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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 227 and 239

[Release No. 33-10829]

Temporary Amendments to Regulation Crowdfunding; Extension

AGENCY: Securities and Exchange Commission.

ACTION: Temporary final rule; extension.

SUMMARY: The Securities and Exchange Commission (“Commission”) is extending the effective date and applicability dates of our temporary final rules under Regulation Crowdfunding to facilitate capital formation for small businesses impacted by coronavirus disease 2019 (COVID-19). The temporary final rules are intended to expedite the offering process for smaller, previously established companies directly or indirectly affected by COVID-19 that are seeking to meet their funding needs through the offer and sale of securities pursuant to Regulation Crowdfunding. The temporary final rules are designed to facilitate this offering process by providing tailored, conditional relief from certain requirements of Regulation Crowdfunding relating to the timing of the offering and the availability of financial statements required to be included in issuers’ offering materials while retaining appropriate investor protections.

DATES: *Effective date:* The amendments in this rule are effective from August 31, 2020, through September 1, 2021. The expiration date for the temporary final rules published May 7, 2020 (85 FR 27116) is extended from March 1, 2021, to September 1, 2021.

Applicability date: The temporary final rules apply to securities offerings initiated under Regulation Crowdfunding between May 4, 2020, and February 28, 2021.

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SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 227.100 (“Rule 100”), 17 CFR 227.201 (“Rule 201”), 17 CFR 227.301 (“Rule 301”), 17 CFR 227.303 (“Rule 303”) and 17 CFR 227.304 (“Rule 304”) of 17 CFR part 227 (“Regulation Crowdfunding”) under 15 U.S.C. 77a et seq. (the “Securities Act”) and to 17 CFR 239.900 (“Form C”) as temporary final rules.

I. BACKGROUND

The outbreak of COVID-19 has had far-reaching effects, with small businesses being particularly affected by the closures and safety measures designed to slow the spread of COVID-19.¹ Recognizing that, as a result, many small businesses were facing challenges accessing urgently needed capital in a timely and cost-effective manner, on May 4, 2020, the Commission adopted temporary final rules intended to address feedback received from its Small Business Capital Formation Advisory Committee and others.² That feedback noted that certain

¹ See, e.g., MetLife & U.S. Chamber of Commerce Special Report on Coronavirus and Small Business (April 3, 2020), *available at* https://www.uschamber.com/sites/default/files/metlife_uscc_coronavirus_and_small_business_report_april_3.pdf (“With high levels of concern about COVID-19 reported in every sector and region of the country, one in four small businesses (24 percent) report having already temporarily shut down. Among those who haven’t shut down yet, 40 percent report it is likely they will shut temporarily within the next two weeks. Forty-three percent believe they have less than six months until a permanent shutdown is unavoidable.”). See also MetLife & U.S. Chamber of Commerce Small Business Coronavirus Impact Poll (July 29, 2020), *available at* https://www.uschamber.com/sites/default/files/metlife_uscc_sbi_coronavirus_impact_poll_july.pdf (reporting that in July 2020, 86% of small businesses surveyed report they are either fully (52%) or partially (34%) open, but “most small businesses are concerned about financial hardship due to prolonged closures (70%) and more than half worry about having to permanently close (58%).”).

² See Transcript of SEC Small Business Capital Formation Advisory Committee (April 2, 2020), *available at* <https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-040220.pdf>, at 30–32 (expressing the view that Regulation Crowdfunding is “the only mechanism” for private businesses to access “non-accredited investors, really the community members” and suggesting relief from the financial statement requirements of Regulation Crowdfunding) and 39–41 (suggesting financial statement relief and relief from the requirement to wait 21 days

Regulation Crowdfunding requirements may have been making it difficult for an issuer affected by COVID-19 to launch an offering and see it to completion within a time frame that would meet its urgent capital needs.³ The temporary final rules provide flexibility for eligible issuers⁴ to assess interest in a Regulation Crowdfunding offering prior to preparation of full offering materials,⁵ and then once launched, to close such an offering and have access to funds sooner than would be possible in the absence of the temporary relief.⁶ The temporary rules also provide an exemption from certain financial statement review requirements for issuers offering \$250,000 or less of securities in reliance on Regulation Crowdfunding within a 12-month period.⁷ In addition, a condition to each aspect of the temporary relief is a requirement to provide clear disclosure to investors with respect to the issuer’s reliance on such relief.⁸ The following table summarizes the amendments. For a detailed description of the temporary final rules, see the Temporary Amendments Adopting Release.

| Requirement | Existing Regulation Crowdfunding | Temporary Amendment |
|--------------------|---|--|
| <i>Eligibility</i> | The exemption is <u>not</u> available to: <ul style="list-style-type: none"> • Non-U.S. issuers; | To rely on the temporary rules, issuers must meet the <u>existing</u> eligibility criteria PLUS: |

before disbursement of funds raised in a Regulation Crowdfunding offering). *See also* Transcript for Online Investment Capital Raising Virtual Coffee Break (April 3, 2020), *available at* <https://www.sec.gov/files/OS-018-20-403-full.pdf>.

³ *See* Temporary Amendments to Regulation Crowdfunding, Release No. 33-10781 (May 4, 2020) [85 FR 27116 (May 7, 2020)] (“Temporary Amendments Adopting Release”).

