

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 227 and 239

[Release No. 33-10781]

Temporary Amendments to Regulation Crowdfunding

AGENCY: Securities and Exchange Commission.

ACTION: Temporary final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is adopting temporary final rules 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 are effective from May 4, 2020, through March 1, 2021.

Applicability date: The amendments apply to securities offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 31, 2020.

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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. INTRODUCTION

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 The Commission recognizes that, in the current environment, many small businesses are facing challenges accessing urgently needed capital in a timely and cost-effective manner. 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. However, based on feedback that the Commission has received from its Small Business Capital Formation Advisory Committee and other outreach conducted by SEC staff, the Commission understands that certain Regulation Crowdfunding requirements

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.”).

may make it difficult for an issuer affected by COVID-19 to launch an offering and see it to completion within a time frame that meets its urgent capital needs.²

In light of the challenges facing small businesses, the Commission has determined that temporary relief from certain requirements of Regulation Crowdfunding is necessary and appropriate to provide issuers with the opportunity to access capital on an expedited basis while maintaining investor protections. The temporary rules provide flexibility for issuers who meet certain eligibility criteria³ to assess interest in a Regulation Crowdfunding offering prior to preparation of full offering materials,⁴ 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.⁵ The temporary rules also provide an exemption from certain financial statement review requirements for issuers offering \$250,000 or less in reliance on Regulation Crowdfunding within a 12-month period.⁶ The following table summarizes the amendments:

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:

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 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 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).

⁴ See temporary 17 CFR 227.201(z)(2) (“Rule 201(z)(2)”).

⁵ See temporary 17 CFR 227.303(g) (“Rule 303(g)”) and temporary 17 CFR 227.304(e) (“Rule 304(e)”).

⁶ 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. See *supra* Note 21.

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 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 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 until 48 hours after they are given)

Requirement	Existing Regulation Crowdfunding	Temporary Amendment
<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>

Section 28 of the Securities Act⁷ provides the Commission with general exemptive authority to conditionally or unconditionally exempt any person, security, or transaction, or any

⁷ 15 U.S.C. 77z-3.

class or classes of persons, securities, or transactions, from any provision or provisions of the Securities Act, or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

The Commission intends to monitor the current situation and may, if necessary, extend the time period during which this relief applies, with any additional conditions the Commission deems appropriate and/or issue other relief.

II. ELIGIBILITY REQUIREMENTS FOR RELIANCE ON TEMPORARY RULES

The temporary relief we are providing in this release will be available to issuers who meet certain eligibility criteria. Specifically, in addition to the current eligibility requirements for Regulation Crowdfunding,⁸ to rely on the temporary rules for an offering an issuer must have been organized and have had operations for no less than six months prior to the commencement of such offering.⁹ We believe that this limitation on eligibility is appropriate because the temporary relief is intended primarily to assist existing businesses that require additional funds because of adverse effects caused by the closures and safety measures designed to slow the spread of COVID-19. In addition, limiting the relief to issuers that had been organized and had operations for at least six months prior to the offering should help mitigate risk to investors

⁸ 15 U.S.C. 77d-1 (“Section 4A”) of the Securities Act specifically excludes non-U.S. issuers, issuers that are required to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, investment companies, as defined in Section 3 of the Investment Company Act of 1940 or excluded from the definition of investment company by Section 3(b) or Section 3(c) of that Act; and other issuers that the Commission, by rule or regulation, determines appropriate. 15 U.S.C. 77d-1(f). In addition, the Commission’s rules further exclude: issuers that are disqualified under Regulation Crowdfunding’s disqualification rules, issuers that have failed to comply with the annual reporting requirements under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement, and blank check companies. 17 CFR 227.100(b). These eligibility requirements remain unchanged under the temporary relief.

⁹ *See* temporary 17 CFR 227.100(b)(7)(i). Because of the wide variety in the types of businesses that may rely on Regulation Crowdfunding, the activities that constitute operations and the level of operations will vary from issuer to issuer. Examples of issuers who would be considered to have operations include but are not limited to those that: have assets, revenue, operating expenses (such as rent, salaries, or utilities), or interest expense; have paid taxes or incurred business debt; or have previously filed a Form C for a Regulation Crowdfunding offering.

associated with use of the temporary accommodations by newly formed businesses. New businesses are not foreclosed from conducting an offering under Regulation Crowdfunding, but will need to comply with existing rules.

In addition, an issuer will be ineligible to rely on the temporary rules for an offering if the issuer has previously sold securities under Regulation Crowdfunding and, in connection with such prior offering(s), did not comply with the requirements in 15 U.S.C. 77d-1(b) (“Section 4A(b)”) of the Securities Act and the related requirements of Regulation Crowdfunding.¹⁰ This limitation will prevent an issuer with a history of non-compliance in Regulation Crowdfunding offerings from taking advantage of the temporary exemptions.

In connection with this temporary amendment, we are making a related amendment to Rule 301 to require that an intermediary¹¹ involved in an offering by an issuer that is relying on the temporary relief must have a reasonable basis for believing that the issuer has complied with the requirements of Section 4A(b) and the related requirements of Regulation Crowdfunding in prior offerings.¹² For this requirement, the intermediary may reasonably rely on the representations of the issuer concerning compliance with these requirements unless the intermediary has reason to question the reliability of those representations.

III. TEMPORARY RELIEF FROM CERTAIN FINANCIAL INFORMATION

¹⁰ See temporary 17 CFR 227.100(b)(7)(ii). An issuer must meet the eligibility criteria at the time it initiates an offering in reliance on the temporary rules. Therefore, an issuer that was delinquent in its filing obligations that becomes current prior to initiating a new offering would be eligible to rely on the temporary rules. An issuer relying on the temporary relief that is subsequently found to be non-compliant in connection with prior offerings (other than insignificant deviations covered by the safe harbor of 17 CFR 227.502(a)) would not have been eligible for the temporary relief, with the result that the Regulation Crowdfunding exemption would not be available for the offering.

¹¹ For purposes of Regulation Crowdfunding, an intermediary means a registered broker-dealer or funding portal. See 17 CFR 227.300(c)(3).

¹² See temporary 17 CFR 227.301(d) (“Rule 301(d”).

REQUIREMENTS

In order to conduct a Regulation Crowdfunding offering, an issuer must electronically file its offering statement on Form C with the Commission and provide it to the intermediary facilitating the crowdfunding offering prior to commencing its offering.¹³ The offering statement must include specified information, including a discussion of the issuer's financial condition and financial statements.¹⁴ The financial statement requirements are based on the amount offered and sold in reliance on Regulation Crowdfunding within the preceding 12-month period:¹⁵

- *For issuers offering \$107,000 or less:* Financial statements of the issuer and certain information from the issuer's Federal income tax returns, both certified by the principal executive officer. If, however, financial statements of the issuer are available that have either been reviewed or audited by a public accountant that is independent of the issuer, the issuer must provide those financial statements instead and will not need to include the information reported on the Federal income tax returns or the certification by the principal executive officer.
- *Issuers offering more than \$107,000 but not more than \$535,000:* Financial statements reviewed by a public accountant that is independent of the issuer. If, however, financial statements of the issuer are available that have been audited by a public accountant that is independent of the issuer, the issuer must provide those financial statements instead and will not need to include the reviewed financial

¹³ See Rule 201.

¹⁴ See *id.*

¹⁵ See 17 CFR 227.201(t) ("Rule 201(t)").

statements.

- *Issuers offering more than \$535,000:*
 - For first-time Regulation Crowdfunding issuers: Financial statements reviewed by a public accountant that is independent of the issuer, unless financial statements of the issuer are available that have been audited by an independent auditor.
 - For issuers that have previously sold securities in reliance on Regulation Crowdfunding: Financial statements audited by a public accountant that is independent of the issuer.¹⁶

In light of the challenges that small businesses are experiencing as a result of COVID-19, we believe that temporary, limited exemptive relief from certain Regulation Crowdfunding requirements for issuers that meet the enhanced eligibility requirements discussed above may help provide timely access to capital, while maintaining appropriate investor protections.

A. Omission of Financial Statements from Initial Form C Filing

An issuer that seeks to conduct an offering under Regulation Crowdfunding to address urgent funding needs arising from or relating to COVID-19 but that does not have current financial statements available, or that is facing challenges in obtaining reviewed or audited financial statements due to COVID-19, may find it difficult to prepare the required financial statements in order to launch a timely offering. Further, the issuer may be more reluctant to undertake the cost of the preparation of such financial statements during the pandemic without some indication that the securities offering has a chance of succeeding. In light of this, we are providing temporary relief from certain financial information requirements in an issuer's initial

¹⁶ See *id.*

Form C filing. The temporary relief will allow an issuer to provide offering information through the intermediary's platform and informally gauge investor interest in an offering before going through the effort and expense of preparing financial statements.

Temporary Rule 201(z)(2) allows an issuer that meets the eligibility requirements described above to (i) omit the financial statements required by Rule 201(t) in its initial Form C filed with the Commission, to the extent such financial statements are not otherwise available; and (ii) commence its offering of securities through the intermediary's platform. Such financial statements are, however, required to be included in an amendment to the Form C and provided to investors and the intermediary before the intermediary accepts any investment commitments in the offering.¹⁷

An issuer relying on this temporary rule must prominently disclose that:

- The financial information that has been omitted is not otherwise available and will be provided by an amendment to the offering materials;
- The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and
- No investment commitments will be accepted until after such financial information has been provided.¹⁸

We believe that this clear disclosure to potential investors, along with the enhanced eligibility requirements and the inability of an intermediary to accept any investment commitment prior to an investor's receipt of all required information, will provide appropriate

¹⁷ Because no investment commitments may be made until complete financial statements are provided, the filing of the amendment including such financial statements will not trigger the reconfirmation requirements of 17 CFR 227.304(c) ("Rule 304(c)").

¹⁸ See temporary 17 CFR 227.201(z)(1) ("Rule 201(z)(1)").

protections to investors involved in such offerings.

