crowdcheck

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October 30,201

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

Re: Concept Release on Harmonization of Securities Exemptions
File No. S7-08-19

Dear Ms. Countryman:

CrowdCheck, Inc. appreciates the opportunity to comment on the existing exempt offering framework under the Securities Act of 1933. CrowdCheck, together with its affiliated law firm, CrowdCheck Law, provides a wide range of compliance, diligence and legal services for capital formation by early-stage companies and the intermediaries who support them. CrowdCheck has unparalleled experience and expertise reaching across all the exemptions covered by the Concept Release: we have a market-leading position with respect to Regulation A offerings, we have prepared or reviewed literally hundreds of Regulation CF filings, and we have prepared or advised on many Regulation D offerings.

While general policy recommendations are outside the scope of the Concept Release, we note that the Commission will not be able to avoid making significant policy choices in making changes to the exempt offering framework. Changes to some exemptions will have significant impact on other exemptions. Changes to some exemptions will have impact on registered offerings, and affect the analysis that a prospective issuer makes in deciding whether to offer in the public or private markets. The choices made by the Commission may also even have broader societal impact. We note that the Chairman has expressed concern that "Main Street investors generally have access to only … our public markets."[1] Further, fewer companies seek to become reporting companies, limiting the opportunities for retail investors to share in the growth of corporate America. And yet, if some of the changes advocated by industry commentators in recent years (and suggested as possible amendments by the Release) are adopted, the Commission may find itself in the position of exacerbating that trend. Federal Reserve figures show an increase in wealth inequality.[2] Household wealth in the United States is typically built by

[1] Chairman Jay Clayton, Remarks to the Economic Club of New York, Sept. 9, 2019, *available at* https://www.sec.gov/news/speech/speech-clayton-2019-09-09.

[2] See, e.g., Distribution of Household Wealth in the U.S. since 1989, https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/ (last accessed Oct. 29, 2019).

ownership of property or through investments. While in general we would not advocate that households that do not have sufficient savings to cope with a relatively modest financial emergency[3] invest in high-risk investments, nor do we believe that small investments into such securities are ever likely to materially change a household's financial status, we still believe that the Commission should be sensitive to any changes that would make the markets that are most attractive to issuers completely unavailable to those of modest means.

We therefore believe that most of the issues raised in the Concept Release should be considered as a whole, not in isolation. We are pleased that the Commission is raising those issues together. We would go further, however, and argue that if the Commission intends to adopt amendments that would likely make the private markets more attractive, it should consider complementary measures that would not result in incentivizing companies to leave the public markets altogether. We believe there is an urgent need for a category of reporting requirements under the Exchange Act of 1934 specifically aimed at earlier-stage companies, potentially based on the reporting requirements of Regulation A, which would reduce the reporting burden on smaller companies. We further believe that the Commission should investigate whether there are steps it could take to encourage wealth-building in general and retail involvement in IPOs in particular.

Our comments and recommendations are particularly focused on making compliance with the securities laws correspond to the benefits of receiving public investment for early-stage companies, especially (in the case of the exemptions aimed at earlier-stage companies) with respect to issuers who can't afford legal assistance. These recommendations also address ways in which more investors would be able to invest in early-stage companies, with certain measures to mitigate the risk to those individual investors.

We have answered all the questions in the Concept Release that cover the areas we practice in. Where we believe that standalone rulemaking that does not have broader implications is possible, and could be introduced other than as part of a comprehensive package of harmonization, we have noted that point.

The following is a summary of our principal recommendations:

- Cease the regulation of "offers" and focus on sales. No investor has ever been harmed by being the subject of an offer; the focus of investor protection should be on circumstances in which money is taken from investors. Ensuring that investors have access to the information they need to make an informed investment decision is easier at the time of sale than at the time of offer.
    - In the meantime, create a rational matrix for testing-the-waters and other marketing communications, permitting the same activities across all exemptions. An essential aspect of harmonization is that where there is a restriction on an activity, it should have the same conditions across all exemptions.

[3] https://www.forbes.com/sites/zackfriedman/2018/05/24/money-retirement-student-loans/#168014111059.

    - Add Regulation S, which is technically a non-application of the registration provisions as opposed to an exemption, to the harmonization efforts. If offers continue to be regulated, then the “directed selling effort” prohibition in Regulation S should be lifted or otherwise conformed to the exempt offerings.

- Eliminate the concept of integration, which no longer serves any purpose except as an anti-avoidance mechanism.

- Expand the definition of “accredited investor” so that retail investors and employees are not excluded from early-stage investments, provided that where not accredited by other measures they are advised by a person acting in a fiduciary capacity:

    - Keep the existing financial qualification, but index it to inflation from now on.

    - Add accreditation by means of securities-specific education (holding a CFA designation or certain FINRA licenses).

    - Add accreditation by a specific test for private investors.

    - Add “accreditation by chaperone” where an independent fiduciary with a direct relationship to the investor makes decisions in the investor’s best interests.

- Eliminate investor limits for accredited investors. If they can make their own informed investment decisions, they can make their own decisions as to what they can afford to lose.

- Permit single-security special-purpose vehicles (“single security SPVs”) advised by independent registered investment advisors (“RIAs”) to be used in Regulation A and Regulation CF offerings without triggering registration requirements under the Investment Company Act of 1940.

- Adopt rules under the Investment Company Act, the Investment Advisers Act of 1940 and the Securities Act to permit diversified investment funds advised by independent registered investment advisers to offer interests in pooled investment vehicles in reliance on Regulation CF and Regulation A.

- “Rebrand” the Tiers of Regulation A so that issuers and investors understand the differences between them and the additional protections that are provided by state review of offerings in some cases.

- Provide greater guidance to issuers making offerings under Regulation CF as to its disclosure requirements, and remove the requirement for audited financial statements.

- Expand the conditional exemption from registration under the Exchange Act so that issuers are not forced into reporting status before they are ready.

- Preempt state law for secondary trading of Regulation A and Regulation CF securities.

Current Exempt Offering Framework

1. Does the existing exempt offering framework provide appropriate options for different types of issuers to raise capital at key stages of their business cycle? For example, are there capital raising needs specific to any of the following that are not being met by the current exemptions: Small issuers; startup issuers; issuers in a particular industry, such as technology, biotechnology, manufacturing, or consumer products; issuers in different geographic regions, including those in rural areas or those affected by natural disasters; or issuers led by minorities, women, or veterans? What types of changes should we consider to address any such gaps in the exempt offering framework? Would legislative changes be necessary or beneficial to address any such gaps?

We do not believe that there are any "gaps" in coverage to the extent that an issuer in a particular industry, geography or stage of development would not be able to find an exemption suitable to its needs, other than the "micro-exemption" discussed below. We do believe, however, that certain of the exemptions would be more attractive to certain issuers if amended, as discussed in more detail below.

2. Do the existing exemptions from registration appropriately address capital formation and investor protection considerations? If so, should we retain our current exempt offering framework as it is? Are there burdens imposed by the rules that can be lifted while still providing adequate investor protection?

Many aspects of the existing exemptions are inconsistent and counter-intuitive and therefore do not foster capital formation. If made more consistent, coordinated and simpler, capital formation could be encouraged without undermining investor protection. Indeed, investor protection would be improved if issuers were not subject to liability from non-substantive "foot faults" and were rather made liable for substantive matters. We have indicated burdens that could be lifted in our discussion of the specific exemptions below.

3. Is the existing exempt offering framework too complex? Should we reduce or simplify the number of exemptions available? If so, should we focus on having a limited number of exemptions based on the amount of capital sought (for example, a micro exemption, an exemption for offerings up to $75 million, and an unlimited offering exemption)? Or should we focus our exemptions on the type of investor allowed to participate? Would legislative changes be necessary or beneficial if we were to replace the current exempt offering framework with a simpler offering framework?

There is some merit to having all the exemptions "in the same place", as it were, with one "Exempt Offering Regulation" ("EOR") setting out all the conditions to exemption in one regulation. It is inevitable, however, that the EOR will end up as a matrix, with a number of variables based on size of offering and type of investors. We do not think it is workable to base the conditions of such EOR solely on the size of offering or type of investors. A $50 million offering to accredited investors is inherently differently from a $50 million offering to non-accredited investors.

We would note that eliminating the regulation of offers, as suggested in the response to Question 5, would reduce the complexity of the exemptive framework significantly.

In an ideal world, the EOR would be constructed so as to permit early-stage companies to make compliant offerings without needing to engage expensive lawyers. However, based on our experience, this is probably an unachievable objective. Some of the concepts behind securities laws, as discussed in response to Question 4 below, are alien to non-lawyers; additionally, as discussed more broadly in reference to Regulation CF below, the intersection of corporate and securities laws, and issuers' lack of understanding of the requirements of corporate law, means that it is difficult to make offerings of securities without at least some legal support.

4. Are the exemptions themselves too complex? Can issuers understand their options and effectively choose the one best suited to their needs? Do any exemptions present pitfalls for small businesses, especially for issuers that may be unfamiliar with the general concepts underlying the federal securities laws?

We do not believe that the exemptions themselves, when each is considered separately, are too complex. However, the differences between the conditions that apply to each exemption are illogical and counter-intuitive to the extent that an issuer that has been thoroughly schooled on the restrictions applicable to one exemption may mistakenly apply the rules of that exemption to a different exemption, and end up violating a rule as a result of its own diligence.

In our experience, unfamiliarity with the concepts underlying the federal securities laws particularly leads to problems in the area of general solicitation and the regulation of offers. Applying the principles of "market conditioning", such as those outlined in Securities Act Release No. 33-3844 (*Publication of Information Prior to or After the Effective Date of a Registration Statement*, Oct. 8, 1957) inevitably leads to pointless arguments between issuer and counsel as to what the issuer hopes to achieve with the communications they are making, and frantic efforts to "fix" communications that the issuer has made without realizing the light in which the communication may be viewed by regulators. Deregulating offers would reduce the burden on issuers without diminishing investor protection.

Other areas that lead to confusion are concepts like "predecessor issuer" and "control." Several exemptions are drafted on the assumption that these concepts will be understood

One area that no amount of harmonization can address, however, is the failure of small businesses to grasp the concept of a "misleading statement" under securities law, which we encounter frequently in the context of exempt offerings.

5. In light of the fact that some exemptions impose limited or no restrictions at the time of the offer, should we revise our exemptions across the board to focus consistently on investor protections at the time of sale rather than at the time of offer? If our exemptions focused on investor protections at the time of sale rather than at the time of offer, should offers be deregulated altogether? How would that affect capital formation in the exempt market and what investor protections would be necessary or *beneficial in such a framework? Would legislative changes be necessary or beneficial if we were to focus on the sale of a security, rather than the offer and sale?*

We believe that no additional investor protection is provided by the regulation of offers, which is a specifically American and increasingly outdated concept. Investor protection should focus on the time of sale rather than the time of offer, and offers should be deregulated entirely insofar as the registration provisions of the Securities Act are concerned. The antifraud provisions of the securities laws would still apply. Misleading statements made or misleading practices used at the time of offer would continue to form the basis for liability. This is not a new or particularly revolutionary concept and has been under discussion since at least the 1990s.[4]

While we recognize that Section 5 of the Securities Act covers offers as well as sales, we do not believe a legislative change would be necessary or helpful. The various exemptions could provide blanket exemptions from registration for offers providing that the conditions of sale were met. In the event an issuer failed to comply with the conditions of sale relating to a particular exemption, any offers made could also be included in any regulatory action or lawsuit.

6. What metrics should we consider in evaluating the impact of our exemptions on efficiency, competition, capital formation, and investor protection? In particular:

- *How should we evaluate whether our existing exemptions appropriately promote efficiency, competition, and capital formation? For example, in evaluating our exempt offering market, should we consider whether investors have more opportunities to participate in exempt offerings? To appropriately evaluate the market, should we consider the cost of capital for a variety of issuers? What other indicators should we consider?*

While cost of capital would be a good measure of efficiency to use, in reality the Commission is never going to get any accurate information about cost of capital unless it undertakes its own, focused research project. Form 1-A does request information about certain cost items, but in our experience those fields, when completed, are sometimes approximations and sometimes preliminary estimates that are not updated, and it is not clear whether or where to include one of the largest expenses in online capital formation, the cost of marketing. In both Regulation A and Regulation CF offerings, the commission to be paid to intermediaries is disclosed, but this is not the case in Regulation D offerings. We would note that even in registered offerings using Form S-1, where Item 511 of Regulation S-K requires the disclosure of offering expenses, the information filed often consists of a number obtained by one junior associate on the issuer's side calling to get an approximate dollar number from an equally junior member of the underwriter's team at the last minute of a transaction. We would not advise trying to obtain this information as a general matter, as that same pattern will be repeated, and hurried estimates giving the impression of accuracy will end up being presented (and possibly received) as accurate data points.

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[4] Linda Quinn, *Reforming the Securities Act of 1933: A Conceptual Framework*, Insights, Vol. 10, No. 1, Jan. 1996, *available at* https://www.sec.gov/info/smallbus/acsec/reformingsa33.pdf.

We do believe that an appropriate measure of success is the number and range of investment opportunities available to retail investors. While in general we are not fans of adding additional mandated disclosure, asking issuers to specify the number of investors in an offering in any "exit report" type filings (Form C-U, Form 1-Z, etc.) would not be unduly burdensome, and would help the Commission assess where further changes might need to be made.

