

Netcapital

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May 31, 2020

VIA ELECTRONIC SUBMISSION (rule-comments@sec.gov)

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

Re: File Number S7-05-20; Release Nos. 33-10763; 34-88321. Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets

Dear Ms. Countryman:

Netcapital Funding Portal Inc. (“Netcapital”)¹ appreciates the opportunity to comment on various proposals (“Proposals”) made by the Securities and Exchange Commission (the “Commission”) in the proposing release entitled “Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets” (Release Nos. 33-10763; 34-88321, March 4, 2020) (the “Proposing Release”).

Among other things, the Commission’s Proposal includes a set of amendments to the exemptive framework under the Securities Act of 1933 (“1933 Act”) that would simplify, harmonize, and improve certain aspects of the framework to promote capital formation while preserving or enhancing important investor protections. We believe that these proposals are timely and appropriate based on experience with this exemptive framework over time and that they will benefit issuers raising capital under Regulation Crowdfunding (“Reg CF”) adopted under the 1933 Act and investors participating in these offerings.

General Comments:

We commend the Commission’s Proposals and generally support their adoption. The Proposal will advance important goals for reducing impediments to access to capital for issuers and expanding investment opportunities for investors. Since its inception, Netcapital has worked with well over 100 companies seeking to raise capital using the exempt offering framework under the Securities Act (both Section 4(a)(6) offerings conducted under Reg CF and, with our broker-dealer partner, 506(c) offerings conducted under Regulation D). The success of these offerings has allowed companies access to critical capital necessary to grow their business, develop and bring to the market new and innovative products and services, expand employment and other opportunities for their employees, and contribute to economic growth and vitality in the communities they operate in and touch.

¹ Netcapital (www.netcapital.com) is a funding portal registered with the Commission and a member of the Financial Industry Regulatory Authority, Inc.

We have experience working with various types of exempt offerings. These offering types have evolved over time through legislative changes and Commission rules, resulting in a current offering framework that is complex and made up of differing requirements and conditions for exemption, some of which may be confusing and difficult for both issuers and investors in these offerings to understand and to navigate. In June 2019, the Commission issued a concept release that solicited public comment on possible ways to simplify, harmonize, and improve the exempt offering framework under the 1933 Act.² We are pleased to see that the Proposal incorporates key input and feedback from a range of stakeholders, including recommendations of the Commission's advisory committees, the SEC's Government-Business Forum on Small Business Capital Formation, direct outreach to, and engagement with, investors and entrepreneurs, and Congressional feedback.

Specific Comments:

Based on our status as a registered funding portal, Netcapital's comments on the Proposal are focused on certain aspects that relate to Reg CF as noted below.

Offering and Investment Limits.

The Commission's proposed revisions to the current offering and investment limits under Reg CF would:

- raise the offering limit in Reg CF from \$1.07 million to \$5 million;
- amend the investment limits for investors in Reg CF offerings by:
 - not applying any investment limits to accredited investors; and
 - revising the calculation method for investment limits for non-accredited investors to allow them to rely on the greater of their annual income or net worth when calculating the limit on how much they can invest; and

We support the increase in the offering limit to \$5 million. We believe that this change will enhance the appeal to issuers of offerings conducted under Reg CF and will improve issuers' ability to raise capital. We believe that this change will enhance the attractiveness of a Reg CF offering to issuers. This is because many issuers, believing that the current Reg CF offering limit is too low, may currently choose not to utilize the Reg CF exemption.

While the proposed increase to \$5 million is welcome, we hope that this increase is part of a set of stepped up increases in this limit from the Commission over time to help keep the approach to crowdfunding offerings in the United States competitive with the limits in other jurisdictions, such as France, Germany, Israel and the U.K. which are more mature than U.S. industry and where these limits can be higher. Therefore, we would like to see the Commission schedule for consideration on a regular basis action to monitor and continue to increase this investment limit, based on ongoing experience under Reg CF and the other rules providing for offering exemptions and a continual assessment of the relative competitiveness of the limits established in Reg CF against those established by other regulators. Over time, we believe that this investment limit should continue to be adjusted upwards.

