

## TEMPORARY SEC RULES EASE REGULATION CROWDFUNDING TO ADDRESS URGENT COVID-19 CAPITAL NEEDS

May 15, 2020

The Securities and Exchange Commission (the “SEC”) recently adopted temporary final [rules](#) to Regulation Crowdfunding to address companies' urgent COVID-19 capital needs. The temporary rules provide tailored, conditional relief to established smaller companies from certain Regulation Crowdfunding requirements relating to the timing of the offering and the availability of financial statements required to be included in issuers' offering materials. For example, the temporary rules provide an exemption from certain financial statement review requirements for issuers offering \$250,000 or less in securities in reliance on Regulation Crowdfunding within a 12-month period.

The SEC included the following table summarizing the existing Regulation Crowdfunding and changes resulting from the temporary rules:

	<i>Regulation Crowdfunding</i>	<i>Temporary Rule Amendments</i>
<b>Eligibility</b>	<p>The offering exemption is <u>not</u> available to:</p> <ul style="list-style-type: none"><li>· Non-U.S. issuers;</li><li>· Issuers that are required to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934;</li><li>· Investment companies;</li><li>· Blank check companies;</li><li>· Issuers that are disqualified under Regulation Crowdfunding's disqualification rules;</li></ul>	<p>In addition to the existing eligibility criteria, issuers wishing to rely on the temporary rule amendments must also meeting the following criteria:</p> <ul style="list-style-type: none"><li>· The issuer cannot have been organized and cannot have been operating less than six months prior to the commencement of the offering; and</li><li>· An issuer that has sold securities in a Regulation</li></ul>

· 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

Crowdfunding offering in the past, must have complied with the requirements in section 4A(b) of the Securities Act and the related rules.

The issuer may file an offering statement with financial statements intentionally omitted (if not otherwise available). However, financial statements must be included in an amendment to the Form C and provided to investors prior to accepting investment commitments. Issuer must prominently disclose that: (i) the financial information that has been omitted is not otherwise available and will be provided by an amendment; (ii) the investor should review the complete set of offering materials, including previously omitted financial statements, prior to making an investment decision; and (iii) no investment commitments will be accepted until after financial statements have been provided.

**Offers permitted**

After the issuer files the offering statement (including financial statements), investors may make investment commitment offers.

**Investment commitments accepted**

Investment commitments may be accepted any time after the issuer

Investment commitments may be accepted any time after filing of an offering

files the offering statement (including financial statements).

statement that includes financial statements or an amended offering statement that includes financial statements.

If an issuer is offering more than \$107,000 and not more than \$250,000 in a 12-month period and reviewed or audited financial statements are not otherwise available,

the issuer must include the following in the offering statement: (i) financial statements of the issuer and (ii) certain information from the issuer's Federal income tax returns, both certified by the principal executive officer.

The issuer must prominently disclose that the financial statements have been reviewed by a principal executive officer rather than a public accountant.

The temporary rule suspends the 21 day requirement, and therefore as soon as offering statement is publicly available and an issuer has received binding investment commitments covering the target offering amount, securities may be sold. (Note: this scenario assumes that the financial information requirements have been met.)

**Financial statements required when the issuer is offering more than \$107,000 and not more than \$250,000 in a 12-month period**

If an issuer is offering more than \$107,000 and not more than \$250,000 in a 12-month period, the issuer must include in the offering statement financial statements of the issuer reviewed by a public accountant that is independent of the issuer.

**Timing of sales**

After information in an offering statement is publicly available for 21 days, securities may be sold.

**Early closing**

Once the target offering amount is reached the issuer may close the offering if:

The issuer may close the offering as soon as binding commitments are received

- The offering remains open for a minimum of 21 days;
  - The intermediary provides notice about the new offering deadline at least five business days prior to the new offering deadline;
  - 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
  - At the time of the new offering deadline, the issuer continues to meet or exceed the target offering amount
- reaching target offering amount if:
- The issuer has complied with the disclosure requirements in the temporary rule amendments;
  - The intermediary provides notice that the target offering amount has been met; and
  - At the time of the closing of the offering, the issuer continues to meet or exceed the target offering amount

**Investor cancellations of investment commitments**

An investor may cancel an investment commitment 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).

An investor may cancel an investment commitment 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. The issuer must describe the process to cancel an investment commitment including: (i) that investors may cancel an investment commitment for any reason within 48 hours the time of an investment commitment (or such later period as the issuer may designate); (ii) the intermediary will notify investors when the target offering amount has been met; (iii) the issuer may close the offering at any time after it has aggregate investment commitments for which the 48-hour right to cancel (or such later period as the issuer may designate) has elapsed that equal or exceed the target offering amount (absent a material change); and (iv) if an investor does not cancel an investment commitment within 48 hours from the time of the binding investment commitment, the funds will be released to the issuer upon closing of the offering and investor will receive securities in exchange for the investment.

Any issuer relying on any of the temporary rules must include a statement that the offering is being conducted on an expedited basis because of COVID-19-related circumstances and pursuant to the SEC's temporary regulatory COVID-19 relief. The temporary rules are effective May 4, 2020 through March 1, 2021, and the temporary rules apply to securities offerings initiated under Regulation Crowdfunding between May 4, 2020 and August 31, 2020.

## **RELATED PRACTICE AREAS**

- Securities & Corporate Governance

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