- *How should we evaluate whether our exemptions provide adequate investor protection? For example, is there quantitative data available that shows an increased incidence of fraud in particular types of exempt offerings or in the exempt market as a whole? If so, what are the causes or explanations and what should we do to address it? What other factors should we consider in assessing investor protection?*

We are not aware of quantitative data covering fraud in exempt offerings. We discuss problematic offerings in the context of Regulation A and Regulation CF in the responses to Questions 52 and 81 below, but these instances are derived from our own specific experience. We note that many market participants and commentators have remarked upon the dearth of hard data in the private markets. We do not know of any entity that has the incentive and resources to undertake quantitative research in this area.

7. How has technology affected an issuer's ability to communicate with its potential and current investors? Do our exempt offering rules limit an issuer's ability to provide disclosure promptly to its potential and current investors? Are there technologies or means of communication (e.g., online chat or message boards) that would effectively provide updated disclosure to potential and current investors that are currently not being used due to provisions in our rules or regulations? If so, what rules are limiting this disclosure and what changes should we consider? Given the transformation of information dissemination that has occurred since our rules were adopted and particularly over the last two decades, should we consider any rule changes to enhance an issuer's ability to communicate with investors throughout the exempt offering framework? How would such changes affect capital formation in the exempt market and what investor protections would be necessary or beneficial in such a framework? Would legislative changes be necessary or beneficial to make such changes?

The rules for exempt offerings currently in effect were written for a different era and under completely different expectations as to how issuers would communicate with investors. The "Ur Exemption" -- the exemption that drives the thinking of many market participants (and especially regulators) is Regulation D, specifically Rule 506 in the form in which it existed until 2013, now known as Rule 506(b). This rule prohibits general solicitation and general advertising, and thus the starting point in thinking about communications is typically that there must be restrictions on communications. Registered offerings are also subject to limitations on the timing and content of communications outside of the prospectus filed with the Commission.

We also note that the traditional paradigm includes the involvement of intermediaries. In registered offerings, issuers' interaction with investors is choreographed by underwriters, and the issuer only has direct interaction with investors in scheduled roadshows, and hardly ever any interaction with retail investors. In traditional Rule 506 offerings, issuers may interact through brokers or with a limited number of investors.

For decades, the starting point with respect to communications regarding securities offerings has essentially been "You can't; but here are some limited and complicated exceptions to that rule."

We suggest that this paradigm is backwards, and the starting point regarding communications should be "Information is good; some of it is required to be published in specified places and all of it is subject to antifraud rules if you say anything misleading."

The current communications rules are ill-suited to online offerings, in particular. Issuers making online offerings and their marketing teams are heavy users of all forms of electronic communication. There are so many different channels of communication and different social media platforms have widely differing (and constantly changing) rules about how things like "legends and links"[5] can be included. For example, we have spent many hours trying to understand the format of Instagram "Stories" and the way in which we can add legends and links to communications relating to a Regulation A offering in compliance with the platform's guidance on format of communications, percentage of communications that may be text, etc. Even when we have solved the issue for one channel of communication for one platform, the platforms develop new formats. The current rules are not flexible enough. Rules and interpretations can't change fast enough. The very flexibility the Commission exhibited, for example, in defining "terms of the offering" in Regulation CF communications has led to some issuers gaming the system at worst and getting very confused at best. We suggest that the best approach is to change to regulating information at the time of sale, making sure mandated disclosure is presented at that time, and using antifraud rules to pursue misleading statements and practices used at the time of offer. As stated above, we believe this could be done without legislative changes.

8. Are there rule changes we should consider to ease issuers' transition from one exempt offering to another as their businesses develop and grow?

In our experience, issuers do not generally transition from one type of exemption to another in the sense of making a predictable and orderly path from the small offering exemptions to the larger offering exemptions. Rather, they use the exemptions in response to their specific needs at any given time. An issuer may make a Regulation CF offering, then a Regulation D offering, then start a Regulation A offering but be unable to offer to investors in certain states and use Regulation CF to include those investors. It is not uncommon for an issuer to be relying on Regulations CF, A and D simultaneously. We believe that in harmonizing the various exemptions, the Commission should assume that they may well all be used at the same time, as opposed to seriatim, and that the integration concept (if retained) should be applied with that likelihood in mind.

9. Would rule changes that simplify, harmonize, and improve the exempt offering framework have an effect on the registered public markets? For example, would a more streamlined exempt market

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[5] See, e.g., Rule 255 of Regulation A, Solicitations of interest and other communications (17 C.F.R. § 230.255), *and* Rule 204 of Regulation Crowdfunding, Advertising (17 C.F.R. § 227.204).

encourage more issuers to remain private longer or forgo registered offerings, and result in less capital being raised in the registered market over time? Are there changes to the current exempt offering framework that we should consider to help issuers transition to a registered public offering without undue friction or delay? Are there changes to the exempt offering framework that we should consider to encourage more issuers to enter the registered public markets? Would these changes increase the costs to issuers? Would these changes benefit investors or particular classes of investors? Would legislative changes be necessary or beneficial to address any such changes?

Making private offerings more efficient and opening them up to a broader investor base will inevitably make private offerings more attractive, and lead to companies remaining private longer, unless the burden of being a public company is made easier to bear. If the Commission wishes to make the exempt to registered transition easier, it would either have to make exempt offerings more difficult, subject to more conditions and limitations (which we do not recommend) or make the process of becoming a registered company easier (which we do recommend). We would be in favor of the Regulation A disclosure regime forming the basis for an alternative form of full registration under the Exchange Act for smaller, non-listed companies.

10. Which conditions or requirements are most or least effective at protecting investors in exempt offerings? Are there changes to these investor protections or additional measures we should implement to provide more effective investor protection in exempt offerings? Are there investor protection conditions that we should eliminate or modify because they are ineffective or unnecessary? Would legislative changes be necessary or beneficial to address any changes to investor protection conditions?

We believe that Staff review of filings provides the single most effective investor protection. Further protections are added when a counsel's opinion with respect to the existence and validity of the securities being offered (see our response to Question 49) is required, although that requirement adds to the cost of capital.

Regulating offers has no discernible impact on investor protection.

11. In light of the increased amount of capital raised through the exempt offering framework, should we consider rule changes that will help make exempt offerings more accessible to a broader group of retail investors than those who currently qualify as accredited investors? If so, what types of changes should we consider? For example, should we expand the definition of accredited investor to take into account characteristics other than an individual's wealth? Should we allow investors, after receiving disclosure about the risks, to opt into accredited status? Should we amend the existing exemptions or adopt new exemptions to accommodate some form of nonaccredited investor participation such that these exemptions may be more attractive to, or more widely used by, issuers?

We believe that the exempt offerings should be available to a broader range of investors, some of which should be designated accredited investors by reason of their education, and some of which should be permitted to invest in exempt offerings only when "chaperoned" by a person with a direct fiduciary relationship to the investor.

We understand, from talking to people involved in the definition of accredited investor in the 1980s, that the reliance on financial criteria was supposed to act as a proxy for ensuring that the investors were able to avail themselves of professional investment advice.[6] It thus seems logical that the people dispensing that advice should be able to invest on their own behalf, instead of just committing investments on behalf of their wealthy clients.

We believe that the following persons should be treated as "accredited investors":

- Investors who meet the current financial thresholds, which should be inflation-adjusted from now on.
- Accredited investors by reason of specific educational qualifications or licenses, including CFA qualifications, and certain FINRA Series.
- Investors that pass a test for investors in the private markets.
- Persons "accredited by chaperone" (where an independent fiduciary with a relationship to the investor makes investment decisions).

We do not believe that "opting in" to accredited status is appropriate. This would exacerbate the "check-the-box-and-agree-to-everything" mentality that already exists in certain Rule 506 offerings.

12. When the current exemptions from registration include offering limits or limits on the amount an individual investor may invest, what should we take into account to determine whether the limits and amounts are appropriate? Should the amounts of all offering limits or investment limits be subject to periodic inflation adjustments? If so, what inflation measure should we use for such adjustments and how often should the adjustments occur? Should we use dollar limits, or some other measure? For example, should individual investment limits be based on a percentage of the investor's income or investment portfolio? Do these limits impose any particular challenges, for example, by having different effects in different parts of the country due to regional differences? Should any investors be limited in how much they can invest?

Investment limitations are unnecessarily paternalistic, almost impossible to monitor or enforce and should only be applied where required by statute. We also note that the limits are different under Regulation CF and Regulation A, and that Regulation CF does not take into account whether an investor is an accredited investor. This could create a scenario where an investor has a substantial amount of net worth, but little in the way of annual income; that investor would be limited under Regulation CF, while under Regulation D the same investor could invest millions in the same company.

13. Many of the existing exemptions from registration require issuers to provide specified disclosure to investors at the time of the offering and, in some cases, on an ongoing basis following the offering. The type of information required to be provided, and the frequency with which the disclosures are required, vary from exemption to exemption. Should we harmonize the disclosure requirements of the various exemptions? If so, how? Should we focus on making the requirements more uniform or more scaled to

[6] We note in passing that the definition was not, at least originally, intended to be a measure of the ability to absorb loss.

the characteristics of the issuer or of the offering? Could changes to the various disclosure requirements of the exemptions help to facilitate issuers' transition from one exempt offering to another or to a registered offering? Would legislative changes be necessary or beneficial if we were to replace the current exempt offering framework with such a framework?

We believe that a harmonized and rationalized set of disclosures for those exemptions that require disclosure would be a helpful development. There is no reason why the disclosure to be provided to non-accredited investors in Rule 506(b) offerings should be different from the disclosure to be provided in Regulation A offerings. We also note that the differences in ongoing disclosure between Regulation A and Regulation CF do not seem rational (why, for example, do Regulation CF investors need risk factors in ongoing disclosure while Regulation A investors do not?). Since many companies are not subject to ongoing reporting requirements under both Regulation A and Regulation CF, we believe it should be possible to devise a Regulation A annual report that would cover the requirements of both exemptions, without a need for two separate filings.

Harmonizing the disclosures that apply to exempt offerings with the disclosures that apply to registered offerings may have some limited utility in assisting issuers to "graduate" from exempt to registered offerings, but the real challenge for earlier-stage companies is meeting the timing requirements for filings under the Exchange Act.

14. Should the availability of any exemptions be conditioned on the involvement of a registered intermediary, such as the registered funding portal or broker-dealer in crowdfunding offerings, particularly where the offering is open to retail investors who may not currently qualify as accredited investors?

We believe that a registered intermediary plays an essential role where sales are made to non-accredited investors. When selling to non-accredited investors, unless those investors are protected by Staff review, investors should be protected through a fiduciary or a registered intermediary. As discussed further in response to Question 81, however, in Regulation CF the Commission has essentially outsourced the investor protection function to non-fiduciary intermediaries, some of which do an excellent job and some do not.

15. Should the availability of any exemptions be conditioned on particular characteristics of the issuer or lead investor(s)? For example, in an offering to non-accredited investors where there is one or more lead investors, should we require that the lead investor(s) hold a minimum amount of the same security type (or a junior security) sold to the nonaccredited investors?

There is currently no exemption that is conditioned upon the role of a lead investor. If such an exemption were to be introduced, we believe that the interests of an experienced lead investor and a non-accredited investor may potentially vary and that conditioning an exemption on the involvement of a lead investor should only be permitted where the lead investor has a direct fiduciary relationship to the investor and is independent of any platform or intermediary hosting or structuring the offering.

16. Should we consider a more unified approach to the exempt offering framework that focuses on the types of investors permitted to invest in the offering and the size of the offering, tailoring the additional investor protections and conditions to be applied based on those characteristics? For example, should we consider changes to the requirements for any or all of the existing exemptions from registration so that specific requirements (such as disclosure requirements or individual investment limits) will not apply if participation in the offering is limited to accredited investors? Would legislative changes be necessary or beneficial if we were to replace the current exempt offering framework with a more unified approach?

See our response to Question 3.

17. Should we consider rule changes that would allow non-accredited investors to participate in exempt offerings of all types, subject to conditions such as a limit on the size of the offering, a limit on the amount each non-accredited investor could invest in each offering, across all offerings, or across all offerings of a certain type, a decision by the investor—after receiving disclosure about the risks—to opt into the offering, and/or specific disclosure requirements? If so, should we scale the type and amount of information required to be disclosed to nonaccredited investors based on the characteristics of the investors or the offering, such as the net worth or sophistication of the non-accredited investors, or whether the offering amount is capped, individual investment limits apply, or an intermediary is involved in the offering? What benefits would be conferred by such an approach? What would be the investor protection concerns? Would legislative changes be necessary or beneficial if we were to replace the current exempt offering framework with such an approach?

We do not believe it is appropriate to allow non-accredited investors to invest in all offerings under specified conditions. While we believe that the definition of accredited investor should be expanded as discussed below, we do not believe that providing mandated disclosure would, across the board, provide the necessary protection for non-accredited investors and "opting in" to the risks of a private offering would encourage unscrupulous actors to hard sell "the next Facebook." Complying with scaled disclosure would be confusing for issuers and, in the absence of any coordinated enforcement efforts (which we believe will likely be the case), compliance will be patchy.[7]

18. Should we move one or more current exemptions into a single regulation, such as currently provided by Regulation D with respect to the exemptions under Rules 506(b), 506(c), and 504? What, if any, current exemptions should be included in a single set of regulations? Would a new single set of exemptions be overly complicated and obscure any possible benefits of coordination and harmonization?

See our response to Question 3.

19. Are we effectively communicating information about the exempt offering framework, including the requirements of each exemption, to the issuers seeking to raise capital and investors seeking investment opportunities in this market? What types of communications have worked best? How can we improve our communications to issuers and investors about the exempt offering framework? Are there additional

[7] See our response to Question 79, where we discuss inadequate compliance with the disclosure requirements of Regulation CF.

technologies or means of communication that we should use to convey information about exempt offerings to issuers and investors?