² Release Nos. 33-10649; 34-86129; IA-5256; IC-33512; File No. S7-08-19. June 18, 2019.

We also support the proposed changes to the investment limits for investors in these offerings, particularly the change in investment limits for non-accredited investors to be based on the greater of an income or net worth standard as well as the recognition by the Commission under the Proposal that it is not necessary to apply any investment limits to accredited investors. Taken together, these changes will provide investors with greater flexibility in making their investment decisions. These changes will improve investor access to these markets. We are pleased to see that the Commission, in arriving at this proposal, continues to apply its experience with Reg CF since its adoption to identify opportunities to update the regulation in order to promote the utility of this important exemption to issuers and investors consistent with the protection of investors.

Integration Framework:

The current 1933 Act integration framework for registered and exempt offerings consists of a mixture of rules and Commission guidance for determining whether multiple securities transactions should be considered part of the same offering.

The Commission proposed changes to the framework to better facilitate this determination by providing a general principle of integration that looks to the particular facts and circumstances of the offering, and focuses the analysis on whether the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering.

Clarification and modernization of the existing integration standards is an important objective and will reduce unnecessary complexities and reduce uncertainties and risks for issuers when planning and carrying out capital raising activities. Hopefully, this results in issuers seeking to raise more capital in the securities markets and on a timetable more dictated by their capital needs and less by adhering to integration-imposed timeframes. The greater certainty around the application of integration concepts along with the proposed and harmonized safe harbor should enhance the attractiveness of conducting offerings under Reg CF. In response to Question 16 of the Proposing Release, we recommend that the Commission codify in Reg CF its existing integration guidance so that issuers and their advisers in this space will have the benefit of clear and transparent guidance from the Commission on this important topic that can impact the planning and execution of offerings conducted under Reg CF.

Other Improvements to Specific Exemptions:

The amendments also would, among other things:

- amend Rule 204 to permit greater flexibility on investor communication and content
- add a new item to the non-exclusive list of verification methods in Rule 506(c); and
- harmonize the bad actor disqualification provisions in Regulation D, Regulation A, and Reg CF.

With respect to Rule 204, we also support the proposal to amend Rule 204 under Reg CF to state that oral communications with prospective investors are permitted once the Form C is filed, so long as the communications comply with the requirements of Rule 204. This will provide issuers with greater certainty as to the acceptable form and content of communications with potential issuers which, in turn, may make Reg CF more attractive to issuers. Finally, these changes would promote an overall important goal of aligning Reg CF rules more closely with Rule 255 of Regulation A.

We would support expanding the types of information considered to be terms of an offering for the purposes of Rule 204 to include, among other things, planned use of proceeds and progress towards meeting the issuer's funding goals. These are important pieces of information of interest to an investor contemplating an investment and their absence creates periodic frustration with investors over the current limitations in Reg CF. An expansion of the definition in Rule 204 would lead to investors receiving more and better information which in turn would promote greater investor acceptance of Reg CF offerings.

With respect to verification of accredited investor status, we fully support the proposal to add a new item to the non-exclusive list in Rule 506(c) that would allow an issuer to establish that an investor for which the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation to that effect and the issuer is not aware of information to the contrary. This will reduce the cost and burden of verification, avoid frustration and confusion by investors who often view subsequent verification as intrusive, duplicative and unnecessary and appropriately address investor privacy concerns for investors who participate in Rule 506(c) offerings on the Netcapital platform. As noted in Question 35, we do not support any time limit on this method of verification provided the two conditions described above continue to be met. We believe these two conditions are reasonable steps to maintain the "evergreen" status of an investor's accredited status determination.

With respect to the proposal to harmonize the bad actor disqualification provisions, we support this harmonization effort by adjusting the look-back requirements in Regulation A and Reg CF to include the time of sale in addition to the time of filing. This will simplify compliance and due diligence activities and improve investor protections. We also support the proposal to amend Rule 503(a) to reflect the offering statement filing requirement before the first Reg CF sale and to more closely track the requirement in Rule 262(a) of Regulation A.

