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The SEC Has Provided Temporary COVID-19 Relief from Certain Requirements of Regulation Crowdfunding, but Will It Make Securities-Based Crowdfunding a More Attractive Fundraising Option?

On March 25, 2020, the Securities and Exchange Commission (“SEC”) adopted [temporary amendments](#) to Regulation Crowdfunding to facilitate capital formation for small businesses impacted by COVID-19. According to the SEC, “[t]he temporary final rules are intended to expedite the offering process for smaller, previously established companies ... affected by COVID-19” and provide “tailored, conditional relief” from certain requirements of Regulation Crowdfunding related to financial information required to be included in the issuer’s offering materials and the timing of the offering “while retaining appropriate investor protections.” The amendments apply to securities offerings initiated under Regulation Crowdfunding during a limited time period between May 4, 2020 and August 31, 2020.

Securities-based crowdfunding is a fairly recent mechanism of fundraising in the United States, which was adopted by the SEC to implement the requirements of the Jumpstart Our Business Startups Act. Regulation Crowdfunding, which generally became effective on May 16, 2016, allows the general public to invest in early stage companies without any “accredited investor” or “sophisticated investor” limitations imposed by other private placement exemptions

under the U.S. securities laws. However, to protect investors, the SEC limited the amount of funds that could be raised and invested through crowdfunding during a 12-month period,¹ and required that crowdfunding offerings be conducted exclusively online through platforms operated by SEC registered broker-dealer or funding portal. Regulation Crowdfunding also imposes certain disclosure and reporting requirements on issuers. An issuer engaging in a crowdfunding offering must file with the SEC an offering statement on Form C, which requires disclosure of certain business and financial information of the issuer. In addition, an issuer relying on the Regulation Crowdfunding exemption is required to file an annual report with the SEC.

Other than relaxing certain financial information and timing requirements for crowdfunding offerings, as discussed below, the SEC’s temporary amendments did not provide relief from any of the limitations described above. In addition, in order to rely on the new temporary rules, a company must meet Regulation Crowdfunding’s existing eligibility requirements² plus an issuer must have been organized and have had operations for no less than six months prior to the commencement of the offering and must not have a history of non-compliance with Regulation Crowdfunding offering

requirements (new businesses are not foreclosed from conducting an offering under Regulation Crowdfunding, but will need to comply with existing rules). An issuer relying on the new temporary amendments will be required to provide prominent disclosures in its Form C that the offering is being conducted on an expedited basis due to circumstances relating to COVID-19 and pursuant to the SEC's temporary regulatory relief.

Temporary Relief from Certain Financial Information Requirements

An issuer conducting a crowdfunding offering is required to include certified, reviewed or audited financial statements in its Form C filed with the SEC, depending on the amount offered and sold in reliance on Regulation Crowdfunding within the preceding 12-month period.³ The temporary rules allow an issuer to omit the financial information required in its initial Form C filed with the SEC, to the extent such financial information is not otherwise available at the time of filing, and commence its offering. However, such financial information is required to be included in an amendment to Form C and provided to investors and the intermediary before the intermediary accepts any investment commitments in the offering. The issuer relying on such relief to omit financial information must disclose in its Form C that (i) the financial information that has been omitted is not currently available and will be provided by an amendment to the offering materials; (ii) the investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and (iii) no investment commitments will be accepted until after such financial information has been provided.

The temporary rules also provide that for an offering, that together with all other amounts sold under Regulation Crowdfunding within the preceding 12 months, has, in the aggregate, a target offering amount of more than \$107,000 but not more than \$250,000, an issuer may provide financial statements of the issuer and certain information from the issuer's federal income tax returns, both certified by the principal executive officer instead of the financial statements reviewed by an independent public accountant (this temporary relief would apply only if reviewed or audited financial statements of the issuer are not otherwise available). If the issuer is relying on such relief, it must include a statement in its Form C that financial information certified by the principal executive officer of the issuer has been

provided instead of financial statements reviewed by an independent public accountant.

Temporary Relief from Certain Timing Requirements

Regulation Crowdfunding requires that the information included in Form C be publicly available on the intermediary's platform for at least 21 days before any securities are sold in an offering, although the intermediary may accept investment commitments during that time. In addition, an intermediary in a crowdfunding offering must promptly direct the qualified third party to transmit funds from such party to the issuer only 21 days after the date, on which the intermediary makes publicly available on its platform the information required to be provided by the issuer.