B. Increase in Offering Threshold Requiring Reviewed Financial Statements

Market participants have indicated to the Commission that a temporary change to the offering threshold that triggers the requirement to include financial statements that are reviewed by a public accountant that is independent of the issuer could facilitate capital raising by issuers affected by COVID-19.¹⁹ In response, we are adopting temporary Rule 201(z)(3), that would apply to an eligible issuer²⁰ in an offering or offerings that, together with all other amounts sold in Regulation Crowdfunding offerings within the preceding 12-month period, have, in the aggregate, a target offering amount of more than \$107,000, but not more than \$250,000.²¹ Such 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, in accordance with 17 CFR 227.201(t)(1) ("Rule 201(t)(1)"), instead of the financial statements reviewed by a public accountant that is independent of the issuer that would otherwise be required by 17 CFR 227.201(t)(2) ("Rule 201(t)(2)"). This temporary relief would apply only if reviewed or audited financial statements of the issuer are not otherwise available.

An issuer relying on this temporary rule would be required to provide prominent disclosure that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is

¹⁹ See *supra* note 2.

²⁰ See temporary Rule 100(b)(7).

²¹ Note that Instruction 1 to paragraph (t) continues to apply in connection with the determination of the offering amount ("To determine the financial statements required under this paragraph (t), an issuer must aggregate amounts sold in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period and the offering amount in the offering for which disclosure is being provided. If the issuer will accept proceeds in excess of the target offering amount, the issuer must include the maximum offering amount that the issuer will accept in the calculation to determine the financial statements required under this paragraph (t).").

independent of the issuer.²²

We are of the view that the financial statement requirements of Rule 201(t)(1), although less rigorous than Rule 201(t)(2), provide appropriate information and protection to investors in offerings up to the higher \$250,000 threshold, when considered in conjunction with the prominent disclosure to investors and other conditions to an issuer's reliance on the temporary rule.

IV. TEMPORARY RELIEF FROM CERTAIN TIMING REQUIREMENTS FOR OFFERINGS UNDER REGULATION CROWDFUNDING

Regulation Crowdfunding requires that the information in an offering statement be publicly available on the intermediary's platform for at least 21 days before any securities may be sold, although the intermediary may accept investment commitments during that time.²³ In addition, Regulation Crowdfunding includes specific requirements with respect to cancellation of investment commitments and the ability to close an offering prior to the originally announced deadline once the target amount is met.²⁴

Market participants have indicated that these timing requirements, in light of business disruptions resulting from COVID-19, may make it difficult for issuers with urgent funding needs to make use of Regulation Crowdfunding to receive funds promptly.²⁵ As a result, we are adopting the following temporary relief from these timing requirements for offerings initiated between May 4, 2020, and August 31, 2020.

A. Suspension of 21-Day Requirement

²² See temporary 17 CFR 227.201(z)(1)(iii) ("Rule 201(z)(1)(iii)").

²³ See Securities Act Section 4A(a)(6); 17 CFR 227.303(a) ("Rule 303(a)"). See also 17 CFR 227.303(e)(3)(i) ("Rule 303(e)(3)(i)") and 17 CFR 227.304(b) ("Rule 304(b)").

²⁴ See Rule 304.

²⁵ See *supra* note 2.

Rule 303(a) of Regulation Crowdfunding sets forth the requirements applicable to an intermediary with respect to the availability of specified issuer information to the Commission and to investors. This includes a requirement that the information be made publicly available on the intermediary's platform for a minimum of 21 days before any securities are sold in the offering. During this time, the intermediary may accept investment commitments.²⁶ In addition, Rule 303(e)(3)(i) similarly imposes a 21-day requirement with respect to the availability of issuer information when a funding portal is directing a qualified third party to transmit funds to an issuer. Rule 304(b), as discussed below, also requires that an offering remain open for a minimum of 21 days pursuant to Rule 303(a).

This 21-day time period, particularly when considered alongside the time required for an issuer to prepare its offering materials and commence an offering under Regulation Crowdfunding, may diminish the utility of Regulation Crowdfunding for issuers with urgent capital needs as a result of COVID-19. Therefore, we are adopting temporary Rule 303(g), under which an intermediary is not required to comply with Rule 303(a)(2)'s 21-day requirement, but instead must make the required issuer information publicly available on the intermediary's platform before any securities are sold in the offering.²⁷ The intermediary may accept investment commitments beginning when such information is made available, but only if the issuer has provided the financial information required by Rule 201(t).²⁸ Similarly, a funding

²⁶ 17 CFR 227.303(a)(2) ("Rule 303(a)(2)").

²⁷ Notwithstanding the waiver of the 21-day requirement, we note that no offering under these temporary rules will be able to close within the first 48 hours, as a result of the right to cancellation described in Section IV.B.

²⁸ 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 by Rule 201(t). *See* Section III.B and temporary Rule 201(z)(3). However, an issuer that has omitted financial statements pursuant to temporary Rule 201(z)(2) will not be able to accept investment commitments until it includes such financial statements. *See* Section III.A.

portal is not required to comply with the 21-day requirement in Rule 303(e)(3)(i) with respect to directing a transmission of funds after a sale has occurred and the cancellation period has elapsed.

An issuer may not rely on the temporary rules unless it meets the temporary eligibility requirements and provides prominent disclosure that the offering is being conducted on an expedited basis due to circumstances relating to COVID-19 and pursuant to this temporary relief.

While the Commission continues to believe that the 21-day time period provides important investor protections by helping to ensure that an investor has an adequate opportunity to evaluate an investment opportunity,²⁹ we believe the prominent disclosure required by the temporary rules will make clear to potential investors that there may be a compressed time frame for the offering, and allow them to take that information into consideration when determining whether or not to invest. For instance, the disclosure will put investors on notice that they may have a shortened time frame within which to consider information about the type of offering the issuer is conducting.³⁰

B. Changes to Cancellation Process

Section 4A(b)(1)(G) of the Securities Act requires an issuer, prior to sale, to provide investors “a reasonable opportunity to rescind the commitment to purchase the securities.” Rule 304(a) of Regulation Crowdfunding gives investors an unconditional right to 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

²⁹ See Crowdfunding, Release No. 33-9974 (Oct. 30, 2015) [80 FR 71387 (Nov. 16, 2015)] at 71442.

³⁰ SEC staff previously published an investor bulletin that discusses the differences between certain types of securities that may be offered. See SEC Office of Investor Education and Advocacy, Investor Bulletin: Be Cautious of SAFEs in Crowdfunding (May 9, 2017), available at https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_safes.

commitments made within the final 48 hours of the offering (except in the event of a material change to the offering).

Rule 304(b) provides that if an issuer reaches the target offering amount prior to the deadline identified in its offering materials, it may close the offering once the target offering amount is reached, provided that: (1) the offering remains open for a minimum of 21 days; (2) the intermediary provides notice about the new offering deadline at least five business days prior to the new offering deadline; (3) 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 (4) at the time of the new offering deadline, the issuer continues to meet or exceed the target offering amount.

These requirements relating to an investor's ability to cancel an investment commitment and an issuer's ability to close an offering once the target offering amount has been met provide protections to investors by enabling them to reconsider investment decisions with the benefit of the views of the crowd or other information that may come to light during the offering period. However, these requirements may, like the 21-day requirement, diminish the utility of Regulation Crowdfunding for issuers with urgent capital needs as a result of COVID-19.

To facilitate the use of Regulation Crowdfunding to address urgent funding needs, we are adopting temporary Rule 304(e) and a related disclosure requirement in temporary Rule 201(z)(1)(iv). These rules would permit an investor in an offering conducted under the temporary rules to cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate).³¹

³¹ Under Rule 303(d), an intermediary must promptly, upon receipt of an investment commitment from an investor, give or send to the investor a notification disclosing certain information, including the date and time by which the investor may cancel the investment commitment.

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, as provided in Rule 304(c). In addition, once an issuer has received binding investment commitments (that is, investment commitments for which the 48-hour cancellation period has run) that equal or exceed the target offering amount, the issuer may close the offering on a date earlier than the deadline identified in its offering materials.³² In order to do so, the issuer must comply with additional disclosure requirements described below and the intermediary must provide notice that the target offering amount has been met. The intermediary is not required to provide five business days' notice of the earlier closing deadline, as would normally be required under Rule 304(b). At the time of the closing of the offering, the issuer must continue to have binding investment commitments that meet or exceed the target offering amount.

We believe that it is appropriate to provide temporary relief from these requirements so that issuers can more readily raise capital to meet their urgent funding needs, while providing protections in the form of prominent, clear disclosure to investors of the changes in the process and preserving the rules that permit cancellations when there has been a material change in the offering.

The temporary rule requires the issuer to provide a prominent description of the process to complete the transaction or cancel an investment commitment, including a statement that:

- Investors may cancel an investment commitment for any reason within 48 hours from the time of their investment commitment (or such later period as the issuer may

³² As is currently the case, an issuer that decides to do a “min/max” offering in which offered securities will be sold if a minimum is met, but subject to a cap on the overall amount sold, may engage in a “rolling close” in which, once a specified minimum threshold is met, investors are notified by the intermediary that that minimum portion of the issue will be closed and funds are released to the issuer. After this initial close, the issuer may make additional closes until the maximum offering amount is received.

designate);

- The intermediary will notify investors when the target offering amount has been met;
- 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 that would require an extension of the offering and reconfirmation of the investment commitment);³³ and
- 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 the investor will receive securities in exchange for his or her investment.

V. DISCLOSURE OF RELIANCE ON TEMPORARY RELIEF

As described above, a condition to each aspect of the temporary relief we are adopting is clear disclosure to investors with respect to the issuer's reliance on such relief. We believe this disclosure is necessary to inform investors of the fact that the mechanics of the offering are different than the investors may be expecting, as well as to ensure that investors are aware that that the issuer is being affected by COVID-19.

