



Crowdfunding Amendments – H.B. 16-1049

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The 2015 General Assembly adopted, and Governor Hickenlooper signed, the Colorado Crowdfunding Act (adding § 11-51-308.5 to the Colorado Securities Act). The Securities Commissioner adopted rules to implement the Colorado Crowdfunding Act (“CCFA”) before its effective date (August 1, 2015), and crowdfunding is off and running in Colorado.¹

Since then, five companies have filed Form CF-3 with the Colorado Division of Securities to be on-line intermediaries through which crowdfunded securities can be offered:²

- Colorado Equity Crowdfunding (coloradoequitycrowdfunding.com),
- EquityEats, Inc. (www.equityeats.com, “if you love food, you’ll love investing in restaurants”),
- EzyXchange Ltd. (www.ezyxchange.info “choose between the privacy of a Rule 504 offering or an equity crowdfunding offering”),
- MassVenture CO, Inc. (www.massventure.co, “invest in your community, keep your money nearby”), and
- Invest Local, LLC. (investlocalcolorado.com).

On October 30, 2015, the Securities and Exchange Commission adopted Regulation Crowdfunding (“Regulation CF”). This contains significantly greater restrictions than the Colorado provisions, and has not been widely praised. Crowdfunding is local, and likely to remain local. With Regulation A+ and proposed amendments to SEC Rule 504 and Rule 147 (SEC Rel. 33-9973, October 30, 2015), federal law will likely have little influence and, while Regulation Crowdfunding may be a satisfaction of the SEC’s obligations under the 2012 JOBS Act, it will likely have little additional impact.³

¹ This was discussed in the Business Law Section newsletter in August 2015, available at <http://www.cobar.org/index.cfm/ID/22954/subID/29470/CORP//> and in The Colorado Lawyer (November 2015).

² This information and more is available from the Colorado Division of Securities, <https://www.colorado.gov/pacific/dora/equity-crowdfunding> (last visited March 4, 2016).

³ For a comparison of federal Regulation CF and the CCFA, see *Crowdfunding In Colorado – State Rules versus the Federal Rules*, available at <http://ssrn.com/abstract=2689415>.

Colorado House Bill 2016-1049 (sponsored by Representative Pete Lee and Senators Mark Scheffel and Owen Hill) sailed through the General Assembly and was signed by Governor Hickenlooper on March 9, 2016. H.B. 1049 is effective upon the Governor's signature.⁴

The 2016 amendments to the CCFA will have a positive impact on crowdfunding in Colorado by making two minor changes. The first is to expand the list of companies that can hold the funds received from a crowdfunding offering in escrow; the second reduces the escrow requirements.

Escrow Holder. As a result of the amendment, any “depository institution” (as defined in the Colorado Securities Act) can be an escrow holder. The original CCFA provided a more limited definition.

Escrow Period. Under the original CCFA, funds received from crowdfunding were required to be deposited into escrow even after the minimum offering amount was received and the initial funds were released (although the funds could be promptly released by following the procedures set forth in the Securities Commissioner's rules). Depositing funds in escrow after the minimum was achieved and the initial funds released was deemed to be unnecessary. As a result, the 2016 amendment provides that, once the funds are released after at least the minimum offering is received, the escrow arrangement is no longer necessary.

The other remaining issue in the CCFA will hopefully be addressed by rulemaking. C.R.S. § 11-51-308.5(3)(a)(XI) provides that the crowdfunding exemption shall not be used in conjunction with any other exemption pursuant to §§ 11-51-307, 11-51-308, or 11-51-309 during the immediately preceding twelve-month period. This is too broad a restriction and if interpreted literally, would likely make crowdfunding under Colorado law irrelevant since crowdfunding will be follow-on funding for most businesses. A rule has been proposed to the Securities Commissioner for consideration to make it clear that this statutory section will be interpreted in accordance with federal and state rules determining whether two offerings are part of a single plan of financing or should be considered separate offerings. Proposed Rule 3.24.K (if adopted) may read as follows:

Single Plan of Financing. In accordance with section 11-51-308.5(3)(a)(XI), the exemption provided by the Colorado Crowdfunding Act shall not be used in conjunction with any other exemption pursuant to section 11-51-307, 11-51-308, or 11-51-309 during the immediately preceding twelve-month period which is part of the same issue. The determination whether offers, offers to sell, offers for sale, and sales of securities are part of the same issue (i.e., are deemed to be integrated) is a question of fact and will depend on the particular circumstances. In determining whether offers and sales should be

⁴ H.B. 16-1049 has a “safety clause” which, according to the Office of Legislative Legal Services:

- Is not subject to the citizens' right to file a referendum petition against all or any part of the bill. (The right is recognized in Section 1(3) of Article V of the Colorado State constitution.)
- Can take effect immediately after the Governor signs it or allows it to become law.

regarded as part of the same issue and thus should be integrated, any one or more of the following factors may be determinative:

1. Are the offerings part of a single plan of financing;
2. Do the offerings involve issuance of the same class of securities;
3. Are the offerings made at or about the same time;
4. Is the same type of consideration to be received; and
5. Are the offerings made for the same general purpose.

Even without the rule amendment, it is hoped that the Securities Commissioner will interpret the CCFA similarly to allow the CCFA to function. With federal and state amendments in 2015 and 2016 intended to facilitate small business capital formation, there has been quite a bit for transactional lawyers to digest and learn.⁵

⁵ Herrick Lidstone recently presented a paper to a CLE in Colorado seminar entitled “Advising Entrepreneurs” (March 10, 2016) on this subject. The paper (entitled “*Capital Formation Simplified*”) is available at <http://ssrn.com/abstract=2736404>.