Under the temporary rules, an intermediary is not required to comply with the 21-day requirements, but instead must make the required issuer information publicly available on the intermediary's platform before any securities are sold in the offering and may accept investment commitments beginning when such information is made available, but only if the issuer has provided the required financial information.⁴ Notwithstanding the waiver of the 21-day requirement, no offering under these temporary rules will be able to close within the first 48 hours, as a result of the new cancellation right described below. Similarly, under the temporary rules, a funding portal is not required to comply with the 21-day requirement with respect to directing a transmission of funds after a sale has occurred and the cancellation period has elapsed.

The temporary rules also permit an investor to cancel an investment commitment for any reason within 48 hours from the time of the investor's commitment (or such later period as the issuer may designate), and after such 48-hour period, an investment commitment may be cancelled only if there is a material change to the terms of an offering or to the information provided by the issuer.⁵ In addition, once an issuer has received investment commitments for which the 48-hour cancellation period has lapsed that equal or exceed its target offering amount, the issuer may close the offering on a date earlier than the deadline identified in its offering materials, provided (i) investors are notified by the intermediary that the target offering amount has been met and (ii) at the time of the closing of the offering, the issuer continues to meet or exceed the target offering amount. If an investor does not cancel an investment commitment within

48 hours from the time of the initial investment commitment, the funds will be released to the issuer upon closing of the offering and the investor will receive securities in exchange for such investment. The temporary rules require the issuer to provide a prominent disclosure of this new process to complete the transaction or cancel an investment commitment.

Conclusion

Time will show whether the number of Regulation Crowdfunding offerings will increase in reliance on the newly adopted temporary rules. In its adopting release, the SEC acknowledged that “some issuers eligible to use the temporary rules, particularly better established issuers or issuers that are more connected to angel investors, may choose to pursue another exempt offering, such as an offering under Rule 506

of Regulation D, to meet their financing needs,” or that some issuers “may choose to pursue a Regulation Crowdfunding offering but forgo the temporary relief in an attempt to send a favorable signal of their financial soundness in the face of the COVID-19 shock to prospective investors.”

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1. An issuer is permitted to raise a maximum aggregate amount of \$1,070,000 through crowdfunding offerings in a 12-month period. Individual investors are permitted to invest in the aggregate across all issuers in crowdfunding offerings over a 12-month period up to: (i) the greater of \$2,200 or five percent of the lesser of the investor's annual income or net worth if either the investor's annual income or net worth is less than \$107,000; or (ii) 10 percent of the lesser of the investor's annual income or net worth, not to exceed an amount sold of \$107,000, if both the investors annual income and net worth are equal to or more than \$107,000.
2. The crowdfunding exemption does not apply to transactions involving the offer or sale of securities by any issuer that is: a non-U.S. company; a reporting company under the Securities Exchange Act of 1934; an investment company; a company that is disqualified under Regulation Crowdfunding's disqualification rules; a company that has failed to comply with the annual reporting requirements under Regulation Crowdfunding during the two years immediately preceding the filing of Form C; and a company that has no specific business plan or has indicated its business plan is to engage in a merger or acquisition with an unidentified company or companies.
3. For example, the following financial information must be provided for offerings that, together with all other amounts sold under Regulation Crowdfunding within the preceding 12-month period, have, in the aggregate, the following target offering amounts: (i) \$107,000 or less—the amount of total income, taxable income and total tax, or the equivalent line items, as reported on the federal income tax returns filed by the issuer for the most recently completed year (if any), and financial statements of the issuer, each certified by the principal executive officer of the issuer; (ii) more than \$107,000, but not more than \$535,000—financial statements of the issuer reviewed by an independent public accountant; and (iii) more than \$535,000—financial statements of the issuer audited by an independent public accountant; provided, however, that for issuers that have not previously sold securities in reliance on Regulation Crowdfunding, offerings that have a target offering amount of more than \$535,000, but not more than \$1,070,000, financial statements of the issuer reviewed by an independent public accountant.
4. For example, an issuer relying on the temporary relief from the requirement to have financial statements be reviewed by a public accountant, will be deemed to have provided the financial information required. However, an issuer that has omitted financial statements in its initial Form C pursuant to the temporary rules will not be able to have investment commitments accepted until it includes such financial statements.
5. Under the regular crowdfunding rules, (i) investors may cancel an investment commitment until 48 hours prior to the deadline identified in the issuer's offering materials; (ii) if an issuer reaches the target offering amount prior to the deadline identified in its offering materials, it may close the offering early if it provides notice about the new offering deadline at least five business days prior to such new offering deadline (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and (iii) if an investor does not cancel an investment commitment before the 48-hour period prior to the offering deadline, the funds will be released to the issuer upon closing of the offering and the investor will receive securities in exchange for the investment.