To assist issuers with compliance with these requirements, the following table summarizes the disclosure requirements. Where applicable, prominent disclosure of each of the

³³ If there is a material change to the terms of the offering or to the information provided by the issuer that would require an extension of the offering and reconfirmation of the investment commitment, the intermediary must give or send to any investor who has made an investment commitment notice of the material change and that the investor's investment commitment will be cancelled unless the investor reconfirms his or her investment commitment within five business days of receipt of the notice, in accordance with Rule 304(c). An investor that reconfirms his or her investment commitment will have 48 hours to cancel such reconfirmed investment commitment.

following is required:³⁴

Requirement:	Applicable to:
<p>A statement 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 COVID-19 relief.</p> <p>[Rule 201(z)(1)(i)]</p>	<p>Any issuer relying on any of the temporary rules</p>
<p>A statement that:</p> <ul style="list-style-type: none"> • The financial information that has been omitted is not currently available and will be provided by an amendment to the offering materials; • The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and • No investment commitments will be accepted until after such financial information has been provided. <p>[Rule 201(z)(1)(ii)]</p>	<p>An issuer relying on temporary Rule 201(z)(2) to omit financial statements from initial Form C filing</p>
<p>A statement that:</p> <ul style="list-style-type: none"> • Financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer. <p>[Rule 201(z)(1)(iii)]</p>	<p>An issuer that does not have available financial statements that have either been reviewed or audited by a public accountant that is independent of the issuer and is relying on the temporary Rule 201(z)(3) relief from providing reviewed financial statements</p>
<p>A description of the process to complete the transaction or cancel an investment commitment, including a statement that:</p>	<p>An issuer relying on temporary Rules 303(g) and 304(e) for relief from the timing requirements</p>

³⁴ We are temporarily amending the introductory paragraphs to the section of Form C entitled “Optional Question & Answer Format for an Offering Statement” by adding a new paragraph reminding issuers that are relying on these temporary rules to review and tailor their responses to certain questions in the Form C appropriately.

Requirement:	Applicable to:
<ul style="list-style-type: none"> • Investors may cancel an investment commitment for any reason within [48 hours]** from the time of their investment commitment; • The intermediary will notify investors when the target offering amount has been met; • The issuer may close the offering at any time after it has aggregate investment commitments for which the [48-hour]** right to cancel has elapsed that equal or exceed the target offering amount (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and • 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 his or her investment. <p>** Under the temporary rules, 48 hours is the minimum cancellation period, but an issuer may designate a later period. If the issuer has designated a period later than 48 hours, such later period must be disclosed.</p> <p>[Rule 201(z)(1)(iv)]</p>	

VI. ECONOMIC ANALYSIS

A. Broad Economic Considerations, Baseline, and Affected Parties

As discussed above, in light of the considerable challenges facing small businesses, the Commission is providing temporary relief from certain requirements of Regulation Crowdfunding to issuers seeking funding on an expedited basis due to circumstances relating to COVID-19. We are mindful of the costs and benefits of the temporary rules.³⁵ Below we discuss the costs and benefits of each provision of the temporary rules, as well as their effects on efficiency, competition, and capital formation.

1. Broad Economic Considerations

Below we summarize the expected economic effects of the final temporary rules. These temporary rules will allow eligible issuers greater flexibility to access capital under Regulation Crowdfunding on an expedited basis. We expect the temporary rules to facilitate capital formation for eligible issuers. Further, relief from certain timing and information requirements and the introduction of the option to solicit investor interest before preparing financial disclosures are expected to reduce some of the barriers to Regulation Crowdfunding, making the capital raising process more efficient for eligible issuers. By providing targeted relief in a market segment that primarily attracts small businesses, which are disproportionately affected by downturns, we expect the temporary rules to incrementally enhance competition between small businesses and larger companies (which tend to be less financially constrained).³⁶ The

³⁵ 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.

³⁶ 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”).

temporary rules may also facilitate capital formation for small companies that previously raised capital from small investors but that have additional financing needs as the result of the COVID-19 shock.

We recognize that the effects of the temporary rules on capital formation may be relatively limited if the issuers relying on the provided relief would have otherwise pursued a Regulation Crowdfunding offering and raised a similar amount of financing in the absence of the relief. However, reliance on the relief might still enable such issuers to optimize their financing cost and benefit from a more efficient and streamlined offering process.

We recognize that temporarily relaxing certain substantive and disclosure requirements of Regulation Crowdfunding may incrementally raise concerns about investor losses, 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 losses is likely limited by various factors, including the tailoring of the relief (*e.g.*, the eligibility requirements) and the modest size of the Regulation Crowdfunding market compared to other market segments that draw small investors. In one potential scenario, investors that receive less information about issuers as a result of the temporary relief from reviewed financial statement requirements may provide a lower amount of financing or financing at a higher cost, which may deter relatively more established, higher-potential issuers from relying on the temporary rules, resulting in adverse selection. At the same time, the substantial, market-wide nature of the negative shock to small issuers' cash flows and financing needs may prompt both low- and high-potential issuers to

rely on the temporary relief in order to raise funds on an expedited basis, which might counteract such adverse selection. It is difficult to predict which effect will dominate.

Importantly, several conditions of the temporary rules are expected to preserve investor protection. As discussed below, the eligibility requirements exclude issuers that were noncompliant with the requirements of Regulation Crowdfunding in previous offerings that resulted in sales. 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 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. Issuers are required to disclose reliance on the temporary rules to investors, enabling more informed decisions. While issuers may solicit investor interest after an initial Form C filing lacking financial disclosures, intermediaries are not allowed to accept investor commitments before the issuer provides all required financial information.

In addition, several essential safeguards contained in the existing Regulation Crowdfunding rules, including offering and investment limits, will continue to apply. Crucially, 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 of a material change to the offering.

In light of the temporary nature of the relief, tailored eligibility criteria, and targeted, conditional relief provisions, we expect the aggregate economic effects of these temporary rules to be modest relative to the economic effects of the 2015 Regulation Crowdfunding rules. Further, the temporary rules may have a limited effect compared to the overall economic effects of the COVID-19 shock and the associated changes in market conditions on affected issuers. In particular, diminished aggregate and industry outlook, investor confidence, and risk tolerance, as well as negative wealth effects of the market downturn on investor portfolios and reduced disposable income due to labor market disruptions may have a negative effect on investors' willingness to participate in offerings, the likelihood of offering success, the amount of capital raised, and the offering terms under Regulation Crowdfunding, irrespective of the temporary rules. However, it is also possible that some investors in crowdfunding offerings are more motivated by nonmonetary considerations, such as a desire to invest in the local community or loyalty to a small business whose products they buy. Under such circumstances, the deterioration of financing conditions in the Regulation Crowdfunding market would be modest relative to that in the market for small cap registered offerings. Similarly, the temporary rules may have minimal effects on investor performance in Regulation Crowdfunding offerings, which, regardless of the temporary relief, may decline as a result of the effects of the shock on

business risk and survival rates of small firms, particularly in industries heavily represented in the Regulation Crowdfunding market, the probability of follow-on financing or exit, and the valuations obtained as a result of such transactions.

We evaluate the economic effects specific to each provision of the temporary rules relative to the baseline in greater detail in Sections VI.B through VI.D below.

2. Baseline and Affected Parties

The baseline is composed of existing Regulation Crowdfunding regulations and industry practices.³⁷ Given the exemption’s offering limit, since Regulation Crowdfunding became effective in 2016, it has been primarily utilized 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.

Table 1: Characteristics of Issuers in Regulation Crowdfunding Offerings: May 16, 2016 - December 31, 2019³⁸

	Average	Median
Age in years	2.9	1.8
Number of employees	5.3	3.0
Total assets	\$455,280	\$29,982
Total revenues	\$325,481	\$0

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 \$30,000 and no revenues (just over half of the offerings were by issuers with no

³⁷ For a more detailed discussion, *see* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (Mar. 4, 2020), Release No. 33-10763 [85 FR 17956 (Mar. 31, 2020)]; 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”).

³⁸ The estimates are based on data from Form C or the latest amendment to it and exclude withdrawn offerings.

revenues). Approximately ten percent of offerings were by issuers that had attained profitability in the most recent fiscal year prior to the offering.

Small businesses often face significant financing constraints.³⁹ Financing constraints make firms more vulnerable to economic downturns and other adverse shocks.⁴⁰

Table 2 summarizes amounts sought and capital reported raised in offerings under Regulation Crowdfunding since its inception through the end of 2019 (the most recently completed full calendar year of data).

³⁹ 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, June 2017, <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf> (“Treasury Report”). According to one study relying on the data from the 2014 Annual Survey of Entrepreneurs, approximately 64 percent of small businesses relied on personal or family savings, compared to 0.6 percent 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 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 76 percent of firms relied on credit, including 24 percent that used trade credit, 44 percent – business credit, and 55 percent – personal credit (percentages do not add up to 100 percent because firms may use multiple types of credit)).

⁴⁰ 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.

**Table 2: Regulation Crowdfunding offering amounts and reported proceeds, May 16, 2016
- December 31, 2019**

	Number	Average	Median	Aggregate
Target amount sought in initiated offerings	2,003	\$63,791	\$25,000	\$126.9 million
Maximum amount sought in initiated offerings	2,003	\$599,835	\$535,000	\$1,174.2 million
Amounts reported as raised in completed offerings	795	\$213,678	\$106,900	\$169.9 million

During that period, based on the analysis of EDGAR filings, we estimate that 2,003 offerings were initiated, seeking an aggregate target amount of \$126.9 million and up to an aggregate maximum amount of \$1,174.2 million, and 795 offerings reported aggregate proceeds of \$169.9 million.⁴¹

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 financing market conditions (collectively referred to as “the shock” or “the COVID-19” shock below). As part of the baseline, small businesses eligible under the existing rules have been facing and are expected to continue to face significant adverse effects of the shock, including, but not limited to, declines in consumer demand and revenues, particularly in consumer-facing industries, such as restaurants, recreation/lifestyle, and retail⁴² (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

⁴¹ 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.

