



SEC Votes to Adopt Final Rules Implementing Crowdfunding Exemption under the JOBS Act

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In October 2013, the SEC released proposed regulations implementing Title III. The final rules, adopted on October 30, 2015, reflect more than 480 comment letters that the SEC had received on the proposed rules.

Under the final rules, offerings exempt from registration under the rules must resemble the kind of crowdfunding enterprises that most Internet users are used to in a nonsecurities context. Issuers relying on the crowdfunding exception must disclose their “target offering amount,” the deadline to reach the amount and the intended use of the offering proceeds. The issuer must also file “Progress Updates” once it receives commitments of 50 percent and 100 percent of the target offering amount. If the amount of investment commitments does not equal or exceed the target offering at the deadline, no securities will be sold, and all investment commitments will be canceled. Investors may cancel their commitment until 48 hours prior to the deadline.

The rules also regulate the funding portals and other intermediaries through which such offerings must be conducted. Intermediaries must actively implement measures to reduce the risk of fraud and furnish educational materials to investors. Furthermore, as with many crowdfunding websites outside of the securities context, intermediaries must provide “communication channels” that enable investors to communicate with each other and with the issuer. Overall, the rules require intermediaries to act as both facilitators of information and gatekeepers against possible misrepresentations.

Funding portals will be required to register with the SEC by completing a Form Funding Portal. The Form ID will be amended to allow funding portals to obtain access codes to file on the EDGAR System.

At the October 30 vote on the final rules, Commissioner Kara M. Stein, though supportive of the final rules, suggested that they did not go far enough to protect investors:

As repeat players in the market, broker-dealers and funding portals are well-positioned to know what to look for and help ensure that the offering complies with the law. To that end, today's rules permit a broker-dealer or a funding portal to rely on the representations of the issuer unless the intermediary has reason to question the reliability of those representations. While I might have preferred stronger language, I am cognizant of the challenges in setting out a more proscriptive standard at this time.

On the opposite end of the spectrum, Commissioner Michael S. Piwowar, who dissented from the vote, felt that the rules were still too cumbersome in some respects:

[T]he majority of the Commission has exercised discretion to make capital raising using crowdfunding even more difficult. In a change from the proposal, the rules will limit the ability to invest in crowdfunding opportunities based on the lesser of annual income or net worth. Because the majority of the Commission cannot trust ordinary Americans—the non-accredited investors—to be able to exercise appropriate judgment in how to spend or invest their resources, our rules will now place smaller limits on the amounts that can be invested. Rather than actually protecting investors, these smaller limits will discourage legitimate companies from engaging in crowdfunding, while simultaneously encouraging less reputable actors to use affinity-based solicitation methods akin to multilevel marketing, a development that could stifle crowdfunding efforts.

The final rules will become effective 180 days after their publication in the Federal Register, except for the funding portal registration requirements, the Form Funding Portal and the amendments to the Form ID, which will become effective on January 29, 2016.

Categories

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