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Communications and publicity by issuers prior to and during a Regulation CF offering

The idea behind crowdfunding is that the crowd — family, friends and fans of a small or startup company, even if they are not rich or experienced investors — can invest in that company's securities. For a traditionally risk-averse area of law, that's a pretty revolutionary concept.

In order to make this leap, Congress wanted to ensure that all potential investors had access to the same information. The solution that Congress came up in the JOBS Act with was that there had to be one centralized place that an investor could access that information — the website of the funding portal or broker-dealer that hosts the crowdfunding offering (going forward we will refer to both of these as "platforms").

This means (with some very limited exceptions that we'll describe below) most communications about the offering can ONLY be found on the platform. On the platform, the company can use any form of communication it likes, and can give as much information as it likes (so long as it's notmisleading). Remember that the platforms are required to have a communication channel — basically a chat or Q&A function — a place where you can discuss the offering with investors and potential investors (though you must identify yourself). That gives you the ability to control much of your message.

So with that background in mind, we wanted to go through what you can and cannot do regarding communications prior to and during the offering. Unfortunately, there are a lot of limitations. Securities law is a highly regulated area and this is not like doing a Kickstarter campaign, or regular advertising for your products or services. Also, bear in mind this is a changing regulatory environment. We put together this guide based on existing law, the SEC's interpretations that it put out on May 13, and numerous conversations with the SEC Staff. As the industrydevelops, the Staff's positions may evolve.

We do understand that the restrictions are in many cases counter-intuitive and don't reflect the way people communicate these days. The problems derive from the wording of the statute as passed by Congress. The JOBS Act crowdfunding provisions are pretty stringent with respect to publicity; the SEC has "interpreted" those provisions as much as possible to give startups and small businesses more flexibility.

What you can say before you launch your offering

US securities laws regulate both "offers" and sales of securities; whenever you make an offer or sale of securities, that offer or sale must comply with the SEC's rules. The SEC interprets the term "offer" very broadly and it can include activity that "conditions the market" for the offering. "Conditioning the market" is any activity that raises public interest in your company, and could include suddenly heightened levels of advertising, although regular product and service information or advertising is ok (see discussion below).

Under new rules which went into effect on March 15, 2021, companies considering making a crowdfunding offering may "test the waters" (TTW) in order to decide whether to commit to the time and

expense of making an offering.[1] Prior to filing the Form C with the SEC, you may make oral or written communications to find out whether investors might be interested in investing in your offering. The way in which you make these communications (e.g., email, Insta, posting on a crowdfunding portal site) and the content of those communications are not limited, but the communications must state that:

- No money or other consideration is being solicited, and if sent in response, will not be accepted;
- No offer to buy the securities can be accepted and no part of the purchase price can be received until the offering statement is filed and only though the platform of an intermediary (funding portal or broker-dealer); and
- A person's indication of interest includes no obligation or commitment of any kind.[2]

You can collect indications of interest from potential investors including name, address, phone number and/or email address. The rule does not address getting any further information, such as the manner of any potential payment. If you do make TTW communications, you must file any written communication or broadcast script as an exhibit to your Form C. And TTW communications are subject to the regular provisions of securities law that impose liability for misleading statements.

Before the point at which you file your Form C with the SEC, the TTW process is the only way you can make any offers of securities, either publicly or privately. This would apply to meetings with potential investors, giving out any information on forums which offer "sneak peeks" or "first looks" at your offering, and public announcements about the offering. Discussions at a conference or a demo day about your intentions to do a crowdfunding offering must comply with the TTW rules and you should read out the information in the bullets above.

Compliance with the TTW rules, is essential for being able to go forward with an offering under Reg CF. Any non-compliant communication made prior to filing the Form C may be construed as an unregistered offer of securities made in violation of Section 5 of the Securities Act — a "Bad Act" that will prevent you from being able to use Regulation CF, Rule 506, or Regulation A in the future. Even if a regulator has not come knocking on your door, any responsible funding portal or broker-dealer will avoid posting your offering if there were non-compliant communications prior to the filing of the Form C.