While the resources posted on the Commission's website, especially on the Division of Corporation Finance's page, are very useful to lawyers, we find that those materials are often misunderstood by issuers trying to raise funds without legal help. In general, more information in plain English would be welcome. As legal and compliance professionals, we find Compliance and Disclosure Interpretations useful and timely. However, there are lawyers that do not understand the structure of the C&DIs and laypeople are unlikely to even discover that they exist. An introduction to this resource, together with a more sophisticated search tool, would be useful.

We would further note that some no-action letters relied on by the Staff do not appear on the Commission's website, and are only available through paid subscription services.

Accredited Investor Definition

20. Should we change the definition of accredited investor or retain the current definition? If we make changes to the definition, should the changes be consistent with any of the recommendations contained in the Accredited Investor Staff Report? Have there been any relevant developments since the 2015 issuance of the Accredited Investor Staff Report, such as changes to the size or attributes of the pool of persons that may qualify as accredited investors; developments in the market or industry that may assist in potentially identifying new categories of individuals that may qualify as accredited investors; or changes in the risk profile, incidence of fraud, or other investor protection concerns in offerings involving accredited investors that we should consider? How do those changes affect investors, issuers, and other market participants?

We believe that the current definition of accredited investors should be expanded. As discussed further in response to several questions below, while in general we are in favor of creating pathways for persons of more limited means to have broader access to investment opportunities, we believe that the objective of reducing complexity would dictate that there be a limited range of ways in which an investor could qualify as accredited, and clear guidelines as to how an issuer or intermediary would establish that status. We would recommend that the following be treated as accredited investors:

- Natural persons who meet the financial thresholds, as detailed in the answer to Question 21.
- Entities (expanded as discussed in the response to Question 25) who meet the financial thresholds.
- Natural persons who currently hold specified FINRA securities licenses or CFA designation.
- Natural persons who pass an "accredited investor exam" as discussed in the response to Question 22.
- Natural persons investing in a single security SPV advised by an independent registered investment adviser or "chaperone" as outlined in the response to Question 27.

However, we believe that even an apparently modest expansion of the definition might have a disproportionate effect on the private markets. While the Commission estimates that, as of 2013, some 9.9% households are accredited, with only a fraction that actually invest in private markets.[8] We are not aware of any database with respect to the financial standing of investors in the Regulation A and Regulation CF markets, but on the basis of our experience with some of these investors, a large number of them might qualify under an expanded definition based on education and qualifications, and of course many more would qualify if "accreditation by chaperone" were to be adopted. That being the case, the number of retail investors who actually invest in private offerings might increase significantly, skewing the analysis that issuers make in deciding which exemption they might use in favor of the private markets, to the detriment of the public exemptions, Regulation A and CF. That could significantly undermine the use of the public exemptions and the ability of non-accredited investors to invest in early-stage companies.

21. Should we revise the financial thresholds requirements for natural persons to qualify as accredited investors and the list-based approach for entities to qualify as accredited investors? If so, should we consider any of the following approaches to address concerns about how the current definition identifies accredited investor natural persons and entities:

- *Leave the current income and net worth thresholds in place, subject to investment limits;*
- *Create new, additional inflation adjusted income and net worth thresholds that are not subject to investment limits;*
- *As recommended by the Advisory Committee on Small and Emerging Companies in 2016, index all financial thresholds for inflation on a going forward basis;*
- *Permit spousal equivalents to pool their finances for purposes of qualifying as accredited investors;*
- *Revise the definition as it applies to entities with total assets in excess of $5 million by replacing the $5 million assets test with a $5 million investments test and including all entities rather than specifically enumerated types of entities; and*
- *Grandfather issuers' existing investors that are accredited investors under the current definition with respect to future offerings of their securities.*

The first objective of any change to the accredited investor definition must be to "do no harm". We do not believe it would be productive to disrupt the current angel investment infrastructure by imposing new limits on the existing definition; that definition should be kept in place. Imposing investment limits where there previously were none would add an unwarranted level of complexity when the objective is to reduce complexity. If the accredited investor definition is to designate persons who do not need the protection of registration, it is not logical to impose protective measures such as loss-limitation; let AIs decide for themselves how much they can afford to lose.

[8] See, Louis Aguilar, *Revising the "Accredited Investor" Definition to Better Protect Investors*, Dec. 17, 2014, *available at* https://www.sec.gov/news/statement/spch121714laa.html.

We would recommend inflation indexation on the income and net worth thresholds on a going-forward basis.

We would recommend that spousal equivalents should be treated as spouses; there is no need to make distinctions among households based on their marital status.

22. As recommended by the Advisory Committee on Small and Emerging Companies in 2016, the 2016, 2017, and 2018 Small Business Forums, and the 2017 Treasury Report, should we revise the accredited investor definition to allow individuals to qualify as accredited investors based on other measures of sophistication? If so, should we consider any of the following approaches to identify individuals who could qualify as accredited investors based on criteria other than income and net worth:

- *Permit individuals with a minimum amount of investments to qualify as accredited investors;*
- *Permit individuals with certain professional credentials to qualify as accredited investors;*
- *Permit individuals with experience investing in exempt offerings to qualify as accredited investors;*
- *Permit knowledgeable employees of private funds to qualify as accredited investors for investments in their employer's funds;*
- *Permit individuals who pass an accredited investor examination to qualify as accredited investors; and*
- *Permit individuals, after receiving disclosure about the risks, to opt into being accredited investors.*

While in general we are in favor of expansion of the definition, we believe that the objective of reducing complexity would dictate that there be a limited (and easily policed) range of ways in which an investor could qualify as accredited, and clear guidelines as to how an issuer or intermediary would establish that status. We would recommend that the following individuals be treated as accredited investors in addition to those meeting the financial thresholds:

- Natural persons who hold a current FINRA securities license.[9]
- Natural persons who pass a substantive "accredited investor exam," meeting certain criteria, which exams could be designated by Staff No-Action Letter in the same manner as "designated offshore securities markets" are designated under Regulation S. Organizations such as the Crowdfunding Professional Association are interested in developing such exams.

We do not believe that "opt-in accreditation" would provide sufficient investor protection. In our experience, many investors will merely "check the box" without actually understanding what they are agreeing to.

[9] The most appropriate licenses would be Series 7, 24 or 65, although combinations of other licenses may also be appropriate.

23. Under the current definition, a natural person just above the income or net worth thresholds would be able to invest without any limits, but a person just below the thresholds cannot invest at all as an accredited investor. Should we revise this aspect of the definition? If so, how?

We do not believe that it is necessary to create new rules for edge cases, which would make life more complicated for issuers and intermediaries. Moreover, if the definition were to be expanded as discussed below, some people who fall just outside the financial thresholds would be caught by the professional qualification categories, and all would be covered by the RIA "chaperonage" definition discussed in the response to Question 27.

24. What are the advantages and disadvantages to issuers and investors of changing—by either narrowing or expanding—the accredited investor definition?

We believe that any expansion to the definition should be coordinated with any changes made to Regulation CF, because the expansion of the accredited universe (and thus the expansion of the attractiveness of Regulation D to issuers) has the potential to suck some of the air out of the Regulation CF market. We believe the Commission should consider whether this would lead to Regulation CF having more of an adverse selection problem than it does currently.

An expansion of the accredited investor definition, even if relatively modest, will likely lead to increase in number of Regulation D offerings, because the number of actual investors will increase exponentially. Although some issuers and intermediaries will still establish high minimum investments, such as $10,000 or $20,000, since they want a limited number of investors, the use of special purpose vehicles (which would be expanded if "chaperoned" funds were to be treated as accredited) could mean that a relatively large number of investors would be able to make investments without the intermediaries changing their offering conditions. A lot of this activity will be online; online capital formation is more efficient and is also where younger generations naturally look for investment opportunities. The online market, where the relationship between issuer and investors is more attenuated, may become more vulnerable to problematic practices, and prior to facilitating the expansion of the online private markets, it would be a good idea for the Commission to provide substantive guidance on the circumstances in which online investment platforms are subject to the broker-dealer registration requirements of the Exchange Act.

25. Are there other changes to the definition that we should consider when harmonizing our exempt offering rules? For example, should we amend Rule 501(a)(3) to expand the types of entities that may qualify as accredited investors? If so, what types of entities should be included? Should we consider amendments to apply an investments-owned standard, or other alternative standard, for entities to qualify as accredited investors?

We would recommend that all entities be included in the definition, rather than enumerating what type of entities should be covered. The current definition causes anxiety among some practitioners who feel that limited liability companies are not covered by the definition, and appears to exclude some entities, such as Indian Tribes, which should clearly be included.

We do not see any reason to change the definition to reflect an investments-owned test. It would be difficult for an entity to build an investment portfolio while it was a non-accredited investor.

We note that single security SPVs would need to be included in the accredited investor definition without reference to any asset or investment threshold.

26. Many foreign jurisdictions provide exemptions from registration or disclosure requirements for offers and sales of securities to sophisticated or accredited investors. These jurisdictions use a variety of methods to identify sophisticated or accredited investors. In addition to criteria based on income, net worth, total assets, or investment amounts, certain regulatory regimes rely on certification or verification by financial professionals. Are there experiences in other jurisdictions that should inform our approach?

We believe that some other jurisdictions have mimicked certain aspects of the accredited investor definition in their own regulations. We are not aware of any jurisdictions whose definitions of sophisticated or accredited investors would be particularly helpful.

27. Should we, as recommended by the 2017 Treasury Report, revise the accredited investor definition to expand the eligible pool of sophisticated investors? If so, should we permit an investor, whether a natural person or an entity, that is advised by a registered financial professional to be considered an accredited investor? Being advised by a financial professional has not historically been a complete substitute for the protections of the Securities Act registration requirements and, if applicable, the Investment Company Act. If we were to permit an investor advised by a registered financial professional to be considered an accredited investor, should we consider any other investor protections in these circumstances? For example, should we require educational or other qualifications for a financial professional advising such an investor and, if so, what type of qualifications? What additional disclosure, if any, should the financial professional be required to provide to the investor in connection with an investment available only to accredited investors? Should the financial professional be required to assess the appropriateness of the investment in an exempt offering on a transaction-by-transaction basis, or would it be appropriate to make the assessment looking at the investor's investment portfolio as a whole?

As stated above, in response to Question 20, we believe that a non-accredited investor should be able to invest in a single security SPV advised by a registered investment adviser with a fiduciary obligation to the investor. We understand that in 1982 the financial thresholds were intended as a proxy to ensure that an investor had access to professional advice as needed. We suggest making this principle explicit. We suggest the following conditions:

- The RIA should be independent of any intermediary or investment platform and registered with the Commission or a state, and its regulatory filings should reflect expertise in early-stage investing;
- The RIA should have a direct relationship with each investor sufficient to establish the fiduciary relationship between the two and ensure that the investor understands the risks involved in the investment (i.e., this cannot be a "check-the-box" relationship) and
- The fees charged by the RIAS should not be excessive.

We do not believe that the advice of a financial professional at the time of the initial offering alone is necessarily sufficient for the protection of a non-accredited investor, which is why we suggest the use of a single security SPV. In the normal course of development of a private company, additional investment decisions may need to be made (such as a shareholders' vote with respect to the issuer's acquisition by another company). While in some cases any such decision-making will not be required due to drag-along clauses and the like, a fiduciary would be at least able to assess the risks of being dragged along in such circumstances. There is no need to mandate additional information; the requirement that there be a fiduciary relationship and antifraud provisions will mean that advisers will provide appropriate disclosure and ensure that the investors understand it, including the advisers' fees.

We note that the offering of interests in the single security SPV to non-accredited investors would need its own separate exemption from registration.

29. If an investment limit is implemented for investors considered to be accredited investors because they are advised by registered financial professionals, what should we take into consideration in setting the amount of the limit? Should the limit vary depending on the particular exemption relied on for the offering or be consistent for all exempt offerings? Should the limit vary depending on the type of issuer conducting the exempt offering (e.g., whether the issuer is an operating company or a pooled investment fund, whether the issuer has a class of securities registered under the Exchange Act, or whether the issuer is subject to any on-going disclosure requirements)? Would varying limits increase complexity for issuers and investors? Should the limit be applied on a per-offering basis or some other basis? Should the limit be determined on an aggregate basis for all securities purchased in exempt offerings over the course of a year or some other time period?

We do not believe that investment limits are appropriate for accredited investors. An investment decision involves all aspects of investment, including the amount that the investor is able to lose, and there is no reason to suppose that an investor could decide for themself whether the investment was appropriate for their investment profile but somehow be unable to decide whether the amount was appropriate.

30. If we were to expand the definition of an accredited investor and/ or limit the types or amounts of investments by accredited investors in exempt offerings, what challenges would exist in the application and enforcement of the revised criteria?

We believe that the expansion of the definition suggested above is limited to circumstances that are precise and easily policed, and provides the certainty that issuers and intermediaries need.

32. Under Rule 12g–1, to calculate the number of holders of record that were not accredited investors as of the last day of its most recent fiscal year, an issuer needs to determine, based on facts and circumstances, whether prior information provides a basis for a reasonable belief that the security holder continues to be an accredited investor as of the last day of the fiscal year. If such prior information does not provide a reasonable basis, is it difficult for an issuer to calculate the number of holders of record that were not accredited investors as of the last day of its most recent fiscal year pursuant to Rule 12g–1? If so, should we consider changes to Rule 12g–1? For example, should we revise Rule 12g–1 to permit *issuers to determine accredited investor status at the time of the last sale of securities to the respective purchaser, rather than the last day of its most recent fiscal year? Would such a change raise concerns about the use of outdated information that may no longer be reliable?*

We note that if the Commission were to embrace the "accredited by chaperone" concept, that status is transient and offering-specific. The Commission will need to amend Rule 12g-1 in any case to account for that, and the fact that one investor may be accredited with respect to part of her holdings, and non-accredited with respect to another part.

