Comments on Concept Release on Harmonization of Securities Offering Exemptions From Regulation Crowdfunding Issuers

June 1, 2020

Via email to rule-comments@sec.gov

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

Re: Release Nos. Release Nos. 33-10763; 34-88321; File No. S7-05-20
Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets

Dear Ms. Countryman,

We would like to thank the Commission for providing the opportunity to comment on an area of the law that has had a great deal of importance to our businesses, employees and customers. We were overjoyed to see the Commission's recent proposals to expand certain areas of the private securities market through the Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets rule proposals, File No. S7-05-20 (the "**Proposals**"). In particular, we wish to reflect on the successes of Regulation Crowdfunding ("**Reg. CF**") and Registered Crowdfunding, specifically Tier 2 or Regulation A ("**Reg. A**") and address the parts of the Proposals which we believe are critical to seeing the expansion of Reg. CF and Reg. A, as well as the Commission achieving its goal of providing access to capital to businesses at all stages, protecting investors and maintain fair and transparent markets. Specifically we wish to highlight (i) increasing offering limits and investment limits, (ii) expanding permissible communications before and during an offering by permitting "testing the waters" and reducing overbearing communications rules, (iii) promoting liquidity for investments made under Reg. CF and Reg A, (iv) allowing issuers flexibility in their choice of security instrument during an offering and (v) easing post-offering triggers for registration with the Commission.

We represent a broad range of small businesses and startups that collectively have raised over **see Appendix A** relying on Reg. CF and Reg A, and hail from **see Appendix A**. We come from diverse backgrounds and include among us Founders and CEOs of different races and genders, veterans, immigrants, parents, first-time entrepreneurs and seasoned ones; some of us are *venture-backed*, others *bootstrappers*. Not only are we innovating in e-commerce, artificial intelligence, social media, medicine, blockchain technology and beyond, but also building and operating local brick-and-mortar businesses. Many of us are alumni of traditional donation and pre-order-based crowdfunding, having previously raised money for a product or idea but found ourselves unable under the law at the time to provide a stake in our company to our earliest supporters. During this time of pandemic, we are also represent companies that are in need of support from their communities, who are best able to deem us worthy of their support, trust and ultimately capital.

By utilizing Reg. CF and Reg. A, we have been able to (i) access capital from our communities, (ii) fundraise from sources previously not available to us, (iii) gain exposure for and market our businesses and

(iv) provide our customers and advocates with the opportunity to share in our future. Our successes under Reg. CF and Reg. A have enabled us to hire team members, expand our customer bases, raise further institutional capital and maintain good corporate governance practices. We have worked with crowdfunding intermediaries, broker dealers and third-party service providers to compliantly prepare for our offerings, run transparent and productive offerings and leverage their experience and support to ensure our compliance with the securities laws. Reg. CF has not only provided a critical route to early capitalization and innovation, it has represented, for many of us, our first experience dealing with the highly-regulated area of semi-public offerings of securities. Many of us who utilized Reg. CF later "graduated" to Reg. A, taking the lessons learned in our Reg. CF offerings to better prepare for and understand the undertakings of a Reg. A offering. This experience, while challenging, has made us better founders and executives and strengthened our companies.

I. Offering and Investment Limits

We applaud the Commission's proposals to raise the offering cap per 12-month rolling period to $5 million for Reg. CF and $75 million for Reg. A. Specifically, we believe raising the Reg. CF offering cap will allow the numerous benefits provided to date to be accessed by a greater number of companies and will reduce the limitations previous utilizers have experienced. As companies look to expand our businesses as quickly and efficiently as we can, we often need to raise a significant amount of capital early on. Some of us have had to reject investment commitments from investors who wanted to fund our businesses but were prevented from doing so because of the current total offering cap of $1.07 million per 12-month period under Reg. CF. This offering cap has increased the time and expense associated with raising capital, while upsetting potential advocates and brand ambassadors for our growing companies. The Commission recently found that the average issuer incurred $22,479 in costs associated with conducting a Reg. CF offering (before paying commissions to intermediaries and escrow agents) and expended 241 hours of human capital.[1] Given this high cost of capital, in terms of both dollars and hours, many startup issuers cannot satisfy their capital needs through Reg. CF alone. A number of us have had to spend additional time and expense pursuing other exempt offering types (either after or in conjunction with our Reg. CF offering) to meet our funding needs, as Reg. CF proved an incomplete solution. Therefore, we respectfully urge the Commission to raise the offering cap so that early-stage companies can fulfill their capital needs relying on Reg. CF alone. With respect to Reg. A, each offering is highly unique, and costs can vary, but many companies have experienced offering costs in excess of $300,000 and some as high as $2 million. For the same reasons stated above for Reg. CF, increasing the amount of capital that can be raised through Reg. A will increase the efficiency of these capital formation exercises. We also believe the financial reporting requirements should be raised in a lockstep manner with the offering limits for Reg. CF, thereby reducing the cost of capital for first time offerings up to $5.0 million and second time offerings under $2.5 million.