Normal advertising of your product or service is permitted as the SEC knows you have a business to run. However, if just before the offering all of a sudden you produce five times the amount of advertising that you had previously done, the SEC might wonder whether you were doing this to stir up interest in investing in your company. If you plan to change your marketing around the time of your offering (or if you are launching your company at the same time as your CF offering, which often happens), it would be prudent to discuss this with your counsel so that you can confirm that your advertising is consistent with the SEC's rules.

Genuine conversations with friends or family about what you are planning to do and getting their help and input on your offering and how to structure it, are ok, even if those people invest later. You can't be pitching to them as investors, though, except in compliance with the TTW rules.

What you can say after you launch

[1] We are talking here about Crowdfunding Regulation Rule 206. There is another new rule that permits testing the waters before deciding which type of exempt offering (e.g., Regulation CF or Regulation A) to make, which does not preempt state regulation; using that rule may be complicated and require extensive legal advice.

[2] We advise including the entirety of this wording as a legend or disclaimer in the communication in question. The convention in Regulation A is that "if it fits, the legend must be included" and if the legend doesn't fit (e.g., Twitter) the communication must include an active hyperlink to it. Additionally, the SEC wants the legend to be prominent, and not buried in footer language of your website in six point font.

After you launch your offering by filing your Form C with the SEC, communications outside the platform fall into two categories:

- Communications that don't mention the "terms of the offering"; and
- Communications that just contain "tombstone" information.

Communications that don't mention the terms of the offering

We are calling these "non-terms" communications in this memo, although you can also think of them as "soft" communications. "Terms" in this context are the following:

- The amount of securities offered;
- The nature of the securities (i.e., whether they are debt or equity, common or preferred, etc.);
- The price of the securities;
- The closing date of the offering period;
- The use of proceeds; and
- The issuer's progress towards meeting its funding target.

There are two types of communication that fall into the non-terms category.

First, regular communications and advertising. You can still continue to run your business as normal and there is nothing wrong with creating press releases, advertisements, newsletters and other publicity to help grow your business. If those communications don't mention any of the terms of the offering, they are permitted. Once you've filed your Form C, you don't need to worry about "conditioning the market." You can ramp up your advertising and communications program as much as you like so long as they are genuine business advertising (e.g., typical business advertising would not mention financial performance).

Second, and more interestingly, offering-related communications that don't mention the terms of the offering. You can talk about the offering as long as you don't mention the TERMS of the offering. Yes, we realize that sounds weird but it's the way the statute (the JOBS Act) was drafted. Rather than restricting the discussion of the "offering," which is what traditional securities lawyers would have expected, the statute restricts discussion of "terms," and the SEC defined "terms" to mean only those six things discussed above. This means you can make any kind of communication or advertising in which you say you are doing an offering (although not WHAT you are offering; that would be a "term") and include all sort of soft information about the company's mission statement and how the CEO's grandma's work ethic inspired her drive and ambition.

You can link to the platform's website from such communications. But be careful about linking to any other site that contains the terms of the offering. A link (in the mind of the SEC) is an indirect communication of the terms. So linking to something that contains terms could mean that a non-terms communication becomes a tombstone communication (see below) that doesn't comply with the tombstone rules. This applies to third-party created content as well. If a third-party journalist has written an article abouthow great your company is and includes terms of the offering, linking to that article is an implicit endorsement of the article and could become a statement of the company that doesn't comply with thetombstone rules.

Whether you are identifying a "term" of the offering can be pretty subtle. While "We are making an offering so that all our fans can be co-owners," might indirectly include a term because it's hinting that you are offering equity, it's probably ok. Try to avoid hints as to what you are offering, and just drive

investors to the intermediary's site to find out more.

Even though non-terms communications can effectively include any information (other than terms) that you like, bear in mind that they are subject, like all communications, to the securities antifraud rules. So even though you are technically permitted to say that you anticipate launching your "Uber for Ferrets" in November in a non-terms communication, if you don't have a reasonable basis for saying that, you are in trouble for making a misleading statement.

Tombstone communications

A tombstone is what it sounds like — just the facts — and a very limited set of facts at that. Think of these communications as "hard" factual information.