⁴² *See, e.g.*, Devin Thorpe (2019) Startup Restauranters Find Willing Investors via Crowdfunding, *Forbes*, September 28, 2019, and 2019 US Equity Crowdfunding Stats – Year in Review, available at: <https://crowdwise.org/funding-portals/2019-equity-crowdfunding-stats-data/>.

workforce and supply chains; and declines in investor sentiment that affect the availability of financing, valuations, and potential for exits.⁴³ At the same time, 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 shock.⁴⁴

We expect the temporary rules to affect issuers, intermediaries, and investors in Regulation Crowdfunding offerings. As of December 2019, we estimate that 1,827 issuers initiated 2,003 Regulation Crowdfunding offerings, excluding withdrawn offerings.⁴⁵ As discussed below, eligibility criteria of the temporary rules exclude (1) issuers that were organized and had operations for less than six months prior to the commencement of the offering and (2) issuers that were not compliant with Regulation Crowdfunding requirements with regard to any prior offerings in which they sold securities.

Turning to the first eligibility requirement, historical data provides an indication of the potential share of offerings eligible for temporary relief among all offerings: from inception of Regulation Crowdfunding through the end of December 2019, we estimate that 1,537 (approximately 77 percent) offerings were initiated by 1,407 eligible issuers.⁴⁶

We lack the data or a methodology to predict how many issuers will be rendered

⁴³ See *supra* note 2.

⁴⁴ See *infra* note 50 and accompanying text.

⁴⁵ These figures are based on the three-and-a-half-year period 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 approximately four-month time frame during which temporary relief will be available.

⁴⁶ In addition, we recognize that many of the issuers that initiated past Regulation Crowdfunding offerings as of the end of 2019 may meet the six-month eligibility criterion as of the effective date of the temporary rules, should they wish to avail themselves of the temporary relief for a follow-on offering under Regulation Crowdfunding.

ineligible as a result of the second eligibility requirement because it is difficult to estimate the percentage of prior Regulation Crowdfunding issuers that will seek to conduct a follow-on offering and that were not compliant with one or more of the requirements of Regulation Crowdfunding with regard to a prior offering in which they sold securities. Based on historical data, this percentage may be modest because relatively few Regulation Crowdfunding issuers have initiated follow-on offerings in the past. We estimate that, from inception through the end of 2019, there were 149 repeat Regulation Crowdfunding issuers, including 116 such issuers that had reported successful completion of at least one Regulation Crowdfunding offering on Form C-U as of the end of 2019.⁴⁷

Staff's experience with, and analysis of, filings has revealed differences among issuers' compliance with financial statement requirements, the requirement to file an annual report on Form C-AR (for issuers that have sold securities under the exemption and have not terminated their reporting obligations), and the requirement to file a final progress update on Form C-U.⁴⁸ We further recognize that the rate of participation of repeat issuers based on historical Regulation Crowdfunding data may underestimate the rate of repeat issuers likely to seek capital under Regulation Crowdfunding while the temporary rules are in effect because: (1) follow-on Regulation Crowdfunding offerings have become more frequent in the latter part of the historical sample period since more initial offerings had been conducted, and we expect the number of repeat issuers to continue to increase as time elapses and more issuers, intermediaries, and investors gain experience with Regulation Crowdfunding; (2) financing needs of issuers affected

⁴⁷ 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 41.

⁴⁸ *See* 2019 Regulation Crowdfunding Study, at 28.

by the shock may be greater than predicted by historical data, leading to increased reliance on follow-on external financing, compared to historical rates; and (3) the relief provided by the temporary rules may make a Regulation Crowdfunding offering a more attractive and viable financing alternative for small issuers.

We estimate that, as of the end of 2019, there were 45 registered funding portals, excluding funding portals that had withdrawn their registration. In addition, 16 registered broker-dealers have participated in crowdfunding offerings, excluding withdrawn offerings. Information on the number of investors per offering is not available for the full sample of Regulation Crowdfunding offerings, and it is not required to be reported in progress updates on Form C-U.⁴⁹

We are unable to predict the number of issuers likely to rely on the temporary rules while they are in effect. On the one hand, the number of issuers seeking capital under Regulation Crowdfunding may exceed the estimates based on extrapolation from historical data because of the significant increase in small businesses' external financing needs as a result of the economic shock of COVID-19. Further, the flexibility and offering process efficiencies afforded by the temporary rules may draw additional issuers to Regulation Crowdfunding.

On the other hand, some issuers eligible under 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 17 CFR 230.506 (Rule 506 of Regulation D), to meet their financing needs. Other such issuers may choose to pursue a Regulation Crowdfunding offering but forgo the temporary relief in an attempt to send a favorable signal of

⁴⁹ See 2019 Regulation Crowdfunding Report, at 21, footnote 54 and accompanying text. According to one industry report, the total number of investors in successful offerings increased from 77,558 in 2017 to 147,448 in 2018.

their financial soundness in the face of the COVID-19 shock to prospective investors. The latter point may not be as significant for the likelihood of issuer uptake of the temporary relief to the extent that issuers not reliant on the temporary relief may still have to disclose material information about business and financial risks, including as a result of the COVID-19 shock, in their offering and periodic disclosures. The prominent disclosures of offering process and disclosure accommodations that an issuer is relying upon under the temporary rules due to being impacted by COVID-19 may cause some investors to forgo investing in those offerings out of concern about business risk, which may in turn deter some issuers from relying on the temporary rules. Further, some small businesses eligible under the temporary rules also may be eligible for other emergency relief or financial assistance,⁵⁰ which may reduce their reliance on the temporary rules.

B. Conditions of the Temporary Rules: Eligibility Criteria and Disclosure of Reliance on Temporary Relief

The temporary rules include several conditions for using the relief. First, to be eligible under the temporary rules, issuers must have been organized and had operations for at least six months prior to the commencement of the offering. This condition is intended to target relief towards issuers that were in existence prior to the COVID-19 shock and suffered its adverse effects on their business, resulting in a need for financing to be raised on an expedited basis. This provision will prevent more recently formed issuers from realizing the benefits of the temporary relief, which could limit the benefits of the rule on capital formation and efficiency. As discussed above, from inception through the end of 2019, we estimate that 77 percent of

⁵⁰ See COVID-19 Resources for Small Businesses, <https://www.sec.gov/page/covid-19-resources-small-businesses>.

offerings were initiated by issuers that would have met this eligibility criterion.⁵¹

We recognize that some issuers that are organized within six months prior to the offering, and thus ineligible under the temporary rules, may also experience adverse effects of the shock, including being unable to raise adequate financing in an initial crowdfunding offering or experiencing challenges in executing their business plan as a result of the shock. This eligibility condition might place newly organized issuers at an incremental competitive disadvantage. Issuers whose age is approaching six months might postpone the offering until they are eligible under the temporary rules. Generally, any effect of this provision on competition is likely limited compared to such issuers' potential competitive disadvantage stemming from limited investor recognition as a result of being recently formed and having a limited track record.

Second, issuers that previously sold securities in a Regulation Crowdfunding offering and were not in compliance with Regulation Crowdfunding requirements are not eligible to rely on the temporary rules. To the extent that an expedited offering process might incrementally reduce the ability of investors to analyze information about the offering, the exclusion of such previously noncompliant issuers from an expedited offering process is expected to mitigate potential effects on investors and reinforce investor protection. This condition may also incrementally incentivize issuers to remain compliant with Regulation Crowdfunding requirements, further strengthening investor protection. As a result of the provision, some issuers that have failed to comply with Regulation Crowdfunding requirements will not realize the benefits of the temporary rules, which would incrementally limit the capital formation

⁵¹ The fraction of offerings eligible based on this criterion is estimated, given data availability, on the basis of the issuer having been organized for at least six months as of the initial Form C filing and having reported positive cash or other assets, revenues, net profits, employees, debt, cost of goods sold, or taxes paid for the most recent fiscal period shown in the initial Form C filing. *See supra* note 9. We recognize that this estimate may not be a precise reflection of the number of eligible issuers to the extent that an issuer may have had operations over the past six months but may not yet have reported positive financial statement activity based on the above metrics.

benefits of the temporary rules. Some of the noncompliance might be due to the issuer's lack of securities market experience and inability to afford outside securities counsel and a dedicated accounting staff to prepare compliant offering materials or ongoing disclosure, rather than intentional noncompliance. However, we believe that applying the exclusion to noncompliant issuers that had raised capital in a prior offering appropriately balances such considerations with the need to preserve investor protection, particularly in an environment of heightened market risk.

Relatedly, the temporary rules amend the intermediary requirements of Rule 301 and specify that intermediaries must have a reasonable basis for believing that an issuer seeking to rely on the temporary rules that has previously sold securities in a Regulation Crowdfunding offering has complied with the requirements of Regulation Crowdfunding. This provision is expected to reinforce the investor protection benefits of the described eligibility condition while imposing an incremental cost on intermediaries that facilitate offerings reliant on the temporary rules. The provision that allows intermediaries to rely on the representations of the issuer concerning compliance, unless the intermediary has reason to question the reliability of those representations, is expected to moderate the economic effects of this intermediary requirement.

Third, the temporary rules specify that a condition to each aspect of the temporary relief is clear disclosure to investors with respect to the issuer's reliance on the temporary relief. Relatedly, the temporary rules make conforming amendments to intermediary requirements to ensure that investors are apprised of issuer reliance on the temporary rules. By conveying the fact that certain offering process mechanics may differ from those of a typical Regulation Crowdfunding offering, as well as the fact that the issuer is being affected by COVID-19, this disclosure requirement is expected to benefit investors and allow them to make a better informed

investment decision. Further, to the extent that it provides clarity as to the modified offering process terms, it is expected to facilitate competition for investor capital among issuers that rely on the temporary relief and issuers that are ineligible for, or choose not to rely on, the temporary relief. We recognize that some investors may fail to fully consider the described disclosure when making their investment decisions. However, the incremental effects of this failure to fully factor in the issuer's reliance on temporary relief may be modest given the continued application of other essential investor protection safeguards and the fact that, under the baseline, these same investors may fail to fully process information contained in other substantive disclosures under Regulation Crowdfunding and materials about the offering process.