We also wish to encourage the Commission to quickly adopt the proposals to align investment limits between Reg. CF and Reg A with respect to the calculations. The current rules regarding investment limits have reduced Reg. CF's utility, and many of us have experienced potential investors bemoaning that they could not invest in an offering because they had reached their rolling 12-month limit or being uncertain as to what their investment limit should be due to the calculation for Reg A being similar but materially different. We believe that current Reg. CF investment limits are arbitrary, often confusing for both investors and issuers and provides limited or no investor protection benefits, especially in the case of more sophisticated investors. We therefore support removing investment limits for accredited investors, which would incentivize issuers and accredited investors to utilize Reg. CF rather than other exempt offering types. We support the Commission's proposal to based investment limits under Reg. CF to being based on the greater of an income or net worth standard, rather than the current of standard. [2] We believe the Commission

[1] Report to the Commission, Regulation Crowdfunding, June 18, 2019, at 25.
[2] Release Nos. 33-10763; 34-88321; File No. S7-05-20 at 132.

should go further and also request that investment limits for non-accredited investors be implemented on a *per offering* rather than a *cumulative 12-month* basis, which would clarify and simplify the tracking of these limits for investors, issuers and intermediaries. These changes would also align the investment limits under Reg. CF more closely with those of Reg. A, further encouraging harmonization.

II. Offering Communications

We wish to encourage the Commission to align Reg. CF and Reg. A with respect to issuer's ability to test the waters and to remove certain communications related rules applicable upon the start of an offering, whether by the filing of a Form C or the qualification of the Form 1-A. We wish to advocate for there to be no specific limits in the manner by which offerings are made, so long as the method and manner by which investment commitment are accepted and closed upon meets the other rules controlling Reg. CF or Reg. A respectively. While we represent issuers that have conducted successful Reg. CF offerings, not all offerings succeed. Reg. CF's prohibition on discussing a potential offering before a Form C is filed means that issuers cannot gain any real insight into the likelihood of success before making a decision as to whether or not to incur the significant monetary and human capital costs associated with conducting a Reg. CF offering and potentially face the negative inferences that customers, employees and future financing sources may draw from the public failure of an offering. Not surprisingly, preparing for a Reg. CF offering in such circumstances caused us some trepidation. While we respect and agree with the Commission's view that the crowd should help determine whether an offering is successful, we believe the crowd should *also* contribute to helping companies decide whether or not to conduct a Reg. CF offering in the first place, just as they can and do for Reg. A offerings. Therefore the Commission should impose the proposed "testing the waters" process, we believe that the Commission can be assured that any materials used to "test the waters" will always be documented in, or superseded by, Form C filings that would precede the formal launch of the offering and that investors would not be harmed through such a process.[3] Therefore, we respectfully urge the Commission to permit potential issuers to "test the waters" before formally launching a Reg. CF offering. Not only would this will help to increase the success rate of Reg. CF offerings, it would further align Reg. CF with Reg. A. We also appreciate the Commission's proposal to allow general testing of the waters unspecific to an particular offering exemption, and believe this flexibility will help prospective issuers to properly identify the registration exemption that makes the most sense for their financing goals and offering plan.

Rule 204 of Reg. CF provides that an issuer may not advertise the terms of its Reg. CF offering except by way of a brief notice that directs investors to the relevant intermediary's platform and includes no more than limited specified information regarding the offering and the issuer. By way of example, the Commission explained in the Adopting Release for Reg. CF its expectation that such notices would "be similar to 'tombstone ads' under Securities Act Rule 134, except that the notices will be required to direct an investor to the intermediary's platform through which the offering is being conducted, such as through a link directing the investor to the platform."[4] We agree with the 2018 Small Business Forum that such rules are difficult to understand and "run counter to the intent of the law: to promote the democratization of investing."[5] Our experience supports this assertion as we have found these restrictions confusing and counterintuitive. We do not believe that allowing issuers to engage in offering-related communications outside of the relevant platform's channels after their Form C has been filed with the Commission would raise significant investor protection concerns, as all sales would remain restricted to the regulated platform. Such communications would also remain subject to the antifraud and other civil liability provisions of the federal securities laws. Accordingly, we recommend that the Commission permit Reg. CF issuers to engage

[3] Release Nos. 33-10763; 34-88321; File No. S7-05-20 at 53.