⁴ *See* temporary 17 CFR 227.100(b)(7) (“Rule 100(b)(7)”). To rely on the temporary rules, an issuer must meet the requirements of temporary Rule 100(b)(7) in addition to the current eligibility requirements of 17 CFR 227.100(b)(1) through (6).

⁵ *See* temporary 17 CFR 227.201(z)(2) (“Rule 201(z)(2)”).

⁶ *See* temporary 17 CFR 227.303(g) (“Rule 303(g)”) and temporary 17 CFR 227.304(e) (“Rule 304(e)”).

⁷ *See* temporary 17 CFR 227.201(z)(3) (“Rule 201(z)(3)”). Note that Instruction 1 to paragraph (t) continues to apply in connection with the determination of the offering amount.

⁸ *See* temporary 17 CFR 227.201(z)(1) (“Rule 201(z)(1)”).

| Requirement | Existing Regulation Crowdfunding | Temporary Amendment |
|---|---|---|
| | <ul style="list-style-type: none"> • 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. | <ul style="list-style-type: none"> • The issuer cannot have been organized and cannot have been operating for less than six months prior to the commencement of the offering; and • An issuer that has sold securities in a Regulation Crowdfunding offering in the past, must have complied with the requirements in 15 U.S.C. 77d-1(b) (“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 investment commitments covering the target offering amount (note: commitments are not binding) |

| Requirement | Existing Regulation Crowdfunding | Temporary Amendment |
|--|--|--|
| | | until 48 hours after they are given) |
| <i>Early closing permitted</i> | <p>Once target amount is reached if:</p> <ul style="list-style-type: none"> • 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. | <p>As soon as binding commitments are received reaching target amount if:</p> <ul style="list-style-type: none"> • The issuer has complied with the disclosure requirements in temporary Rule 201(z); • 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. |
| <i>Cancellations of investment commitments permitted</i> | <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> |

The temporary rules as adopted applied to offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 31, 2020. However, the Commission indicated in the Temporary Amendments Adopting Release that it intended to monitor the situation and

might, if necessary, extend the time period during which this relief applies, with any additional conditions the Commission deems appropriate, and/or issue other relief. In light of the continuing challenges facing small businesses, and for the reasons detailed below, the Commission has determined that it is necessary and appropriate to extend the applicability and effectiveness dates of the temporary final rules.

II. AMENDMENT OF APPLICABILITY AND EXPIRATION DATES OF THE TEMPORARY FINAL RULES

As noted above, the temporary final rules currently apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 31, 2020. The Commission has continued to monitor the COVID-19 outbreak and its impact on small businesses. At this time, COVID-19 still presents significant challenges for small businesses and is likely to continue to do so for some time.⁹ We continue to believe that a securities offering under Regulation Crowdfunding may be an attractive fundraising option for some small businesses at this time, particularly as a means of allowing an issuer to make use of the internet to reach out to its customers or members of its local community as potential investors as well as to existing investors. Overall, as discussed below, the temporary final rules have been well received by the market and have proven effective for some issuers to raise capital under the current conditions.

⁹ See *infra* note 25. See also McKinsey & Co., *Tracking US small and medium-sized business sentiment during COVID-19* (May 29, 2020), available at <https://www.mckinsey.com/industries/financial-services/our-insights/tracking-us-small-and-medium-sized-business-sentiment-during-covid-19>; MetLife & U.S. Chamber of Commerce Small Business Coronavirus Impact Poll, *supra* note 1 (“Over the long term, small businesses show signs of guarded optimism, but feel it will be some time before things return to normal. More than half of small businesses believe it will take six months to a year before the small business climate returns to normal...”). Minority-owned businesses are considered to be particularly at risk of closing their businesses. See MetLife & U.S. Chamber of Commerce, *Special Report on Race and Inequality on Main Street* (Aug. 4, 2020), available at https://www.uschamber.com/sites/default/files/sbi_inequality_on_main_street_8.4.pdf (finding that two in three (66%) minority-owned small businesses are concerned about having to permanently close their business versus 57% for non-minority small businesses).

We believe it is important to maintain the flexibility provided by the temporary final rules for small businesses that continue to face difficulties as a result of COVID-19.

Based on feedback that the Commission has received through comment letters on our proposing release, *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*¹⁰ and other outreach conducted by Commission staff, the Commission understands that the temporary amendments generally have been helpful not only to those issuers that have initiated a Regulation Crowdfunding offering under the rules thus far, but also to those issuers that continue to consider their financing options during the pandemic.¹¹ Members of the Small Business Capital Formation Advisory Committee also expressed positive views of the temporary amendments after they were adopted.¹² As of July 31, 2020, the latest available full month of data, we find that, of the 248 new offerings on Form C by eligible issuers (out of 292 total offerings), 94, or 38% (32%), relied on one or more of the

¹⁰ *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, Release Nos. 33-10763; 34-88321 (Mar. 4, 2020) [85 FR 17956 (Mar. 31, 2020)] (“Access to Capital Proposing Release”).