Finally, the relief under these rules is limited to eligible issuers seeking to conduct a Regulation Crowdfunding offering on an expedited basis due to circumstances relating to COVID-19 during the period specified in the temporary rules. The time-limited, tailored nature of the relief is expected to limit the aggregate economic effects of the rule while also targeting the benefits to small issuers that are most affected by the shock.

We have considered alternatives to the described conditions of the temporary rules. As an alternative, we could relax the issuer age requirement (*e.g.*, removing the requirement for the issuer to have operations or shortening the period from six to three months) or waive it but preserve the exclusion of noncompliant issuers in prior offerings. As another alternative, we could extend the relief under the temporary rules to all first-time Regulation Crowdfunding issuers or to all issuers below a certain size, such as \$1 million in total assets. These alternatives could expand the capital formation benefits compared to the temporary rules and extend the benefits to a larger pool of financially constrained issuers that may seek capital on an expedited basis from retail investors. As of the end of 2019, we estimate that 78 percent of offerings were

by issuers organized at least six months and 86 percent of offerings – by issuers organized at least three months – prior to the initial Form C filing for that offering, irrespective of whether they had operations; 91 percent of offerings were by first-time crowdfunding issuers; and 93 percent of offerings were by crowdfunding issuers with total assets below \$1 million (these are overlapping subsets of issuers). However, relaxing or waiving the issuer age requirement or extending the relief to all initial Regulation Crowdfunding offerings would result in offering process and disclosure relief being temporarily extended to less well-known issuers with shorter track records, potentially increasing risks to investors and adverse selection, compared to the temporary rules.

As another alternative, we could waive the requirement to prominently disclose reliance on the relief as a condition of using the relief provided in the temporary rules. Compared to the temporary rules, this alternative may increase the attractiveness of the relief to prospective Regulation Crowdfunding issuers and decrease issuer concerns about prominently signaling to investors the vulnerability of their business to the effects of COVID-19 (however, issuers not relying on the temporary relief may have to disclose some related information about the effects of COVID-19 in offering materials and periodic reports if it materially affects the risks facing their business), and the modified information and offering process requirements of their offering. At the same time, by failing to provide relevant disclosure to investors about material modifications to offering process and disclosures applicable to a given offering, this alternative may result in less informed investor decisions, compared to the temporary rules.

As another alternative, we could shorten or extend the period of the temporary relief. Such an alternative would decrease or increase, respectively, the aggregate economic effects of the rules and the number of issuers eligible to qualify for the relief, compared to the temporary

rules.

C. Temporary Relief from Certain Financial Information Requirements

1. Temporary Omission of Financial Statements from Initial Form C Filing

The temporary rules provide flexibility for eligible issuers to assess the probable interest in a Regulation Crowdfunding offering prior to preparation of full offering materials that include financial statement information.⁵² The temporary rules are expected to benefit issuers by allowing greater flexibility to communicate with prospective investors about the contemplated offering and to gauge market interest prior to incurring the full cost of preparation of financial statement disclosures. The temporary rules are expected to particularly benefit prospective issuers that do not have current financial statements available and that may otherwise find it difficult to prepare the required financial statements in order to launch a timely offering. This is expected to have favorable incremental effects on capital formation and the efficiency of the capital raising process for eligible issuers that choose to rely on this provision. These benefits are expected to be particularly important in the current environment of increased market uncertainty as a result of the COVID-19 shock, which can make it more difficult for issuers to gauge prospective investor demand for their offering. Further, issuers with binding financing constraints and scarce cash reserves may hesitate to incur the upfront costs of preparation of financial statement disclosures for an offering that may fail to draw prospective investor interest. Among various issuers eligible under the temporary rules, this benefit is likely to be especially valuable for smaller, less well known, and first-time issuers that may not have financial statement disclosures otherwise available and that may lack an accurate understanding of prospective investor demand for their securities, have a high degree of information asymmetry,

⁵² See temporary Rule 201(z)(2).

or operate in lines of business characterized by a considerable degree of uncertainty and/or more pronounced effects of the COVID-19 shock.

If, after communicating with investors, the issuer is not confident that it would attract sufficient investor interest, the issuer could amend offering plans or the target amount of the offering, reconsider the contemplated offering structure and terms, postpone the offering, or explore alternative methods of raising capital. The temporary rules may attract some eligible issuers that may be uncertain about the prospects of raising investor capital through a Regulation Crowdfunding offering, thus potentially promoting competition for investor capital as well as capital formation in this market segment. The temporary rules are expected to reduce uncertainty about whether a Regulation Crowdfunding offering could be completed successfully before the issuer incurs the costs of preparing financial statement disclosures. While this provision can reduce the risk of a failed offering after an issuer has incurred financial statement costs, an issuer that solicits interest on the basis of a public filing of an initial offering circular may still incur some reputational costs of failure to attract sufficient investor commitments.

We recognize that there may also be potential costs associated with the temporary rules. In particular, if financial statement information is omitted at the investor interest solicitation stage, it may result in an incomplete representation of the risk of an offering. If investors later fail to read the offering circular that is subsequently amended to include financial information disclosures before making the investment decision, they may make less informed investment decisions. In the specific context of the COVID-19 shock, to the extent that issuer financial disclosures are historical in nature (although issuers must disclose certain material subsequent events in the notes to financial statements), such disclosures may be relatively less meaningful for purposes of assessing the current financial condition and future growth prospects of an issuer

that has experienced significant adverse effects of the COVID-19 shock. In some cases, investors may be members of a local community that know the business well, which may give them insight into the issuer's prospects during and after the COVID-19 shock. Further, historical financial disclosures may be incrementally less meaningful for evaluating the business of a relatively recently formed or development-stage issuer (*e.g.*, an issuer organized more than six months but less than a year prior to the commencement of an offering or an issuer that has not yet developed substantial business operations). Finally, intermediaries for issuers relying on the temporary rules would not be allowed to accept investor commitments until financial information disclosures are provided.

Overall, potential investor protection concerns discussed above are expected to be substantially alleviated by several factors: the application of the anti-fraud provisions of the Federal and state securities laws;⁵³ prominent disclosures to investors regarding reliance on the temporary rules; the requirement that financial disclosures be available before investor commitments may be accepted, providing investors (and the Commission) with the ability to review financial information; the availability of investor education materials required to be provided by crowdfunding intermediaries before investing; the continued application of other provisions of Regulation Crowdfunding, including ones expected to provide additional investor protection, such as investment limits, offering limits, crowdfunding intermediary obligations to take measures to reduce the risk of fraud and other intermediary requirements, periodic reporting requirements, and issuer eligibility restrictions; and the reputational incentives of issuers and intermediaries, as well as the potential risk of litigation.

⁵³ The initial offering circular used to solicit investors under the temporary rules will continue to be treated as an offer of securities.

Because the filing of the initial offering circular used to solicit investor interest will be a requirement, this provision will provide information to investors and allow them to compare the initial offering circular with any amended offering statement disclosures, leading to potentially more informed investment decisions. In addition, the requirement in the temporary rules that the initial offering circular used to solicit investor interest contain all offering disclosures as specified in Regulation Crowdfunding, except financial statement information, is expected to maintain investor protection. Moreover, prominent disclosure regarding reliance on the temporary rules that reminds investors to review the amended offering circular augmented with financial disclosures, also required to be filed, is expected to encourage investors to make informed decisions after considering the full financial picture of the issuer.

As an alternative to the temporary rules, we could permit eligible issuers to avail themselves, on a temporary, conditional basis, of the option to engage in a broader range of pre-offering communications than what is permitted under the temporary rules, such as by allowing pre-filing solicitations of interest. Such an alternative would afford greater flexibility to issuers and potentially result in larger capital formation benefits, compared to the temporary rules. However, we believe that a more limited approach is appropriate in the context of temporary, conditional relief we are adopting to assist issuers affected by the COVID-19 shock.

2. Temporary Relief from the Review Report Requirement for Smaller Offerings

As discussed in Section III above, we are providing temporary, conditional exemptive relief from the independent accountant review report requirement to issuers in Regulation Crowdfunding offerings of up to \$250,000, inclusive of amounts sold in the prior 12 months, in reliance on Regulation Crowdfunding. Under the existing rules, issuers are not required to

submit an independent accountant’s review report if they are offering up to \$107,000. Issuers seeking to conduct an offering under Regulation Crowdfunding in excess of \$107,000 at this time may be facing challenges in obtaining reviewed financial statements in a time frame that would be helpful to an issuer with immediate capital needs due to the COVID-19 shock. By allowing issuers to gain more timely access to capital, the temporary rules are expected to facilitate capital formation and benefit eligible issuers affected by the COVID-19 shock that may be facing unexpected financing constraints or delays in raising capital due to a temporary inability to retain an independent accountant.⁵⁴ Temporary Rule 201(z)(3) allows eligible issuers in offerings of up to \$250,000, rather than \$107,000, to provide financial statements and certain information from the issuer’s Federal income tax returns, both certified by the principal executive officer, in accordance with Rule 201(t)(1) requirements, if reviewed or audited financial statements of the issuer are not then available.

We expect this relief to allow issuers to raise capital without incurring costs and delays involved in an independent accountant’s review of their financial statements. This may incrementally enhance the efficiency of conducting the offering and yield capital formation benefits for eligible issuers that find themselves financially constrained and in need of financing in excess of \$107,000 but up to \$250,000 on an expedited basis as a result of the COVID-19 shock. To the extent that issuers relying on the relief under these temporary rules are likely to be small businesses, this provision is expected to incrementally promote competition between such smaller issuers and larger issuers.