The specific rules under Regulation CF allow for "notices" limited to the following, which can be written or oral:

- A statement that the issuer is conducting an offering pursuant to Section 4(a)(6) of the Securities Act;
- The name of the intermediary through which the offering is being conducted and (in written communications) a link directing the potential investor to the intermediary's platform;
- The terms of the offering (the amount of securities offered, the nature of the securities, the price of the securities, the closing date of the offering period, the intended use of proceeds and progress made so far); and
- Factual information about the legal identity and business location of the issuer, limited to the name of the issuer of the security, the address, phone number and website of the issuer, the e-mail address of a representative of the issuer and a brief description of the business of the issuer.

These are the outer limits of what you can say. You don't have to include all or any of the terms. You could just say "Company X has an equity crowdfunding campaign on SuperPortal — Go to www.SuperPortal.com/CompanyX to find out more." The platform's address is compulsory.

"Brief description of the business of the issuer" does mean brief. The rule that applies when companies are doing Initial Public Offerings (IPOs), which is the only guidance we have in this area, lets those companies describe their general business, principal products or services, and the industry segment (e.g.,for manufacturing companies, the general type of manufacturing, the principal products or classes of products and the segments in which the company conducts business). The brief description does not allow for inclusion of details about how the product works or the overall addressable market for it, and certainly not any customer endorsements.

"Limited time and availability"-type statements may be acceptable as part of the "terms of the offering." For example, the company might state that the offering is "only" open until the termination date, or explain that the amount of securities available is limited to the oversubscription amount.

A few "context" or filler words might be acceptable in a tombstone notice, depending on that context. For example, the company might state that it is "pleased" to be making an offering under the newly- adopted Regulation Crowdfunding, or even refer to the fact that this is a "historic" event. Such additionalwording will generally be a matter of judgement. "Check out our offering on [link]" or "Check out progress of our offering on [link]" are OK. "Our offering is making great progress on [link]" is not. Words that imply growth, success or progress (whether referring to the company or the offering) are always

problematic. If you want to use a lot of additional context information, that information can be put in a "non-terms" communication that goes out at the same time and through the same means as a tombstone communication.

The only links that can be included on a tombstone communication are links to the platform. No links to reviews of the offering on Kingscrowd. No links to any press stories on Crowdfund Insider or CrowdFundBeat. No links to the company's website. The implicit endorsement principle applies here just as with non-terms communications, meaning that anything you link to becomes a communication by the company.

An important point with respect to tombstone notices is that while content is severely limited, medium is not. Thus, notices containing tombstone information can be posted on social media, published in newspapers, broadcast on TV, slotted into Google Ads, etc. Craft breweries might wish to publish notices on their beer coasters, and donut shops might wish to have specially printed napkins.

What constitutes a "notice"

It is important to note that (until we hear otherwise from the SEC) the "notice" is supposed to be a standalone communication. It can't be attached to or embedded in other communications. That means you cannot include it on your website (as all the information on your website will probably be deemed to be part of the "notice" and it will likely fail the tombstone rule) and you cannot include it in announcements about new products — again, it will fail the tombstone rule.

We have listed some examples of permissible communications in Exhibit A.

Websites

It's a bad idea to include ANY information about the terms of the offering on your website. However, some issuers have found a clever solution: you can create a landing page that sits in front of your regular website. The landing page can include the tombstone information and two options: either investors can continue to your company's regular webpage OR they can go to the platform to find out more about the offering on the platform. We have attached sample text for landing pages on Exhibit A.

"Invest now" buttons

Under the SEC's current interpretations as we understand them, having an "invest now" button on your website with a link to the platform hosting your offering is fine although you should not mention any terms of the offering on your website unless your ENTIRE website complies with the tombstone rule. Most of them don't.

Social Media

As we mention above, the medium of communication is not limited at all, even for tombstone communications. Companies can use social media to draw attention to their offerings as soon as they have filed their Form C with the SEC. Social media are subject to the same restrictions as any other communications: either don't mention the offering terms at all or limit content to the tombstone information.

