

Comment on Proposed Regulation Crowdfunding
File Number: S7-09-13
Date: November 13, 2013

Dear Securities and Exchange Commissioners:

This comment concerns an apparent loophole in Regulation Crowdfunding that provides investors falling under the exceptions in Securities Act of 1933 section 4A(e)(1)(A)-(C)—and only those investors—the opportunity to get around the maximum purchase amount limitations of section 4(a)(6)(B) through the resale market. Please either explain why the rule does not contain a loophole, or provide justifications for the existence of the technical loophole. Specifically there seems to be very little reason to create a loophole only for those investors advantaged enough to fall under 4A(e)(1)(A)-(C) when the purpose of the JOBS Act was to “open these capital markets to the average investor[.]”¹

According to the rule, the “issuer” may not sell to “any investor” securities totaling more than a certain maximum value.² The rule discusses at length the responsibilities of intermediaries in enforcing this requirement under JOBS Act section 4A(a)(8), and apparently believes that it is an important limitation encouraging the flourishing of the market.³

The resale market unfairly undermines this limit for all but small investors. Only those investors qualifying under sections 4A(e)(1)(A)-(C) can purchase from anyone on the resale market.⁴ Only investors can easily get around any maximum purchase requirements that apply only to intermediaries.

For example, an advantaged investor could post an advertisement on one of the communication channels allowed under Regulation Crowdfunding soliciting more securities than they are allowed to purchase through the intermediary.⁵ There are strict requirements that intermediaries must follow when policing the activities of *issuers* on communication channels, but there seem to be no requirement that these kinds of communications from advantaged investors be disallowed.⁶

This proposed rule does not explain who—if anyone—would clear the resale of securities. It just lays out limitations found in section 4A(e). The agency seeks to impose many limitations on all purchases directly from intermediaries, but only a small portion of investors can take advantage of the resale market where there are fewer rules. If the securities can only be resold to a limited number of investors, then the only individuals who can scour the market generally to invest above the restriction in section 4(a)(6)(B) appear to be the investors in section 4A(e)(1)(A)-(C).

¹ Crowdfunding, 78 Fed. Reg. 66427, 66428 n.7 (proposed Nov. 5, 2011) (citing Rep. Patrick McHenry’s statement explaining the purpose of the Jumpstart Our Business Startups (JOBS) Act).

² Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, sec. 302(a), § 4(a)(6)(B) 126 Stat. 306 (2012).

³ Crowdfunding, 78 Fed. Reg. 66427, 66470 (proposed Nov. 5, 2011) (Requesting comments on the proper way to limit the maximum value an individual investor should be allowed to purchase in request for comments 158-161).

⁴ JOBS Act, § 4A(e)(1)(A)-(C). The fact that all investors can sell to family members under section 4(e)(1)(D) does not affect the conclusion that smaller purchasers face a paltry amount of potential suppliers on the resale market when compared to those that qualify under sections 4(e)(1)(A)-(C).

⁵ See Crowdfunding, 17 C.F.R. 227.303(c).

⁶ *Id.*

This appears to be an arbitrary and capricious limitation on investors who do not qualify for resale purchase. There is no explanation why they are not allowed to circumvent the maximum individual ownership limitations in the same technical way.

The Commission should not purposefully formalize a beneficial technicality available only to institutional/wealthy investors if the purpose of section 4(a)(6) is to get more heterogeneous kinds of investors with more heterogeneous risk preferences from less traditional funding channels involved in capital markets.⁷

Please either allow everyone to purchase resale securities above the section 4(a)(6) maximum on the secondary market or find ways to police this market more aggressively to ensure that no individual accredited investor can vacuum up more securities than they would be allowed to purchase directly from an intermediary.

Thank you,

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⁷ See Crowdfunding *supra* 1.