1423 Leslie Avenue
Alexandria, VA 22301

June 11, 2020

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549

Re: File No. S7-05-20, Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets

Dear Ms. Countryman:

Thank you for the opportunity to comment on the proposed rules and rule changes to facilitate capital formation utilizing various exemptions from registration available under the Securities Act of 1933. CrowdCheck, together with its affiliated law firm, CrowdCheck Law, was formed for the express purpose of serving small and early stage companies relying on the exemptions identified in the proposals. Since 2012, we have experienced all facets of these exemptions in practice, including issuer and intermediary compliance, behavior of investors, and regulatory uncertainty.

In response to the proposals, we are providing comments where specifically requested by the Commission and where CrowdCheck has relevant insight to provide, as well as a few final thoughts on matters that were not raised. Our responses, along with the prompting questions, are set out below.

Integration

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

Our preference, as stated in our comment letter on the Concept Release, would be to eliminate the concept of integration altogether and rely on general anti-evasion principles. The concept of integration adds another trap for the unwary, including early-stage companies that have no, or inadequate, legal representation, without materially enhancing investor protection.

However, experience suggests that the amount of work the Staff has spent on elaborating an integration rule, alongside with well-articulated safe harbors, means there would be considerable reluctance to throw out proposed Rule 152 as drafted, and the Rule is a distinct improvement on the current state of affairs, so we support, in general, the adoption of a comprehensive integration framework.

We would not advise further provisions applying the general principle to particular fact patterns. The more you do this, the less lawyers will be inclined to venture beyond the examples and the safe harbors you delineate.

2. Should we replace the five factor test of integration, currently set forth in Rule 502(a), with the more recent approach to integration adopted in rulemakings involving Regulation A, Regulation Crowdfunding, and Rules 147 and 147A, as proposed? Is there another integration principle that should apply in this context? Are there situations in which the five factor test should continue to apply? If so, should the current factors be revised, such as by adding new factors, or should we provide guidance with respect to the relative importance of the factors to the analysis? Are there uses of the five factor test for purposes other than the integration of offerings?

We support the complete replacement of the five factor test. It was useful in the early days of Regulation D when it was common to deliberately "slice and dice" offerings (especially real estate offerings) to fit within the numerical limitations set out in that Regulation; it serves no useful purpose now.

3. Should we adopt specific safe harbors as part of the proposed integration framework? If so, are the proposed safe harbors appropriate? Are there additional or different safe harbors we should codify? What effect, if any, would the proposed safe harbors have on investor protection or on issuers' ability to raise capital in the exempt offering markets? Should any of the integration provisions in proposed Rule 152(a) be reframed as safe harbors in proposed Rule 152(b)? Similarly, should any of the safe harbors in proposed Rule 152(b) be reframed as principles of integration in proposed Rule 152(a)?

We do not object to the adoption of safe harbors, but do not believe that the safe harbors should be expanded. The more focus that is placed on safe harbors, the more likely issuers and their counsel will not stray from them. This would flip the intent of the proposed rule, as it would not be the principles that control behavior, but the safe harbors. We believe that maintaining the focus on the principles of anti-evasion and integration would be preferential to adoption of safe harbors.

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

In effect, the proposed rules have three levels of application: the statement of the general principle, the provisions that apply the general principle to specific fact patterns, and the safe harbors. We believe this three-level analysis is a mistake and may lead to confusion. Specific fact patterns could be included in the safe harbors, together with guidance as to why the safe harbor is consistent with the above stated principles.

With respect to the provisions in proposed Rule 152(a)(2), we see the need for some clarification. The Rule would clarify that if an issuer's general solicitation materials for one offering discuss the material terms of another concurrent offering, the offering materials must include the necessary legends for, and otherwise comply with, the requirements of each exemption. This poses particular problems in the case where an issuer is making concurrent offerings under both Regulation A and Regulation CF:

- In such cases, once the Regulation A offering is qualified, no written offers may be made unless the Regulation A offering circular precedes or is delivered with such offer. A discussion of a Regulation A offering in a Regulation CF Form C would likely be deemed an offer (and it would have to be discussed, otherwise the Form C would omit material information). When the Form C is posted on an intermediary's website, the offering circular can be delivered by means of a live hyperlink from the website. However, the Form C filed on EDGAR could not include that hyperlink (files with active hyperlinks result in non-validation errors when attempting to file through EDGAR). We understand from discussions with the Staff in the past that live links need not be included in the Form C filed on EDGAR; we would appreciate confirmation of this point.
- More disturbingly, and confirmed in footnote 75 of the Proposing Release, a Form 1-A filed with the Commission that discusses the material terms of a Regulation CF offering would not comply with the limitations on advertising in Rule 204 of Regulation CF. Current practice in such circumstances is not to mention material terms; merely to state that the issuer is making a concurrent offering under Regulation CF and identify the portal. However, if the Commission were to increase the offering limit for Regulation CF, and the amount sought under Regulation CF were to be material in relation to the amount sought under Regulation A, not to reflect the amount sought in the Regulation CF offering, and to reflect the impact of the Regulation CF offering in Use of Proceeds, Dilution, etc. in the Form 1-A might be an omission of a material fact. It would not even be possible to state that the issuer was seeking a relatively modest amount under Regulation CF, as the amount sought is a material term. This might make it impossible to make concurrent Regulation A and Regulation CF offerings, which would have the most impact on very small issuers, who often make such offerings concurrently because they are unable to comply with state broker-dealer regulations in connection with their Regulation A offerings.

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

We believe that a 30-day period is appropriate. It is consistent with market practice in registered offerings to cure gun-jumping.

7. Should we, as proposed, condition the availability of the 30-day safe harbor on the requirement that, for an exempt offering for which general solicitation is not permitted, the purchasers in such offering were not solicited through the use of general solicitation or that the purchasers established a substantive relationship with the issuer prior to commencement of the offering for which general solicitation is not permitted? Alternatively, is a provision similar to that in proposed Rule 152(b)(1) more appropriate in Rule 502(c) of Regulation D concerning purchasers in offerings for which general solicitation is not permitted? Should the provision be included in both proposed Rule 152(b)(1), as well as in Rule 502?

We believe that this condition would be appropriate.

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

We believe this would be appropriate.

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

We believe that to do so would be a useful clarification.

10. Should general solicitation in the United States in connection with an exempt, U.S. offering constitute directed selling efforts under Rule 902(c)(1) of Regulation S for purposes of the offshore transaction? Should we, as proposed, amend the definition of "directed selling efforts" to permit issuers to make concurrent offers under Regulation S and an exemption from registration that permits general solicitation? Should we expand the definition of "directed selling efforts" to also exclude activities that would be "reasonably expected to" condition the U.S. market, regardless of the intent of those activities? Would an issuer be able to demonstrate the intent underlying general solicitation activities under the proposed amendment? Would the proposed amendments provide sufficient clarity to issuers using social media to make concurrent U.S. and non-U.S. offerings? In such situations, would an issuer have difficulty separately complying with Regulation S and other exemptions? Do the proposed amendments to Regulation S raise investor protection concerns for offshore investors? Should we expand the proposed exclusion from "directed selling efforts" to apply not only to concurrent exempt offerings that permit general solicitation, but also to domestic registered offerings?

We would prefer that the definition of "directed selling efforts" be amended to provide that it is not triggered by concurrent compliant Rule 506(c) offerings providing those offerings are not undertaken with the intent to condition the US market for the securities being offered under Regulation S. However, permitting such offers to be made under the proposed rules would be a significant improvement on the current state of affairs, where issuers must take elaborate and generally pointless precautions to prevent investors in the United States being aware of the Regulation S offering.