We suggest that the simplest way to permit issuers to make any kind of realistic determination is to amend Rule 12g-1 to provide that if an investor was accredited at the time of his or her last investment, he or she may be treated as accredited, with respect to the entirety of all his or her holdings, permanently. We do not believe that this would materially impact investor protection, but note that part of our thinking here is colored by our belief that companies should not be forced into reporting status solely by reason of the number of equity investors they have.

Section 4(a)(2) and Rule 506

33. Should we consider any changes to Rule 506(b) or 506(c)? Do the requirements of Rules 506(b) and 506(c) appropriately address capital formation and investor protection considerations? Alternatively, should we retain Rules 506(b) and 506(c) as they are?

We understand that many in the venture capital community believe that the ability to include non-accredited investors in Rule 506(b) offerings is useful, and there are certainly cases where an issuer would want to include a non-executive employee, for example, in its offering as a matter of fairness.

The "accreditation by chaperone" concept might be an adequate alternative for permitting non-accredited investors to invest in 506(b) offerings, however. That would not require any additional disclosure to be made. If the ability to include a limited number of non-accredited investors providing that the disclosure requirements are met, those disclosure standards should be harmonized with the requirements of Regulation A, Tier 1.

We note that there is a continuing debate among market participants as to the difference between 506(b) and (c) where it concerns the steps to be taken to confirm accreditation. While weight must be given, as a matter of statutory interpretation, to the requirement of "reasonable steps" to ascertain accredited status for 506(c) offerings, and the Commission has made valiant efforts to explain what these steps might be in the face of criticism from those who insist on treating safe harbors as rulebooks, there also needs to be guidance as to what the appropriate steps are in ascertaining accredited status for 506(b) offerings. Many market participants are convinced that all that is required for 506(b) is for the investor to "check a box" as to accredited status. Many Commission Staffers have said informally "We never said that worked," and yet in the absence of any definitive statements, the practice continues. If, as suggested in Question 34, the exemptions were to be merged, the market would benefit from some certainty in this area.

34. Should we combine the requirements for Rule 506(b) and Rule 506(c) offerings in one exemption? If so, what aspects of each rule should be retained in the combined exemption and why? Would legislative changes be necessary or beneficial to make such changes?

If the regulation of offers were to be abandoned, it would make a lot of sense to have just one exemption under Rule 506, providing that sales to accredited investors could be made with no mandated disclosure and sales to a limited number of non-accredited investors (assuming the Commission did not want to substitute the “accredited by chaperone” concept) could be made with Regulation A Tier 1 disclosure.

35. Is it important to continue to allow non-accredited investors to participate in Rule 506(b) offerings? Are the information requirements having an impact on the willingness of issuers to allow non-accredited investors to participate?

As discussed above, including non-accredited investors serves an important purpose in some cases, although the “accreditation by chaperone” concept might serve the same purpose.

36. Are the current information requirements in Rule 506(b) appropriate or should they be modified? Should we revise the information requirements contained in Rule 502(b) to align those requirements with those of another type of exempt offering, such as Regulation Crowdfunding, Tier 1 of Regulation A, Tier 2 of Regulation A, or Rule 701? How would such changes affect capital raising under Rule 506(b)? Should we consider eliminating or scaling the information requirements depending on the characteristics of the non-accredited investors participating in the offering, such as if all non-accredited investors are advised by a financial professional or a purchaser representative? Should the information requirements vary if the non-accredited investors can only invest a limited amount or if they invest alongside a lead accredited investor on the same terms as the lead investor? Would there be investor protection concerns regarding any reduction in information required to be provided to non-accredited investors?

As discussed above, if this aspect of Rule 506(b) is retained, the disclosure requirements should track Tier 1 of Regulation A. The Commission has already made the decision that this level of information is appropriate for non-accredited investors. Not having to get an audit will increase issuers’ ability to rely on this exemption. If investors are accredited by reason of using a RIA chaperone, the chaperone should decide whether the information presented is sufficient. We do not recommend complicating the exemption further by having different levels of disclosure in the circumstances.

37. Should we amend Regulation D to clarify or define ‘‘general solicitation’’ or ‘‘general advertising’’? Does the current definition pose any particular challenges? Alternatively, should we expand the list of examples provided in Rule 502(c)? Should we consider amending the definition or adding an example clarifying whether participation in a ‘‘demo-day’’ or similar event would be considered general solicitation?

Whether or not a particular communication or event is a general solicitation involves a great deal of time, worry and legal bills, with no impact on investor protection. If the Commission chooses not to regulate “offers,” as we recommend above, the question becomes moot.

38. If we reduce the information requirements in Rule 506(b), should we include investment limits for nonaccredited investors? If so, what limits are appropriate and why? Should accredited investors be subject to investment limits?

We would not think it necessary to include investment limits so long as the disclosure requirements discussed above were followed.

39. Should information requirements apply to accredited investors in offerings under either Rule 506(b) or 506(c)? If so, what type of information requirements would be appropriate? Should any such information requirements apply to all accredited investors, whether natural persons or entities?

See our response to Question 36.

40. 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? Has the adoption of Rule 506(c) enabled issuers to reach a greater number of potential investors and/or increased their access to sources of capital? Are there changes we should consider to encourage capital formation under Rule 506(c), consistent with the protection of investors?

While in many cases, issuers or intermediaries simply do not feel the need to use general solicitation, we believe that some of the hesitancy to use Rule 506(c) comes from intermediaries as opposed to issuers, and is influenced to a certain extent by misinformation. As discussed in the response to Question 33, many market participants are convinced that having investors "check the box" as to their accredited status is sufficient for Rule 506(b). Another source of hesitancy is the fact that not all platforms and intermediaries are set up to accept all the forms of verification included in the safe harbors for 506(c), and some accredited investors have been excluded from offerings as a result of not being able to provide financial information in the format requested. In addition, while there are independent firms that provide verification services, many issuers have expressed concern about the added cost of capital represented by the fees charged by these services. We believe that use of 506(c) will increase over time.

41. Are there data available that show an increase or decrease in fraudulent activity in the Rule 506 market as a result of the adoption of Rule 506(c)? If so, what are the causes or explanations and what should we do to address them?

We are not aware of any data being collected on this specific topic.

42. 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)? Are there additional or alternative verification methods that we should include in the non-exclusive list of reasonable verification methods that would make issuers more willing to use Rule 506(c) or would better address investor protections?

See our responses to Questions 33 and 40.

43. If we do not revise or expand the verification methods in Rule 506(c), but we expand the ''accredited investor'' categories (e.g., to include investors that are financially sophisticated or advised by a financial professional), how would an issuer verify accredited investor status under these new categories?

We believe that the additions to the definition we discuss above are easily established by issuers and intermediaries. A registered investment adviser's status is easily ascertained by reference to the Commission's own website, and persons holding FINRA licenses can be searched for on FINRA's BrokerCheck, for example.

44. Should we consider rule changes to allow non-accredited investors to purchase securities in an offering that involves general solicitation? If so, what types of investor protection conditions should apply? For example, should we allow non-accredited investors to participate in such an offering only if: (1) Such non-accredited investors had a pre-existing substantive relationship with the issuer or were not made aware of the offering through the general solicitation; (2) the offering is done through a registered intermediary; or (3) a minimum percentage of the offering is sold to institutional accredited investors that have experience in exempt offerings and the terms of the securities are the same as those sold to the non-accredited investors? How would such changes affect capital formation and investor protection? Would legislative changes be necessary or beneficial to make such changes?

This question would become moot if the regulation of offers were eliminated. If the regulation of offers were to be retained, adding these conditions would be unnecessarily complicated, and likely lead to artificial manipulation of the circumstances in which a "substantive relationship" could be established.

45. What other changes to Rule 506 should we consider when harmonizing our exempt offering rules? For example, should we amend Rule 503 to provide a deadline to file the Form D other than the current requirement to file the Form D no later than 15 calendar days after the first sale of securities in the offering? If so, what deadline would be more appropriate? Would a different deadline, or a deadline tied to the completion of the offering, facilitate issuers' compliance with the Form D filing requirement? What impact would any such changes have on the utility of Form D for the Commission, investors, or state securities regulators? Is the Form D information useful to investors? Should we consider any changes to the information required in Form D?

Form D information would be more useful if information regarding the termination of the offering were required, in addition to the information required to be provided shortly after the first sale. While we are not generally in favor of expanding the scope of Form D, at present the form does not provide enough information to form an accurate picture of the size of the private markets.

46. How frequently are issuers relying on the Section 4(a)(2) exemption or otherwise conducting private offerings where no Form D is required to be filed? We request data on such offerings where no Form D is available.

We believe that Section 4(a)(2) is typically relied on:

- In private placements to Qualified Institutional Buyers intended to trade under Rule 144A; this data is available in professional datasets used by investment bankers.
- At the other end of the capital markets spectrum, in the extremely early days of a company's development, when the issuer cannot fit a capital-raising transaction into any other exemption, essentially as a "fallback." We are not aware of any data on such offerings.

Regulation A

47. Do the requirements of Regulation A appropriately address capital formation and investor protection considerations? Is the process for qualifying Regulation A offerings appropriately tailored to the needs of investor protection? Is there anything about the process that is unduly burdensome? Do the costs associated with conducting a Regulation A offering dissuade issuers from relying on the exemption? If so, can we alleviate burdens in our rules or reduce costs for issuers while still providing adequate investor protection? Alternatively, should we retain Regulation A as it is?

We see Regulation A as a success. We have represented a number of companies that have successfully used Regulation A to raise funds from retail investors, including their own customers, and Regulation A permits retail investors to invest in early-stage companies in a way that echoes the American public markets in earlier decades, when retail investors were more common.

Regulation A does not work for all companies:

- It is currently an imperfect means of listing on an exchange. Regulation A offerings are typically conducted on a best efforts as opposed to a firm commitment basis (although there is no requirement that this be the case). Underwriters have had a limited ability to stabilize prices, and offerings have been subjected to attacks from short sellers. This is not necessarily a problem inherent to Regulation A, and we understand that some underwriters are working to make "going public via Reg A" as standardized as a traditional IPO. The results of the handful of companies that have used Regulation A to list on an exchange should not be viewed as indicative of its potential.

- The old saying "securities are sold and not bought" is still true, and companies will need to market their offering, either by engaging a broker, using a securities marketing consultant or relying on their own inherent "sex appeal" to retail investors (including heavy use of social media). Brokers are frequently uninterested in smaller offerings. Marketing consultants can be expensive. Beer and consumer electronics companies catch the eye of retail investors, but we have seen some very sound companies with promising financial results fail to gain traction. For that reason, we recommend a flexible approach to marketing communications, as outlined in the response to Question 53.

- Many companies do not ever intend to seek an exchange listing, but would like some liquidity for their investors, and this is currently limited, due in part to the state secondary trading provisions discussed in the response to Question 137.

- Some companies are leery of Regulation A due to the increased number of shareholders a Regulation A offering brings, potentially triggering the registration requirements of Section 12(g) of the Exchange Act. High-growth issuers find the conditional exemption from registration too restrictive, with the potential to force them into registration before they are ready. Issuers and their counsel currently contort themselves into legal pretzels trying to structure deals in such a way that 12(g) is not triggered. Allowing single security SPVs to be formed for Regulation A offerings (as discussed in the response to Question 62) would help address this issue.

The costs of a Regulation A offering are not generally disproportionate to the funds raised. Broker commissions, where a broker is used, are reviewed by FINRA for fairness. Legal services (including those of CrowdCheck Law) are available at fixed prices, as are the fees of certain auditors practicing in the area.[10] Marketing fees can vary widely, but are not required. State notice filing fees are unavoidable, and generally start at the $12,000 level, rising in some cases where larger amounts are sought, but the Commission is unable to affect those costs.

48. Should we increase the $50 million Tier 2 offering limit? Should we increase the $20 million Tier 1 offering limit? If so, what limits would be appropriate? For example, as recommended by the 2017 Treasury Report and by the 2017 and 2018 Small Business Forums, should we increase the Tier 2 offering limit to $75 million? Alternatively, as suggested by one commenter, should we increase the Tier 2 offering limit to $100 million? Would another higher limit be appropriate? What are the appropriate considerations in determining a maximum offering size? In connection with an increase in either or both of the limits, should we consider additional investor protections—for example, aligning standards for when an amendment is required in an ongoing Regulation A offering with registered offering standards? Should we periodically adjust the offering limits for inflation? If so, how often should the adjustment be made? Would increasing the maximum offering size encourage issuers to undertake the cost of conducting a Regulation A offering?

While most of the companies we work with, especially companies not in the real estate business, look to raise a more modest amount than $50 million, we understand that life sciences companies really need larger amounts, and $100 million would be a more appropriate amount.

As discussed in our response to Question 60, we feel that Tier 1 Offerings (other than those involved in dubious offerings as discussed in the response to Question 52) are a qualitatively different type of offering than Tier 2 offerings. There is a tendency for issuers to think that Tier 1 offerings, with a ceiling set at $20 million and fewer disclosure requirements at the federal (although not the state) level, are somehow “easier.” This is not the case and the lower dollar limit sends a misleading message. In our opinion, the substantive review applied by the states in Tier 1 offerings warrants a higher limit: the

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[10] Different considerations apply with respect to Tier 1. See our response to Question 60.

issuer limit for both Tiers should be set at the same amount. We would also countenance a name change to the Tiers, signaling the fact that state review may well result in a less-risky investment.