[4] *See* Release No. 33-9974 (Oct. 30, 2015), at 139.

[5] *See* Final Report of the 2018 SEC Government-Business Forum on Small Business Capital Formation (Jun. 2019), at 20.

in such communications as issuers are allowed to in all other exempt offerings. Further, we wish to ask that the Commission remove certain advertising rules which may prohibit advertisements by print media, radio and television, mediums which do not provide for easy ways to provide a hyperlink to an EDGAR filing. Instead we recommend that any advertisement that cannot provide a link directly to EDGAR should instead provide simple instructions to visit the issuer's website, which should provide a prominent link to an intermediary's platform for Reg. CF offerings or directly to EDGAR for Form 1-A filings under Reg. A.

III. Promoting Liquidity

Reg. CF and Reg. A both benefit from Blue Sky preemption with respect to the sale of securities thereunder.[6] However, secondary transactions are not treated the same way, creating great uncertainty for our investors as to how, when and at what cost they can sell or otherwise dispose of their securities. The Commission asked, "Should we extend federal preemption to secondary sales of Reg. A or Regulation Crowdfunding securities, for example, by expanding the definition of "qualified purchaser"? We believe the answer is an absolute "yes", as recommend by 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 Reg. A.[7]

IV. Flexibility in Instruments

We wish to comment on the proposed rules and commentary found in the Proposals that pertain to the estimated 300 small businesses, startups and early stage companies that have chosen to conduct their Reg. CF offerings using Simple Agreements for Future Equity ("SAFEs"). We believe any proposal that may prohibit the use of the SAFE would not harmonize Reg. CF relative to other offering exemptions, instead it would simply add additional uncertainty for issuers considering which offering exemption(s) to pursue either singularly or simultaneously. Modifying Reg. CF only to exclude particular security types such as SAFEs[8] would (i) improperly target SAFEs in light of the disclosure requirements of Reg. CF, which we believe are appropriately protective of investors (ii) have the effect of restricting access to capital in the private markets and (iii) would likely encourage companies to avoid the disclosure and suitability requirements of Reg. CF, therefore reducing the "crowds" access to investment opportunities as issuers continue to rely on the more flexible offering exemptions under Reg. D and (iv) stifle the growth and innovative spirit of Reg. CF. We believe that the Commission should not deviate from its longstanding approach of basing exemptions on the characteristics of the securities themselves or the transactions in which they are offered or sold and therefore should remove all restrictions on security type for Reg. A and Reg. CF due to the issuer eligibility requirements act as the effective gate to prevent investment companies and other highly speculative special purpose issuers from utilizing the exemptions.[9]

SAFEs are one of the most popular securities offered in Reg. CF offerings,[10] which has resulted in a wealth of literature and guidance regarding their use, conversion mechanics, risks and common terms.[11]

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[6] We are aware that some states continue to require an issuer to register as a dealer or engage a registered dealer to make sales in their state, which we find antithetical to the federal preemption these rules are supposed to provide.
[7] Release Nos. 33-10763; 34-88321; File No. S7-05-20 at 137, FN 307.
[8] Release at 158.
[9] Id. at 10.
[10] See Release at 262 "SAFEs accounted for 21 percent of the number of offerings and 24 percent of the aggregate target amount sought."
[11] A simple Google search of "SAFE", "Crowd SAFE" and "Simple Agreement for Future Equity" will provide hundreds of educational resources discussing the pros and cons of SAFE instruments as well as other convertible