We would urge the Commission to consider whether it is solving for a problem that does not exist. When concurrent Regulation D and Regulation S offerings are made, the issuer is generally looking to channel accredited US investors into the Regulation D offering. Is the concern that non-accredited US investors, hearing of the Regulation D offering and not being permitted to participate, might discover the Regulation S offering and seek to invest in that as an alternative? In our experience, they are much more likely to simply misrepresent their accredited status and invest in the Regulation D offering.

The definition of "directed selling efforts" should not be expanded to include activities that are reasonably expected to condition the US market. Again, we note that we are talking about a situation in which there is a concurrent, presumably compliant, Regulation D offering. Quite apart from the fact that it would be difficult to ascertain which activities condition the market for Regulation D securities, and which condition the market for the Regulation S securities, we do not see what problem the Commission is attempting to address.

11. Should we require the resale restrictions of proposed Rule 906? Will proposed Rule 906 help prevent flowback of securities to the United States? Is the proposed six-month time period appropriate, or should we consider a longer or shorter time period for the resale restriction to apply? Should the time period during which resales are restricted instead correspond to the distribution compliance period for Category 2 or Category 3 offerings under Regulation S, as applicable? Should we permit resales to QIBs and IAIs during this six-month period, as proposed? We expect that issuers would consider implementing measures similar to the "offering restrictions" defined in Rule 902(g) to comply with the 59 proposed Rule 906 resale restriction, but should we specify measures an issuer must take to comply with the proposed resale restrictions? If so, what type of measures would be appropriate? Are the proposed definition of "directed selling efforts" and new Rule 906 in keeping with the territorial approach taken in Regulation S?

We believe that the six-month resale restrictions add an unnecessary level of complexity to Regulation S, which is already complex, and that prescribing measures to enforce the restrictions is unnecessary. We question whether flowback in these circumstances is problematic, and whether it is likely to occur at all, given existing resale restrictions.

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

We believe that the Commission should adopt this safe harbor, but note that at least in part the premise stated is faulty. The proposing release states " . . . a subsequent Regulation A or Regulation Crowdfunding offering would provide investors in these offerings with an offering document and ongoing disclosures to provide them with material information about the offering prior to making their investment decision." As we have pointed out on previous occasions, including in our comment letter to the Concept Release, compliance with the disclosure requirements of Regulation CF is frequently inadequate. (We also note that compliance with ongoing disclosure requirements is dismal, but that is not really relevant to investor protection at the time of purchase.) If the Commission's decision to adopt this safe harbor is based on the provision of information in order to provide investor protection, then the Commission should consider enforcing the disclosure requirements already on its books.

14. Should we include any other safe harbors from integration in Rule 152? For example: a. Should we include a safe harbor for all offers or sales to investors with whom the issuer has a pre-existing substantive relationship? Should this safe harbor be available for all such offers or sales, regardless of when they occur in relation to another offering (i.e., whether prior to, concurrent with, or subsequent to another offering) and regardless of whether the other offering is exempt or registered? If we were to adopt such a safe harbor, would that make any of the proposed safe harbors unnecessary? b. Should we include a safe harbor from integration for all offerings limited to QIBs and accredited investors? Should such a safe harbor include offers or sales preceding or concurrent with a registered offering? Alternatively should such a safe harbor apply only to QIBs and IAIs, regardless of whether the offer or sale was prior to, concurrent with, or subsequent to other offerings? Do offers and sales to such investors raise concerns with respect to conditioning the market for a subsequent registered offering of the issuer's securities? c. Should we include a safe harbor available for offers or sales made in reliance on Rule 506(c) that are made concurrently with an exempt offering permitting general solicitation, such as in reliance on Regulation A, Regulation Crowdfunding or Rule 147A, provided that, if the general solicitation materials used in connection with the Rule 506(c) offering include the material terms of the other concurrent exempt offering permitting general solicitation, then the Rule 506(c) materials must conform to the legend and other requirements of the other exempt offering permitting general solicitation? In this regard, is our proposed Rule 152(a)(2) more appropriate as a safe harbor or as an integration principle?

We believe that adding more safe harbors undermines the utility of the general principle.

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

A single integration rule is far preferable to revising the existing rules.

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

We do not believe that this is necessary if Rule 152 is adopted.

17. Should we define the terms "terminated or completed," as proposed? Should the analysis of whether an offering is "terminated or completed" be predicated on the issuer's entry into a binding commitment, subject only to conditions outside of the investor's control, to sell securities under the offering, as proposed, or should we consider an alternative such as the closing of the final sale of securities under the offering? Are there any administrative or logistical issues that would be raised if the "termination or completion" of an offering were determined based on the closing of the final sale of securities under the offering? Should anything else be considered "terminated or completed" with respect to offerings under Regulation A and Regulation Crowdfunding, and registered offerings?

It might be preferable to include guidance in determining when offerings might be treated as "terminated or completed" as opposed to defining those terms, in light of the fact that the definitions might not catch all possible circumstances. We note that the definition with respect to Section 4(a)(2), Regulation D or Rules 147 and 147A references a binding commitment to sell on the part of the issuer "subject only to conditions outside the investor's control" and wonder whether the reference should instead be to "conditions outside the issuer's control." We also note that the definition as it applies to Tier 2 Regulation A offerings provides that for continuous offerings not withdrawn or abandoned, the offering is deemed completed on the third anniversary of qualification. This would mean that even where <u>by its own terms</u> the offering terminates a year after qualification, for the purposes of the safe harbor it would not be treated as terminated. This is not logical. (Regulation A Form 1-Z is not filed upon completion of a Tier 2 offering.)

In the event that guidance or definitions are provided with respect to termination or completion, we suggest that similar guidance with respect to "commencement" of an offering would be equally useful, especially in the context of testing the waters or seeking indications of interest.

With respect to concepts such as "closing of the final sale of securities" we would note that "closing" in most Regulation A offerings is not such a concrete concept as it is in registered, or larger, offerings. When dealing with clearance and settlement of investments made by retail investors, who may have committed to purchase but not actually delivered funds into escrow, or may have provided incorrect details with respect to instructions for share delivery, we tend to live in a "T plus infinity" world.

18. Should we consider revisions to Regulation Crowdfunding that relate to intermediaries in light of the proposed integration safe harbors? For example, should we revise the portal requirements under Regulation Crowdfunding to permit concurrent Rule 506(c) offerings to be offered and sold via a portal's internet platform? What other Regulation Crowdfunding rules should be revised to facilitate Rule 506(c) offerings concurrent with Regulation Crowdfunding offerings? Should we provide guidance regarding issues that may arise when an intermediary seeks to host concurrent offerings? Should we expand any of our rules, for example, the rules under Regulation Crowdfunding, to permit certain entities to act as intermediaries for sales of securities to accredited investors in concurrent Rule 506(c) offerings?

It is already standard market practice for concurrent Rule 506(c) offerings to be offered and sold alongside Regulation CF offerings on the same online platform. Where the platform is not a registered broker-dealer, the Regulation CF offering is intermediated by a registered funding portal, and the Rule 506(c) offering is not intermediated by the funding portal but hosted by the same technology and no commission is charged. It is not clear what the objective of any changes or guidance in this area would be unless either (a) the Commission believes that this structure is not permitted, or (b) the Commission wishes to permit funding portals to receive commission from Regulation D offerings. If the latter, then the Commission should consider whether an increase in the offering limit of Regulation CF is necessary.

General Solicitation

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

We believe that the Commission should adopt a specific exemption for communications in connection with demo days and similar events. However, we believe that the conditions proposed make the exemption largely unworkable. Limiting communications to the types of information outlined means that not only will issuers be unable to answer any of the common questions that potential investors ask, but that the breakout or one-on-one sessions that frequently follow general sessions will be akin to the Monty Python Cheese Shop sketch:

> "So what traction do you have?" "Sorry, can't answer that."
>
> "How is your solution better than your competitors?" "Sorry, can't answer that."
>
> "What was your valuation on your Series B?" "Well actually . . . no, sorry, can't answer that."