49. Should we extend eligibility to rely on Regulation A to additional categories of issuers, such as those organized and with a principal place of business outside of the United States and Canada, investment companies, or blank check companies? Should we, as recommended by the 2014, 2015, and 2016 Small Business Forums, allow BDCs to be eligible to rely on Regulation A? Should we, as recommended by the 2015 Small Business Forum, allow SBICs to be eligible to rely on Regulation A? Should we allow rural business investment companies (''RBICs'') to be eligible to rely on Regulation A? Should we exclude any additional categories of issuers from Regulation A eligibility? What changes, if any, would need to be made to the offering statement disclosure requirements to accommodate these additional categories of issuers? What would be the effect on investors of permitting these additional categories of issuers?

We believe that there should be a way for retail investors to engage in diversified offerings by early-stage companies, and recommend that Regulation A should be open to investment companies advised by registered investment advisers, as discussed in Question 111.

We do not see any reason not to extend eligibility to BDCs and RBICs. We would not, however, recommend that Regulation A be open to issuers from countries other than the United States and Canada. While (as discussed in response to Question 10) we believe that Commission review forms an essential part of investor protection, the protection provided by "gatekeepers" such as brokers and counsel is important, and we doubt that there would be sufficient participation by such parties in smaller-size offerings by non-US companies.

50. Should we expand the types of eligible securities issuable under Regulation A? If so, what additional types of securities would be appropriate? What would be the effect on issuers, investors, and the market of permitting these additional categories of securities? Would legislative changes be necessary or beneficial in order to expand the types of eligible securities issuable under Regulation A?

It seems that the Staff have already accepted and processed offerings of securities that would not appear to be strictly equity, debt or convertible debt, such as certain digital securities or tokens, or securities representing interests in assets. We believe permitting such offerings is appropriate and beneficial for the markets (encouraging offerings of digital securities to be made in compliant circumstances). We therefore believe that including such securities as eligible under Regulation A is beneficial, although we are not entirely sure that this practice is strictly covered by the wording of the statute.

51. Should we eliminate or change the individual investment limits for nonaccredited investors in Tier 2 offerings? If we change the investment limits, what limits would be appropriate?

In our experience, most investors are merely making a representation that their investments are within the prescribed limits of Tier 2 of Regulation A, making the individual limits of limited value as an investor protection mechanism. However, we would not recommend adding any requirements to issuers or intermediaries to verify investors are actually staying within limits.

52. Are there any data available that show an increase or decrease in fraudulent activity in the Regulation A market as a result of the 2015 or 2018 amendments? If so, is any change the direct result of an increase in the number of offerings since the amendments? If there has been an increase in fraud but the cause is not attributable to the overall increase of offerings, what are the causes or explanations and what should we do to address them?

While we are not aware of any data being maintained on this topic, we do keep track of Regulation A filings in general. We have noted (and alerted the Staff to) a significant number of Tier 1 Regulation A filings that we believe are abusive or fraudulent,[11] and are in any case so poorly drafted as to be non-compliant. We believe that bad actors have identified Tier 1 as offering a potential loophole to "pump" unregistered securities into the over-the-counter market, and that this is a direct result of the 2015 amendments. We strongly urge the Commission to cede review to the states only where at least one state has undertaken a substantive review of the offering. Even in those circumstances, we believe that the Staff should review Tier I offerings to ensure that Regulation A is not being used to circumvent Section 5 of the Securities Act for entities essentially acting as statutory underwriters bearing no risk.

53. Should we, as recommended by the 2018 Small Business Forum, permit the use of QR codes in lieu of a hyperlink to the most recent offering circular? Are there other technological solutions that we should consider, such as use of the issuer's website address, other URL addresses, or other methods or technologies that would facilitate access to such information? Should we define permissible delivery methods more broadly so as to allow subsequently developed delivery technologies that become generally accepted elsewhere in the marketplace to be used in lieu of a hyperlink to a qualified offering circular? If so, how should we define permissible delivery methods?

We note that the current position regarding the delivery of offering documents (the electronic "same envelope" concept") was formulated in the mid 1990s.[12] Information technology and the way in which people access information has changed in fundamental ways since then.

The offering circular delivery rules pose an ongoing challenge to issuers wishing to communicate using new and ever-changing forms of communications technology. The guidance given by Staff in C&DIs, while helpful, is insufficient to address some of the questions we face. For example, Instagram Stories, in which images appear in quick succession for a limited period of time, are a popular means of communication that our clients have tried to use. Instagram rules limit the amount of text that can appear in an image, and viewers would not have time to read a legend, click a link or capture a QR in the time the images appear.

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[11] See, e.g., "Tier 1 Zombies: a Regulation A scam to watch out for," Nov. 9, 2018, https://www.crowdcheck.com/blog/tier-1-zombies-regulation-scam-watch-out, and "Section 3(a)(10) and Regulation A," July 28, 2019, https://www.crowdcheck.com/blog/section-3a10-and-regulation.

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[12] See, e.g., *Use of Electronic Media for Delivery Purposes*, Securities Act Release No. 33-7233, Exchange Act Release No. 34-36345, effective Oct. 6, 1995, *available at* https://www.sec.gov/rules/interp/33-7233.txt.

Our ultimate objective in this area, as discussed in our response to Question 5 above, would be to eliminate the regulation of "offers" altogether, and to shift the requirements relating to offering circular delivery into the conditions of sale. This would have the effect of eliminating the "legends and links" requirements relating to TTW and other marketing communications.

In the meantime, however, we believe that rather than prescribing how an offering circular should be delivered when an offer is made (and thus trying to address all the possible channels via which offers may be made, which are going to constantly change), offering circular delivery should be linked to the sales process. We suggest adopting rules (or interpretations) that provide that a condition to relying on Regulation A is that, prior to sale, the investor must be presented by the issuer or its agents with a physical or digital offering circular and urged to read it. While we are skeptical whether investors read mandated disclosure in any case, they are no less likely to read it at point of sale than at the point of offer. We also note that this would actually at least be as effective, if not more, than the prospectus delivery rules for registered offerings.

We would urge the Commission to adopt this requirement as a standalone rule ahead of any comprehensive rulemaking, or alternatively to sanction this process in the form of a C&DI.

As an alternative, we would urge that a QR code, visual or audio statement as to where the offering circular may be obtained, or a URL that can be copied and pasted by a prospective investor, in addition to an active hyperlinks, be viewed as an acceptable method of delivery.

54. Are the ongoing reporting requirements of Rule 257 appropriate from the perspective of issuers and investors? Should we consider changes to these requirements? If so, what changes should we consider?

We believe that the ongoing reporting requirements of Rule 257 are appropriate for investor protection and properly scaled to the abilities of issuers.

55. Are the financial statement requirements in Form 1–A for each tier appropriate? Should we consider different financial statement requirements for Exchange Act reporting companies filing Forms 1–A? If so, what requirements should we consider?

The financial statement requirements for Tier 1 are confusing. As discussed in the response to Question 60, issuers frequently start off believing that the requirements for Tier 1 as much less burdensome than those for Tier 2, then discover the significant disclosure requirements imposed by many states, especially the "merit review" states. One option might be to embed a reference to state requirements into the financial statement requirements for Tier 1.

We believe that all issuers would benefit from guidance as to the circumstances in which "predecessor" financial statements are required.

The financial statement requirements for Exchange Act reporting companies should not be amended.

56. Should we, as recommended by the 2018 Small Business Forum, amend Regulation A to permit at-the-market offerings?

We believe this would be appropriate, especially since the 2018 amendments.

57. Should we amend Regulation A to allow incorporation by reference of the issuer's financial statements in the Form 1–A?

We believe incorporation by reference of later-filed financial statements would be appropriate.

58. Should we, as recommended by the 2016 Small Business Forum, provide additional guidance on what constitutes testing the waters materials and permissible media activities? If so, what materials should be covered?

As discussed above, we believe that offers should be deregulated, which would have a significant effect on issuers' ability to use a variety of communications channels. However, since we also believe that offering materials should be filed, some guidance as to what would be treated as constituting such materials (for example, excluding normal course product and services advertising) would also be beneficial.

59. Are there other changes that should be considered specifically with respect to the use of Regulation A by Exchange Act reporting companies, in light of the recent amendments to allow such issuers to rely on the exemption? If so, what changes should we consider?

We do not have any additional changes to recommend in this area.

60. For Tier 1 issuers, how is the dual Commission staff and state review process working? If issuers find the Tier 1 dual review process burdensome, should we eliminate the staff's review and qualification of Tier 1 offering statements given the concurrent state review and qualification of the same offering statement? If the Commission staff does not review and qualify the offering, should we replace the requirement to file a Tier 1 offering statement with a requirement to comply with the appropriate state filing requirements and file only a notice with the Commission? Alternatively, should we use such an approach only if the issuer is required to register or qualify the offering based on a substantive disclosure document in at least one state, and not where the issuer is relying exclusively on state exemptions from registration or qualification that do not require state review of a substantive disclosure document?

We believe that a complete "rebranding" of the two Tiers is called for. An offering under Tier 1 is not required (by federal law) to include audited financial statements and is not subject to any ongoing reporting requirements. This, together with the fact that the offering limit is lower than the limit for Tier 2, gives the impression that Tier 1 is the "easier" of the two options. This is completely misleading, especially where a number of "merit review" states are involved. Some early-stage issuers find they cannot meet the requirements of such states with respect to disclosure and the rights required to be offered to investors.

We do not believe that concurrent review is particularly burdensome, but it is unnecessary where one or more states are making a substantive review of the filing. We would propose that full Commission review be required where the filing is not subject to a substantive review in any state (for example, where the offering is purported to be made only in a "notice" state) and that Commission review be limited to notice-only where one or more states is making a substantive review.

We note that Tier 1, especially where merit review states are involved, only works for companies in a later stage of their development or that have significant assets. In many ways, Tier 1 offerings looks like IPOs in the 1970s and 1980s. Merit state requirements may add significant investor protections that are not typical in Tier 2 offerings. A Tier 1 offering is a qualitatively different investment opportunity than a Tier 2 offering, and we suggest that the Tiers be renamed in order to emphasize that fact, and that the Tier 1 offering limit be aligned with that for Tier 2.

61. Do issuers find state advance notice and filing fee requirements burdensome? If so, are there changes it would be possible and appropriate for us to consider to alleviate such burdens or would legislative changes be necessary or beneficial in order to do so?

Issuers find the filing fees to be a significant burden. Even the smallest offering conducted on a 50-state basis will incur fees in excess of $11,000. To the extent the Commission could limit these fees, the market would benefit. Additionally, the states have differing requirements with respect to the timing of notice filings, ranging from requiring filing 21 days prior to "offers" (which is not consistent with the ability to test the waters under Rule 255) to requiring filing prior to qualification, to not accepting filings before qualification. Some states require physical copies of the offering circular, which of course is readily available on EDGAR. States also have differing requirements with respect to renewing notice filings for offerings lasting over a year.

62. Should the conditional Section 12(g) exemption for Regulation A Tier 2 securities be modified? If so, in what way? For example, should we increase the thresholds in Exchange Act Rule 12g5–1(a)(7)? Should we, as recommended by one commenter, amend Rule 12g5–1 to tie the thresholds to those in the smaller reporting company definition? If we were to broaden the Section 12(g) exemption or make it permanent, would potential issuers be more likely to use Regulation A? What investor protection concerns could arise from such a change?

On the grounds that no company should be forced into registration and reporting under the Exchange Act before it is ready, we believe that the exemption from Section 12(g) should be permanent, not conditional, and that investors who obtained their securities in Regulation A offerings (under either Tier) should not be included in the shareholder threshold, providing that the ongoing reports under Rule 257 are filed. We believe that more issuers would use Regulation A in that case. As we have stated elsewhere in this comment letter, the ongoing reporting requirements under Rule 257 provide adequate investor protection and would be a good alternative reporting regime for fully-registered small companies.

63. Should we, as recommended by the 2017 and 2018 Small Business Forums, require any intermediary that is in the business of facilitating Regulation A offerings to register as a broker-dealer and comply with requirements similar to the requirements for intermediaries under Regulation Crowdfunding, such as required disclosure of compensation and the amount thereof?

Intermediaries in this market provide a very wide range of services. Some merely act as "bulletin boards" and have no input into any aspect of the offering or the statements made in connection with it. Others essentially function as unregistered brokers.

We believe it is essential, in connection with Regulation D offerings as well as Regulation A offerings, that the Commission provide clear guidance as to what it means to "be in the business" of being a broker-dealer, and to provide some option for "broker lite" registration. We note that this has been requested by the American Bar Association for some years.

64. Should we, as recommended by the 2017 and 2018 Small Business Forums, provide any additional guidance for broker-dealers, transfer agents, clearing firms, or intermediaries regarding Regulation A securities? If so, in which areas and why?

See our response to Question 63.

Rule 504

65. Should we consider any changes to the Rule 504 exemption? Do the requirements of Rule 504 appropriately address capital formation and investor protection considerations? Is the Rule 504 exemption useful to help issuers meet their capital-raising needs? Alternatively, should we retain Rule 504 as it is?

Rule 504 is not widely used and we believe it is too complex for early-stage companies to understand. In the event "offers" were no longer regulated, and thus general solicitation were to be permitted across the board, we believe the remaining provisions of Rule 504 would overlap with Rule 506 or Tier 1 of Regulation A, and it may not serve any continuing purpose.