¹¹ *See, e.g.*, letters from NextSeed dated July 19, 2020 (“NextSeed letter”), *available at* <https://www.sec.gov/comments/s7-05-20/s70520-7449553-220993.pdf>; and Republic dated June 1, 2020 (“Republic-1 letter”), *available at* <https://www.sec.gov/comments/s7-05-20/s70520-7258471-217640.pdf>. Market participants in discussions with Commission staff also have noted that the flexibility provided by the temporary final rules may make a Regulation Crowdfunding offering a more realistic choice for an issuer seeking financing in the current market environment. One commenter stated that it had not yet listed an offering under the temporary final rules, but noted its “shared enthusiasm with dozens of small businesses in [its] network actively evaluating the possibility of availing the Temporary Relief to fundraise.” *See* letter from Republic dated August 22, 2020 (“Republic-2 letter”), *available at* <https://www.sec.gov/comments/s7-05-20/s70520-7677531-222676.pdf>. This commenter urged the Commission to expand the relief to allow small businesses to “test the waters” prior to filing the offering statement “so that they can determine where it is worthwhile to undertake the effort of preparing an offering statement.” *But see* letter from Better Markets dated June 1, 2020 (“Better Markets letter”), *available at* <https://www.sec.gov/comments/s7-05-20/s70520-7261530-217652.pdf> (stating its view that the temporary amendments would expose investors to greater risks and less information).

¹² *See, e.g.*, Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at* <https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf>, at 17-19 (noting positive feedback from small businesses intending to take advantage of the relief).

provisions of the temporary relief.¹³ The commenters who found the temporary amendments helpful also have urged the Commission to extend the relief to offerings initiated after August 31, 2020.¹⁴

In light of the continuing challenges facing small businesses and the feedback received on the temporary final rules, the Commission has determined that it is necessary and appropriate to extend the applicability and effectiveness dates of the temporary final rules. The temporary final rules, as extended, will apply to offerings initiated under Regulation Crowdfunding through February 28, 2021 and will be effective until September 1, 2021. This extension will continue to provide issuers with the opportunity to access capital on an expedited basis while maintaining appropriate investor protections.

III. ECONOMIC ANALYSIS

As discussed above, in light of the continued, considerable financing constraints and challenges facing small businesses as a result of the COVID-19 crisis, the Commission is extending temporary relief from certain requirements of Regulation Crowdfunding to issuers seeking funding on an expedited basis due to circumstances relating to COVID-19. Several commenters have expressed support for the temporary rules.¹⁵

¹³ For this estimate, eligibility was estimated based on the issuer having been formed at least six months prior to the filing date of the offering and having had (1) either positive assets, revenues, net income, debt, accounts receivable, cost of goods sold, taxes paid, or employees in the most recent fiscal year reported on Form C, or (2) a prior Regulation Crowdfunding offering. *See also infra* notes 31 and 36.

¹⁴ *See, e.g.*, NextSeed letter; Republic-1 letter (noting the relief relating to financial statement requirements and encouraging the Commission to extend the relief, “as the economic harm caused by the COVID-19 Pandemic is likely to be far reaching”); Republic-2 letter (encouraging the Commission to consider incorporating the temporary relief into Access to Capital Proposing Release or extending the relief for at least 12 months).

¹⁵ *See supra* note 11 and accompanying text. *See also* <https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf>. *But see* Better Markets letter (opposing the temporary rules).

The temporary rules were originally adopted in response to the unprecedented adverse impact of the COVID-19 crisis on small businesses. Since the adoption of the temporary rules, small businesses have continued to experience significant disruption, across a wide range of individual industries as well as the broader economy.¹⁶ In light of ongoing adverse financing conditions for small businesses as a result of the COVID-19 crisis, we believe that the relief remains necessary and appropriate. Preliminary evidence from the period of the temporary rules' effectiveness indicates that a significant proportion of eligible issuers conducting offerings in reliance on Regulation Crowdfunding have relied on one or more provisions of the relief in their capital raising.¹⁷

We have considered the costs and benefits of the temporary rules.¹⁸ After examining recent evidence on the state of the crowdfunding market and the ongoing effects of the COVID-19 crisis summarized in Section III.A., we believe that the general economic considerations related to the benefits, costs, and effects on efficiency, competition, and capital formation of the individual provisions discussed in the May 4, 2020 Temporary Amendments Adopting Release continue to apply. In particular, we continue to believe that issuers eligible under the temporary rules continue to face adverse economic conditions and significant difficulties with raising external financing as a result of COVID-19. Extending the temporary relief will avoid a loss of targeted relief from certain requirements of Regulation Crowdfunding and enable eligible issuers affected by the COVID-19 crisis to continue to avail themselves of a more flexible and efficient

¹⁶ See *infra* note 25.

¹⁷ See *infra* note 36.

¹⁸ Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

offering process. Extending the temporary relief also will prevent competitive disadvantages for issuers that initiate their offerings after the expiration of the existing temporary relief.

Except as specified below, we incorporate the earlier economic analysis by reference.¹⁹ However, the adoption of the temporary relief on May 4, 2020 has also resulted in some economic effects that are discussed in Section III.A below. These effects are now part of the current baseline from which we evaluate the economic effects of the extension of these temporary rules.

A. Baseline

The baseline for this extension includes existing Regulation Crowdfunding regulations and industry practices²⁰ and the existing temporary relief adopted on May 4, 2020.

Given the exemption's offering limit, since Regulation Crowdfunding became effective in 2016, it has been utilized primarily by small businesses (which typically lack significant internal cash flows or access to other securities market financing options). Table 1 below presents data on the characteristics of issuers in Regulation Crowdfunding offerings as of July 31, 2020 (the most recent available full month of data).

