

SEC Provides COVID-19 Relief to Small Businesses for Crowdfunding Offerings

As a result of the challenges facing small businesses effected by COVID-19 that are seeking to access capital to meet funding needs the Securities and Exchange Commission (the “SEC”) is providing temporary, conditional relief to allow established smaller companies more flexibility to conduct a “Crowdfunding Offering.”

Under the Securities Act of 1933, the offer and sale of securities must be registered unless an exemption from registration is available. Title III of the “Jumpstart Our Business Startups (JOBS) Act of 2012” added an exemption from registration for certain crowdfunding transactions, i.e., using the Internet to raise funds through small individual contributions from a large number of people. In 2015, the SEC adopted Regulation Crowdfunding to implement the requirements of Title III. Under the rules, eligible companies were allowed to raise capital using Regulation Crowdfunding starting May 16, 2016. The new temporary rules amend Regulation Crowdfunding for offerings initiated before August 31, 2020.

The new temporary rules are intended to allow eligible small businesses to expedite the offering process by allowing them to assess interest in the offering prior to preparing full offering materials with financial statements provided that such information is made available before any investment commitments are accepted. To take advantage of the temporary rules, a company must meet enhanced eligibility requirements and provide clear, prominent disclosure to investors about its reliance on the relief.

An intermediary, i.e., registered broker-dealer or funding portal, that is involved in an offering by an issuer relying on the temporary rules must have a reasonable basis for believing that the issuer has complied with Regulation Crowdfunding in prior offerings. For this requirement, the SEC release provides that the intermediary may reasonably rely on the representations of the issuer unless the intermediary has reason to question their reliability.

The following table included in the SEC release summarizes the amendments:

Requirement	Existing CF Regulation	Temporary Amendment
<i>Eligibility</i>	<p>Not Available to:</p> <ul style="list-style-type: none"> - Non-US issuers; - Issuers that are required to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934; - Investment companies; - Blank check companies; - Issuers that are disqualified under Regulation Crowdfunding’s disqualification rules; and - Issuers that have failed to file the annual reports required under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement 	<p>To rely on the temporary rule issuers must meet the existing requirements PLUS:</p> <ul style="list-style-type: none"> ï The issuer cannot have been organized and cannot have been operating less than six months prior to the commencement of the offering; and ï An issuer that has sold securities in a Regulation Crowdfunding offering in the past, must have complied with the requirements in section 4A(b) of the Securities Act and the related rules.
<i>Offers permitted</i>	After filing of offering statement (including financial statements)	After filing of offering statement, but financial statements may be initially omitted (if not otherwise available)

<i>Investment commitments accepted</i>	After filing of offering statement (including financial statements)	After filing of offering statement that includes financial statements or amended offering statement that includes financial statements
<i>Financial statements required when issuer is offering more than \$107,000 and not more than \$250,000 in a 12- month period</i>	Financial statements of the issuer reviewed by a public accountant that is independent of the issuer	Financial statements of the issuer and certain information from the issuer’s Federal income tax returns, both certified by the principal executive officer
<i>Sales permitted</i>	After the information in an offering statement is publicly available for at least 21 days	As soon as an issuer has received binding commitments covering the target offering amount (note: commitments are not binding until 48 hours after they are received)
<i>Early closing permitted</i>	Once target amount is reached if: <ul style="list-style-type: none"> ï The offering remains open for a minimum of 21 days; ï The intermediary provides notice about the new offering deadline at least five business days prior to the new offering deadline; ï Investors are given the opportunity to reconsider their investment decision and to cancel their investment commitment until 48 hours prior to the new offering deadline; and 	As soon as binding commitments are received reaching target amount if: <ul style="list-style-type: none"> ï The issuer has complied with the disclosure requirements in temporary Rule 201(z); ï The intermediary provides notice that the target offering amount has been met; and ï At the time of the closing of the offering, the issuer continues to meet or exceed the target offering amount.

	<p>ii At the time of the new offering deadline, the issuer continues to meet or exceed the target offering amount.</p>	
<p><i>Cancellations of investment commitments permitted</i></p>	<p>For any reason until 48 hours prior to the deadline identified in the issuer’s offering materials. Thereafter, an investor is not able to cancel any investment commitments made within the final 48 hours of the offering (except in the event of a material change to the offering).</p>	<p>For any reason for 48 hours from the time of the investor’s investment commitment (or such later period as the issuer may designate). After such 48 hour period, an investment commitment may not be cancelled unless there is a material change to the offering.</p>

For additional information, please contact any of the following: Robert Boresta at Robert.Boresta@fisherbroyles.com or Michael Pierson at Michael.Pierson@fisherbroyles.com, with any questions or more specific situations.

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