Essentially, the proposal would limit issuers to reading out "tombstone advertisements" from a platform. We do not see the need to undermine the utility of demo days in this way and believe that issuers and organizers will simply fail to comply.

We believe that limiting the exemption to events organized by the type of entities named is appropriate.

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

While we would love a clear definition of "general solicitation," we fear it is impossible and that attempting to cover all potential permutations is doomed to failure. Technology will always be one step ahead of the regulations. For example, when it becomes possible to beam offering information directly into the electronic devices (or even the brain implants) only of investors unknown to the issuer but meeting very specific parameters (LA-based, writes checks of $10-20k, invests in perpetual motion machines and muffins, favors female founders) is that general solicitation or not?

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

For the reasons stated above, we think expanding the examples would not be of much assistance. We do not see the need to move the examples to a new rule.

22. Should we define the term "pre-existing substantive relationship" in the rule? If so, should we define the term consistently with the guidance set forth in this release? If not, how should we define this term?

We believe it would be appropriate to define the term consistently with the guidance in the release.

23. Would the proposed changes positively impact access to capital by counterbalancing social network effects for underrepresented founders, such as women, minorities, and entrepreneurs in rural areas?

Any actions that make it easier for underrepresented founders to get attention for their offerings will have this effect, although it will be hard to measure a specific impact.

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

As we stated in our response to the Concept Release, we do not believe investors are harmed by being the subject of offers, since adequate protections can be implemented at the point of sale. We are strongly in favor of generic solicitations of interest being permitted. Limiting testing-the-waters materials to specific investors adds a totally unnecessary level of complexity.

25. Should we, as proposed, require filing of the generic solicitation materials as an exhibit to the Form C in a subsequent Regulation Crowdfunding offering, or with the Form 1-A in a subsequent Regulation A offering? Should we instead require the generic solicitation materials to be either filed with Form C or Form 1-A, or filed separately on EDGAR? Should we, as proposed, limit the filing requirement to offerings that commence within 30 days of the most recent generic test-the-waters communication? Should we instead impose the filing requirement irrespective of the timing of the subsequent offering or for some alternative timeframe?

We believe that filing of solicitation materials as an exhibit is appropriate.

We have been involved, both in the registered and the exempt context, with "gun jumping" issues, where industry practice is to cease communications for 30 days after an unintentional offer, not covered by registration or an exemption, is made. Materials used prior to 30 days before filing are not filed with the Commission in the case of registered offerings, and should not be filed in the case of exempt offerings.

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

We have no objection to requiring issuers to provide generic solicitation materials to investors, although there is the possibility that investors may be confused by any discrepancies between the generic solicitation materials and the mandated disclosure materials. We do not believe that any materials should be filed with the Commission. Based on our experience with Regulation CF, investors attach importance to materials filed with the Commission even where those materials are not reviewed.

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

In such cases, the generic solicitation materials should be provided to investors, but not to the Commission.

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

We support the inclusion of testing-the-waters communications for offerings under Regulation CF prior to the filing of a Form C. With intermediaries' role as gatekeepers under the exemption, it makes sense to require that testing-the-waters be conducted following the engagement of an intermediary. Without such an engagement, the issuer would have limited means to receive substantive feedback, such as overall investor interest, and questions that prospective investors may have that could be communicated through the intermediary's communication channels. Communications used outside of the intermediary's platform should be required to include information to direct prospective investors to the platform.

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

We believe that the lack of state preemption would make the exemption almost useless. Regulation A and Regulation CF offerings are generally online offerings, and thus implicitly made to residents of all states. Where states require all offers to be registered or subject to a notice provision prior to offers being made, complying with those requirements will be burdensome and cost-prohibitive. We do not believe it is worth adopting this rule in the absence of state preemption.

30. Should we permit testing-the-waters communications to continue following the filing of the Form C with the Commission in a Regulation Crowdfunding offering?

Following the filing of the Form C, no special circumstances for testing-the-waters are necessary. Issuers already have the choice to communicate about their offerings (with restrictions on communications that include the terms of the offering) but not accept investments following the filing of the Form C.

31. Should we allow for oral communications about the offering outside of the funding portal's platform channels, as proposed? If so, what would be the benefits of allowing more communications? Should we impose any additional requirements to address investor protection concerns?

Part of the intention of Regulation Crowdfunding is to facilitate early investment by what we call "friends, family, and fans" of the issuer. These are often individuals in close physical proximity to the issuer, for which oral communications would be a normal occurrence. Additionally, as part of the start-up's early life, many issuers will want to attend trade shows, or company demonstrations that, even if not for the specific purpose of seeking investment, are important activities for building a business to viability.

While we do not believe that oral offers are in fact limited by Regulation CF, as not constituting "advertising," they do pose certain challenges, not least the possibility of information asymmetry. The current rules for Regulation CF create concerns for issuers as to what may be said about an ongoing offering during those types of encounters. We believe a potential solution is for issuers to be able to engage in these types of oral communications, but within five business days of the communication, to provide a summary of the oral communication that occurred as an update included on the offering page, such as through the communication channel provided by the intermediary.

32. Should we expand the types of information considered to be the terms of the offering for purposes of Rule 204? For example, should we amend the definition of "terms of the offering" to include information about the planned use of proceeds of the offering or about the issuer's progress toward meeting its funding target? Should we amend Rule 204 to allow for oral communications pertaining to any disclosure required by Rule 201 that is included in the filed Form C? Alternatively, should an issuer that uses advertising that includes the terms of the offering be permitted to include additional information, such as information about the planned use of proceeds of the offering or the issuer's progress toward meeting its funding target, even if such information is not included within the definition of the "terms of the offering"? Are there other steps we should take to clarify the advertising restrictions in Rule 204?

Before amending the definition of "terms of the offering", the Commission should assess whether current communication practices have in fact been problematic. Most communications outside the investment platform are either through social media, which by virtue of the character limits are limited to basic information about the company, or are designed to be "non-terms communications" in which the issuer can freely discuss its business without discussing any term of the offering. Adding additional categories of information to be considered "terms of the offering" would work to limit what issuers may say, rather than enable additional disclosure about use of proceeds or progress of the offering. This would have the effect of suppressing communications rather than providing more flexibility.

Moreover, we would ask whether the Commission believes that its rules as written actually impact oral communications. We have not generally viewed discussions with friends in the neighborhood tavern as constituting "advertising" within the meaning of Rule 204.

33. In light of proposed Rule 152(a)(2), which concerns the integration of concurrent exempt offerings permitting general solicitation, should we amend Rule 204 of Regulation Crowdfunding to permit an issuer to disclose the material terms of a concurrent offering made in reliance on Regulation Crowdfunding in a Regulation A offering statement or a Securities Act registration statement filed with the Commission? Are any revisions needed to Regulation A to permit such disclosures?

We believe that knowledge of the existence of a concurrent offering is essential to an investor's ability to make an informed investment decision. We believe that the provision of information about a concurrent offering, in limited but sufficient detail for the investor to understand the other offering and its impact on the offering the investor is considering, should never be deemed a prohibited offer, advertisement or communication that results in the integration of the two offerings. See further the discussion in our response to Question 4.

Investor Verification

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

We believe that the principal reason more issuers don't use 506(c) is that they don't need it. Some of the heaviest users of Regulation D are private funds who are able to find their investors without advertising and don't need small-dollar investors writing checks of less than $50,000. Many issuers value the ability to include non-accredited investors upon the provision of mandated information. There may also be some reluctance from old-school lawyers who are instinctively averse to advertised private placements. That doesn't mean that there aren't some small issuers who find Rule 506(c) invaluable. We believe that use of the exemption will rise over time and the Commission should not regard it as in any way as having failed to meet its potential.