Emails

"Blast" emails that go out to everyone on your mailing list are subject to the same rules as social media:

either don't mention the offering terms at all or limit content to the tombstone information. Personalized emails to people you know will probably not be deemed to be advertising the terms of the offering, so you can send them, but be careful you don't give your friends any more information than is on the platform — remember the rule about giving everyone access to the same information.

Images

Images are permitted in tombstone communications. However, these images also have to fit within the "tombstone" parameters. So brevity is required. Publishing a few pictures that show what the company does and how it does it is fine. An online coffee table book with hundreds of moodily-lit photos, not so much. Also, a picture tells a thousand words and those words better not be misleading. So use images only of real products actually currently produced by the company (or in planning, so long as you clearly indicate that), actual employees hard at work, genuine workspace, etc. No cash registers, or images of dollar bills or graphics showing (or implying) increase in revenues or stock price. And don't use images you don't have the right to use! (Also, we never thought we'd need to say this, but don't use the SEC's logo anywhere on your notice, or anywhere else.)

While the "brevity" requirement doesn't apply to non-terms communications, the rules about images not being misleading do.

Videos

Videos are permitted. You could have the CEO saying the tombstone information, together with video images of the company's operations, but as with images in general, the video must comport with the tombstone rules. So "Gone with the Wind" length opuses will not work under the tombstone rule, although they are fine with non-terms communications. The video must also include a text overlay of where investor should go to access the intermediary's platform.

Updates and communications to alert investors that important information is available on the platform

Updates can and should be found on the crowdfunding platform. You can use communications that don't mention the terms of the offering, to drive readers to the platform's site to learn about updates and things like webinars hosted on the platform. They may include links to the platform.

Press releases

Yes, they are permitted, but they can't contain very much. Press releases are also laden with potential pitfalls, as we discuss below. Press releases that mention the offering terms are limited to the same "tombstone" content restrictions that apply to all notices. Companies may say that they are pleased (or even thrilled) to announce that they are making a crowdfunding offering but the usual quotes from company officers can't be included (unless those quotes are along the lines of " I am thrilled that Company will be making a crowdfunding offering," or "Company is a software-as-a-service provider with offices in six states"). The "about the company" section in press releases is subject to the same restrictions and if the press release is put together by a PR outfit, watch out for any non-permitted language in the "about the PR outfit" section of the press release (nothing like "Publicity Hound Agency is happy to help companies seeking crowdfunding from everyday investors who now have the opportunity to invest in the next Facebook").

You could also issue non-terms press releases that state you are doing an offering (and you can identify or link to the platform) but don't include terms and still include all the soft info, including quotes, mission statements and deep backgrounds. It's likely, though, that journalists would call asking "So what are you

offering, then?" and if you answer, you are going to make your non-terms communication into communication that fails the tombstone rule.

Press interviews and articles

Interviews with the media can be thorny because participation with a journalist makes the resulting article a communication of the company. In fact, the SEC Staff have stated that they don't see how interviews can easily be conducted, because even if the company personnel stick to the tombstone information (which would make for a pretty weird interview), the journalist could add non-tombstone information later, which would result in the article being a notice that didn't comply with the tombstone rule.

The same thing could happen with interviews where the company tries to keep the interview on a non-terms basis. The company personnel could refrain from mentioning any terms (again, it's going to be pretty odd saying, "Yes, we are making an offering of securities but I can't say what we are offering"), but the first thing the journalist is going to do is get the detailed terms from the company's campaign page on the platform's site, and again the result is that the article becomes a non-complying notice.

These rules apply to all articles that the company "participates in." This means that if you (or your publicists) tell the press, "Hey, take a look at the Company X crowdfunding campaign" any resulting article is probably going to result in a violation of the rules. By you.

Links to press articles are subject to all the same rules discussed in this memo. If you link to an article, you are adopting and incorporating all the information in that article. If the article mentions the terms of the offering then you can't link to it from a non-terms communication (such as your website) and if it includes soft non-terms information, then you can't link to it from a tombstone communication. And if it includes misleading statements, you are now making those statements.

Remember that prior to the launch of the offering you should not be talking about your campaign with the press (or publicly with anyone else). If you are asked about whether you are doing a campaign priorto launch you should respond with either a "no comment" or "you know companies aren't allowed to discuss these matters." No winking (either real or emoji-style.)

