Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Re: File No. S7-09-13 January 9, 2014

Dear Ms. Murphy:

CrowdCheck, Inc., which provides disclosure and due diligence services for online offerings by early-stage companies, is pleased to submit comments with respect to the Commission's proposals for crowdfunding. This comment letter relates to the disclosure aspects of proposed Regulation Crowdfunding; specifically the filing requirements in Rule 203, and the requirement in Rule 303 that intermediaries present information in a format that can be downloaded by prospective investors.

When we first reviewed the proposed rules, we were very pleased to note that the Commission had apparently taken a flexible and forward-looking approach to disclosure in online offerings. It appeared from the proposal that the Commission was proposing to require certain information to be filed on Form C, but to permit additional offering material to be made available on the intermediary's platform and not filed on Form C. We now understand that that may not have been the Commission's intention. We are writing to request clarity on this point, and to recommend that "free writing" disclosure materials be permitted to be used without filing them with the Commission, in the circumstances set out below.

The nature of disclosure in online offerings

The manner in which information is presented by companies seeking funds in online offerings (which currently includes offerings made in reliance on Rule 506(b) and 506(c) and will include Section 4(a)(6) offerings) is in a state of rapid evolution. Technological developments and investor expectations mean that online investors no longer expect all the information that they need in order to make an informed investment decision to be presented to them in one, text-heavy, private placement memorandum (PPM). Current practice is to use a variety of media to present information, such as slide decks, videos explaining the offering, videos demonstrating the issuer's product, graphics, animations and the like. Some of these may be interactive. Innovative approaches, such as "widgets" that allow an investor to calculate potential return on investment using assumptions that the investor inputs him or herself help to encourage the investor to think about the possible returns on investment. New information delivery methods are being developed all the time.

We submit that this development is in the interests of investors. Our CEO worked on PPMs describing cellular telephone technology in the early 1980s and feels strongly that investors would have

understood the risks and opportunities of cellular technology much better if animations showing the technology, as opposed to written descriptions, had been an option at the time.

We note that many of these media formats cannot be filed on EDGAR, and also may present problems with respect to the requirement of proposed Rule 303 that intermediaries present the information delineated in Rules 201 and 203 in a form that can be downloaded, saved and stored by the investor (as discussed in more detail below).

We further note that the nature of online disclosure is iterative and dynamic. The traditional practice in offline offerings used to be to present all information to investors in one PPM prepared ahead of time and not changed once the offering starts. Even offline, we note that many early-stage companies, who may use an "investor deck" of slides as opposed to a PPM, now constantly amend their deck in response to the feedback of potential investors. Online, disclosure will likewise evolve in response to investor questions, and it is important that this process, reflecting the "wisdom of the crowd," which the Commission has referred to as a crucial element of crowdfunding, be encouraged. Material disclosure may be elicited from the questions of the crowd, and issuer responses to crowd questioning may result in frequent updates to the disclosure presented.

Timing of filing and material changes

As discussed above, online disclosure is dynamic. It is possible that material changes will be made to the disclosure on a platform at frequent intervals, as a result of the information-forcing process that the crowd commentary will drive. The Commission acknowledges this as an essential element of crowdfunding. Requiring a filing to be made every time a material change is made, however, will completely undermine this process. Crowdfunding issuers are unlikely to have the legal sophistication to identify material changes, and unlikely to have the resources to make frequent filings with the SEC. Imposing an obligation to file an amended Form CA as proposed would likely result in either the issuer innocently failing to meet its obligations, or in deliberately not responding to investor questions or comments in order to avoid having to make filings.

Considerations with respect to presentation of material in downloadable form

Proposed Rule 303(a)(1) would require that intermediaries present the information set out in Rules 201 and 203 in a manner that reasonably permits a person accessing the site to "save, download or otherwise store" that information. This may be more of a problem than the Commission realizes. On any modern website, information is stored in a structured database in many different formats, to be retrieved and assembled interactively as the user navigates the site. The system renders the requested data for display in a web browser, but that is usually only a small subset of the available information, selected and configured for display by a complex user interface and content management system. The on-screen layout of text, tables, graphics, videos, animations, interactive buttons, hyper-links, etc. is created on the fly and vary significantly from one instance to the next, depending on the user's actions and the interface software. Even textual information may not be stored in a linear, start-to-finish format inside the database. The user has no way to download the whole database of information, much less the content management system that determines which elements go together in what order.