We wonder, at this point, whether additional investor verification procedures are truly helpful. If a qualified lawyer can't help his or her client work out whether a specific process constitutes "reasonable steps to verify" and apply the principle to a specific set of facts then there is no hope for any of us. We have some more sympathy for an issuer not represented by counsel, but adding more options, or changing them, or making them mandatory, or optional, is just going to confuse issuers.

Another reason not to add further bells and whistles to Rule 506(c) is that doing so exacerbates an artificial distinction between it and Rule 506(b). The "reasonable steps to verify" requirement sits atop the existing requirement for both rules that the issuer have a "reasonable belief" that an investor is accredited. Many Rule 506(b) offerings have been made on the basis of "check-the-box" self-certifications which (depending on the facts and circumstances) don't actually support that belief. The more elaborate the "reasonable steps" under 506(c) become, the more the Commission seems to be signaling that the process to be used in 506(c) is qualitatively different and that the (often inadequate) procedures used in 506(b) are acceptable.

You're not going to make "fetch" happen. If anything, the relatively infrequent use of 506(c) compared to 506(b) may be an indication that extensive lobbying efforts to convince Congress (or the Commission) to expand an exemption will not in fact produce the results the lobbyists promised.

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

We worry that guidance has become shibboleth in this area, and that adoption of any time limit will have the effect of making some issuers reluctant to rely on any determination of accreditation, however reasonable, made outside the time limit.

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

We do not believe this is necessary.

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

Again, we do not believe this is necessary.

38. 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 protection? For example, should we provide a non-exclusive list of reasonable verification methods that would apply to the verification of an entity's accredited investor status? Should we add as a specific verification method for either natural persons or entities with investments of a large minimum amount, accompanied by written confirmation that investment is not financed by a third party? If so, what minimum investment amount would be appropriate for natural persons or for IAIs?

That would be a reasonable verification method, but it does not need to be written into the rules.

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

We do not anticipate needing new verification methods with respect to the proposed extension of the definition. We think what would be reasonable in most cases is self-evident. For example, if the investor claims accreditation by reason of holding A Series 7 FINRA, the issuer or its counsel can check FINRA's Broker Check.

Regulation D Disclosure

40. Are the current financial statement information requirements in Rule 506(b) appropriate or should they be modified to align the information requirements contained in Rule 502(b) applicable to non-reporting companies with those of Regulation A, as proposed? How would aligning such requirements affect capital raising under Rule 506(b)? Would there be investor protection concerns regarding any *reduction in information required to be provided to non-accredited investors? Should we retain the current Rule 502(b) provisions that permit an issuer, other than a limited partnership, that cannot obtain audited financial statements without unreasonable effort or expense, to provide only the issuer's audited balance sheet?*

We believe that all the disclosure requirements in Rule 506(b) should be harmonized with those of Regulation A Tier 2. We see no reason for any differences between them, and do not believe it is necessary to provide any exceptions from the requirement to provide audited financial statements. The disclosure requirements of Regulation A provide adequate information upon which a non-accredited investor can make an informed investment decision, and should be the standard.

Regulation A Simplification

48. We are proposing to amend our rules and forms to replace the competitive harm standard with new language based on the Supreme Court's definition of "confidential." Are there other changes we should make to our rules and forms in light of the Supreme Court decision?

We agree with the change in standard and its application to Form 1-A.

49. Should we amend the Regulation A exhibit filing requirements as proposed? Is there any reason not to extend this simplified confidential treatment application process to Regulation A issuers? Do our proposed amendments raise any investor protection concerns?

We are not aware of any reason to not extend the simplified confidential treatment application process to Regulation A issuers. Small businesses relying on Regulation A do not have the resources to go through the extended process to request confidential treatment of information contained in exhibits and are the most likely to benefit from this relief.

While we note that the Staff has processed CTRs for Regulation A offerings in a timely and sympathetic manner while the existing rules still apply, we would request, if the proposed changes are not adopted in the near future, that the Commission look into the adoption of temporary rules or procedures to give small issuers the relief that has been accorded to larger registrants.

50. Should we, as proposed, amend Form 1-A to allow non-public draft offering statements, amendments and related non-public correspondence to be made publicly available through the use of the EDGAR system, rather than requiring issuers to file such documents as exhibits to a publicly filed offering statement?

We support the proposal to allow draft offering statements and related correspondence to be made publicly available through EDGAR rather than as attached as an exhibit to a public offering statement. There is no added benefit to investors to including the draft and non-public materials as exhibits in the final offering statement on EDGAR, because these materials are already present on EDGAR and easily accessed. However, companies are sometimes tripped up by the requirement to include the draft offering statement as an exhibit even though it is already available publicly on EDGAR.

51. Should we amend Form 1-A to allow incorporation by reference of an issuer's previously filed financial statements, as proposed? How would such an amendment affect investors? Would this cause any increase in costs for issuers, such as in connection with consent fees from auditors?

We believe that "backward" incorporation by reference should be permitted, under the conditions proposed. However, we do not expect that being able to do so will have a significant impact on issuers. Auditors' consents will be required whether financial statements are included or incorporated, and will not generally have already been issued in connection with the filing of financial statements on a Form 1-K. Furthermore, the additional auditors' fees may be considerable.

52. Should the ability to incorporate financial statements into an offering circular by reference to previously filed documents be conditioned on eligibility requirements, similar to those currently applicable to issuers using Form S-1, as proposed? Are there other eligibility requirements we should consider? Should the ability to incorporate by reference financial statements into an offering circular be limited to previously filed financial statements as proposed or extended to include forward incorporation by reference to future financial statements under Regulation A?

We do not believe that backward incorporation by reference should be subject to more conditions than those applicable to issuers using Form S-1. See the response to Q.53 with respect to forward incorporation by reference of all information (not just financial statements).

53. Should we allow forward incorporation by reference in Regulation A offerings? In order to forward incorporate Exchange Act reports into a registration statement on Form S-1, a smaller reporting company must be current in its reporting obligations by having filed an annual report for its most recently completed fiscal year and all required Exchange Act reports and materials during the 12 months immediately preceding the Form S-1 filing (or such shorter period that the smaller reporting company was required to file such reports and materials). The smaller reporting company must also make its incorporated Exchange Act reports and other materials readily available and accessible on a website maintained by or for the issuer, and disclose in the prospectus that such materials will be provided upon request. If we were to permit forward incorporation by reference in Regulation A offerings, should issuers be required to meet similar requirements? Should issuers using forward incorporation by reference still be required to file an annual post-qualification amendment to their Form 1-A to include updated financial statements as well as to reflect a fundamental change in the information set forth in the offering statement?

Forward incorporation by reference of all information filed pursuant to ongoing reporting requirements should be permitted on the basis of the same conditions that apply to smaller reporting companies. If forward incorporation by reference were permitted, we believe that the requirement to file an annual PQA in order to include updated financial statements would not be not necessary, although we assume that this would only work if the auditors' consent was included in the Form 1-K, which is not currently required.

Because incorporation by reference means that information necessary to make an informed investment decision will be spread across two or more documents, which might be confusing to retail investors, issuers taking advantage of forward incorporation by reference should be required to explain clearly on their website which documents are current, or to provide an updated offering circular that incorporates all relevant information (which, however, would involve more cost to the issuer).

54. Should we, as proposed, amend Rule 259(b) to permit the Commission to declare a post-qualification amendment to an offering statement, abandoned, consistent with the rule applicable to registered offerings? Should we also provide notice to the issuer and a waiting period prior to declaring a post-qualification amendment abandoned, as is specified in Rule 479?

We believe that the Commission should be able to declare PQAs abandoned, with notice and a waiting period.

Offering Limits

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

Providing that the Commission is able to support the use of the general exemptive authority of Section 28 to increase the limit, we believe that it should be increased to $100 million. We have long maintained that the disclosure requirements of Regulation A provide adequate investor protection, and would eventually like to see Regulation A standards replace the Exchange Act requirements for smaller reporting companies.