The upfront costs of obtaining a review report may be nontrivial for small issuers,

⁵⁴ This may be a particularly salient concern for small issuers that sought to use an individual Certified Public Accountant (“CPA”) or a small accounting firm to obtain a review report as such accounting firms’ operations and business may themselves be adversely impacted by the COVID-19 shock, resulting in potential reductions in service, extended delays, and additional costs for small issuers that require a review report.

particularly issuers experiencing declines in internal cash flows as a result of the COVID-19 shock. Available filing data does not allow us to estimate the cost of obtaining a review report. In the 2015 Regulation Crowdfunding Adopting Release, the Commission estimated review costs to be approximately \$1,500 to \$18,000.⁵⁵ We also consider more recent information about the costs of a review report available from commenters and industry sources. For example, one industry source estimates the cost of a review as \$2,000 to \$2,450 for a single-owner LLC/S-Corp/Sole Proprietor issuer that has not previously had a review or audit but is in possession of full financial records.⁵⁶ If the same single-owner issuer that has not previously had a review or audit instead tracks financials in a spreadsheet format (*e.g.*, because it lacks an in-house accountant), the same source estimates the review cost as approximately \$2,400 to \$2,950.⁵⁷ A commenter on the 2019 Harmonization Concept Release⁵⁸ states that it has “interviewed dozens of CPA firms and found that the average cost of reviewing a company that has two years of financial history is at least \$6,000” and that “[f]or a company with no history, this quote (from many CPA firms) has been in the \$1,500 to \$2,500 range.”⁵⁹

It is difficult to estimate how many of the eligible issuers will elect to avail themselves of this relief. Based on data from inception through the end of 2019, we estimate that 59 offerings by eligible issuers (76 offerings by all issuers, irrespective of age) sought above \$107,000 but no

⁵⁵ See Crowdfunding, Release No. 33-9974 (Oct. 30, 2015) [80 FR 71387 (Nov. 16, 2015)] (“2015 Regulation Crowdfunding Adopting Release”), at 71499.

⁵⁶ See CrowdfundCPA Crowdfunding Audit/Review Cost Calculator, available at: <http://crowdfundcpa.com/cost-estimate--calculator.html> (retrieved April 22, 2020). These are estimates based on a hypothetical issuer. Costs may vary depending on the accountant and the issuer’s circumstances.

⁵⁷ See *id.*

⁵⁸ See Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649 (Jun. 18, 2019) [84 FR 30460 (Jun. 26, 2019)].

⁵⁹ See Letter from Mainvest (Sep. 24, 2019), available at: <https://www.sec.gov/comments/s7-08-19/s70819-6193357-192513.pdf>.

more than \$250,000.⁶⁰ It is possible that some of the issuers within the eligible range will forgo reliance on the temporary rules in order to more credibly signal to prospective investors the quality of their financial disclosures. From a costly signaling standpoint, eligible issuers with lower information asymmetries or higher potential might incur the review report cost in order to differentiate themselves from eligible issuers that choose to provide a principal executive officer certification with their financial disclosures in lieu of a review report. This might introduce adverse selection among eligible issuers that choose to avail themselves of the relief from the review report requirement in reliance on the temporary rules, which in turn might limit investor willingness to back such offerings and moderate the capital formation benefits of the temporary relief. At the same time, such quality-based separation may not occur if the business and cash flow disruptions due to the COVID-19 shock cause a number of both low- and high-potential eligible issuers to be unable to incur the upfront costs and delays associated with obtaining a review report and thus elect to forgo it. Further, if the market volatility and recent business disruptions due to the COVID-19 shock effectively render historical financial disclosures and associated proxies for their reliability less relevant for projecting an issuer's future growth potential, risks, and cash flows, a review report may become a noisier and less informative signal of quality for affected issuers.

We recognize that the number of issuers seeking up to \$250,000 in reliance on the temporary rules may be greater than suggested by the historical data on the distribution of

⁶⁰ The above counts are based on XML data in Form C filings. *See supra* note 51 for the definition of eligible issuers. Amounts sought are based on data either in the initial Form C filing, or the latest amendment to it at the offering level, if the offering has been amended. Withdrawn offerings are excluded. The above estimates are calculated at the offering level and do not adjust for issuers with follow-on offerings within 12 months of prior financing raised under Regulation Crowdfunding. In cases of offerings that accept oversubscriptions, the maximum offer amount is used to estimate the number of issuers eligible under the temporary rules. *See also supra* note 45 and accompanying and following text.

Regulation Crowdfunding offering amounts if the exemptive relief from the review report requirement under the temporary rules leads issuers that would otherwise cap their offering size at a lower threshold under the existing rules (to avoid the costs of a review report) to offer a larger amount in reliance on the temporary rules. For example, there was some bunching around the review report threshold in the historical distribution of offerings as of December 2019, with an estimated 275 offerings by eligible issuers (356 offerings by all issuers) seeking amounts equal to the review report offer size threshold that was in effect at the time of the offering.⁶¹ Some of the issuers in that category might elect to avail themselves of the temporary rules and seek larger amounts up to \$250,000 under the temporary rules.

Although a review report provides a more limited level of assurance compared to an audit report, reviewed financial statements confer valuable informational benefits to investors.⁶² Thus, temporarily exempting a broader range of issuers from the review report requirement, particularly in an environment of heightened market uncertainty, may result in less information for investor decisions and additional risks to investor protection. Exemptive relief from the review report requirement might weaken the incentives of some issuers to provide compliant financial statement disclosures since they no longer would be required to undergo a review by an

⁶¹ The above counts are based on XML data in Form C filings. *See id.* The estimates consider offerings with offer size of \$107,000 in the period following the April 2017 amendments and offerings with offer size of \$100,000 in the period prior to the amendments. *See* Inflation Adjustments and Other Technical Amendments under Titles I and III of the JOBS Act (Technical Amendments; Interpretation), Release No. 33-10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)].

⁶² *See, e.g.,* Brad Badertscher, Jaewoo Kim, William Kinney, and Edward Owens (2018) Verification Services and Financial Reporting Quality: Assessing the Potential of Review Procedures, *Working Paper* (“[b]oth reviews and audits yield significantly better reporting quality scores and lower cost of debt than zero-verification compilations. However, model-based reporting quality scores of reviews and audits are indistinguishable statistically, on average. Regarding broader economics, we find that relative to compilations, reviews yield more than half the added interest rate benefit associated with an audit, at considerably less than half the added cost. Overall, our results suggest reviews may provide a cost-effective verification alternative to audits, and the potential of analytical procedures warrants more attention by audit researchers and regulators.”)

independent accountant and to provide such a report to investors, resulting in potentially less informative financial disclosures provided to investors in affected offerings. For example, some financial statement disclosures provided by issuers below the existing review report threshold are not prepared in a U.S. GAAP-compliant manner.⁶³ As discussed above, however, in the specific context of the COVID-19 shock, to the extent that issuer financial disclosures are historical in nature, such disclosures might be relatively less meaningful for purposes of assessing the current financial condition and growth prospects of an issuer that was financially sound but has experienced significant adverse effects as a result of the COVID-19 shock. Further, historical financial disclosures may be incrementally less meaningful for evaluating the business of a recently formed or development-stage issuer.⁶⁴

Importantly, several provisions of the temporary rules are expected to mitigate potential risks to investors. Issuers relying on the temporary rules must still provide financial statement disclosures at the time of the offering, certified by the principal executive officer. Further, an issuer relying on this temporary rule would be required to provide prominent disclosure to that end. Moreover, temporary exemptive relief from the review report requirement does not preclude liability in instances of materially misleading financial disclosures provided at the time

⁶³ *See, e.g.*, Letter from CrowdCheck (Oct. 30, 2019) commenting on the 2019 Harmonization Concept Release, available at: <https://www.sec.gov/comments/s7-08-19/s70819-6368811-196431.pdf> (stating that its belief that “the larger concern for Regulation CF is the fact that, as we discovered in the course of the Compliance Survey, issuers making offerings for under \$107,000 do not appear to be producing financial statements in a format anything close to GAAP”).

Separately, one of the intermediary respondents to the Regulation Crowdfunding survey stated that “smaller issuers that do not have reviewed or audited financial statements may find it difficult to prepare a statement of changes of equity, because the typical accounting software does not print it automatically. This respondent stated that these issuers also often have trouble accurately preparing a cash flow statement or accounting for stock issuances or issuances of stock options and warrants.” *See* 2019 Regulation Crowdfunding Report, at 32.

⁶⁴ *See, e.g.*, Letter from Mainvest (stating that “a company with no operating history simply does not have historical financial information that can be reviewed. Issuers on our platform unfortunately are required to get CPA reviews of a balance sheet with almost no zeros [*sic*]. This adds practically no value to investor protections and significantly increases up-front costs to companies.”).

of the offering, and general anti-fraud provisions and liability for offers under Regulation Crowdfunding will continue to apply. Finally, as discussed in Section VI.A above, the remaining investor protections of Regulation Crowdfunding would generally continue to provide significant safeguards for investors in offerings reliant on the temporary rules.