Table 1: Characteristics of Issuers in Regulation Crowdfunding Offerings: May 16, 2016 - July 31, 2020²¹

| | Average | Median |
|---------------------|----------------|---------------|
| Age in years | 3.0 | 1.9 |
| Number of employees | 5.3 | 3.0 |
| Total assets | \$430,400 | \$37,194 |
| Total revenues | \$347,124 | \$226 |

¹⁹ See Temporary Amendments Adopting Release, at 27121-31.

²⁰ For a more detailed discussion of the crowdfunding market, see Access to Capital Proposing Release; Report to the Commission: Regulation Crowdfunding (Jun. 18, 2019), available at https://www.sec.gov/files/regulation-crowdfunding-2019_0.pdf ("2019 Regulation Crowdfunding Report").

²¹ The estimates are based on data from Form C or the latest amendment to it and exclude withdrawn offerings.

The median crowdfunding offering was by an issuer that was incorporated approximately two years earlier and that employed about three people. The median issuer had total assets of approximately \$37,000 and close to zero revenues (approximately 49% of offerings were by issuers with no revenues). Approximately 11% of offerings were by issuers that had attained profitability in the most recent fiscal year prior to the offering.

Table 2 summarizes EDGAR filings data on amounts sought and capital reported raised in offerings under Regulation Crowdfunding since its inception (May 16, 2016) through July 31, 2020.

Table 2: Regulation Crowdfunding offering amounts and reported proceeds, May 16, 2016 - July 31, 2020

| | Number | Average | Median | Aggregate |
|---|--------|-----------|-----------|-------------------|
| Target amount sought in initiated offerings | 2,525 | \$60,089 | \$25,000 | \$150.9 million |
| Maximum amount sought in initiated offerings | 2,525 | \$607,503 | \$535,000 | \$1,494.2 million |
| Amounts reported as raised in completed offerings ²² | 1,005 | \$230,219 | \$107,000 | \$231.4 million |

The baseline also includes the recent and ongoing effects of the disruption to the U.S. and global economy related to COVID-19, interventions aimed at mitigating its effects, and adverse changes in macroeconomic and financial market conditions (collectively referred to as “the COVID-19 crisis”). Small businesses often face significant financing constraints.²³ Financing

²² Issuers that have not raised the target amount or not filed a report on Form C-U are not included in the estimate of proceeds. *See also* 2019 Regulation Crowdfunding Report, at 15, footnote 40.

²³ Small businesses often lack access to securities markets and rely on personal savings, business profits, personal and business credit, and friends and family as sources of capital. *See* U.S. Department of Treasury (2017) A Financial System That Creates Economic Opportunities: Banks and Credit Unions, *available at* <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>. According to one study relying on the data from the 2014 Annual Survey of Entrepreneurs, approximately 64% of small businesses relied on personal or family savings, compared to 0.6% receiving VC capital. About one-third of businesses used banks and other financial institutions as a source of capital for financing business operations in 2014. A significant share of businesses that established new funding relationships continued to have unmet

constraints make small firms more vulnerable to economic downturns and other negative shocks.²⁴ The COVID-19 crisis has resulted in a substantial deterioration in financing and business conditions for small businesses.²⁵ Small businesses eligible under the existing rules have been facing and are expected to continue to face significant adverse effects of the crisis, including, but not limited to, declines in consumer demand and revenues, particularly in

credit needs. See Alicia Robb (2018) Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms, *Working Paper*. See also Alicia M. Robb and David Robinson (2014) The Capital Structure Decisions of New Firms, *Review of Financial Studies* 27(1), 153–179 (showing that, while entrepreneurial firms frequently rely on outside loans, outside equity use is uncommon); Rebel Cole and Tatyana Sokolyk (2013) How Do Start-Up Firms Finance Their Assets? Evidence from the Kauffman Firm Surveys, *Working Paper* (showing, based on the 2004 Kauffman Firm Survey, that at start-up stage 76% of firms relied on credit, including 24% that used trade credit, 44% that used business credit, and 55% that used personal credit (percentages do not add up to 100% because firms may use multiple types of credit)). As a general caveat, working papers have not undergone peer review and may be subject to revision at a future date.

²⁴ Studies of the 2008–2009 financial crisis have documented disproportionate impacts of the crisis on the outcomes and employment of financially constrained small businesses. See, e.g., Michael Siemer (2019) Employment Effects of Financial Constraints during the Great Recession, *Review of Economics and Statistics* 101(1), 16–29; Arthur Kennickell, Myron Kwast, and Jonathan Pogach (2017) Small Businesses and Small Business Finance during the Financial Crisis and the Great Recession: New Evidence from the Survey of Consumer Finances, In: J. Haltiwanger, E. Hurst, J. Miranda, and A. Schoar (Eds.), *Measuring Entrepreneurial Businesses: Current Knowledge and Challenges*, University of Chicago Press, 291–349; Burcu Duygan-Bump, Alexey Levkov, and Judit Montoriol-Garriga (2015) Financing Constraints and Unemployment: Evidence from the Great Recession, *Journal of Monetary Economics* 75, 89–105. Various studies of traded small-cap companies show that small firms, which tend to be most financially constrained, are disproportionately affected by downturns or tightening credit conditions. See, e.g., Gabriel Perez-Quiros and Allan Timmermann (2000) Firm Size and Cyclical Variations in Stock Returns, *Journal of Finance* 55(3), 1229–1262 (showing that “small firms display the highest degree of asymmetry in their risk across recession and expansion states, which translates into a higher sensitivity of their expected stock returns with respect to variables that measure credit market conditions”); Murillo Campello and Long Chen (2010) Are Financial Constraints Priced? Evidence from Firm Fundamentals and Stock Returns, *Journal of Money, Credit, and Banking* 42(6), 1185–1198 (finding that financially constrained firms’ business fundamentals are significantly more sensitive to macroeconomic movements than unconstrained firms’ fundamentals). See also Eugene Fama and Kenneth French (1993) Common Risk Factors in the Returns on Stocks and Bonds, *Journal of Financial Economics* 3, 3–56.