However, we are concerned about the Commission's use of Section 28 of Securities Act to increase a limit established by statute, especially since the Proposing Release includes no discussion of the basis of authority. Using Section 28 to this extent is unprecedented in our experience. Issuers may be reluctant to make offerings for larger amounts if there is a possibility that the increase will be challenged in court.

56. Should we increase the Regulation A Tier 1 offering limit? Alternatively, we note that there is significant overlap between Rule 504 and Regulation A Tier 1 offerings. Should the threshold for Rule 504 be raised to $20 million such that Rule 504 might serve as a replacement for Regulation A Tier 1 offerings? If so, should we eliminate Tier 1 of Regulation A?

Our experience of Tier 1 has been mixed. When a filing is actually subject to state review, we have observed a robust review process that ensures adequate investor protection, at least during the course of the offering. However, we have observed many Tier 1 offerings by issuers that claim to be selling only in states that do not review those offerings but are in fact making unreviewed offerings nationally.

Additionally, making Tier 1 offerings does not obligate the issuer to comply with ongoing disclosure requirements. We think those ongoing disclosure requirements are an important element of investor protection. We would not therefore support an increase in the Tier 1 limits.

While we understand the overlap between Rule 504 and Tier 1, we would not support the replacement of Tier 1 by Rule 504 without seeing actual proposals. The circumstances under which general solicitation is permitted under Rule 504 can trip up issuers that are making offerings over the internet and we think confusion is likely to result.

57. Would increasing the maximum offering size encourage more issuers to undertake Regulation A offerings? Would it attract more institutional investors to the market?

We understand from discussions with market participants that increasing the offering size of Tier 2 might encourage more issuers, especially those in the life sciences, to use it. We also understand that more broker dealers might be interested in the market if offering limits were higher. We have not heard the same with respect to the Tier 1 limits.

58. Would increasing the maximum offering size increase the risk to investors? Is there any data available that shows an increase or decrease in fraudulent activity in the Regulation A market as a result of the 2015 or 2018 amendments?

We are not aware of any such data. If the offering limits for Tier 1 were to be increased without addressing the problems noted above, the number of problematic offerings would likely increase.

59. Should we, as proposed, increase the Rule 504 offering limit from $5 million to $10 million? Is another limit more appropriate? Would the increased offering limit encourage more regional multistate offerings and state coordinated review programs? Are there additional investor protections we should consider in connection with an increase?

We believe that it is the complexities of Rule 504, not its offering limit, that have resulted in its not being used more. We do not believe that increasing the offering limit will necessarily drive more regional multistate offerings.

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

In our comment letter on the Concept Release, we detailed the many compliance failures that we have encountered with respect to Regulation CF (both with respect to the initial filing and ongoing reporting). We noted that the structure of the Regulation means that responsibility for ensuring that the conditions of the Regulation are met has essentially been outsourced to crowdfunding intermediaries, who are not all meeting that responsibility. We believe that unless changes aimed at increasing the volume of offerings under Regulation CF are coupled with a robust enforcement program, investor protection will be adversely affected.

One problem we encounter frequently is non-compliance with generally accepted accounting principles. Issuers often ignore the rules regarding "predecessor companies" and omit financial statements that would provide useful information to investors. In the event that the offering limit is increased, issuers may well use the proceeds for acquisitions. We suggest that the Commission provide more explicit guidance as to the financial statements that are to be provided in Form C with respect to these scenarios.

At the very least, requiring a legality opinion from counsel for offerings of larger amounts would address some of the issues we have encountered on a regular basis with respect to compliance with corporate law.

61. In conducting our review and analysis of exempt offerings, we and our staff relied on data collected from filings with the Commission and third party data sources. In order to better analyze the exempt offering markets, should we consider ways to enhance compliance with Form D filing requirements?

There is no doubt that there is insufficient access to data about the exempt markets, especially with respect to smaller companies. With respect to larger offerings, such as those made under Rule 144A, privately collected data is probably fairly accurate. That data is commercially valuable and those providing and collecting the information have every incentive to ensure its accuracy. The same is not true with respect to small exempt offerings. We have noted disparities between information collected with respect to angel financing by institutions such as the University of New Hampshire (UNH) and filings made under Form D. We suggest that rather than trying to fix the problem via Form D, the Commission coordinate with UNH, the Angel Capital Association, Crunchbase and similar organizations to form a more accurate picture of early-stage financing.

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

We note that the Commission justified the treatment of accredited investors in Regulation A as follows:

> We do not believe that additional requirements for issuers and their intermediaries, such as requiring issuers to take reasonable steps to verify an investors' compliance with the investment limitations, are necessary to protect investors in light of the total package of investor protections included in the final rules for Tier 2 offerings.[1]

The "total package of investor protections" cited (including extensive disclosure requirements, audited financial statements and review by the Commission) do not exist in the context of Regulation CF. We

[1] https://www.sec.gov/rules/final/2015/33-9741.pdf; text accompanying footnote 157

would support the removal of investment limits for accredited investors if those investor protections were replicated.

63. Should we amend the method for calculating the investment limits for non-accredited investors in Regulation Crowdfunding to allow those investors to rely on the greater of their annual income or net worth as proposed? Is there any evidence to suggest that a more restrictive approach to investment limits is warranted for Regulation Crowdfunding offerings? Should we align the non-accredited investor limits in Regulation Crowdfunding with those in Regulation A Tier 2?

We would support the amendments as proposed.

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

We would support a micro-offering with no disclosure requirements or investment limits but would recommend that it be limited to those circumstances where the investor would have no reasonable expectation of government protection, made among true "friends and family" and limited to $25,000 in proceeds. We would not support easing requirements for offerings as large as $250,000; as the Commission itself noted in the Concept Release, seed round sizes are in fact getting smaller. As we discussed in our comments on the Concept Release, the Commission should bear in mind that it would be "blind" to the use of this exemption; with no filing or disclosure requirements (which we do not think should be required), there will be no way to monitor its use or abuse.

65. Should we extend federal preemption to secondary sales of Regulation A or Regulation Crowdfunding securities, for example, by expanding the definition of "qualified purchaser"? Several Small Business Forums, as well as the Commission's Advisory Committee on Small and Emerging Companies, have recommended that the Commission provide blue sky preemption for secondary trading of securities issued under Tier 2 of Regulation A. Should we preempt state securities registration or other requirements applicable to secondary sales of all securities initially issued in a Tier 2 Regulation A offering? Should we preempt state securities registration or other requirements applicable to secondary trading of securities only of Regulation A Tier 2 issuers that are current in their ongoing reports? Should *we similarly preempt state securities registration or other requirements applicable to secondary trading of securities of initially issued in a Regulation Crowdfunding offering? Should such preemption only apply if the Regulation Crowdfunding issuer is current in its ongoing reports? What other steps should we consider to improve secondary trading liquidity of securities exempt from registration under Regulation A or Regulation Crowdfunding?*

We believe that the Commission should extend federal preemption to secondary sales of securities of Regulation A reporting issuers that are current in their ongoing reports. Those reports, in our opinion, provide adequate information for investor protection. The same is not true for the ongoing reports under Regulation CF, where financial statements are not required to be reviewed or audited, and in our experience very rarely comply even with the reduced disclosure requirements of Form C-AR. We would suggest that preemption in the case of Regulation CF issuers only be permitted where the issuer provides in its Form C-AR financials that would meet the requirements of Form C that would apply to the issuer if it made a primary offering under Regulation CF.

Crowdfunding Vehicles

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

We believe that crowdfunding issuers should be permitted to use crowdfunding vehicles ("CVs") with the modifications suggested below. We believe that some issuers have been reluctant to make Regulation CF offerings because they feel that having a large number of retail investors on their cap table discourages later investment by VCs. However, we do not believe that it will necessarily follow that the use of CVs will result in issuers offering voting rights or more advantageous terms to crowdfunding investors. That is only likely to happen if the managers of the CVs are empowered and encouraged to act in the interests of the investors, and the structure proposed by the Commission would not seem to foster or even permit that level of involvement.