We have considered several alternatives to the temporary rules. The temporary rules provide exemptive relief from the review requirement for qualifying offerings by eligible issuers. As one alternative, we could implement a temporary deferral (*e.g.*, for 90 days after the closing of the offering), rather than a waiver of the review report requirement for qualifying offerings. Compared to the temporary rules, such an alternative would result in significantly more modest benefits for issuers, which would still have to incur the costs of a review report (as discussed above, such costs may be nontrivial compared to the typical amounts of offering proceeds). Obtaining a review report, even after a deferral, may be challenging for issuers facing significant financing constraints as a result of the COVID-19 shock. This alternative might lead fewer issuers to rely on the temporary relief and result in smaller capital formation benefits, compared to the temporary rules. Compared to the temporary rules, the review report required under this alternative would provide informational benefits to investors (especially since reviewed financial statements are not required in annual reports unless otherwise available) and on the margin could incentivize issuers to provide investors with compliant and accurate financial disclosures at the time investors make an investment decision. However, because Regulation Crowdfunding securities have transferability restrictions and generally are not traded in a secondary market, the benefits of a review report provided *ex post* to investors might be relatively limited since investors cannot readily use this information to divest or reallocate their investment in

crowdfunding securities.⁶⁵

As a different alternative, we could lower (increase) the offering size threshold used in conjunction with the temporary relief for issuers eligible under the temporary rules or for all issuers eligible under Regulation Crowdfunding. Table 3 below summarizes the potential effects of these alternatives based on historical data on offering size distribution.⁶⁶

Table 3: Potential Number of Offerings Eligible for Temporary Relief from the Review Report Requirement under Alternative Offering Size Thresholds⁶⁷

Offerings seeking above \$107,000 and up to	Offerings by eligible issuers	Offerings by all issuers
\$200,000	33	44
\$250,000	59	76
\$300,000	96	125
\$400,000	140	183
\$500,000	248	324

As noted above, the number of issuers electing to avail themselves of the relief under such alternatives may exceed the number of affected issuers on the basis of historical data if issuers previously seeking amounts equal to the review report threshold elect to increase offering size as a result of the relief. Compared to the temporary rules, the alternatives of lowering (increasing) the offering size threshold would decrease (increase) the number of issuers eligible for the review report exemption and the resulting capital formation and efficiency benefits but also lead to a smaller (larger) aggregate reduction in the information available to investors.

D. Temporary Suspension of Certain Timing Requirements for Offerings under Regulation Crowdfunding

⁶⁵ See 2019 Regulation Crowdfunding Report, at 53–54.

⁶⁶ See *supra* note 60.

⁶⁷ See *id.*

The temporary rules provide eligible issuers with greater flexibility to close a Regulation Crowdfunding offering early and access capital sooner than would be possible in the absence of the temporary relief.

1. Temporary Suspension of 21-Day Requirement

Existing Rule 303 of Regulation Crowdfunding specifies that the information in an offering statement must be publicly available for at least 21 days before securities may be sold, although the intermediary may accept investment commitments during that time, as well as imposes a 21-day requirement with respect to the availability of issuer information when a funding portal is directing a qualified third party to transmit funds to an issuer. As discussed in Section IV above, in light of the need for expedited access to capital among small business issuers affected by the COVID-19 shock, the temporary rules we are adopting would replace the 21-day requirement with the requirement that the intermediary make the required issuer information publicly available on the online platform before securities are sold in the offering.⁶⁸ The intermediary will be allowed to accept investment commitments during the time such information is made available, but only if the issuer has provided complete financial information disclosures.⁶⁹ In addition, the temporary rules will waive the 21-day requirement in Rule 303(e)(3)(i) for funding portals with respect to directing a transmission of funds.

The temporary rules will provide faster access to capital for eligible issuers that are able to reach the target amount quickly, resulting in potential capital formation benefits and greater

⁶⁸ Market participants have indicated that these timing requirements, in light of business disruptions resulting from COVID-19, may make it difficult for issuers with urgent funding needs to make use of Regulation Crowdfunding to receive funds promptly. *See supra* note 2.

⁶⁹ *See* Section III.A for a discussion of an issuer's ability to omit financial statements pursuant to temporary Rule 201(z)(2).

efficiency of the capital raising process for such issuers. It is difficult to predict how many issuers will be affected. While historical data suggests that the typical offering duration was longer than the 21-day period,⁷⁰ it is likely that these estimates may not be representative of the offering duration time frames sought by financially constrained issuers affected by the COVID-19 shock under the temporary rules that enable an expedited offering process. Some issuers absorbing unexpected significant shocks to their internal cash flows and carrying limited, if any, cash reserves,⁷¹ might be facing binding liquidity constraints or risk of insolvency after a few weeks without additional funding, resulting in a heightened value of expedited access to capital.

We recognize that waiving the 21-day period may reduce the time afforded to investors to evaluate the information about the issuer before making the investment decision. It is important to note, however, that investors seeking to participate in an offering may continue to evaluate information about the offering after the offering begins accepting commitments and before the offering closes. Further, the requirement that all required disclosures be made available before the intermediary may begin accepting commitments is expected to enable investors to reach an informed decision. Finally, the requirement that prominent disclosure be provided to indicate that the offering is being conducted on an expedited basis is expected to inform investors about the modified offering process. Other important Regulation Crowdfunding safeguards, including extensive issuer disclosure requirements and most intermediary requirements of Regulation Crowdfunding, will continue to apply, as discussed in Section VI.A above.

As an alternative, we considered shortening rather than eliminating the 21-day period.

⁷⁰ Based on the analysis of Form C data from inception of Regulation Crowdfunding through the end of 2019, we estimate that the average (median) duration of a Regulation Crowdfunding offering from initial Form C filing to offering deadline was approximately four months (three months).

⁷¹ Based on the data from inception through the end of 2019, the median (average) Regulation Crowdfunding offering was made by an issuer with \$4,655 (\$78,867) in cash holdings.

Compared to the temporary rules, preserving a waiting period before investment commitments may be accepted would provide less flexibility to financially constrained issuers to quickly access capital. At the same time, compared to the temporary rules, it would provide investors with additional time to evaluate information about the issuer. The incremental effect of such a provision for the ability of investors to make informed decisions about the offering is likely to vary across investors and issuers.

2. Temporary Changes to the Cancellation Process

Under the existing rules investors may rescind their commitment up until the final 48 hours of the offering (except in the event of a material change to the offering, where investors may rescind the commitment later on). As discussed above, the temporary rules would narrow the rescission window to 48 hours from the time of their investment commitment (or such later period as the issuer may designate), or a material change to the offering, if it occurs at a later time. Further, once an issuer has received binding investment commitments (that is, investment commitments for which the 48-hour cancellation period has run) covering the target offering amount, the issuer will be allowed to close the offering prior to the deadline identified in its offering materials, but the issuer would be required to provide the relevant disclosure to that effect and notice that the target offering amount has been met. The temporary rules would waive the requirement that the intermediary provide notice to investors at least five business days prior to the new offering deadline.

The temporary rules are expected to benefit eligible issuers by giving them the flexibility to close the offering and to receive access to the raised funds sooner, which may be particularly valuable for issuers facing unexpected financing constraints as a result of the COVID-19 shock. Reduced incidence of late investor commitment cancellations and the ability to more easily close

an offering that has reached the target amount prior to the deadline can increase the efficiency of the offering process. As a result of expedited offering completion, we also expect the temporary rules to provide incremental benefits for capital formation and, to the extent that small issuers are relatively more likely to rely on these rules, we expect favorable effects on competition.

By restricting investor ability to rescind commitments, the temporary rules will reduce investor flexibility to adjust their crowdfunding investments based on supplemental information (other than a material change to the offering) arriving more than 48 hours after their commitment, including the flow of other investors' commitments and communications on the online platform that occur more than 48 hours after the investor's own commitment,⁷² or based on changes in the investor's opinion of the issuer, financial circumstances, or other factors. Some investors that would have sought to cancel their commitment after 48 hours may find themselves unable to do so. We expect the prominent disclosure regarding the different cancellation process for issuers relying on the temporary rules to provide adequate notice to investors, allowing investors to adjust their initial commitment decisions accordingly. It is difficult to predict how a typical investor will adjust behavior in response to this change. Some investors may exercise greater caution with respect to the amount invested, hesitate to invest early in the offering, opting to observe the wisdom of the crowd, or be more inclined to cancel the commitment if the "wisdom of the crowd" (offering progress or communications from other investors on the online platform) within 48 hours of the commitment reveals mixed signals. Other investors may engage in more due diligence in light of the reduced ability to rely on the gradual accumulation of the wisdom of the crowd. These adjustments in investor behavior may

⁷² Predictions in prior research studies regarding the impact of social interaction akin to "wisdom of the crowd" on investor decisions are mixed. See 2015 Regulation Crowdfunding Adopting Release, at 71495, footnote 1346.

also be affected by issuer choices with respect to offering duration and early closing of offerings. For example, the short offering duration or the possibility that an offering may close early may induce some investors to participate in an offering early on, which may counteract some of the conservatism discussed above. Thus, changes in investor behavior and their impacts on the likelihood of offering success and performance of crowdfunding investments are likely to vary across investors and issuers.

Besides the required disclosure of the modified cancellation process and the 48-hour period for rescission of commitments for any reason, the ability of investors to rescind commitments in the event of a material change to the offering will remain as a crucial investor protection. Further, as discussed in Section VI.A above, various safeguards will continue to apply to all Regulation Crowdfunding offerings, including offerings relying on the temporary rules, which is expected to mitigate potential effects of the temporary rules on the risk of investor losses.

It is difficult to predict how many issuers and investors will be affected by these changes. Information on amounts invested by investors in each offering is not available in required Regulation Crowdfunding disclosure. Based on a subset of data made available by one crowdfunding intermediary,⁷³ we find that: (i) among all investor-initiated cancellations, the median and average cancellation time was approximately five and 25 days, respectively, and cancellations after 48 hours were relatively common (58 percent of investor-initiated cancellations); (ii) approximately 88 percent of offerings had at least one investor-initiated

⁷³ We examine investor-initiated cancellations outside of the 48-hour window using a subset of data made available by Wefunder for a period from May 2016 through September 2018. Given the focus on investor cancellations, to avoid biasing the estimates, we include all offerings and investments, including failed and ongoing offerings, in the provided subset of data. Investments and investors have unique identifiers in the provided subset of data. We use the “investor canceled” cancellation reason to differentiate investor-initiated cancellations from cancellations due to failure to reconfirm a commitment following material changes, oversubscription, or offering expiration or termination by the issuer. These estimates use the full sample. Restricting the sample to offerings by eligible issuers in a sensitivity analysis has little effect on the discussed estimates.

cancellation after 48 hours, and the aggregate amount of such cancellations accounted for approximately 48 percent of all investor-initiated cancellations in dollar terms but only eight percent of aggregate net investor commitments in dollar terms; (iii) approximately nine percent of investors had initiated at least one cancellation, including an estimated six percent of investors that initiated at least one cancellation after 48 hours, however, investors with cancellations participated in significantly more offerings on average. Based on this data, while cancellations after 48 hours appear to be a fairly common occurrence, they were concentrated among relatively few investors and accounted for a small share of net aggregate commitments in dollar terms. We are unable to assess whether these data are representative of commitment cancellations for other issuers, platforms, and time periods, particularly in light of the significant market uncertainty related to the COVID-19 shock, which might increase investor willingness to cancel commitments as a result of evolving market conditions or personal financial circumstances. Further, we cannot gauge what proportion of eligible issuers will elect to restrict commitment cancellations after 48 hours, permitted by the temporary rules. Finally, as discussed above, investor behavior with respect to initial commitments and their cancellations is likely to adjust at least to some extent in response to changes introduced by the temporary rules.

