

## CROWDFUNDING TEMPORARY LIBERALIZATIONS EASE RAISING CAPITAL DURING CRISIS

May 5, 2020

### I. Executive Summary

On May 4, 2020, the U.S. Securities Exchange Commission (“SEC”) published new, temporary, conditional rules to permit small businesses to pursue expedited “crowdfunding” securities offerings during the Covid-19 crisis. “Crowdfunding” is itself an expedited small offerings exemption from the usual public registration requirement for the offer and sale of securities provided by section 4(a)(6) of the Securities Act of 1933, as amended (the “Securities Act”) and the SEC’s Regulation Crowdfunding. We have reported over the last year on a number of linked SEC rulemakings as part of its exempt offering regime and disclosure liberalization, harmonization and simplification efforts. Most recently, on March 4, 2020, the SEC proposed amendments to the exempt securities offering regime, including Crowdfunding liberalizations, notably increasing the amount that could be raised in a Crowdfunding offering to \$5 million (*see, Major Capital Raising Liberalization: SEC Proposes New Rules to Facilitate Regulation D, Regulation A, and Crowdfunding Exempt Securities Offerings*, March 6, 2020) (available on the Kurtin PLLC website at <https://kurtinlaw.com/> or on request to [info@kurtinlaw.com](mailto:info@kurtinlaw.com)).

These new, temporary amendments augment the speed and ease of use of the Crowdfunding exemption by relaxing the timing and financial statements requirements as long as the issuer company raising capital meets eligibility requirements and prominently discloses to investors its reliance on the temporary rules, which are in place until August 31, 2020. The temporary rules are summarized in Section II. The pending March 4 permanent amendments are summarized in Section III.

A comprehensive review of the Securities Act registration-exempt offering regime is available in our *Raising Capital through Private Placements: Deal Points (January 2020 edition)*, also available on our website or on request. *Raising Capital* compares in detail Regulations D, A, S, Crowdfunding and other principal Securities Act sections, rules, and regulations that may be used for registration-exempt offers and sales of securities for the purpose of raising capital and discusses their respective uses, requirements, advantages, and disadvantages.

### II. The May 4 Temporary, Conditional Crowdfunding Amendments:

- Amend eligibility by providing that in addition to existing eligibility criteria (the Crowdfunding exemption is not available to non-U.S. issuers, reporting companies under Sections 13(a) or 15(d) of the Securities Exchange Act of 1934, investment companies,

“blank check” companies, companies disqualified under Regulation Crowdfunding rules or which have failed to file prior Regulation Crowdfunding annual reports), to use the temporary rules, the issuer cannot have been organized and operating less than six months prior to the offering. Also, if the issuer has previously sold securities in a Regulation Crowdfunding offering, it must have complied with Securities Act section 4A(b) and related rules.

- Allow acceptance of investment commitments after filing an offering statement that includes financial statements or an amended offering statement including financial statements in lieu of existing requirement of financial statements included in initial offering statement.
- Relax financial statement requirements when the issuer is offering more than \$107,000 and not more than \$250,000 in a 12-month period by allowing CEO certification in lieu of independent public accountant review.
- Allow sales as soon as issuer has received binding investment commitments covering the target offering amount (after 48 hour waiting period for “binding” commitments to vest), in lieu of 21-day waiting period after public filing of offering statement.
- Allow early closing as soon as binding commitments reaching target amount are reached if issuer has complied with temporary Rule 201(z) disclosure requirements, intermediary gives notice that target offering amount has been reached, and the target offering amount has still been reached or exceeded at the time of closing, again in lieu of 21-day waiting period and five-day intermediary notice period.
- Allow cancellation of investment commitments for any reason for 48 hours after investor’s commitment (or greater period specified by issuer), after which investment commitment becomes binding in the absence of material change to the offering, in lieu existing rules’ 48 hours prior to deadline identified in issuer’s offering materials.

III. The March 4 [permanent] pending Crowdfunding Amendments:

- Increase the aggregate offering limit in Regulation Crowdfunding from \$1.07 million to \$5 million.

- Amend a proposed rule to allow Test-the-Waters activity in crowdfunding prior to filing an offering document with the SEC similar to the method used for Regulation A.
- Remove investment limits for Accredited Investors.
- Amend the calculation method for non-accredited investors to permit them to rely on the greater of their annual income or net worth when calculating how much they can invest.
- Harmonize the “bad actor” disqualification provisions from Regulation D.
- Permit the use of Special Purpose Vehicles (“SPVs”) to facilitate Regulation Crowdfunding investment, and limit the type of securities that may be offered and sold in reliance on the Regulation Crowdfunding exemption (*see, Special Purpose Vehicles: Uses and Abuses*, January 2020, *Id.*).

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