67. Should we require registered investment advisers to manage crowdfunding vehicles? Would there be a role for a registered investment adviser in light of the limited activities in which a crowdfunding vehicle could engage? Would registered investment advisers find it practical to serve a role with respect to a crowdfunding vehicle? Should we require an exempt reporting adviser to manage crowdfunding vehicles?

As discussed in more detail below, we believe that the almost-passive role that the proposals envisage for the CVs is not workable in practice, and that by necessity the manager of the CV will end up making decisions on behalf of investors that should properly be made by a person with fiduciary obligations to those investors. For example, we believe the mismatch between rights under corporate law and those created by contract, flagged in our response to Question 70, means that the CV's activities cannot effectively be limited to "acting solely as a conduit to hold the securities of the crowdfunding issuer without the ability for independent investment decisions to be made," as stated in the Proposing

Release. Additional issues arise with respect to decisions to wind up the CV, whether changes should be made upon the crowdfunding issuer's eventual listing or quotation on a trading forum, and what to do in the event of the crowdfunding issuer's non-compliance with securities laws, as discussed in our response to Questions 72 and 73 below.

As a registered investment adviser, CrowdCheck would be willing to serve a management role with respect to CVs; however certain issues would need to be addressed before registered investment advisers (RIAs) would be interested in this market. This would include the question of whether a RIA involved in this market would be required to have the securities held by a "qualified custodian." In most cases in Regulation CF, securities are in book-entry only form, and their ownership is recorded on the books of a registered transfer agent. Any RIA would require guidance as to its responsibilities as regards custodianship before it could provide services in this market.

Should we allow investment advisers to form funds for non-accredited investors that invest in multiple crowdfunding issuers?

We are disappointed that this question is tucked away at the end of a largely unrelated series of questions, because it deserves broader discussion. We believe strongly that the Commission should make it possible for non-accredited investors to invest in funds comprising diversified portfolios of crowdfunding issuers, to provide a wider range of investment opportunities for those of modest means, provided that investor protection concerns are paramount. We believe that, even more than in the case of single-issuer CVs, such funds should be advised by registered investment advisers. We would be very happy to see a framework for the creation of such funds to be proposed by the Commission.

68. The proposed rule includes several conditions designed to require that the crowdfunding vehicle serve the sole purpose of acting as a conduit for investors to invest in the crowdfunding issuer. Are these conditions appropriate? Should a crowdfunding vehicle be permitted to engage in a broader range of activities? For example, should the rule provide that a crowdfunding vehicle must redeem or offer to repurchase its securities if there is a liquidity event at the crowdfunding issuer? If so, how should the rule accommodate these activities? Are there other purposes for which the crowdfunding vehicle should be permitted to receive compensation or use offering proceeds? Should a crowdfunding issuer be required to pay the expenses associated with the formation, operation, or winding up of the crowdfunding vehicle? Should anyone else bear these costs? Should any compensation paid to any person operating the crowdfunding vehicle be paid solely by the crowdfunding issuer? Should we include any additional restrictions? Are there any other issues that could arise if we allow the use of crowdfunding vehicles in Regulation Crowdfunding offerings, as proposed? Would legislative changes be necessary or beneficial to permit crowdfunding vehicles to engage in a broader range of activities, pay compensation to any person operating the crowdfunding vehicle, or include any additional restrictions on the operations of the crowdfunding vehicle?

We discuss the need for the CV to act in a coordinated manner with the crowdfunding issuer in questions 70 and 74 below.

As regards compensation, it is important to distinguish the CV from the person operating the CV (the "CV Administrator"). In order to maintain the objective of an almost-passive conduit role for the CV, the CV itself should be permitted to act as a conduit for the flow of cash or securities in connection with its designated functions (expanded as discussed below) but should not be separately compensated. The CV Administrator should be permitted to receive compensation in accordance with its costs and its responsibilities. We do not believe that legislative changes are necessary in this regard.

It is not uncommon in crowdfunding that investors are charged fees by the crowdfunding intermediary, and sometimes these fees mean that investors effectively end up subsidizing the commissions payable to the crowdfunding intermediary. For example, the intermediary's commission might be reduced from 7% to 4% if the issuer agrees to investor fees of 3%. If the Commission wishes to ensure that a specific party is responsible for the costs and fees associated with the creation and operation of the CV (a matter as to which we are agnostic) then it should take this practice into account. Otherwise, fees paid by investors will end up indirectly supplementing both the commissions payable to the intermediary and the CV creation and administration fees payable to the CV Administrator.

69. The proposed rule includes several conditions designed to provide investors in the crowdfunding vehicle the same economic exposure, voting power, and Regulation Crowdfunding disclosures as if the investors had invested directly in the crowdfunding issuers. Are these conditions appropriate? Should a crowdfunding vehicle be allowed to issue multiple classes of securities in the event that the crowdfunding issuer has multiple classes of securities? Would legislative changes be necessary or beneficial to permit a crowdfunding vehicle to issue multiple classes of securities? Should the crowdfunding vehicle and the crowdfunding issuer be deemed co-issuers for purposes of the Securities Act, including that Act's antifraud and liability provisions?

Since CVs will likely be created in the form of Series LLCs, there would seem to be no need for an individual CV to have multiple classes of securities. It would be simpler to simply create a new Series for additional classes of securities issued by the crowdfunding issuer.

We agree that the CV should be deemed a co-issuer for the purposes of the Securities Act, including the Act's antifraud and liability provisions. As discussed above, we believe there is a role for a third-party CV Administrator who has a fiduciary duty to investors, rather than the CV being an extension of the underlying issuer controlled by management. This would necessitate that the CV Administrator be adequately compensated for managing the CV as a co-issuer separate from the underlying issuer.

70. Would the proposed requirement that the crowdfunding vehicle maintain a one-to-one relationship between the number, denomination, type and rights of crowdfunding issuer securities it owns and the number, denomination, type and rights of crowdfunding vehicle securities outstanding provide an investor in the crowdfunding vehicle the same economic exposure as if he or she had invested directly in the crowdfunding issuer? Are there any changes we should make to achieve this objective more effectively or to address the manner in which a crowdfunding vehicle may hold crowdfunding issuer securities? For example, in the case of a stock-split by a crowdfunding issuer, should we permit a crowdfunding vehicle to maintain its current capitalization structure on the condition that it otherwise *maintain the same economic exposure for its beneficial owners to the stock-split securities of the crowdfunding issuer?*

An exact correlation between the investment opportunity presented by the crowdfunding issuer and that offered by the CV is never going to be possible.

The crowdfunding issuer may be a corporation, an LLC or a limited partnership. It may be formed under the laws of any state or territory. In contrast, the CV will have to be a pass-through entity for taxation purposes; otherwise the investors would be subject to double taxation, and economic exposure would not be mirrored. Even so, the circumstances under which a crowdfunding issuer's status as a Qualified Small Business, subject to preferential taxation treatment, could be passed through is uncertain. If CV Administrators are to operate efficiently in this market, they will have to take advantage of structures such as Series LLCs in order not to have to create (and charge for the creation of) entirely new CV structures for each crowdfunding issuer. To completely replicate the shareholder rights of a crowdfunding issuer incorporated in State X with specific rights set out in its bylaws, the CV would need to incorporate the CV in the same state, and draft custom bylaws that reflected the rights of direct investors in the issuer. Even then, the match would not be perfect, and it is highly unlikely that any market participant would be willing to undertake such a project, or that a crowdfunding participant would be willing to pay for it.