As an alternative, we considered extending the minimum time frame during which investors are able to rescind their commitments for any reason beyond 48 hours. Alternatively, we could shorten or even eliminate the 48-hour period for rescinding the commitments for any reason, absent a material change to the offering. The alternatives of shortening (extending) the time period for canceling commitments would provide greater (lesser) certainty to issuers with respect to interim progress towards the offering target and the likelihood of offering success, potentially making the process of raising financing under Regulation Crowdfunding relatively more efficient

and more attractive to prospective issuers, compared to the temporary rules. At the same time, the alternatives of shortening (extending) the time period for canceling commitments would provide less (more) flexibility to investors to gradually process information about the offering and incorporate the gradually accumulating wisdom of the crowd in their final investment decision, compared to the temporary rules. It is likely, however, as discussed above, that at least some investors will adjust their behavior in response to the changes to the cancellation process in ways that may counteract some of these effects.

VII. 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.”⁷⁴ 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.⁷⁵

Given the temporary nature of the relief contemplated by the temporary final rules and 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 amend Rules 100, 201, 301, 303 and 304 of Regulation Crowdfunding.⁷⁶ In particular, small

⁷⁴ 5 U.S.C. 553(b)(3)(B).

⁷⁵ 5 U.S.C. 553(d)(3).

⁷⁶ 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

businesses affected by the closures and safety measures designed to slow the spread of COVID-19 may face urgent funding needs⁷⁷ 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 intended 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 will provide relief from certain financial information requirements of Regulation Crowdfunding. In addition, the temporary final rules will require issuers relying on the temporary relief to provide certain additional disclosures, although we expect the burden of those disclosures to be minimal. 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.⁷⁸ Accordingly, we are not adjusting the burden or cost estimates associated with existing collections of information under Regulation Crowdfunding for purposes of the Paperwork Reduction Act of 1995.⁷⁹

Pursuant to the Congressional Review Act,⁸⁰ the Office of Information and Regulatory Affairs has designated these amendments as “a major rule,” as defined by 5 U.S.C. 804(2).

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).

⁷⁷ *See supra* note 1.

⁷⁸ 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.

⁷⁹ 44 U.S.C. 3501 *et seq.*

⁸⁰ 5 U.S.C. 801 *et seq.*

STATUTORY BASIS AND TEXT OF AMENDMENTS

We are adopting temporary amendments to 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.

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).

2. Amend §227.100 by adding paragraph (b)(7) to read as follows:

§227.100 Crowdfunding exemption and requirements.

* * * * *

(b) * * *

(7) Seeks to rely on §227.201(z) to conduct an offering on an expedited basis due to circumstances relating to coronavirus disease 2019 (COVID-19), where such offering is initiated between May 4, 2020, and August 31, 2020, and:

(i) Was organized and had operations less than six months prior to the commencement of the offering; or

(ii) Sold securities in reliance on section 4(a)(6) of the Securities Act and has not complied with the requirements in section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) and the related requirements in this part.

* * * * *

3. Amend §227.201 by adding paragraph (z) to read as follows:

§227.201 Disclosure requirements.

* * * * *

(z) Between May 4, 2020, and August 31, 2020, an issuer may initiate an offering intended to be conducted on an expedited basis due to circumstances relating to COVID-19. Such issuer:

(1) Must prominently provide the following information:

(i) A statement 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 COVID-19 relief set out in this part;

(ii) If the issuer is relying on paragraph (z)(2) of this section to omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with §227.203(a)(1), a statement that:

(A) The financial information that has been omitted is not currently available and will be

provided by an amendment to the offering materials;

(B) The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and

(C) No investment commitments will be accepted until after such financial information has been provided; and

(iii) If the issuer is relying on paragraph (z)(3) of this section to provide financial statement information required by paragraph (t)(1) of this section, a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer; and

(iv) In lieu of the information required by paragraph (j) of this section, a description of the process to complete the transaction or cancel an investment commitment, including a statement that:

(A) Investors may cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate);

(B) The intermediary will notify investors when the target offering amount has been met;

(C) The issuer may close the offering at any time after it has aggregate investment commitments for which the right to cancel pursuant to paragraph (z)(1)(iv)(A) of this section has lapsed that equal or exceed the target offering amount (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and

(D) 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 his or her investment;

(2) May omit the information required by paragraph (t) of this section in the initial Form C:

Offering Statement (Form C) (§239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with §227.203(a)(1) if such information is unavailable at the time of filing, but the intermediary may not accept any investment commitments until complete information required under paragraph (t) of this section is provided through an amendment to the Form C in accordance with §227.203(a)(2); and

(3) May comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period, have, in the aggregate, a target offering amount of more than \$107,000, but not more than \$250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing.

4. Amend §227.301 by adding paragraph (d) to read as follows:

§227.301 Measures to reduce risk of fraud.

* * * * *

(d) Have a reasonable basis for believing that an issuer seeking to initiate an offering of securities between May 4, 2020, and August 31, 2020, in reliance on section 4(a)(6) of the Securities Act through the intermediary's platform on an expedited basis due to circumstances relating to COVID-19 that has previously sold securities in reliance on section 4(a)(6) of the Securities Act has complied with the requirements in section 4A(b) of the Act (15 U.S.C. 77d-1(b)) and the related requirements in this part. In satisfying the requirement in this paragraph (d), an intermediary may rely on the representations of the issuer concerning compliance with the requirements in this paragraph (d) unless the intermediary has reason to question the reliability of those representations.

5. Amend §227.303 by adding paragraph (g) to read as follows:

§227.303 Requirements with respect to transactions.

* * * * *

(g) *Temporary requirements.* (1) An intermediary in a transaction involving the offer or sale of securities initiated between May 4, 2020, and August 31, 2020, in reliance on section 4(a)(6) of the Securities Act by an issuer that is conducting an offering on an expedited basis due to circumstances relating to COVID-19:

(i) Shall prominently make publicly available on the intermediary's platform the issuer information required pursuant to §227.201(z)(1);

(ii) Shall not be required to comply with paragraph (a)(2) of this section; and

(iii) Shall make the issuer information described in paragraph (g)(1)(i) of this section publicly available on the intermediary's platform before any securities are sold in the offering.

The intermediary may accept investment commitments during the time such information is made available, but only if the issuer has provided the information required by §227.201(t) or, if applicable, §227.201(z)(3) in either the initial Form C: Offering Statement (Form C) (§239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with §227.203(a)(1) or through an amendment to the Form C in accordance with §227.203(a)(2); and

(2) A funding portal that is an intermediary in a transaction involving the offer or sale of securities initiated between May 4, 2020, and August 31, 2020, in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) by an issuer that is conducting an offering on an expedited basis due to circumstances relating to COVID-19 shall not be required to comply with the requirement in paragraph (e)(3)(i) of this section that a funding portal not direct a

transmission of funds earlier than 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 §§227.201 and 227.203(a).

6. Amend §227.304 by adding paragraph (e) to read as follows:

§227.304 Completion of offerings, cancellations and reconfirmations.

* * * * *

(e) *Temporary requirements.* The following shall apply in lieu of paragraphs (a) and (b) of this section with respect to an offering initiated between May 4, 2020, and August 31, 2020, that is intended to be conducted on an expedited basis due to circumstances relating to COVID-19:

(1) An investor may cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate). After such 48 hour period, an investment commitment may not be cancelled except as provided in paragraph (c) of this section; and

(2) If an issuer has received aggregate investment commitments for which the right to cancel pursuant to paragraph (e)(1) has lapsed covering the target offering amount prior to the deadline identified in its offering materials pursuant to §227.201(g), the issuer may close the offering on a date earlier than the deadline identified in its offering materials pursuant to §227.201(g), *provided that:*

(i) The issuer has complied with §227.201(z);

(ii) The intermediary provides notice to any potential investors, and gives or sends notice to investors that have made investment commitments in the offering, that the target offering amount has been met; and

(iii) At the time of the closing of the offering, the issuer continues to meet or exceed the target offering amount.

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. Amend Form C (referenced in § 239.900) by adding a new second paragraph to the introductory paragraphs in the Optional Question and Answer Format for an Offering Statement to read as follows:

Note: The text of Form C does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM C

UNDER THE SECURITIES ACT OF 1933

* * * * *

OPTIONAL QUESTION AND ANSWER FORMAT
FOR AN OFFERING STATEMENT

Respond to each question in each paragraph of this part. Set forth each question and any notes, but not any instructions thereto, in their entirety. If disclosure in response to any question is responsive to one or more other questions, it is not necessary to repeat the disclosure. If a question or series of questions is inapplicable or the response is available elsewhere in the Form,

either state that it is inapplicable, include a cross-reference to the responsive disclosure, or omit the question or series of questions.

If you are seeking to rely on the Commission's temporary rules to initiate an offering between May 4, 2020, and August 31, 2020 intended to be conducted on an expedited basis due to circumstances relating to coronavirus disease 2019 (COVID-19), you will likely need to provide additional or different information than described in questions 2, 12, and 29. When preparing responses to such questions, please carefully review temporary Rules 100(b)(7), 201(z), and 304(e) and tailor your responses to those requirements.

* * * * *

By the Commission.

Dated: May 4, 2020.

Vanessa A. Countryman,
Secretary.