Regulation CF

79. Do the requirements of Regulation Crowdfunding appropriately address capital formation and investor protection considerations? Do the costs associated with conducting a Regulation Crowdfunding offering dissuade issuers from relying on the exemption? If so, can we alleviate burdens in the rules or reduce costs for issuers while still providing adequate investor protection? For example, should we simplify any of the disclosure requirements for issuers in small offerings under Regulation Crowdfunding? For example, as recommended by the 2017 and 2018 Small Business Forums, for offerings under $250,000, should we scale the disclosure requirements to reduce costs? Alternatively, as recommended by the 2016 Small Business Forum, should we allow issuers to provide reviewed rather than audited financial statements in subsequent offerings unless audited financial statements are available? How would such changes affect capital formation and investor protection? How would changes to the requirements affect issuer interest in the exemption and investor demand for securities offered under Regulation Crowdfunding? Would legislative changes be necessary or beneficial to make such changes?

As an introductory matter, we note that Regulation CF has introduced an element of regulatory complexity much earlier in a company's life than used to be the case. Traditionally, a company would raise funds from family and friends, then angels, then venture capitalists, then go (eventually) to the public markets with an IPO. At some point along that journey, with enough money in hand to pay experienced counsel, someone (usually VCs or major investors) would insist that the company clean up its corporate records, work out how many shares it had actually issued and to whom, document any back-of-the-napkin loans it had received, properly appoint its board and retroactively approve any significant items in its corporate history. Only then would the company take money from strangers.[13] Now, companies are able to take investments from the public while they are still in the early, naturally-chaotic stage of their corporate life.[14]

In our practice we have noticed that the bigger challenge for issuers under Regulation CF is compliance with corporate law, rather than compliance with securities law. The two are interrelated, of course -- being able to describe accurately the officers and directors of a company in Form C is a direct function of understanding the difference between the roles of officers and directors and the way in which each of them is appointed. Understanding how a class of securities is created is key to being able to accurately describe the rights of that class of securities.[15]

That being said, in general and on its face, with the exception of the suggestions addressed below, Regulation CF appropriately balances capital formation needs and investor protections. In practice, however, the picture is more nuanced. Because there is no Commission review of any Form C filings, the investor protection function is essentially outsourced to the intermediaries. As discussed below in the response to Question 81, litigation or regulatory action after the offering has already closed is of limited protection to investors. Some intermediaries do an outstanding job of ensuring that disclosure requirements are met, and despite not having the resources to pay for large outside legal teams, their personnel are developing acute instincts for red flags and misleading statements. Others do not.

The costs of complying with the non-financial disclosure requirements are not that extensive. Some portals have developed sophisticated disclosure production processes, free to the issuer, that lead the issuer through the drafting of mandated disclosure. Specialized third-party document production services are also available, although their fees may be passed on to issuers. While the disclosure required of issuers does run to some 25 separate items, most of those items are pretty obviously necessary and equally pretty obviously straightforward (for example, the name of the company, the name of the company's officers and directors). We do not believe that the non-financial disclosure requirements should be changed. We do believe, however, that some disclosure items should be the subject of more guidance from the Staff, possibly by rewriting the "Q and A" format of Form C. Earlier in

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[13] At the time of an IPO, it is usual for all existing series of preferred notes and convertibles and contracts for future equity (including KISSes, SAFEs, etc) to convert. Since crowdfunding does not generally trigger conversion of these instruments, it is not uncommon for companies raising funds under Regulation CF to have several such instruments outstanding, which adds to the complexity and the potential for inadequate disclosure.

[14] In general, there is no ill intent. Many times, issuers at this stage often don't have specific roles for officers and do not have records of consents of the directors. Also, certain friends and family fundraising may be ambiguous. How does a company account on their balance sheet for funds from family where the sole terms are "pay me back when you have the money."

[15] While SAFEs and similar instruments may not be suitable for all issuers, one advantage that SAFEs have is that, being creatures of contract as opposed to corporate law, it is easier to ensure that they are properly issued and have the rights described in the Form C.

the development of the Regulation CF market, CrowdCheck conducted a review of some 400 offerings to assess compliance with the disclosure requirements (the "Disclosure Study"). Assuming that certain items, such as the issuer's own name, would always be accurately disclosed (an assumption that actually proved to be incorrect), we selected six disclosure items from Rule 201, broken up into 19 components, and assessed compliance. Our admittedly subjective review showed a compliance rate of 76.93%. The areas that proved most problematic were:

- Description of the terms of the securities being sold, and how those terms could be affected by other securities of the issuer (Rule 201(m)(1)): Disclosure here is especially problematic when, as is becoming more common, there are multiple issuances of convertible notes, KISSes, SAFEs or similar instruments outstanding. Drafting an understandable description of how they all interact, and how they would affect the new investors, is a challenge. Issuers appear to have a consistent misunderstanding of corporate concepts which leads to misstatements and missing information.

- Information about the issuer's financial performance: In our Disclosure Study, we identified missing information with respect to liquidity and capital resources, performance since the date of the financial statements provided, and the issuer's "runway."

The areas where we identified the most problems are inherently complicated. However, they are also the most crucial for investors to understand: investors must understand the rights they are acquiring and how those rights could be affected by other securities. If any "scaling" of disclosure requirements is instituted, that is likely to focus on the items which issuers have the most problems with, which are precisely the items that are most important to an informed investment decision. We note that in many cases the Commission could rewrite the "Q&A" format of Form C to make that easier. We would also suggest that the Form should require the provision to investors of the actual instruments reflecting the rights of the securities to be offered, and all other securities previously issued.

The cost of compliance with financial disclosure is a genuine burden on many issuers. While we appreciate that the difference between a review and an audit may be significant in some cases, while the issuer is still small and raising a limited amount of capital the difference in the information provided by audited and reviewed financial statements is unlikely to change an investment decision. We would recommend acceptance of reviewed-only financial statements for offerings under $1 million, even for issuers making follow-on offerings.

It is not clear why producing ongoing reporting disclosure only to investors and not to the general public would result in any savings. We understand that some issuers would prefer not to share financial information with their competitors, and in many cases, that's what is behind them not wanting to publicize ongoing reporting. We have noted a fairly cynical approach to ongoing reporting, in that some issuers take the view that they will simply not make filings until they decide to make another Regulation CF offering, whereupon they will bring their reporting up to date; in the meantime, investors remain in the dark. Since there is no Staff review and no ongoing involvement by intermediaries, compliance is being treated as an option. We appreciate the irony in discussing how to make ongoing reporting less burdensome when so very many issuers simply escape that burden by failing to file altogether.[16]

80. Should we retain Regulation Crowdfunding as it is?

We would recommend adding a requirement to provide the instruments governing the securities offered and the securities previously issued. There are other changes that the Commission could make to improve functioning of the Regulation without fundamentally changing it.[17]

81. Are there any data available that show fraudulent activity in connection with offerings under Regulation Crowdfunding? If so, what are the causes or explanations and what should we do to address them?

We do not know of any definitive data or database with respect to fraud in Regulation CF. In light of the small amounts invested (which also affects whether or not plaintiffs' lawyers might be interested), there are unlikely to be any non-governmental entities that have the resources or the incentive to monitor problematic practices under Regulation CF. However, we have seen many allegations of fraud on the funding portals' communication channels[18] and also understand that intermediaries have handled a significant number of queries from regulators in terms that suggest the regulators are following up on allegations of fraud. It will likely take some time before we have a complete picture in this area.

Moreover, we believe that many people think of fraud narrowly in terms of "running away with the money," whereas the definition of "fraud" in the securities context is much broader and covers, under Rule 10b-5 and Section 12(a)(2), misleading statements of material facts or omissions of information necessary to make information provided not misleading.

In the course of our business, and in the course of an in-depth survey that we conducted with respect to compliance by 100 crowdfunding companies (the "Compliance Survey"), we have identified a number of problematic practices in Regulation CF offerings, some of which may be viewed as "fraud" within the meaning of that term in securities law:

- "Running away with the money." While this is uncommon, in our experience, it does happen. One very clear example is an issuer that filed a Form C which described the intended use of

[16] See, e.g., Report to the Commission: Regulation Crowdfunding, June 18, 2019, in which Commission staff note the frequent failure to file annual reports and surmise some of this may be due to business failure. We note that even when annual filings are made, they are frequently non-compliant, the most frequent non-compliance being a failure to present financial statements in GAAP. See, e.g., "Regulation CF annual filing season stars off batting .200," Apr. 30, 2018, https://www.crowdcheck.com/blog/regulation-cf-annual-filing-season-starts-batting-200.

[17] For example, the forms could be modified to make it easier to provide accurate information and to receive the information in a timely manner. Currently the Form C-U needs to be filed within 5 days of completion of the offer. Based on market practice, this time frame does not promote accurate results. It can currently take several weeks – including the verification of accounts and additional information -- to compile an accurate number. Further, the information is provided in a text field where issuers provide varying information. A data field for the total amount raised in terms of dollars may facilitate analyzing the information.

[18] Many of these allegations are merely trolling. See, "Troll-hunting season," Oct. 27, 2019, https://www.crowdcheck.com/blog/troll-hunting-season.

proceeds of the offering as being for corporate purposes and not for repayment of debt. Some weeks later, the issuer filed an amended Form C saying that it intended to repay its creditors with the money then held in escrow. The issuer did not check the "material amendment" box in Form C, justifying that omission on the basis that it had disclosed the existence of the debt in its original Form C. This meant that investors did not have the ability to cancel their investment and retrieve their money, even though doubtless many of them would have wished to do so when provided with this new information. The issuer then proceeded to close the offering immediately, paid the investors' funds to a creditor affiliated with a company officer and subsequently filed for bankruptcy. We understand that this specific matter is the subject of litigation brought by the bankruptcy trustee, although it does not seem to have attracted a great deal of attention so far. We note that it has taken many months for this case to make its way through the justice system.

- It is difficult to categorize some misstatements as "fraud" because of the scienter requirement that is part of the fraud definition. For example, we were unable to determine whether a founder of a company that intended to build a perpetual motion machine was acting fraudulently or was just deluded. While it frequently happens that founders find that they have bitten off more than they can chew and their plan cannot be executed as easily as they think (or is actually technically impossible), the line between flakiness and fraud is a hard one to draw. We would note, however, that perpetual motion machines have proved to be a recurring theme in crowdfunding. We note that several intermediaries, some of which experienced problems in this area, now will not accept offerings at the pure concept/back-of-a-napkin stage of development, and demand that prototypes exist of any product. This reduces the risk on the part of the intermediaries, but means that ideas at the "Call me crazy, but this might just work" stage (which are, generally speaking, crazy) are deprived of any funding source. The micro-exemption discussed in responses to Questions 93-103 might provide funds for companies at that stage of development.

- Similar considerations apply in the case of promotional statements. Lawyers know when a statement should be viewed as "mere puffery" and when it should be viewed as a statement of objective fact, but issuers are frequently unaware of this distinction and end up making promises of performance that end up not being achieved. In some cases, the disclosure made on a Form C is so inadequate or internally inconsistent that it could be argued that the exemption under Regulation CF in not available because material terms of the exemption (disclosure requirements) were not complied with.

- We are also aware of cases in which issuers have made a follow-on offering under Regulation CF, despite not being in compliance with the annual filing requirements. Since compliance with the annual filing requirements is a condition to reliance on the exemption, the follow-on offerings were made in violation of Section 5 of the Securities Act (no other exemption being available). The companies' officers signed the follow-on Form Cs, attesting to compliance with the regulation's requirements. Again, whether they understood their obligations sufficiently to show scienter is unknown, but a violation certainly occurred. In a similar vein, audited financial statements are required for companies raising more than $535,000 in follow-on offerings under Regulation CF, and a number of companies have made follow-on offerings without doing so. In our Compliance Survey we identified eight companies that failed to comply with the requirements for follow-on offerings.

- Failure to comply with corporate governance requirements presents serious concerns. Laypersons may not view failure to comply with state corporate law as fraud, but when a company offers preferred shares in a Regulation CF offering, and accepts funds for the sale of such shares, despite the fact that the shares do not exist because no amended certificate of incorporation has been filed with the company's state of incorporation, it is problematic. (In this specific case, the issuer was acting in good faith, believing that all it needed to do to create preferred shares was to approve their issuance in a directors' meeting.)

As discussed above, Regulation CF essentially outsources compliance oversight to intermediaries. Most intermediaries are constrained in terms of financial and personnel resources. The Commission should look for opportunities to encourage intermediaries to enforce compliance, and specifically coordinate with FINRA to focus on assisting funding portals in that endeavor; FINRA's current approach of multiple inquiries second-guessing good faith decisions by funding portals is a significant burden to the portals.

82. Should we increase the $1.07 million offering limit? If so, what limit is appropriate? For example, should we, as recommended by the 2017 Small Business Forum and the 2017 Treasury Report, consider increasing the offering limit to $5 million? What are the appropriate considerations for a maximum offering size? Should additional investor protections and/or disclosure requirements depend on the size of the offering? If the individual investment limits are preserved as they currently exist, will there be adequate investor demand to justify an increase in the offering limit, or would an increase in the individual investment limits also be required? Would legislative changes be necessary or beneficial to increase the offering limit?

We note that the $1 million (inflation-adjusted) limit in Section 4(a)(6) of the Securities Act is set by statute, and that the Commission cannot change Section 4(a)(6), including its offering and investment limits, but would rather have to rely on the general exemptive authority of Section 28 of the Securities Act to adopt a new, somewhat parallel, exemption at a time when it is seeking to streamline the number of exemptions and reduce the complexity of the exemptive regime. We are concerned that without a legislative change Section 4(a)(6) would co-exist with "New Regulation CF", causing confusion. That confusion would be exacerbated in the event of litigation along the lines of the lawsuit brought by Massachusetts and Montana regarding the authority of the Commission to enact amendments to Regulation A, accusing the Commission of facilitating ICO scams and the like, casting doubt among issuers and investors as to the status of regulation and damaging the reputation of Regulation CF offerings.