Provided that a record of the information presented is available in some specified location for regulatory or litigation purposes, it is not clear why disclosure should be limited to formats that investors can download.

The limitations of EDGAR

As EDGAR is currently configured, it can only accept a limited range of file formats. Videos, for example, cannot be filed on EDGAR, and yet videos are likely to be an important component of a securities crowdfunding offering. Videos present particular challenges with respect to issues of liability. In the words of the old saw, "a picture is worth a thousand words," and a video may be worth many more. It is possible to imagine a small software company giving the impression that it has many more employees than is actually the case by filming the CEO's presentation in front of a bank of workers in a co-working space. Or a video could show a loading bay filled with boxes, giving the impression of inventory ready to ship, whereas in fact the boxes are empty. A transcript cannot capture the statements that are made purely by visual means. In the event of litigation or enforcement, visual elements may be material.

The filing requirement of Rule 203

Proposed Rule 203(a)(1) provides:

> An issuer offering or selling securities in reliance on Section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with Section 4A of the Securities Act (15 U.S.C. 77d-1) and this part must file with the Commission on EDGAR, provide to investors and the relevant intermediary, and make available to potential investors a Form C: Offering Statement (Form C) (§ 239.900 of this chapter) prior to the commencement of the offering of securities. The Form C **must include the information required by § 227.201** of Regulation Crowdfunding. [Emphasis added.]

Proposed Rule 201 provides:

> An issuer offering or selling securities in reliance on Section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with Section 4A of the Securities Act (15 U.S.C. 77d-1) and this part must file with the Commission on the Electronic Data Gathering, Analysis, and Retrieval system (EDGAR), provide to investors and the relevant intermediary, and make available to potential investors **the following information**: [Items (a) through (v).] [Emphasis added.]

Rule 203 would seem to impose on issuers a baseline obligation to file the information specified in Rule 201 (which includes only the items enumerated (a) through (v) and has no "catch-all" clause), and nothing else (although it would not seem to prohibit the filing of additional information). Thus, provided that information corresponding to the enumerated categories in Rule 201 is filed, there is nothing in the Rule that would require all the information that is presented to investors on an intermediary's platform to be filed.

We understand that the Commission may be of the view that the proposed rules would require filing of all the information that appears on the intermediary's website. There are hints of this position in the

fact that proposed Rule 203(a)(2) would require that an amendment be filed to Form C to disclose "any material changes, additions or updates to information that it provides to investors through the intermediary's platform," which would be consistent with an initial obligation to file all of the information provided on the intermediary's platform. Likewise, footnote 409 of the Proposing Release refers to "additional information" that might appear on the intermediary's platform as if it were expected to be a limited category of data, possibly including information filed with the Commission in a different format. Additionally, proposed Rule 404, which imposes record-keeping obligations on intermediaries, does not seem to impose on intermediaries any obligation to keep a record of all offering information presented on their sites, which would seem to imply an expectation that such record would be available elsewhere. Indeed, the Proposing Release states that one of the objectives for requiring the issuer to file updates with the SEC is to "create a central repository for this information—information that otherwise might no longer be available on the intermediary's platform after the offering terminated."

However, this position is not reflected in Rule 203 as drafted.

Proposed Rule 203, as drafted, only requires that information complying with the enumerated categories of Rule 201 be filed. Thus, it would not require the filing of all the offering material that falls within the Rule 201 categories, as long as some information, which must of course be responsive to those categories, is provided.

The drafting may have been affected by assumptions relating to the way which the Commission generally encounters information filed on EDGAR, which is in the context of an offering registered under the Securities Act. In the context of registered offerings, the provisions of Section 5 of the Securities Act, the definition of "prospectus" under Section 2(a)(10) and the content requirements for prospectuses under Section 10 act together to prevent an issuer's use of offering materials not filed with the Commission as part of the prospectus except in the limited circumstances permitted by the "free writing prospectus" rules. This regulatory regime does not apply to offerings under Section 4(a)(6). Section 4A requires the filing of specified information. It does not prohibit the use of information that is not filed with the Commission. In Section 4(a)(6) offerings there is no equivalent concept to the "non-complying Section 10 prospectus" which would drive all information into one offering document which must be filed with the Commission.

