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Thank you for the opportunity to comment on S7-09-13, the SEC's proposed crowdfunding regulation. I am writing today because I am concerned about an ambiguous set of provisions in Title III of the JOBS Act of 2012 ("the Act"). The ambiguity I will highlight has not been directly addressed by the SEC, but it is urgent that it do so.

From the language of the Act, it is not clear whether the individual investor cap prohibits the prospective crowdfunding investor from investing more than the cap amount in a single issuer, or from investing more than the cap amount across all issuers utilizing the crowdfunding exemption. I believe the statute was crafted to establish a cap relationship between a single investor and a single issuer. Under this interpretation, the statute would prevent an investor from investing more than the cap amount in a single given issuer, but the investor would be free to invest the maximum amount as many times as they wished in other issuers. I believe that the opposite interpretation of the Act (establishing a cap relationship between a single investor and multiple issuers) risks harming the nascent crowdfunding market. If the SEC chose such an interpretation, it would signal the SEC's mistrust of the crowdfunding market by a conscious choice to limit the market's capital inflows. Furthermore, and more significantly, such an interpretation would curtail the average investor's ability to create diversified investment portfolios, thereby limiting their ability to create attractive and predictable investment returns in this new market. The SEC should directly address the Act's ambiguous provisions and clarify the SEC's interpretation and view of the legislative intent of the Act.

The Individual Investor Cap Provisions are Ambiguous and Conflicting

With respect to individual investors, issuers must determine the maximum amount they are allowed to sell to that particular investor under the relevant statutory calculation. The investor's cap is calculated relative to their income or net worth. If the investor has an income or net worth less than $40 thousand, the statute permits the issuer to sell up to $2 thousand worth of crowdfund securities to that investor.[1] If the investor's income or net worth is between $40 thousand and $100 thousand, the statute permits the issuer to sell crowdfund securities worth up to 5% of that investor's income or net worth.[2] For investors who have an income or net worth greater than $100 thousand, the statute permits the issuer to sell crowdfund securities worth up to 10% of the investor's income, "not to exceed a maximum aggregate amount sold of $100 thousand."[3]

It is an open question whether the individual investor cap relates to the investor's investment in a single issuer or to the investor's aggregate investment across all issuers. The statute says, "The aggregate amount sold to *any* investor by *the* issuer" may not exceed the hard dollar cap ($2,000 or $100 thousand) or the relative to income or net worth cap (5 percent or 10 percent) (emphasis supplied).[4] The emphasized language establishes that the relationship contemplated is between a single issuer and any single investor. If the relationship is between one investor and one issuer, it would suggest that the investor is free to invest the maximum amount in multiple offerings. But subparagraph (ii) of the investor cap (for individuals with a net worth greater than $100 thousand) complicates this reading by qualifying the investment cap with a second aggregation provision: "the aggregate amount sold to any investor by an issuer…

[1] Securities Act of 1933 § 4(6)(B); 15 U.S.C. § 77d(6)(B).
[2] *Id.*
[3] *Id.*
[4] *Id.*

[may not exceed] … 10 percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of $100 thousand."

One might suppose that the second aggregation provision creates a hard cap for all the investor's investments. However, the more natural reading of subparagraph (ii) is that the second use of the word aggregate simply reaffirms that the issuer may not sell more than allowed under the statute to a particular investor. Such a reminder might be necessary if an issuer solicits multiple investments in the issue. The all-or-nothing model of some crowdfunding portals makes it highly likely that issuers would solicit repeat investments from high net worth investors, particularly as the campaign nears its close. If the provision were to create an aggregate cap across all issuers, Congress would have written the provision to say "not to exceed a maximum aggregate amount *purchased* of $100 thousand."[5]

One other provision of the Act refers to the investor cap, and it serves to complicate the issue still further. Under "Requirements on Intermediaries," the statute provides "[An intermediary] shall… (8) make such efforts as the Commission determines appropriate, by rule, to ensure that no investor in a 12 month period has purchased securities offered pursuant to section 4(6) that, in the aggregate, from all issuers, exceed the investment limits set forth in section 4(6)(B)."[6] This provision seems to refer to an investor cap that would apply across all issuers when it uses the language "in the aggregate, from all issuers." But this provision creates an obligation for intermediaries and then refers back to the caps set in § 4(6)(B). Why would Congress have decided to outline the scope of the relationship between issuers and

[5] It is worth noting that the second investor cap provision is phrased differently than the first provision. The first provision relates the hard dollar cap to the relative to income or net worth by providing that the investor may invest "the greater of" the two in a particular crowdfunding offering. For clarity's sake, the second investor cap provision should have used parallel construction, and said "the lesser of." Previous drafts of the crowdfunding bill promulgated by the House included just such a construction of the investment cap provision. *See e.g.* H.R. Rep. No. 112-262, at 1 (2011) (Draft promulgated by Congressman Bachus out of the Committee on Financial Services). The construction of the investment cap included in the final bill was promulgated by Senator Merkley in an amendment.
[6] 15 U.S.C. 77d-1(a)(8).

intermediaries when the provision 1) creates an obligation for intermediaries and 2) the relationship is clearly established elsewhere? There is no legislative history to support the proposition the § (a)(8) amends the scope of § 4(6)(B).

Assuming for the sake of argument that § (a)(8) does adjust the scope of an investor's investment ability, it would only serve to make the statute ambiguous as a whole. If § 4(6)(B) creates a relationship between an issuer and an investor, and § (a)(8) refers to that relationship but in a way that makes the scope of § 4(6)(B) seem broader, then the statute is ambiguous because it is unclear which provision dictates the scope of the investor's investments.

Relevant Legislative History of the JOBS Act

The legislative history of the JOBS Act evidences intent to set the relationship between a single issuer and a single investor. Discussing the Senate bill, Senator Merkley, whose language for this provision eventually won out,[7] created the aggregate cap provision out of fear that "a person could lose their entire life savings in one fell swoop."[8] Essentially, Senator Merkley was afraid that investors would put all their eggs in one basket. If there were no investment cap in a single issuer, one lone fraudster could return to the same gullible people again and again until they had risked their entire life savings. At no point does Senator Merkley, nor any other commenter from the legislative history, contemplate or mention that an investor may be interested in multiple crowdfunding offerings, and that if they were, they wouldn't be allowed to invest more than their cap across all issuers. Such an unsupported reading of the statute and the legislative history would be contrary to the spirit of Senator Merkley's "one fell swoop" comment, particularly since it could discourage investors from availing themselves of the simple investment tactic of diversification, the only known cure for egg-basket syndrome.

[7] Subparagrah (ii) replaced the house provision by amendment.
[8] CONG. REC. S1887 (daily ed. Mar. 21, 2012) (statement of Sen. Merkley).

Conclusion

At bottom, the language of § 4(6)(B) sets the relationship between a single issuer and a single investor. But the scope of § 4(6)(B) could be ambiguous depending on one's reading, and either conflicts with § (a)(8) or the relationship between the two provisions is unclear. The single-issuer/single-investor interpretation of the cap relationship is preferable because it keeps the door open to diversification, one of the most desirable and common investor traits, and it is commensurate with the legislative history of the statute. Any intent to create an investor cap across multiple issuers must be read into the language of the statute, and draws no support from the legislative history of the Act. The SEC should state that the Act is ambiguous with regard to this issue, and elect to interpret the statute and explain its reasons on the record. Otherwise, the SEC risks an arbitrary and capricious interpretation of the Act.