The Commission itself has issued educational materials regarding SAFEs.[12] While we commend the Commission on its efforts to provide clarity and guidance for investors who may be offered non-traditional securities under Reg. CF, we believe that the Proposal expresses undue concern regarding SAFEs and that the Commission should continue to let registered funding portals and broker dealers to determine the suitability of offerings on their platforms, as provided for in the Rule 400 of Regulation Crowdfunding. SAFEs provide numerous benefits, for example, many investors do not wish to have a direct beneficial ownership in companies organized as LLCs or LPs, and instead opt to invest via a SAFE or a Convertible Note with a requirement that there can be no conversion unless and until the company has been restructured and incorporated as a corporation. Regardless of whether an investment is made in an LLC or corporation, the main difference between SAFE and Convertible Note is that the former does not accrue ongoing interest. Interests accrued under a Convertible Note is often de minimis and not paid out in cash, but it results in complex accounting obligations and added expenses for the issuer as well as the investors (primarily in the form of Form K-1 issuance and IRS reporting). Because of that, from our experience SAFEs are preferred by the majority of founders and investors due to the reduced cost and complication, regardless of the form of entity issuing them. We also believe the Commission's proposals to allow special purpose vehicles, as proposed, would not provide the necessary efficiencies that can be achieved with the use of SAFEs and other convertible instruments that are under scrutiny.

V. Section 12(g)

The final issue we would like to address is the application of Section 12(g) of the Exchange Act to Reg. CF offerings. While we appreciate that the JOBS Act excluded Reg. CF investors from counting as holders of record in certain circumstances, we believe that the total asset test of $25 million is arbitrary and too low, especially given that Reg. CF encourages broad investor bases and, accordingly, many Reg. CF offerings have more than 500 participants – it is important to note that we do not believe that Reg. CF issuers can generally avail themselves of the higher 2,000 holder of record threshold with respect to accredited investors as Reg. CF issuers and intermediaries typically do not take steps to accredit investors under the current rules. Taken together, these provisions mean that successful and fast-growing Reg. CF issuers may face compelled registration under Section 12(g) much earlier in their lifecycles than they would if they pursued other exempt offering types. We therefore advocate either (i) permanently excluding investors who purchased securities through Reg. CF from counting as holders of record under Section 12(g) of the Exchange Act or (ii) if an issuer that conducted an offering under Reg. CF later conducts a Reg. A offering and such issuer's trigger for 12(g) reporting is potentially dictated by §240.12b-2, then the securities issued under Reg. CF should be conditionally exempt from securities counted under §240.12g-6.

We thank you for your time and consideration and the efforts that the Commission has undertaken to date to ease the capital-raising burdens that small businesses and startups face.

Sincerely,

See **Appendix A** which will be continuously updated.

security instruments as well as a recent FINRA educational release, see Be Safe—5 Things You Need to Know About SAFE Securities and Crowdfunding, available at https://www.finra.org/investors/insights/safe-securities.

[12] See SEC Office of Investor Education and Advocacy, Investor Bulletin: Be Cautious of SAFEs in Crowdfunding (May 9, 2017), available at https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_safes.

Appendix A:

As of June 1, 2020, for additions see:
https://docs.google.com/spreadsheets/d/1IvIbDK9FJyrO5HU3uULgqaS8LtIMLxXM_eX2-iqrONs/edit#gid=0

Dollars Raised: over $8.9 million

Eshwawr Inapuri, CEO
InnaMed, Inc.
Philadelphia, PA

Pierre Laguerre, CEO
Fleeting, Inc.
New York, NY

Arjun Rai, CEO
Woofy, Inc.
New York, NY

Alex Fedosseev, CEO
1World Online, Inc.
Redwood City, CA

Ladar Levison, CEO
Lavabit LLC
Dallas, TX

Justin Silver, COO
Aavrani, Inc.
New York, NY

Alice Cheng
TaxDrop Inc.
New York, NY

Jiannan Zhang
Twenty-Second Century Dora Technology Holdings Inc.
San Francisco, CA

Starling Childs
Citiesense Inc.
New York, NY

Andrew Christodoulides, CEO
WeLivv, Inc.
New York, NY

Edward, Lerner, CEO
PiQPiQ, Inc.
San Francisco, CA

Jewl Zimmer, CEO
Kind Collection Inc.
San Francisco, CA

Sumaya Lakis, CEO
Layali LLC
Athens GA

Fred McGill, CEO
SimpleShowing Holdings Inc.
Atlanta, GA

Harold Hughes, CEO
BandwagonFanClub, Inc.
Greenville, SC

Paul Gambill, CEO
Nori LLC
Seattle, WA

Kerem Ozkan, CEO
Soar Robotics, Inc.
Los Angeles, CA

Ezra Goldman, CEO
Upshift, Inc.
Oakland, CA

Katherine Stillwell, CEO
Jumpstart Insurnace Solutions, Inc.
Oakland, CA

Taylor Jacobson
Focusmate Inc
New York, NY

Marco Trujillo, CEO
Sunu, Inc.
Cambridge, MA