²⁵ See *supra* notes 1, 2, and 9. See also, e.g., several recent working papers examining impacts of the COVID-19 crisis on small businesses: Alexander W. Bartik, Marianne Bertrand, Zoë B. Cullen, Edward L. Glaeser, Michael Luca, and Christopher T. Stanton (2020) How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey, *NBER Working Paper* No. 26989; Jose Maria Barrero, Nicholas Bloom, and Steven J. Davis (2020) COVID-19 Is Also a Reallocation Shock, *NBER Working Paper* No. 27137; John Eric Humphries, Christopher Neilson, and Gabriel Ulyssea (2020) The Evolving Impacts of COVID-19 on Small Businesses Since the CARES Act, *Cowles Foundation Discussion Paper* No. 2230; Robert W. Fairlie (2020) The Impact of COVID-19 on Small Business Owners: The First Three Months after Social-Distancing Restrictions, *NBER Working Paper* No. 27462.

consumer-facing industries, such as restaurants, recreation/lifestyle, and retail²⁶ (e.g., as a result of changes in consumer confidence, commuting and travel patterns, declines in purchasing power, and explicit restrictions on the operation of certain businesses); disruptions to workforce and supply chains; and declines in investor sentiment that affect the availability of financing, valuations, and potential for exits.²⁷ Some small issuers eligible under the temporary rules may also qualify for emergency relief under other economic assistance programs, which may mitigate some of the adverse impacts described above and the financing constraints stemming from the crisis.²⁸ However, a recent report indicates that “[b]ased on the number of firms that reference COVID-19, many companies are coming online to search for capital where they can’t get it from banks or government programs like the Payroll Protection Program (PPP).”²⁹

We expect the temporary rules to affect issuers, intermediaries, and investors in Regulation Crowdfunding offerings. As of July 31, 2020, we estimate that 2,276 issuers had initiated 2,525 Regulation Crowdfunding offerings, excluding withdrawn offerings.³⁰ As discussed below, eligibility criteria of the temporary rules exclude (1) issuers that were organized or had operations for less than six months prior to the commencement of the offering and (2)

²⁶ See, e.g., Devin Thorpe, Startup Restaurateurs Find Willing Investors via Crowdfunding, *Forbes* (Sept. 28, 2019) and 2019 US Equity Crowdfunding Stats – Year in Review, available at <https://crowdwise.org/funding-portals/2019-equity-crowdfunding-stats-data/>.

²⁷ See *supra* notes 1–2.

²⁸ See COVID–19 Resources for Small Businesses, <https://www.sec.gov/page/covid-19-resources-small-businesses>.

²⁹ See Crowdfund Capital Advisors, <https://mailchi.mp/3f278c568278/crowdfunding-update-2019-state-of-regulation-crowdfunding-2638840>.

³⁰ These figures reflect data from the approximately 4.2 years since inception of Regulation Crowdfunding, with offering activity accelerating in the second half of the sample period. It is difficult to predict how many of the past issuers will conduct a follow-on offering in reliance on the relief as well as how existing market conditions, which affect both supply and demand of capital, will affect the flow of new crowdfunding offerings relative to historical data. Thus it is difficult to extrapolate from these numbers the flow of new crowdfunding offerings projected during the time frame during which temporary relief will be extended.

issuers that were not compliant with Regulation Crowdfunding requirements with regard to any prior offerings in which they sold securities.

Historical data provides an indication of the potential share of offerings eligible for temporary relief among all offerings. From inception of Regulation Crowdfunding through July 31, 2020, we estimate that 2,074 (approximately 82%) offerings were initiated by 1,867 issuers that were eligible or would have been eligible for the temporary relief.³¹ With respect to the eligibility requirements related to follow-on offerings under Regulation Crowdfunding, *i.e.*, that the issuer complied with Regulation Crowdfunding with respect to any prior offering in which they sold securities, it is difficult to estimate the percentage of prior Regulation Crowdfunding issuers that were not compliant with one or more of the requirements of Regulation Crowdfunding in a prior offering. From inception through July 31, 2020, we estimate that there were 209 repeat Regulation Crowdfunding issuers, including 160 such issuers that had reported successful completion of at least one Regulation Crowdfunding offering on Form C-U.³²

We estimate that there are 57 registered funding portals, excluding funding portals that have withdrawn their registration.³³ Information on the number of investors per offering is not available for the full sample of Regulation Crowdfunding offerings, as it is not required to be

³¹ See *infra* note 13. In addition, we recognize that many of the past Regulation Crowdfunding issuers may meet the six-month eligibility criterion as of the effective date of these amendments, should they wish to avail themselves of the temporary relief for a follow-on offering under Regulation Crowdfunding.