We believe that without wading into this morass, Regulation CF could be made more attractive to both issuers and investors by adopting the changes we recommend, including:

- Permitting the use of single security SPVs; and
- Regulating sales rather than offers, thus permitting issuers to test the waters.

Removing the investor limit on accredited investors would be ideal but we do not believe it would be permitted without a statutory change.

We note that few Regulation CF offerings reach the $1.07 million limit, and that Regulation CF offerings may be made in conjunction with Regulation D offerings, which are not subject to any limit. We further note that much of the discussion in this area focuses on the "supply" side of the equation – the companies that say they would make Regulation CF offerings if improvements were made. Less attention has been paid to the "demand" side – the investors in this market. We believe that the demand is probably inherently limited: by definition, it is the rich people that have the money, and in our (admittedly anecdotal) experience their investments in Regulation CF offerings are limited. The Division of Corporation Finance's June 2019 Crowdfunding Report identified an average investment size of $992, which you would need a lot of in order to accumulate a $1 million portfolio. We also note that that average investment size is derived from information voluntarily provided by a limited number of intermediaries. We would urge that any change to offering or investor limits be made on the basis of (a) in-depth research as to the numbers as opposed to relying on anecdotal evidence from advocates (including us), (b) with a view to a specific objective -- would the purpose in making such changes be a desired increase in the number of offerings, an increase in the number of offerings that reach a certain size, an increase in the number of investors or the size of investments or some other objective?, and (c) with some idea of how success in this objective would be measured.

Any measurement of success, of course, will be complicated by the fact that other regulatory changes are contemplated to be made at the same time. In considering expansion of the Regulation CF limits, the Commission should take into account the anticipated impact of changes to the accredited investor definition. If the accredited investor definition is expanded, Regulation D offerings will become even more attractive to issuers when compared to Regulation CF offerings. This results in a difficult policy decision for the Commission: if you make Regulation D offerings more attractive by including a larger potential pool of investors, should you attempt to make Regulation CF offerings more attractive to issuers in order not to relegate non-accredited investors only to "adversely selected" issuers, which may loosen the investor protections currently included in Regulation CF?

We would suggest that an important precondition to any increase of the limit would be to address the problematic practices currently apparent in the market and discussed in our response to Question 81.

83. If we were to increase the offering limit, would Regulation Crowdfunding overlap with Rule 504 of Regulation D or with Regulation A? If there is overlap, should we still retain the overlapping exemptions? How could we rationalize and streamline these offering exemptions?

Regulation Crowdfunding already overlaps with Regulation A, as the two tiers of Regulation A overlap with each other. We do not view such overlapping as a cause for concern, and believe that it would be problematic if issuers were forced into using a specific exemption due to the amount of money they were trying to raise.

84. Should we modify the eligibility requirements for issuers or securities offered under Regulation Crowdfunding? Should we extend the eligibility for Regulation Crowdfunding to Canadian issuers or all foreign issuers? Should the eligibility requirements for Regulation Crowdfunding mirror the Regulation A eligibility requirements? For example, should we exclude issuers subject to a Section 12(j) order? Should we amend the types of securities eligible under Regulation Crowdfunding? Should we extend the eligibility for Regulation Crowdfunding to issuers subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act? Are there other eligibility limitations we should consider? Would legislative changes be necessary or beneficial to make such changes?

With all due respect to our Northern friends, we believe that expanding eligibility to Canadian companies should be subject to reciprocity.

We note that Regulation A and Regulation CF treat issuers with non-US connections differently. Regulation CF merely requires companies to be incorporated in the United States, not managed from the United States, and we believe this requirement has been exploited by persons outside the reach of US laws. We believe that Regulation CF eligibility should mirror eligibility under Regulation A. The Commission should confirm that Indian Tribes and the corporations they control are allowed to rely on Regulation CF.

85. Should we, as recommended by prior Small Business Forums, permit issuers to offer securities through SPVs under Regulation Crowdfunding? If so, are there additional requirements that would be appropriate to ensure investor protection? Would legislative changes be necessary or beneficial to make such changes? Are there other ways we should modify our regulations to allow investors to invest in pooled crowdfunding vehicles that are advised by a registered investment adviser?

Single security SPVS advised by a registered investment adviser independent of the funding portal should be permitted. This addresses the “messy cap table” issue and also makes it easier for growth companies to remain attractive targets for acquisition. Otherwise, especially if there are no “dragalong” provisions applying to the securities sold, acquirors might be put off by the difficulty of having to deal with all investors and comply with state and federal law in the acquisition offer.

The investor limitations would need to be amended so as to permit single security SPVs.

86. Should we revise the rules that require issuers to provide reviewed or audited financial statements? If so, how? At what level should issuers be required to provide reviewed or audited financial statements? For example, if we were to increase the offering limit, should reviewed financial statements only be required for offerings over $1 million and audited financial statements only be required for offerings over another higher limit, such as the Regulation A Tier 1 limit? Would legislative changes be necessary or beneficial to make such changes?

In our experience, the difference between audited and reviewed financial statements for early-stage companies are generally not significant. The distinction becomes larger as companies grow and seek to raise larger amounts of capital. We would not endorse review-only financial statements for raises above $1 million. We believe that the larger concern for Regulation CF is the fact that, as we discovered in the course of the Compliance Survey, issuers making offerings for under $107,000 do not appear to be producing financial statements in a format anything close to GAAP.

87. As generally recommended by the 2015, 2017, and 2018 Small Business Forums and the 2017 Treasury Report, should we eliminate, increase, or otherwise amend the individual investment limits? If we should change the investment limits, what limits are appropriate and why? Should we require verification of income or net worth for larger investments, such as $25,000 and higher? Should certain investors be subject to higher limits or exempt from the limits altogether? For example, should accredited investors be exempt from the investment limits or should accredited investors be subject to higher limits? If accredited investors are subject to higher investment limits or exempt from investment limits, should we require verification of accredited investor status? Should we make changes to rationalize the investment limits for entities by entity type, not income? If investment limits are raised to allow an offering to be successful with fewer investors, would such a change have an effect on the use of the exemption? Would legislative changes be necessary or beneficial to make such changes?

We do not believe that investors who are able to make larger investments typically do so in Regulation CF offerings. An investor seeking to invest amounts of that kind is more likely to want a more direct relationship with the company and better terms than the Regulation CF offering, and is more likely to be making a Regulation 506(c) investment, where the investor’s income or net worth will be verified.

We believe that no purpose is served by imposing investment limits on accredited investors in Regulation CF offerings, and doing so is inconsistent with the manner in which accredited investors are treated under Regulation D and Regulation A.

Because issuers are free to set the target at any amount they choose, and because it is not clear whether investors actually take notice of and comply with the self-certified investment limit in any case, we do not think raising the investment limits will have a noticeable impact on the ability of issuers to make a successful offering.

88. As generally recommended by the 2016 and 2017 Small Business Forums, should we allow issuers to test the waters or engage in general solicitation and advertising prior to filing a Form C? If so, should we impose any limitations on such communications to ensure adequate investor protection? Would legislative changes be necessary or beneficial to make such changes?

As discussed in our introductory comments and in response to Question 5, we believe that offers should be deregulated. That would have the result of permitting any form of testing the waters communications or general solicitation, at any time. Existing antifraud provisions of the securities laws would apply to any misstatements. We would suggest that testing the waters or market conditioning materials be included as part of Form C, consistent with our recommendations with respect to the corresponding process under Regulation A.

89. As recommended by the 2018 Small Business Forum, should we allow for more communication about the offering outside of the funding portal's platform channels? If so, what would be the benefits of allowing more communications? Would there be investor protection concerns? Are there limitations we should impose on those communications?

While issuers have significant ability to communicate outside of a funding portal's platform channels for prepared offering materials, we are aware of significant interest by issuers to be able to communicate directly with prospective investors at start-up pitch events. To the extent that offers are not deregulated, allowing these types of communications would significantly benefit issuers as it would reduce the friction of accessing prospective investors that are actually interested in investing in start-up type companies. Since the prospective investor would not be able to invest except by going to the funding portal, there are limited investor protection concerns. While issuers would still be liable under antifraud rules and statutes, portals should not be liable for statements made by the issuer outside of the portal.

90. Should the Section 12(g) exemption for securities issued in reliance on Regulation Crowdfunding be modified? For example, should it be revised to follow the Section 12(g) exemption for Regulation A Tier 2 securities?

The conditional Section 12(g) exemptions from registration as they apply to securities issued under Regulation A and Regulation CF should be made consistent and permanent. Many companies have issued securities under both exemptions, and the burden on early-stage companies in complying with both conditional exemptions, even with the help of an experienced transfer agent, is significant.

We would recommend that the 12(g) exemptions be non-conditional. Companies should not be forced into becoming reporting companies under the Exchange Act solely by reason of using these exemptions (nor, we would argue, solely by reason of the number of their equity holders in any case, regardless of how those investors acquired their shares).

91. Do the costs associated with facilitating offerings under Regulation Crowdfunding or operating as a Crowdfunding intermediary dissuade intermediaries from facilitating offerings under the exemption? If so, should we modify the requirements to alleviate burdens or reduce costs for crowdfunding intermediaries while still providing adequate investor protection? If so, which ones and how? Should we modify any of the requirements regarding crowdfunding intermediaries to better meet the needs of issuers and investors? If so, which ones and how? For example, as recommended by the 2017 and 2018 Small Business Forums, should we allow intermediaries:

- *To receive as compensation securities of the issuer having different terms than the securities of the issuer received by investors in the offering; or*
- *To co-invest in the offerings they facilitate? In addition, as recommended by the 2018 Small Business Forum, should we clarify the ability of funding portals to participate in Regulation A and Rule 506 offerings? Would legislative changes be necessary or beneficial to make such changes?*

Funding portals typically have limited resources. Despite that, they are developing excellent instincts for the type of issuers that will prove to be time-sinks: founders who are difficult, who don't understand corporate law, who insist on including misleading information, who make frequent changes to their offering materials, etc. Currently, funding portals are required to take all issuers that meet their published criteria for acceptance. It is almost impossible to craft a standard that says, in effect, "We won't take you if you are a complete loser who will waste our time and not succeed." But that is what the portals need to do. Some refer to this as a form of "curation." Portals need to be permitted to reject time-wasters so long as they do not advertise that as being a measure of the quality of the companies on their site.

So long as the nature of the investment (and the rights of the portal's investment compared to the securities offered to the public) is disclosed, portals should be able to receive compensation in the form of securities with different terms, and to co-invest.

As further discussed in our response to Question 63, the market needs guidance from the Commission as to what activities may be conducted by funding portals or platforms without triggering broker-dealer registration requirements.

92. To the extent not already addressed in the questions above, would legislative changes be necessary or beneficial to address any recommended changes to Regulation Crowdfunding? Alternatively, should we consider using our exemptive authority under Section 28 of the Securities Act to adopt an alternative exemption for crowdfunding offerings to complement Section 4(a)(6)? If so, how should we structure the exemption to facilitate capital formation while still ensuring adequate investor protection? Is there anything else we should do to reduce the accounting, legal, and other inelastic costs associated with Regulation Crowdfunding?

As discussed above, adding an additional, alternative, exemption would result in significant market confusion. We believe the Commission should address problematic practices described above prior to the creation of any such additional exemption.

Potential Gaps in Offering Framework

93. Should we add a micro-offering or micro-loan exemption? If so, please describe the parameters of such a potential exemption. In suggesting parameters, consider how the small offering size should affect the potential requirements.

We recognize that some industry experts believe that there are some securities offerings that the government should have no role in, given that the parties to such transactions have no real expectation of government protection. We also frequently encounter situations where a founder has issued securities to family and friends with no exemption available and the complications caused by such issuances when the company goes on to make offers of securities more broadly. However, in light of the issues identified with respect to Regulation CF above that we encounter on a daily basis, and the significant investor protection role played by gatekeepers such as funding portals, we cannot endorse a generally applicable micro-offering exemption without significant limitations. The limitations on any micro-offering that we suggest below are intended to limit the exemption to circumstances where the investors have no expectation of being subject to or protected by the securities laws and where they know the founders of the issuer.

We therefore suggest that the exemption apply where:

- There are fewer than 35 investors; and
- The investors have a substantive relationship with at least one of the founders.

In order to obtain some information on the use of any new micro-offering exemption, we recommend that some limited filing be made with the Commission. However, as many of these offerings will be made when the issuer is nothing more than an idea, they likely will not be in a position to file a Form ID and obtain EDGAR codes. Instead, a limited filing identifying the legal name of the issuer, its principal management, the amount raised, and number of investors that may be submitted via a searchable PDF would be an ideal accommodation for a micro-offering exemption filing.

94. Should there be limits on the types of securities that may be offered under such an exemption? For example, should the exemption be limited to debt securities? Are there inherent differences in debt offerings, such as the general liquidation preference of debt holders, which would protect investors in these types of offerings? Does the inclusion of equity or other types of securities in this type of offering raise concerns for investors or does it expand investor options in a way that would benefit them?

We suggest that the exemption apply to equity, in the form of common or preferred stock, or limited liability company interests (but not SAFEs or convertible notes), or debt. We would impose different limits on each, however, as discussed below. We believe that debt and equity should be treated differently in that debt is more likely to be used for bricks-and-mortar type operations (such as restaurants) where more money is needed, that investors understand debt better than equity and that the general liquidation preference does provide them more protection. We believe that, in general, the type of companies that wish to offer equity are likely to be more high-growth companies, and that tech companies and the like can be founded with ever-decreasing seed investments.[19]

95. What would be the appropriate aggregate offering limit for such an exemption? For example, would $250,000 or $500,000 in a 12-month period be appropriate? Would another limit be appropriate? What are the appropriate considerations for the offering limit?

