would be accomplished by requiring investors to make their self-certifications under penalty of perjury. This would make investors less willing to lie on their certifications to issuers since a criminal penalty for doing so would attach to their fraudulent behavior.

Section 1746 of Title 28 authorizes this approach. It reads:

> 28 USC §1746
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> Unsworn declarations under penalty of perjury Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
> (Signature)
> (2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
> (Signature)

> (a) I am a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date below;
> (b) I have made more than one investment in an unlisted company in the two years prior to the date below;
> (c) I am working, or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;
> (d) I am currently, or have been in the two years prior to the date below, a director of a company with an annual turnover of at least £1 million.

I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me seek advice from someone who specialises in advising on non-mainstream pooled investments.

Request for Comment 35. Should we provide an additional method of verification, as proposed, that would allow an issuer to establish that an investor that the issuer has previously verified remains an accredited investor as of the time of sale, so long as the investor provides a written representation to that effect to the issuer and the issuer is not aware of information to the contrary? If so, should we impose a time limit on this method of verification, and if so, how long should that time limit be?

Response 35. Yes, this will be mildly helpful. See also response 34.

Request for Comment 36. Is additional guidance for reasonable steps needed? Would further guidance provide more clarity? Should we eliminate the requirement to take reasonable steps to verify accredited investor status in specified circumstances? If so, which circumstances? Should the verification requirements be eliminated altogether, as suggested by some commenters? Would legislative changes be necessary or helpful?

Response 36. Given the statutory requirement, eliminating the verification requirements altogether is probably best left as a matter for Congress (although the Commission does have very broad exemptive authority). Treating the receipt of self-certification (potentially under penalty of perjury as authorized by 28 USC §1746) as having taken "reasonable steps to verify" accredited investor status is within the Commission's purview. As discussed in detail in my 2011 comment letter, this would be entirely consistent with the legislative history.[13]

Request for Comment 37. Should we consider rescinding the non-exclusive list of reasonable verification methods? Should we consider mandating the items on the list as the exclusive methods for verification?

Response 37. At this point, probably no and definitely no. The list gives some issuers and practitioners comfort and has become the norm. Absent a more explicit authorization of self-certification (with or without the perjury penalty), these provisions would probably be regarded as "best practice" by practitioners and, probably, SEC enforcement staff. Mandating them would also be a mistake since there are undoubtedly other ways to take "reasonable steps to verify" accredited investor status. In addition, if the Commission adopts the proposed rule allowing accredited investor status to be granted based on various indicia of sophistication, then other (non-financial) means of verification must be permitted.

Request for Comment 39. The Commission has proposed to amend the definition of accredited investor to include new categories of natural persons and institutions. Are there additional verification methods that we should include in the non-exclusive list of reasonable verification methods in light of these proposed changes?

Response 39. Additional verification methods must be permitted since financial metrics have nothing to do with whether or not a person has a particular license, accreditation, certification or degree.

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[13] Comment letter of David R. Burton regarding "Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings," October 5, 2012 https://www.sec.gov/comments/s7-07-12/s70712-118.pdf.

Request for Comment 55. Should we, as proposed, increase the Regulation A Tier 2 offering limit from $50 million to $75 million? Is another limit more appropriate, such as $100 million? What are the appropriate considerations in determining a maximum offering size? In connection with an increase, should we consider additional investor protections, such as aligning standards for when an amendment to an offering statement is required with those in registered offerings? Should we instead simply adjust the offering limit for inflation?

Response 55. Increasing the cap is warranted. It will allow more issuers to access the quasi-public Regulation A market sooner and give more investors access to these types of investments (that are usually limited to Regulation D accredited investors). There is some indication that the $50 million cap has limited some issuers and investor protection issues related to Regulation A appear to be small.

Request for Comment 60. Should we, as proposed, increase the Regulation Crowdfunding offering limit from $1.07 million to $5 million? Is another limit more appropriate? Would increasing the limit encourage more issuers to use Regulation Crowdfunding? Are there additional investor protections we should consider in connection with the increase?

Response 60. Yes. Raising the limit to $5 million may make Regulation CF useful to some companies that currently find it to be too expensive and cumbersome given the low maximum amount that can be raised. And it may improve the caliber of issuer that uses crowdfunding.

Request for Comment 62. Should we remove investment limits for accredited investors in Regulation Crowdfunding offerings as proposed? If so, should we require verification of accredited investor status, as suggested by several commenters? Should the limits be modified in some other way?

Response 62. Absolutely. Accredited investors may invest unlimited amounts in Rule 506 offerings which have fewer disclosure requirements than crowdfunding offerings.

Request for Comment 64. The 2017 and 2018 Small Business Forums recommended that the Commission amend Regulation Crowdfunding requirements for debt offerings and small offerings under $250,000, such as by limiting the ongoing reporting obligations to actual investors instead of the general public, and scaling the requirements to reduce accounting, legal and other costs of the offering. Further, the 2019 Small Business Forum recommended that the Commission should provide an exemption for investments of less than $25,000 for up to 35 non-accredited investors, where all investors have access to the same disclosures about the issuer. Should we consider creating a "micro-offering" tier of Regulation Crowdfunding consistent with these recommendations? If so, should that micro-offering exemption be limited to offerings of debt securities conducted through an intermediary, but with no specific disclosure requirements? Would an aggregate offering limit be appropriate, such as $250,000, as recommended by the 2017 and 2018 Small Business Forums? Should such a micro-offering be available to non-accredited investors? If so, should there be a limit on the number of non-accredited investors that may participate? Should there be any limit on how much a person can invest in any one offering or in all such offerings during a specified time period?