³² This figure likely provides a lower bound on the number of issuers that have initiated a follow-on offering after successfully completing a prior offering due to incomplete reporting of offering proceeds on Form C-U. See *supra* note 22. Follow-on issuance activity may differ from historical data due to changes in the crowdfunding market as a result of confounding market factors and continued uptake of the relief under the temporary rules by past issuers. See also Temporary Amendments Adopting Release, at 27124.

³³ See <https://www.finra.org/about/funding-portals-we-regulate> (retrieved Aug. 22, 2020).

reported in progress updates on Form C-U.³⁴

We are unable to predict precisely the number of issuers likely to rely on the temporary rules while they are in effect.³⁵ A review of new filings made on Form C on or after May 4, 2020 provides some information about issuer reliance on the temporary rules. As of July 31, 2020, we find that, of the 248 new offerings on Form C by eligible issuers (out of 292 total offerings), 94, or 38% (32%) relied on one or more of the provisions of the temporary relief.³⁶

The temporary relief, which took effect on May 4, 2020, was accompanied by an increase in Regulation Crowdfunding offering activity through the end of the period of analysis (July 31, 2020), as illustrated in Table 3 below. The increase was observed in comparison to both the pre-rule period of equivalent length (89 days from February 5, 2020 to May 3, 2020) and the same period in the previous year (May 4, 2019 to July 31, 2019). The increase was most pronounced for issuers that had been formed at least six months prior to the offering and thus would have been eligible under the temporary rules.

Table 3: New Regulation Crowdfunding activity, May 4, 2020 – July 31, 2020³⁷

| Period | Number of new filings | Aggregate target amount (\$ million) | Aggregate maximum amount (\$ million) |
|------------------------------------|-----------------------|--------------------------------------|---------------------------------------|
| <i>All issuers</i> | | | |
| Post (May 4, 2020 - July 31, 2020) | 292 | 15.5 | 173.4 |
| Pre (Feb. 5, 2020 - May 3, 2020) | 199 | 10.0 | 110.9 |
| Change Post vs. Pre | 47% | 56% | 56% |
| 2019 (May 4, 2019 - July 31, 2019) | 128 | 7.9 | 72.6 |

³⁴ See also Temporary Amendments Adopting Release, at 27124.

³⁵ For a more detailed discussion, see Temporary Amendments Adopting Release, at 27124-5.

³⁶ Among those 94 offerings, 50 offerings initially omitted financial statements, 38 relied on the shorter closing time, and 27 provided certified rather than reviewed financial statements. (Some offerings relied on multiple provisions.) These estimates may represent a lower bound because reliance on the provisions is not disclosed in a structured data or standardized format and was evaluated based on manual review of filings for mention of the temporary rules. See *supra* note 13.

³⁷ Based on staff analysis of EDGAR filings on Form C, excluding amendments.

| | | | |
|---|------|------|-------|
| Change Post vs. 2019 | 128% | 98% | 139% |
| <i>Issuers formed at least six months before the offering</i> | | | |
| Post (May 4, 2020 - July 31, 2020) | 251 | 13.4 | 156.1 |
| Pre (Feb. 5, 2020 - May 3, 2020) | 161 | 7.8 | 86.6 |
| Change Post vs. Pre | 56% | 72% | 80% |
| 2019 (May 4, 2019 - July 31, 2019) | 100 | 5.7 | 58.8 |
| Change Post vs. 2019 | 151% | 137% | 165% |

Important caveats apply: (1) the post-May 4, 2020 period coincided with a significant strengthening of the broader market sentiment, compared to the market sentiment in the preceding months;³⁸ (2) due to the time required for the closing of an offering and lags in Form C-U filing, we lack systematic data on the success rate and proceeds realized in offerings initiated under the temporary rules.³⁹ We cannot infer causal effects because the regulatory change coincided with potential confounding aggregate factors. It is also possible that the trends in the number of initiated offerings reflect a general increase in issuer interest in crowdfunding over time independent of the temporary rules. Small sample sizes warrant further caution in interpreting the changes.

B. Economic Effects

The temporary final rules currently in effect serve as the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of the amendments are measured. Because the extension of the expiration dates in the temporary final rules maintains the status quo, we do not expect additional significant costs or benefits to result from the extension. We also do not expect the extension to have additional significant

³⁸ Based on Bloomberg data, between May 4 and July 31, 2020, Russell 3000 gained approximately 16%. This is in contrast to the 16% decline in the index between February 5 and May 4, 2020.

³⁹ As of July 31, 2020, only a handful of reports of proceeds on Form C-U were filed for offerings initiated on or after May 4, 2020. Issuers generally file Form C-U upon completion of an offering. The typical issuer that has filed Form C-U has filed it over two months after the initial filing of Form C.

effects on efficiency, competition, or capital formation. In addition, while we expect the extension of the temporary relief to benefit small businesses, it will not eliminate the large-scale challenges facing small businesses as a result of the COVID-19 crisis and ensuing disruptions to individual industries, the broader economy, purchasing power of these businesses' consumers, and investor confidence.