We suggest a limit of $50,000 per year for equity and $100,000 per year for debt. We note that $250,000 is close to the average raise through Regulation CF.

96. What type of investor protections should be required? For example, should investors be limited on how much they can invest in any one offering? If so, what should the limit be? Are there other

[19] See, e.g., Gene Teare, *Decade in review: Trends in seed-and early-stage funding*, Mar. 16, 2019, https://techcrunch.com/2019/03/16/decade-in-review-trends-in-seed-and-early-stage-funding/.

protections we should consider? Should there be investor requirements, such as a financial sophistication requirement?

We do not believe that any further conditions should be imposed than those outlined above. Requiring financial sophistication of a founder's great-uncle is unnecessary.

97. Should the issuer be prohibited from engaging in general solicitation or advertising to market the securities?

No general advertising or solicitation should be permitted, with the objective of limiting the offering to persons who genuinely know the company founders.

98. Should there be disclosure requirements or notice filing requirements?

We do not believe this is necessary. The objective of this exemption should be to provide a simple channel for seed financing, and potentially to regularize transactions that take place all the time without the parties to them realizing there are regulations they must comply with.

99. Should we require the offering to take place through a registered intermediary, such as broker-dealer or funding portal?

No intermediary should be mandated. If an intermediary were to be required, the result would just be to create a lower tier of offerings under Regulation CF and further remove the nexus between founder and investor.

100. Should the securities issued under the exemption contain resale restrictions? If so, what resale restrictions are appropriate? Should the securities be deemed ''restricted securities'' under Rule 144(a)(3) (similar to securities acquired from the issuer that are subject to the resale limitations of Rule 502(d)) or have a 12-month resale restriction (similar to Regulation Crowdfunding)?

The securities should be deemed "restricted" but not made subject to any other limitations. They are unlikely to be traded in any case, and monitoring compliance would likely be impossible.

101. Should the securities sold in the transaction be considered a ''covered security'' such that the issuer would not be required to register or qualify the offering with state securities regulators?

We would recommend that such securities be considered "covered securities." We should bow to the inevitable and recognize that founders at this stage of a company's development are unlikely to recognize that state securities laws apply and need to be complied with. Not preempting state law would only be setting up the companies for failure.

102. Should there be issuer eligibility requirements, such as bad actor disqualification provisions or exclusion of investment companies or non-U.S. issuers?

With the limitations set out above, the companies using the exemption are highly unlikely to be non-US or investment companies, and no further eligibility requirements should be required, other than specifying that the company should be in good standing (i.e., actually exist) at the time of the offering.

103. Are there other perceived gaps in the current exempt offering framework that we should address? If so, why are the existing exemptions from registration inadequate? For example, are the existing exemptions unavailable due to the nature of the securities being offered or characteristics of the issuer? Or are the existing exemptions not feasible or attractive to issuers due to compliance costs or similar concerns? Are regulatory changes needed in light of the geographic concentration of certain types of offerings?

We believe the micro-offering is the primary gap in the exempt offering framework.

Integration

104. Should we articulate one integration doctrine that would apply to all exempt offerings? If so, what should that integration doctrine be? For example, should we articulate that two or more exemptions, or an exemption and a registered offering, will not be deemed to be part of the same offering if the issuer is able to satisfy the requirements of the exemption(s) at the time of sale? If so, should we still aggregate the total number of nonaccredited investors for purposes of multiple Rule 506(b) offerings that occur less than six months apart? Would one consistent integration doctrine make it easier for issuers to transition from one exemption to another and, ultimately, to a registered offering? Would there be any investor protection concerns if we were to articulate one integration doctrine for all exempt offerings?

We believe that two or more exemptions, or an exemption and a registered offering, should not be deemed to be part of the same offering if the requirements of the exemption are met at the time of the offering. The integration doctrine should only be retained as an anti-avoidance mechanism where an issuer artificially divides an offering in order to comply with a number-of-investors or dollar offering limit. That being the case, the “five factor test” would become a tool to determine whether avoidance is taking place, as opposed to being an objective to be met in structuring an offering.

105. Throughout the Securities Act rules, where a safe harbor does not apply, should we replace the five-factor test with the new analysis articulated in connection with Regulation A and Rules 147 and 147A (i.e., whether each offering complies with the requirements of the exemption that is being relied on for the particular offering), consistent with the 2016, 2017, and 2018 Small Business Forum recommendations? Are there other integration analyses that we should consider? Should we consider whether other categories of transactions clearly do not need to be integrated into other offerings, similar to the treatment of offerings conducted in accordance with Regulation S, Rule 144A, and Rule 701?

We believe that the new analysis should be applied wherever there is no safe harbor, and would in fact go further and urge that in many cases existing safe harbors should be replaced by the new analysis.

106. Should we shorten the six-month integration safe harbor in Rule 502(a) of Regulation D? If so, what time period is appropriate? 90 days? 30 days? What are the appropriate considerations for an alternate time period?

See our response to Question 105. We believe the Commission should reconsider the need for this safe harbor.

107. Consistent with Regulation A and Rules 147 and 147A, for issuers relying on an exemption that permits general solicitation and advertising, such as the exemption under Rule 506(c), should we provide an integration safe harbor for offers and sales of securities prior to the commencement of that offering?

We do not think that would be necessary if the changes discussed in the response to Question 104 were adopted.

108. Should we specifically revise Rule 152 to clarify that offers and sales that do not involve any form of general solicitation or advertising prior to the completion of those transactions would not be integrated with subsequent offers and sales of securities that involve general solicitation or advertising? Consistent with the 2016, 2017, and 2018 Small Business Forum recommendations, should we revise Rule 152 to provide an integration safe harbor for an issuer that conducts a Rule 506(c) offering and then subsequently engages in a registered public offering?

We do not think that would be necessary if the changes discussed in the response to Question 104 were adopted.

109. Should we revise Rule 155? For example, should we define a private offering as an exempt offering that does not involve any form of general solicitation or advertising? In addition, should we expand Rule 155(c) to include an abandoned offering that involved general solicitation followed by a private offering?

We believe that if offers were deregulated, Rule 155 would have to be amended, but defining private offering in that manner would not work.

110. Should we consider other integration safe harbors? If so, please describe the parameters of such potential safe harbors. For example, as recommended by the 2015 Small Business Forum, should we provide additional guidance about concurrent offerings under Regulation Crowdfunding and Rule 506(c)? If so, should we provide guidance regarding issues that may arise when an intermediary seeks to host concurrent offerings? Conversely, should we eliminate any of the existing integration safe harbors? How would such changes affect capital formation and investor protection?

See our responses to Questions 104 and 105. We would be in favor of the entire integration concept, and all the safe harbors, being replaced by the general principle outlined in the new analysis, with the five factor test being relegated to anti-avoidance analysis.

Pooled Investment Funds

111. To what extent do issuers view pooled investment funds as an important source of capital for exempt offerings? Do certain types of pooled investment funds facilitate capital formation more efficiently than others? For example, do private equity and venture capital funds provide more capital to issuers than registered investment companies and BDCs? From an issuer's perspective, are there benefits to raising capital from a pooled investment fund rather than from individual investors?

Pooled investment funds do not currently provide a significant source of capital for the early-stage issuers that make offerings under Regulation CF and Regulation A. The amounts that could be deployed in Regulation CF offerings, compared to the amount of due diligence that would be required, are not attractive to VC funds. In our experience, funds tend to invest in Regulation D offerings.

However, we believe that investors would welcome the chance to invest in diversified investment funds that offered fund interests in Regulation A or Regulation CF offerings, and that invested in Regulation A, Regulation CF or Regulation D offerings. Those funds would provide significant resources to early-stage companies that are not currently available to them.

In order to increase the funds available to small companies, and to offer diversified investments in early-stage companies to investors, we urge the Commission to consider opening Regulation A and Regulation CF to investment companies advised by registered investment advisers not affiliated with any intermediary or investment platform on which the securities are offered.

Secondary Trading

130. Do concerns about secondary market liquidity have a significant effect on issuers' decision-making with respect to primary capital-raising options? Does secondary market liquidity affect the decision-making of individual investors? In considering which exemption may be best suited to a particular offering, do issuers take into account whether the securities issued in the transaction will be restricted securities and/or subject to other resale restrictions?

Issuers do take into account whether the securities they offer will be subject to resale restrictions. For some issuers, this is an important point, since they believe their investors desire liquidity, or want to assure them that their money will not be tied up indefinitely. Many such issuers are currently frustrated and disappointed by the state of the secondary markets for securities offered in exempt offerings. There are a few forums for trading, and (as discussed below) impediments to active trading due to state securities laws.

131. Issuers that are not currently subject to Exchange Act registration may prefer that their securities have restrictions on resale, due to concerns that trading in the securities could lead to a high number of record holders, which could trigger Section 12(g) registration. What effect would an exemption from Section 12(g) registration for certain exempt offerings, if introduced, extended, or made permanent, have on issuers' access to capital or secondary market liquidity? For example, should we, as recommended by the 2014 Small Business Forum, exempt purchasers and transferees of securities issued *pursuant to Regulation A from the calculation of the number of registered holders under Section 12(g)? Would these types of changes provide benefits that could outweigh a decline in the rate at which issuers may become reporting companies?*

We believe it is appropriate to provide a permanent exemption from the provisions of Section 12(g) for securities sold pursuant to Regulation A or transferred thereafter. Doing so may in theory delay a company's eventual progression to reporting, but in reality many companies will tie themselves and their counsel into legal pretzels trying to find ways to avoid that. We believe that companies should not be forced into full registration before they are ready, and also that the ongoing reports required under Regulation A provide adequate investor protection, even for the long term.

132. Should we revise the Rule 144 non-exclusive safe harbor? If so, how should we revise Rule 144? For example, should we, as recommended by the 2012 and 2016 Small Business Forums, reduce the Rule 144 holding period for securities of issuers meeting the current public information requirement from six months to three months? Should we, as recommended by the 2012 Small Business Forum, reduce the Rule 144 holding period for securities of issuers not subject to the current information requirements from 12 months to six months?

It is time to rethink all the resale exemptions. Since the holding period is intended to ensure that the reseller is not an "underwriter," does the different treatment for issuers for which public information is available actually make any sense? Surely the defining issue should be whether the investor has been at risk long enough to ensure that he or she is not acting as a conduit from the issuer to the investing public? We would propose that Rule 144 be simplified to provide that investors must have held their securities for six months before they can resell freely, and not impose any disclosure/information requirements.

134. Investors who purchase in secondary transactions may not have access to current information about the issuer and its securities. Particularly if we expand the population of investors who may qualify as accredited investors, should we impose some type of issuer disclosure requirement in connection with resales? If so, should we consider a requirement similar to that required by Section 4(a)(7) or one similar to the manual exemption available in many states? What alternatives should we consider?

As discussed in the response to Question 132, we do not believe that an information requirement is useful in these circumstances.

135. Are market participants using the Section 4(a)(7) resale exemption? We request data with respect to the use of the Section 4(a)(7) exemption.

We believe that a limited number of ATSs may be relying on, or intending to rely on, Section 4(a)(7) for trading. We understand that most of the ATSs we work with would prefer to rely on an alternative exemption.

136. In addition to Section 4(a)(7), secondary sales of securities may rely on other resale exemptions, such as those contained in Section 4(a)(1) and the related safe harbors under Rule 144 and Rule 144A, *Section 4(a)(3), and Section 4(a)(4). Would additional resale exemptions or safe harbors be appropriate? If so, what other resale transactions should be exempt from the provisions of Section 5?*

We do not believe there is a need for additional exemptions at the federal level. As discussed below, what market participants really need is exemptions that preempt state laws.

137. Should we extend federal preemption to additional offers and sales of securities, for example, by expanding the definition of ''qualified purchaser''? For example, should we preempt state securities registration or other requirements applicable to secondary sales of securities:

• Offered or sold pursuant to Section 4(a)(1) or 4(a)(3), if the issuer of such security is a Tier 2 Regulation A issuer and remains current in its ongoing reporting required under the rules, as recommended by the 2014 and 2015 Small Business Forums;

• Initially issued in a Tier 2 Regulation A offering, as recommended by the 2014–2018 Small Business Forums and the 2017 Treasury Report; or

• Initially issued in an offering registered under the Securities Act, as recommended by the 2015 Small Business Forum?

Federal preemption should apply in all these circumstances. Especially for issuers utilizing Regulation A, the limitation on secondary sales imposed by the varied requirements of state law impacts the ability of issuers to attract investors and raises the cost of obtaining capital. As previously presented to the Commission,[20] the patchwork of rules applying to issuers and brokers facilitating secondary transactions makes secondary liquidity excessively expensive and unavailable to many small issuers. This poses a harm to investors as well, as they do not have any real opportunity for liquidity until an issuer is listed on a national securities exchange. Some states have taken the initiative and included issuers current with their reporting under Regulation A or Exchange Act reporting, where those reports are available on EDGAR, as eligible for their Manual Exemption. It would be of great benefit to issuers and the secondary trading markets to expand the availability of secondary liquidity for these issuers by preempting state law. If this step is taken, we would additionally recommend that issuers under Tier 1 of Regulation A should be permitted to be voluntary filers of ongoing information under Rule 257.

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CrowdCheck and its officers would be very happy to discuss any of these recommendations in further depth at the Commission's convenience.

Sincerely,

/s/ Sara Hanks
CEO

[20] See, e.g., SecondMarket, Secondary Trading Developments, Mar. 4, 2015, https://www.sec.gov/info/smallbus/acsec/slides-acsec-meeting-030415-secondary-trading-tierney.pdf.