Netcapital Recommendation Concerning Annual Reports prepared and filed under Reg CF:

An issuer that sold securities in a Reg CF offering is required to provide an annual report on Form C-AR no later than 120 days after the end of its fiscal year. The report must be filed on EDGAR and posted on the issuer's website. The annual report requires information similar to what is required in the offering statement, although neither an audit nor a review of the financial statements is required.

Issuers must comply with the annual reporting requirement until one of the following occurs:

- (1) the issuer is required to file reports under Exchange Act Sections 13(a) or 15(d);
- (2) the issuer has filed at least one annual report and has fewer than 300 holders of record;
- (3) the issuer has filed at least three annual reports and has total assets that do not exceed \$10 million;
- (4) the issuer or another party purchases or repurchases all of the securities issued pursuant to Regulation Crowdfunding, including any payment in full of debt securities or any complete redemption of redeemable securities; or
- (5) the issuer liquidates or dissolves in accordance with state law.

Any issuer terminating its annual reporting obligations is required to file notice on Form C-TR reporting that it will no longer provide annual reports pursuant to the requirements of Reg CF.

We have seen issuers prepare only one or three annual reports and then rely on the conditions in Rule 202(b) to cease any further current reporting to their investors, typically because they meet the standards under Rule 202(b)(2) and/or (3) relating to holders of record and total assets, respectively. We understand that many issuers find the annual report to be an unwelcome regulatory requirement and a cost and distraction they would prefer to minimize. Some issuers are concerned about making updated information about their business and related financial statements in a report that is publicly available. While we are sympathetic to many of these concerns of issuers, we also believe that investors in Reg CF offerings need ongoing and current reporting from these issuers to be able to evaluate their investments over time.

In order to create a more attractive framework for issuers to prepare, disseminate and file these reports and to provide more information to investors in Reg CF offerings, we recommend that the Commission consider amending Rule 202(b)(2) and (3). The other current conditions that excuse the annual report requirement set forth in Rule 202(a) would be unchanged. The amendment would continue to require each Reg CF issuer meeting the conditions in Rule 202(b)(2) or (3) to prepare, disseminate and file at least one annual report. However, the conditions that now excuse an issuer from any further annual report requirements would be changed; the same conditions in an amended rule would instead permit an issuer to produce an annual report that contained all of the information required in an annual report except would permit the omission of updated financial statements. Under this proposal, while investors would not have the benefit of updated financial reporting, they would receive updates for all of the other items of information set forth in Rule 202(a) that must be addressed in an annual report; issuers would be relieved of providing the most sensitive information that today may be acting as the main deterrent to producing ongoing annual reports. Under this proposal, except for investors in issuers which meet the conditions of Rule 202(b)(1), (4) or (5), all investors in Reg CF offerings would continue to receive some form of ongoing, current reporting through an annual report from an issuer.

Notwithstanding the current or our proposed changes in the conditions which excuse an issuer from the Reg CF annual report requirement, even when an available exemption exists, many issuers may conclude that continuing to produce annual reports on a regular annual basis is a best practice for a variety of reasons. For example, the annual report demonstrates a key commitment to maintaining open, ongoing and transparent investor relations with the issuer's various shareholders and other stakeholders. These reports are likely highly valued by current investors (and future investors) and help to meet their expectations as investors in the company. In addition, the discipline and process of creating these reports keeps an issuer focused on telling its story in a fresh and current fashion that may pay dividends in many ways, such as accelerating its preparedness to raise further rounds of capital in the future.

Finally, notwithstanding whether one of these exemptions would excuse an issuer's obligation to prepare, file and disseminate an annual report to its investors, issuers should be strongly urged to carefully weigh and balance the relatively modest costs and effort of producing the report against the many benefits that result from being an issuer with current ongoing reporting to its shareholder base.

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We appreciate the opportunity to provide these comments on the Proposal and to suggest an amendment relating to annual reports under Rule 202 of Reg CF. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact the undersigned at [REDACTED] or [REDACTED] or my colleague, Jim Bordewick, at [REDACTED] or [REDACTED]

Respectfully submitted,



Jason Frishman
Chief Executive Officer

cc: James R. Bordewick, Jr., Head of Operations