In the alternative, we could have allowed the temporary final rules to expire. Not extending the relief would impose costs and reduce the flexibility for small issuers adversely affected by COVID-19 seeking to meet their financing needs through Regulation Crowdfunding. It also would create competitive disparities for otherwise similar issuers that initiate offerings before and after the expiration of the existing relief (August 31, 2020). As a general matter, the flexibility to access capital under Regulation Crowdfunding on an expedited basis facilitates capital formation and reduces some of the barriers to accessing capital markets for small issuers, allowing some issuers to raise additional capital or to optimize their financing cost through a more efficient and streamlined offering process.⁴⁰ By providing targeted relief in a market segment that primarily attracts small businesses, which are disproportionately affected by downturns, the temporary rules also serve to incrementally enhance competition between small businesses and larger businesses (which tend to be less financially constrained).⁴¹

⁴⁰ See also *supra* notes 11, 12, and 14.

⁴¹ Research has related small size to financing constraints, and conversely, larger size to being less financially constrained. See, e.g., Nathalie Moyen (2004) Investment–Cash Flow Sensitivities: Constrained versus Unconstrained Firms, *Journal of Finance* 59(5), 2061–2092; Christopher Hennessy, Amnon Levy, and Toni Whited (2007) Testing Q Theory with Financing Frictions, *Journal of Financial Economics* 83(3), 691–717. Other studies also show that diversified firms can rely on internal capital markets to mitigate financing constraints. See, e.g., Venkat Kuppuswamy and Belén Villalonga (2016) Does Diversification Create Value in the Presence of External Financing Constraints? Evidence from the 2007–2009 Financial Crisis, *Management Science* 62(4), 905–923 (showing that “the value of corporate diversification increased during the 2007–2009 financial crisis” and that “conglomerates’ access to internal capital markets became more valuable”). See also *supra* note 25.

We recognize that the alternative of allowing the temporary rules to expire could incrementally decrease concerns about investor protection,⁴² either due to the investors' reduced time period within which to make an informed decision about an offering or the increased ability of opportunistic issuers seeking to exploit COVID-19 concerns to raise capital from investors through crowdfunding in an expedited timeframe. Generally, however, the aggregate incremental effect of the temporary rules on retail investor protection is likely limited by various factors, including the tailoring of the relief (through the eligibility requirements and the narrow scope and time-limited nature of the relief) and the modest size of the Regulation Crowdfunding market compared to other market segments that draw retail investors. Importantly, the eligibility requirements exclude issuers that were noncompliant with the requirements of Regulation Crowdfunding in previous offerings in which they sold securities. Further, to the extent that investors know less about newly formed issuers with a limited track record, the incremental risk of the temporary relief to investors is reduced by the exclusion from eligibility of issuers formed, or with operations for, less than six months prior to the offering. This limitation on eligibility will tailor the relief to assist existing issuers that require additional funds because of adverse effects caused by the closures and safety measures designed to slow the spread of COVID-19. Further, issuers are required to disclose reliance on the temporary rules to investors, enabling more informed decisions. Moreover, while issuers may solicit investor interest after an initial Form C filing without certain financial disclosures, intermediaries are not allowed to accept investor commitments before the issuer provides all required financial information.

In addition, we note that several essential safeguards contained in the 2015 Regulation Crowdfunding rules continue to apply to issuers that rely on the temporary rules. Crucially,

⁴² See also Temporary Amendments Adopting Release, at 27122; Better Markets letter.

offering and investment limits serve to limit the potential magnitude of investor losses, irrespective of cause. Further, Regulation Crowdfunding offerings will continue to be conducted through registered crowdfunding intermediaries, which remain subject to Commission and FINRA oversight. Crowdfunding intermediaries remain required to take measures to reduce the risk of fraud, provide investor education materials and issuer disclosures to investors, and meet other substantive requirements of Regulation Crowdfunding. Intermediaries remain required to provide communications channels on the online platform to allow investors to draw on the wisdom of the crowd, particularly in analyzing dynamic information about short-term offerings. Issuers remain subject to the extensive disclosure requirements of Form C as well as annual report obligations. While the temporary rules provide exceptions to certain timing requirements of Regulation Crowdfunding for eligible issuers, investors remain able to rescind their commitments within 48 hours from the time of making their commitment, and from the time of a material change to the offering. These safeguards, as well as various other requirements of Regulation Crowdfunding offerings may have served as key deterrents to potential misconduct. Since the inception of Regulation Crowdfunding, there have been relatively few enforcement actions taken against issuers and intermediaries in the crowdfunding market.⁴³ Staff is not aware of an increase in misconduct due to the adoption of the temporary rules. However, this inference is inherently limited by the difficulty of identifying misconduct.

As another alternative, we could extend the relief for a shorter or longer time period than specified in these amendments. The alternative of extending the relief for a shorter (longer) time period would lead to fewer (more) potential issuers being afforded the flexibility in capital raising under the temporary rules, compared to the amendments. Because of the severe and

⁴³ See 2019 Regulation Crowdfunding Report, at 5.

continuing economic impact of the COVID-19 crisis, we believe that the extension of the temporary rules is appropriate.⁴⁴

IV. PROCEDURAL AND OTHER MATTERS

The Administrative Procedure Act (“APA”) generally requires an agency to publish notice of a rulemaking in the Federal Register and provide an opportunity for public comment. This requirement does not apply, however, if the agency “for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.”⁴⁵ The APA also generally requires that an agency publish an adopted rule in the Federal Register at least 30 days before it becomes effective. This requirement does not apply, however, if the agency finds good cause for making the rule effective sooner.⁴⁶

Given the temporary nature of both the relief contemplated by the temporary final rules and the extension of such relief, as well as the significant, unprecedented, and immediate impact of COVID-19 on affected issuers, as discussed above, the Commission finds that good cause exists to dispense with notice and comment as impracticable, unnecessary, or contrary to the public interest, and to act immediately to extend the applicability and expiration dates of the temporary amendments to Rules 100, 201, 301, 303 and 304 of Regulation Crowdfunding.⁴⁷ In

⁴⁴ As another alternative, we could extend some but not all of the provisions of the temporary rules, or modify further some of the provisions of the temporary relief. For a detailed discussion of the economic effects of the individual provisions and the alternatives involving modifications of the provisions in the temporary rules, see Temporary Amendments Adopting Release, at 27121–31.