Exact replication of the rights attached to the securities of the crowdfunding issuer will not be possible; the objective should be to pass on all the economic and voting rights that can be passed on. Some element of judgment will be involved in establishing whether this objective is met, again militating in favor of a registered investment advisor with a fiduciary obligation to the end investors.

That being the case, a one-for-one relationship between number, denomination, type and rights of securities is not only impossible but unnecessary. "Type" and "rights" are most difficult to replicate, as discussed above. Provided that investors understand the relationship between the number of securities the CV issues and the number of securities the crowdfunding issuer has issued, there is no compelling reason for there to be an exact match, or for stock splits at the crowdfunding issuer level to be mirrored by the CV. Denominations can be easily mirrored.

71. The crowdfunding vehicle would be required to seek instructions from its investors with regard to two matters: (i) The voting of the crowdfunding issuer securities it holds; and (ii) participating in tender or exchange offers or similar transactions conducted by the crowdfunding issuer. The crowdfunding vehicle would be required to vote the crowdfunding issuer securities, and participate in tender or exchange offers or similar transactions, only in accordance with instructions from the investors in the crowdfunding vehicle. Would these requirements effectively pass-through any voting rights associated with securities issued by crowdfunding issuers and the ability to participate in tender or exchange offers or similar transactions? Should the rule refer to additional types of transactions? Would these requirements impact an issuer's willingness to use a crowdfunding vehicle, as the issuer would still indirectly be required to obtain consent or approval from numerous investors? Operationally, how would crowdfunding vehicles comply with this condition? Should the rule provide that a crowdfunding issuer may obtain proxies or *investors' pre-approval with respect to certain (or all) matters? Should the rule provide more flexibility? For example, should the rule permit a crowdfunding vehicle to disclose to its investor at the time of its initial offering that the vehicle will cast all of its votes in accordance with the instructions of a majority of its security holders, rather than using pass-through voting as proposed? Would legislative changes be necessary or beneficial to provide the crowdfunding vehicles additional flexibility with respect to voting rights and the distribution of information?*

It is common practice for crowdfunding issuers to require investors to grant proxies to management or persons appointed by management. That being the case, the CV would grant the same proxy with respect to the securities it held, and would disclose that fact in its Form C. We do not believe that the use of a CV would result in crowdfunding issuers' granting voting rights to investors in general, and therefore indirectly to investors in the CV. If the crowdfunding issuers' securities did carry any voting rights, we do not believe that indirectly needing to seek the vote of numerous investors would affect an issuer's willingness to use a CV.

In contrast, requiring CVs to seek the vote of investors with respect to exchange and tender offers would provide meaningful investor protection.

72. Upon receiving all of the disclosures and other information required under Regulation Crowdfunding from the crowdfunding issuer, the crowdfunding vehicle would then be required promptly to provide such disclosures and information to the investors and potential investors in the crowdfunding vehicle's securities and to the relevant intermediary. Would these requirements address any concerns about investors and potential investors in a crowdfunding vehicle receiving regular information from the crowdfunding issuers?

We believe the Commission is focusing on the wrong issue here. Requiring CVs to pass on information they receive is not problematic. The problem is that such an extremely high percentage of crowdfunding issuers do not comply with their ongoing reporting requirements under Regulation CF. Once issuers have made their initial offerings they tend to ignore those requirements until they need to seek funds again, at which point they can bring their reports up to date without any negative repercussions. In this context, the use of CVs may improve compliance with ongoing reporting requirements. CV Administrators will likely have contractual relationships with crowdfunding issuers whereby they can force crowdfunding issuers to provide mandated information.

73. The crowdfunding vehicle would be required to provide to each investor (i) the right to direct the crowdfunding vehicle to assert the rights under state and federal law that the investor would have if he or she had invested directly in the crowdfunding issuer and (ii) any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer. Would this effectively preserve state and federal law rights for shareholders and provide shareholders with the necessary information to determine whether to direct the crowdfunding vehicle to assert such rights? Is this condition appropriate for crowdfunding vehicles which, unlike collective investment vehicles generally, would serve the specific and limited purpose of functioning solely as conduits to invest in businesses raising capital through the vehicle under Regulation Crowdfunding? Operationally, how would *crowdfunding vehicles comply with this condition in practice? In lieu of this condition, would a crowdfunding vehicle's disclosure to investors in writing of any differences that its investors would experience by investing indirectly in the crowdfunding issuer through the crowdfunding vehicle sufficiently address any concerns about a crowdfunding vehicle affecting an investor's rights under state or federal law?*

This is another area where a pro-active RIA, as opposed to a near-passive conduit, could provide necessary investor protection. As we have noted many times in the past, including in our comment letter on the Concept Release, it is not uncommon that the subscription documentation used in a Regulation CF offering will waive some of the most basic investor protections. These include jury waivers, agreements not to hold intermediaries liable for misleading statements and the like. A CV directed to enforce the rights that it has under state and federal law and to pass on information would not only preserve those rights for shareholders, but could also actively decide not to invest when those rights have been undermined. The contract between CV investors and the CV would not only disclose the differences between having direct privity with the crowdfunding issuer to enforce those rights and needing to have the CV act on investors' behalf but also explain the CV's obligation to act, in circumstances where investors holding limited stakes would not be incentivized to take action.

74. Should we, as proposed, require crowdfunding issuers and crowdfunding vehicles to jointly file a Form C? Alternatively, should we require that each file a separate Form C or only require the crowdfunding vehicle to file a Form C? What would be the advantages and disadvantages of requiring separate Forms C to be filed? Should the application of the Regulation Crowdfunding offering limit be revised in light of the requirement to jointly file a Form C?

We believe that there are a number of issues that need to be addressed with respect to filing.

- The filing obligations of the crowdfunding issuer and the CV should be coterminous and coordinated. The crowdfunding issuer's filing obligations could in theory be terminated after one filing of Form C-AR (since it would have less than 300 holders of record), while the CV would have ongoing reporting obligations for at least three years. We suggest that ongoing reporting obligations should only be permitted to be terminated if both parties meet the conditions for termination.
- Having both parties file the same Form C and the same Form C-AR would reduce market confusion, help investors access information more easily, and assist the CV Administrator in enforcing the crowdfunding issuer's ongoing reporting obligations.

There would be no need to change the offering limit solely in order to accommodate the CV structure; the offering limit could just be applied separately to each of the co-issuers. In this case, since the CV would not be an entity under common control with the crowdfunding issuer, the question of "issuer aggregation" to comply with Rule 100(a) would not arise.

75. The proposed rule would require a crowdfunding issuer that is offering securities through a crowdfunding vehicle to file a separate Form C if it wanted to also directly offer its securities to investors.

Should we instead permit such a crowdfunding issuer to offer its securities directly to investors on the same Form C the crowdfunding vehicle uses to offer its securities? If so, are there any restrictions or disclosure obligations we should implement to avoid investor confusion? What issues could arise if crowdfunding issuers were allowed to simultaneously offer on Form C in this way?

We believe that combining direct and CV investments in a single offering are likely to add significantly to investor confusion. If this combination were to be permitted, the issuer should file a separate Form C, but we do not believe it is advisable.

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

The investors in the CV should be treated as if their shares were held through a single custodian, constituting a single holder of record with respect to both the crowdfunding issuer and the CV. We do not believe that legislative changes would be necessary in this regard.

77. Should the Commission further address the status of a crowdfunding vehicle complying with the proposed rule for purposes of the definition of broker under Section 3(a)(4) of the Exchange Act or dealer under Section 3(a)(5) of the Exchange Act, and persons operating such crowdfunding vehicle?

We believe that a RIA operating a crowdfunding vehicle in accordance with the processes we outline above would not be a broker-dealer and that it would be appropriate for the Commission to confirm that doing so would not result in the operator being required to register as either a broker or a dealer.