Policy objectives

One can easily see why the Commission would wish to have all offering material filed on EDGAR. It is possible that information about the offering that the issuer posts on the intermediary's platform but is not required to file on EDGAR (which we are terming "free writing") could be material information that an investor might deem important to an investment decision and that might be relevant to enforcement actions. Moreover, state regulatory authorities will be expected to obtain information about offerings from EDGAR, and forcing the state authorities to have to access a number of intermediaries' sites would add to the states' enforcement burden. In addition, requiring all offering material to be filed would address the apparent contradiction presented by proposed Rule 203(a)(2), which would seem to require

a filing of an amended Form C to update for material changes to information on the platform that may not have been required to be filed on Form C in the first place.

Similarly, for purposes of enforcement or litigation, it is clear that a complete file of all information used to make an offer of securities must be collected and saved.

We do not believe, however, that filing of all such information on EDGAR is necessary, both in light of the fact that the disclosure filed on Form C is not reviewed by the Commission Staff, and especially in light of the inadequacy of EDGAR as a "central repository." We believe that investor protection and policy objectives can be met in a less burdensome way.

Why we believe free writing should be permitted

1. Limitations on innovation. Not permitting free writing will cramp innovation in the delivery of information to investors. The driver behind the choice of format used in disclosure should be its usefulness to investors, not how easy it is to file on EDGAR.

2. Additional burdens on issuers. If free writing disclosure is required to be filed, entrepreneurs will be forced to reformat disclosure in order to file it on EDGAR, or to use only offering information that is presented in conventional formats.

3. Issuers have liability for free writing information. Since liability for untrue statements or omissions is predicated on statements made, "in light of the circumstances in which they were made," any misrepresentations made in the free writing information would form the basis for liability under Securities Act Section 4A(c). Investors will make their investment decisions on the basis of the complete range of information on the platform, in the format in which it is presented to investors, not the potentially more limited information available on EDGAR.

4. Intermediary obligations. Intermediaries must keep records of the offering information for compliance and litigation purposes. Intermediaries are also liable for misstatements made in the disclosure, and thus have the incentive to police it.

5. No statutory prohibition. The JOBS Act specifies that certain information must be filed with the Commission. It does not require that all information used be filed.

6. "***The monopoly of the platform."*** We would suggest that the "monopoly of the prospectus" has been supplanted by the "monopoly of the platform." The result of the statutory and proposed regulatory provisions is to concentrate all the information about the offering in one place -- the intermediary's platform – and not only to impose liability for that information but also to require the intermediary to review that information.

Suggested solutions

1. In order to provide the Commission and the states with a fuller picture of the information that is being used, without requiring that entrepreneurs stifle innovation in disclosure, we suggest that the Commission add the following disclosure requirement to proposed Rule 201:

> "(w) An adequate summary of all material information presented to investors but not otherwise filed on Form C, including:
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> - A detailed description of the content of such disclosure, including the material points made in such disclosure;
> - If such disclosure is in video or audio format, details of running time, a transcript and description of any visual background; and
> - A description of the format in which such disclosure is presented."

2. The idea of having EDGAR act as the repository of record of all offering materials would be a good one if only EDGAR could be used in that way, but it can't. If the Commission wants to have such a record (which would seem essential from the point of view of investor protection), it should impose a record-keeping requirement on the issuer or the intermediary. Such an obligation would also address the concern discussed above that innovative disclosure methods may not be easily downloaded, stored and saved by investors. There are reputable and established companies that would be able to handle the requirement to handle large amounts of information (which could even reflect the change in disclosure over time) in varied formats at a reasonable price.

3. The proposed requirement to file an amendment every time a material change is made to the disclosure is burdensome and also discourages issuer interaction with the crowd. We suggest that only one amendment be required, as the Commission is already proposing a five day reconfirmation period upon material changes. Providing there is a five-day period between filing of a single, final Form CA and sales of securities, there is no need for multiple Forms CA. This final Form CA would function much as the 424(b) filing does in the context of registered offerings.

4. We suggest that the Commission remove the requirement in proposed Rule 303(a)(1) that effectively limits the presentation of information to formats that can be downloaded by prospective investors.

Thank you for your consideration,

/s/Sara Hanks

Sara Hanks
CEO, CrowdCheck, Inc.