⁴⁵ 5 U.S.C. 553(b)(3)(B).

⁴⁶ 5 U.S.C. 553(d)(3).

⁴⁷ This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the temporary final rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a Federal agency finds that notice and public comment are impractical, unnecessary or contrary to the public interest, a rule shall take effect at such time as the Federal agency promulgating the rule determines). The temporary final rules also do not require analysis under the Regulatory Flexibility Act. *See* 5 U.S.C. 604(a) (requiring a final regulatory flexibility analysis only for rules required by the APA or other law to undergo notice and comment). One commenter expressed concern that the Commission adopted the temporary final rules without public input. *See* Better Markets letter.

particular, small businesses continue to be affected by the closures and safety measures designed to slow the spread of COVID-19 and may face urgent funding needs⁴⁸ that could be addressed by use of the internet to reach potential investors. In the current circumstances, a delay in implementation would substantially undermine the relief provided by the temporary rules and could exacerbate the existing challenges faced by many small businesses in urgent need of capital to continue their operations.

The temporary final rules provide relief from certain financial information requirements of Regulation Crowdfunding. In addition, the temporary final rules require issuers relying on the temporary relief to provide certain additional disclosures, although, as we stated in the Temporary Amendments Adopting Release, we expect the burden of those disclosures to be minimal. We also stated in the Temporary Amendments Adopting Release that overall, we expect the temporary final rules to result in a net decrease in compliance burden per form for Form C (OMB Control No. 3235-0307); however, because of a possible increase in the number of issuers relying on Regulation Crowdfunding, we believe that the net change in paperwork burden will be minimal.⁴⁹ Accordingly, we did not adjust the burden or cost estimates associated with existing collections of information under Regulation Crowdfunding for purposes of the Paperwork Reduction Act of 1995.⁵⁰ The extension of the applicability and expiration dates of the temporary final rules does not change our analysis.

However, consistent with the discussion above, we believe this approach was warranted given the extraordinary challenges faced by many issuers under the current circumstances as well as the fact that any delay in implementation would have substantially undermined the intended benefits of the temporary relief.

⁴⁸ *See supra* note 1.

⁴⁹ We note that the temporary nature of the amendments and the inherent uncertainty in estimating how many issuers will take advantage of the temporary relief makes estimation of the net change in paperwork burden difficult.

⁵⁰ 44 U.S.C. 3501 *et seq.*

Pursuant to the Congressional Review Act,⁵¹ the Office of Information and Regulatory Affairs has designated the temporary final rules as a “major rule,” as defined by 5 U.S.C. 804(2).

V. STATUTORY BASIS

We are temporarily amending Rules 100, 201, 301, 303, and 304 of Regulation Crowdfunding and Form C under the authority set forth in the Securities Act (15 U.S.C. 77a *et seq.*), particularly, Section 28 thereof as follows, and the expiration date for the temporary final rules published May 7, 2020 (85 FR 27116) is extended from March 1, 2021, to September 1, 2021.

List of Subjects

17 CFR Part 227

Crowdfunding, Funding portals, Intermediaries, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 227—REGULATION CROWDFUNDING, GENERAL RULES AND REGULATIONS

1. The authority citation for part 227 continues to read as follows:

Authority: 15 U.S.C. 77d, 77d-1, 77s, 77z-3, 78c, 78o, 78q, 78w, 78mm, and Pub. L. 112-106, secs. 301-305, 126 Stat. 306 (2012).

⁵¹ 5 U.S.C. 801 *et seq.*

§227.100 [Amended]

2. In §227.100(b)(7) introductory text, remove the date “August 31, 2020” and add in its place the date “February 28, 2021”.

§227.201 [Amended]

3. In §227.201(z) introductory text, remove the date “August 31, 2020” and add in its place the date “February 28, 2021”.

§227.301 [Amended]

4. In §227.301(d), remove the date “August 31, 2020” and add in its place the date “February 28, 2021”.

§227.303 [Amended]

5. In §227.303(g)(1) introductory text and (2), remove the date “August 31, 2020” and add in its place the date “February 28, 2021”.

§227.304 [Amended]

6. In §227.304(e) introductory text, remove the date “August 31, 2020” and add in its place the date “February 28, 2021”.

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The general authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

* * * * *

8. In Form C (referenced in § 239.900) remove the words “August 31, 2020” in the second paragraph to the introductory paragraphs in the Optional Question and Answer Format for an Offering Statement and add, in their place, the words “February 28, 2021”.

By the Commission.

Dated: August 28, 2020.

Vanessa A. Countryman,
Secretary.