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SEC Small Biz Panel Wants Limits Eased On Private Offerings

By **Tom Zanki**

Law360 (May 8, 2020, 6:50 PM EDT) -- A U.S. Securities and Exchange Commission panel focused on small business capital formation on Friday recommended that the agency raise annual funding limits for crowdfunding campaigns and so-called Reg A+ offerings, often dubbed as miniature initial public offerings.

The agency's Small Business Capital Formation Advisory Committee informally agreed to endorse the measures, which the SEC **outlined in a March proposal** before inviting comments. The SEC intends to make certain unregistered private offerings — which provide young companies with early-stage capital but also carry greater risks for investors — more appealing.

Specifically, the committee endorsed raising the current annual limit on annual crowdfunding campaigns from $1.07 million to $5 million and increasing the annual limit of certain Reg A+ offerings from $50 million to $75 million. The committee has also supported lifting capital-raising limits under Rule 504 of the Regulation D exemption from $5 million to $10 million annually.

The Reg A+ offerings have been often described as "mini IPOs" in that they allow companies to raise up to $50 million under looser regulations than full-fledged IPOs, which allow unlimited fundraising. However, the SEC has admitted that use of Reg A+ offerings has been modest since authorized by the Jumpstart Our Business Startups Act of 2012. Plus, several companies that raised money under Reg A+ and listed their stocks publicly have **struggled to perform**.

Committee member Jeffrey Solomon said there is a "taint" to Reg A+ in that it is not well regarded by the marketplace, pointing out that "nobody likes to eat at the kids' table." Solomon, the CEO of investment bank Cowein Inc., said raising the annual limit could marginally help such offerings.

Some committee members said raising the Reg A+ limit to $100 million may be needed to improve the quality of companies and intermediaries drawn to such deals. The SEC, in its March proposal, said it considered raising the Reg A+ limit to $100 million but opted for an incremental approach instead, hoping that a $75 million limit would attract more participants.

"Some people have been reluctant to go down the path of Reg A if it's only $50 million," said committee member Catherine Mott, CEO of Pittsburgh-based BlueTree Capital Group LLC, an investor of early stage companies. "Let's see what happens if we bump things up."

Crowdfunding was also authorized by the JOBS Act as a way of allowing small, local businesses the ability to raise money from their followers through Internet campaigns. Its usage has also been light, prompting the SEC to propose lifting the annual funding limit to $5 million.

Committee member Greg Yadley, a partner at law firm Shumaker, Loop & Kendrick LLP said raising the crowdfunding limit "makes the most sense" of all the capital-raising proposals the SEC is considering "because $1 million is such a small amount."

Committee member Sara Hanks cautioned that more attention needs to be paid to enforcing compliance rules. The SEC, in an analysis last year, noted that crowdfunding issuers are **not consistently complying** with financial statement requirements and other disclosure rules.

"We have to address non-compliance," Hanks said. "If you raise the amount to $5 million, it's going to get worse."

The committee also endorsed other items in the SEC's proposal that would loosen restrictions on private companies' ability to communicate with investors in the run-up to an offering.

The SEC is proposing to permit startups to pitch their business before investors in gatherings known as "demo days" without violating securities law that ban "general solicitation" — or advertising — of an offering before capital is raised. Startups often participate in demo days, which are generally organized by universities or technology incubators, to meet with potential investors. The SEC's proposed exemption would make clear that such activity is allowed.

The SEC is also proposing to let crowdfunding companies "test the waters" — meaning consult with investors before an offering to gauge market interest — without violating communications restrictions that typically apply to securities offerings. Reg A+ offerings and public offerings already allow companies to test the waters in limited ways.

The SEC is accepting public comments on its package of proposal through June 1. The small business committee's role is advisory, though its recommendations can be taken up by the SEC.

For instance, the SEC on Monday **agreed** to temporarily allow crowdfunding issuers to file an offering without accompanying financial statements, as long as such statements are provided to investors before commitments are secured. The temporary rule, which is intended to relieve hardships caused by the coronavirus pandemic, followed a recommendation by the committee.

SEC Commissioner Hester Peirce, who attended Friday's videoconference meeting, said more relief may be needed for issues coping with the coronavirus pandemic. She said it may be wise to temporarily lift restrictions that prevent Reg A+ issuers from using television or other media to reach out to potential investors given complications caused by the pandemic.

"There may be more we can do to aid small businesses with urgent funding needs," Peirce said.

--Editing by Alyssa Miller.