Eligibility and Disqualification Issues

78. Should we harmonize the limitations on the types of eligible securities issuable under Regulation Crowdfunding with Regulation A as proposed? If so, what would be the effect on issuers, investors, and the market of limiting these categories of securities? In the alternative, should we modify Regulation Crowdfunding only to exclude particular security types, such as SAFEs?

We believe that the Commission should harmonize the types of securities eligible to use the two Regulations. Investor protection requires that investors understand the nature and risks of what they are investing into. We have seen many cases where SAFEs have been issued by issuers that are very unlikely to ever take the actions that would trigger the issuance of equity to investors, and yet investors have not been alerted that their securities are unlikely ever to be worth anything. In the time of the blockchain craze, we also saw ICOs and similar instruments issued in circumstances where the rights of the purported securities were never made clear and the underlying documentation was both incomprehensible and unenforceable. We would support limiting issuance under Regulation CF to equity, debt and convertible securities. With respect to convertible securities, we believe the Commission should also re-issue the guidance the Staff has given previously with respect to the need for the offering statement to cover both the securities issued and the securities into which they are convertible.

We would suggest that if the Commission intends to exclude SAFEs, it should provide guidance as to the extent of the prohibition. There are other instruments issued under Regulation CF that are not called SAFEs, but have very similar terms. We suggest that the Commission describe the terms that an instrument must contain in order to be treated as a "convertible" security.

Moreover, we would note that the sort of convertible notes issued by Silicon Valley companies that were replaced in popularity by SAFEs are fairly complex instruments. Since the Commission appears to be concerned that investors may not understand the rights of the instruments they are investing in, we believe that it should take into account the fact that if it prohibits SAFEs and yet permits that sort of convertible note, with its full or weighted ratchet anti-dilution provisions and its potential multiple liquidation preferences, little will have been achieved in terms of investor protection.

In contrast, revenue-sharing agreements are much more easily understood by retail investors. They are essentially debt instruments and should be permitted.

79. If the popularity of SAFEs is in part due to a desire by issuers to avoid a complicated capitalization table, would our proposed amendments permitting crowdfunding vehicles to use Regulation Crowdfunding appropriately alleviate that concern? Are there other reasons why issuers issue SAFEs or other security types in Regulation Crowdfunding offerings that we should be aware of when considering whether to exclude particular security types?

We believe that permitting the use of CVs (providing the issues identified above are addressed) would address the "messy cap table" issue although that is by no means the only reason driving the use of SAFEs. One of the primary drivers of the use of SAFEs is to delay substantive analysis of the valuation of the issuer when that issuer is still in its developmental stages. SAFEs are also generally easier for an issuer to issue as, being creatures of contract, they can be entered into without complying with the corporate niceties that are so often ignored when securities are issued under Regulation CF, and which are discussed in our response to Question 60. They are also faster to negotiate. We would note that SAFEs started to be used in Silicon Valley in response to some of the perceived shortcomings of convertible notes including the anti-dilution provisions and multiple liquidation preferences discussed above.

80. Should we amend Regulation A as proposed to include an eligibility requirement that requires Exchange Act reporting companies to be current in their Exchange Act reporting for the two years before filing an offering statement?

We believe that Regulation A should be amended as proposed.

81. Should we revise the bad actor look-back provisions in Rule 262(a) of Regulation A and Rule 503(a) of Regulation Crowdfunding as proposed?

In general we understand the reasoning behind the proposals and support the policy objectives behind them. However, we note that many Regulation A offerings are essentially permanent (an offering statement being usable for up to three years), and most Regulation CF offerings extend over several months. The changes may potentially impose financial burdens on both issuers and Regulation CF intermediaries.

With respect to Regulation A, if the amendment is adopted, brokers or other service providers (such as escrow agents) may require additional background checks or require the issuer to re-execute certification as to its non-disqualification on a basis that might be as frequent as every time a subscription agreement is executed by an investor (that constitutes a "sale") or every time a tranche of the offering is closed (when the offering uses "rolling closings," which is common and could be as frequent as every two weeks). This would be expensive and logistically difficult. While Regulation A does not impose explicit obligations with respect to checking that an issuer is not disqualified on persons other than the issuer, we believe guidance as to when third parties would need to make independent investigation as to the issuer's non-disqualified status would be helpful.

In contrast, intermediaries under Regulation CF have a positive obligation to remove issuers from their platform if disqualified, and an affirmative obligation to conduct a background check. If the lookback (for certain persons) is to be calculated by reference to every sale, and the offering extends for, say six months or a year, how frequently are such background checks to be conducted?

82. Should we keep any of the current bad actor look-back provisions centered on the time of filing rather than the time of sale as we are proposing to do for 20 percent beneficial owners? Should we do the same for any covered persons other than 20 percent beneficial owners?

While we understand the reasoning for excluding 20% holders for the lookback extension, we are concerned that having different lookback periods for different covered persons will lead to confusion. We believe that in most cases of continuous offerings under Regulation A and Regulation CF, trading will not be so frequent that it would make it unreasonably difficult to identify 20% beneficial owners.

83. Instead of disqualifying Regulation A or Regulation Crowdfunding issuers affected by disqualifying events that first arise or occur during an ongoing offering, should we allow such issuers to continue the offering but require them to disclose the disqualifying event, and provide investors with the option to cancel their investment commitments and obtain a refund of invested funds? Would such an option be difficult for issuers to administer?

We do not believe that such an option would be difficult to administer, but we do not understand why a more recent disqualifying event should be treated, in effect, as being less serious than an older one. We would not support that approach.

84. Should we, as proposed, revise the language in Rule 503(a) to more closely track the requirement in Rule 262(a) of Regulation A by including "any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale"?

We believe that the requirement should be amended as proposed.

85. Are there any anticipated additional costs of verifying the bad actor status of covered persons under Rule 262(a) and Rule 503(a) with a look-back period based on the time of sale instead of the time of filing? If so, would those costs be significant to the average issuer in Regulation A and Regulation Crowdfunding offerings?

We have discussed those costs in our answer to Question 81, and believe that those costs could be significant, especially in the case of Regulation CF offerings.

Additional Comments

We would also like to bring the Commission's attention to the following items that we believe would benefit issuers relying on Regulation A and Regulation CF.

- Under Regulation Crowdfunding, instructions to paragraph (c) of Rule 100 provides that issuers are under common control when there is the "power to direct or cause the direction of management and policies of the entity … by contract or otherwise." This language restricts the ability of small businesses to use Regulation CF if they are subject to franchise agreements, or wish to raise funds for opening a franchise, because of the franchisor's contractual control of the prospective issuer. As businesses and entrepreneurs who closed their doors due to COVID-19 restart operations, clarity on common control that allows the use of Regulation CF by franchisees would be beneficial.
- Issuers that are subject to ongoing reporting requirements under both Regulation CF and Regulation A have to file Form 1-K and Form C-AR at the same time every year. We believe that investor protection would be enhanced if issuers were given the option to comply with both filing requirements under cover of the same Form, the 1-K, provided all the information required by the Form C-AR was included therein and Regulation CF investors were informed of the change. We believe that investors would find one annual report on EDGAR to be less confusing.
- We would suggest that Regulation CF eligibility be conformed to match Regulation A eligibility with respect to issuers' being genuine US companies with a place of business in the United States. As it stands, the requirement that issuers merely be organized under the laws of a US state means that holding companies are being formed in the US to manage businesses that are located overseas, without disclosure of all the additional risks involved therein.
- We were disappointed that the Commission did not follow up on the Regulation A offering circular delivery issues it raised in Question 53 of the Concept Release. As we noted in our comment letter, our ultimate objective in this area would be to eliminate the regulation of "offers" altogether, and to shift the requirements relating to offering circular delivery into the

conditions of sale. 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. 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.

We would be happy to answer any questions the Commission or the Staff may have on any of the issues identified.

Sincerely,

/s/ Sara Hanks
CEO
CrowdCheck, Inc.