Response 64. The issues involving crowdfunding debt securities and micro-offerings are analytically distinct.

If you are raising a small amount of money from a few people, most of whom you know already, you should not have to hire a securities lawyer, do a private placement offering memorandum and file a Form D or otherwise risk being pursued by federal or state regulators, or more likely, being successfully sued by disgruntled investors for selling unregistered securities if the business fails or does not have the hoped for returns. Some businesses are simply of such small scale that they should simply not have to deal with the securities laws. There should be a micro-offering exemption creating a safe harbor such that any offering (within a 12-month period):

(1) to people with whom the issuer (or its officers, directors, or 10 percent or more shareholders) has a pre-exisitng substantive relationship,
(2) involving 35 or fewer investors, or
(3) of less than $500,000

would be deemed not to involve a public offering for purposes of Securities Act section 4(a)(2). The anti-fraud provisions of federal and state laws would remain fully applicable.

Many small or family businesses do not want to have additional equity investors for control or other reasons. Yet they often have difficulty accessing bank credit. The Commission should create a category of crowdfunding security called a "crowdfunding debt security" whereby the issuer offering these debt securities pursuant to Regulation CF would be exempt from many of the Regulation CF continuing disclosure requirements. A debt security would be defined "as any contract that (1) provides for the repayment of the principal amount over a definite period together with interest and (2) provides no payments to the holder other than principal payments, interest payments and penalties for late payments. Continuing disclosure requirements that may be appropriate with respect to an equity investment (particularly if there are active secondary markets), are often entirely inappropriate for debt securities. Valuing equity securities requires making a judgment about expected future earnings by the business. Ergo, significant disclosure is appropriate. Moreover, some form of equity security will exist so long as the company exists. In the case of a loan, disclosure related to future earnings prospects is much less appropriate and needed. The question is simply whether the loan is being repaid and, of course, once it is repaid, there is no need for continued disclosure. And it is highly unlikely that an active secondary market in crowdfunded debt securities will ever develop. Such an approach might give vitality to lending via Title III crowdfunding platforms and make a major contribution to improving small firm access to capital.

Request for Comment 65. Should we extend federal preemption to secondary sales of Regulation A or Regulation Crowdfunding securities, for example, by expanding the definition of "qualified purchaser"? Several Small Business Forums, as well as the Commission's Advisory Committee on Small and Emerging Companies, have recommended that the Commission provide blue sky preemption for secondary trading of securities issued under Tier 2 of Regulation A. Should we preempt state securities registration or other requirements applicable to

secondary sales of all securities initially issued in a Tier 2 Regulation A offering? Should we preempt state securities registration or other requirements applicable to secondary trading of securities only of Regulation A Tier 2 issuers that are current in their ongoing reports? Should we similarly preempt state securities registration or other requirements applicable to secondary trading of securities of initially issued in a Regulation Crowdfunding offering? Should such preemption only apply if the Regulation Crowdfunding issuer is current in its ongoing reports? What other steps should we consider to improve secondary trading liquidity of securities exempt from registration under Regulation A or Regulation Crowdfunding?

Response 65. The most constructive thing that can be done to improve Regulation A and to protect investors in Regulation A offerings is to preempt state qualification and registration requirements for primary and secondary Regulation A offerings. Blue sky laws have prevented the development of an active secondary market for Tier 2 securities even though the primary offerings were Blue Sky exempt. This affirmatively harms investors by making it much, much more difficult for them to get a reasonable price for the securities that they own.

Request for Comment 66. Should we permit crowdfunding issuers to use crowdfunding vehicles as proposed? Would this approach encourage crowdfunding issuers to offer voting rights or other advantageous terms to investors?

Response 66. Yes. But the approach adopted is so utterly prescriptive that it is unlikely to be much used. The only real reason to use the approach *as drafted* would be the section 12(g) problem which, as discussed below, is much more simply and directly addressed by simply removing the asset cap in the conditional 12(g) exemption.

Request for Comment 76. A crowdfunding vehicle may constitute a single record holder for purposes of Section 12(g), rather than treating each of the crowdfunding vehicle's investors as record holders as would be the case if they had invested in the crowdfunding issuer directly. Is this treatment appropriate? Should each investor in the crowdfunding vehicle be treated as a separate record holder for purposes of Section 12(g)? Would legislative changes be necessary or beneficial to address the treatment of the crowdfunding vehicle under Section 12(g)?

Response 76. To the extent that the crowdfunding vehicle provisions are meant to address problems associated with the Securities Exchange Act section 12(g) thresholds, a much simpler (and desirable) approach would be to simply amend the conditional exemption by increasing the asset threshold from $25 million or eliminating this condition altogether. This is a Commission-caused problem. Securities Exchange Act section 12(g)(6) allows the Commission to *unconditionally* exclude *all* securities acquired via crowdfunding from the holder of record count. Ergo, no legislative changes are necessary.[14]

Crowdfunded securities should simply be disregarded for purposes of the 12(g) count. Period. Crowdfunding is meant to be about allowing large numbers of ordinary investors to make small investments. And the Commission should not place conditions on the exemption allowed by 12(g)(6) that have little policy rational but make crowdfunding unattractive because of potential future 12(g) count problems.

[14] See proposing release footnote 421 for the relevant discussion.

Sincerely,

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