Press articles that the company did not participate in

In general, if you (or your publicists) didn't participate in or suggest to a journalist that he or she write an article, it's not your problem. You aren't required to monitor the media or correct mistakes. However, if you were to circulate an article (or place it or a link to it on your website), then that would be subject to the rules we discuss in this memo. You can't do indirectly what you can't do directly.

Also, if you add (or link to) press coverage to your campaign page on the platform's site, you are now adopting that content, so it had better not be misleading.

Demo days

Demo days and industry conferences are subject to many of the same constraints that apply to press interviews. In theory, you could limit your remarks to a statement that you are raising funds through crowdfunding, but in reality people are going to ask what you are selling. You could say "I can't talk about that; go to SuperPortal.com," but that would lead to more follow-up questions. And following the tombstone rules means you can't say too much about your product, which rather undermines the whole purpose of a demo day.

Demo days might be easier to manage when you are still in the testing-the-waters phase.

"Ask Me Anythings"

The only place you can do an "Ask Me Anything" (AMA) that references the terms of the offering is on the platform where your offering is hosted. You can't do AMAs on Reddit. Unless you limit the AMA to non-terms communications or tombstone information. In which case, people aren't going to be able to ask you "anything."

Product and service advertising

As we mentioned above, once you've filed your Form C, ordinary advertising or other communications (such as putting out an informational newsletter) can continue and can even be ramped up. Most advertising by its nature would constitute non-terms communication, so it couldn't include references to the terms of the offering. So don't include information about your offering in your supermarket mailer coupons.

What about side by side communications?

You are doubtless wondering whether you could do a non-terms Tweet and follow it immediately with a tombstone Tweet. It appears, at least for the moment, that this works. There is the possibility that if you tried to put a non-terms advertisement right next to a tombstone advertisement in print media or online, the SEC might view them collectively as one single (non-complying) "notice". It is unclear how much time or space would need to separate communications to avoid this problem, or even whether it is a problem.

"Can I still talk to my friends?"

Yes, you can still talk to your friends face to face at the pub (we are talking real friends, not Facebook friends, here) and even tell them that you are doing a crowdfunding offering, even before you file with the SEC. You aren't limited to the tombstone information (man, would that be a weird conversation). After you've launched the offering, you can ask your friends to help spread the word (that's the point of social media) but please do not pay them, even in beer or donuts, because that would make them paid "stock touts." Don't ask them to make favorable comments on the platform's chat board either, unless they say on the chat board that they are doing so because you asked them to. If they are journalists, don't ask them to write a favorable piece about your offering.

"What if people email me personally with questions?"

Best practice would be to respond "That's a great question, Freddie. I've answered it here on the SuperPortal chat site [link]". Remember the Congressional intent of having all investors have access tothe same information.

Links

As we've seen from the discussion above, you can't link from a communication that does comply with the rule you are trying to comply with to something that doesn't. So for example, you can't link from a Tweet that doesn't mention the offering terms to something that does and you can't link from a tombstone communication to anything other than the platform's website.

Emoji

Emoji are subject to antifraud provisions in exactly the same way as text or images are. The current limited range of emoji and their inability to do nuance means that the chance of emoji being misleading is heightened. Seriously people, you need to use your words.

After the offering

These limitations only last until the offering is closed. Once that happens you are free to speak freely again, so long as you don't make any misleading statements.

And what about platforms?

The rules for publicity by platforms are different, and also depend on whether the platform is a broker or a portal. We have published a separate memo for them.

CrowdCheck is not a law firm, the foregoing is not legal advice, and even more than usual, it is subject to change as regulatory positions evolve and the SEC Staff provide guidance in newly-adopted rules. Please contact your lawyer with respect to any of the matters discussed here.

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Exhibit A

Sample Tombstones:

- Company X, Inc.
  [Company Logo]

  Company X is a large widget company based in Anywhere, U.S.A. and incorporated on July 4, 1776. We make widgets and they come in red, white, and blue. Our widgets are designed to spread patriotic cheer.

  We are selling common shares in our company at $17.76 a share. The minimum amount is $13,000 and the maximum amount is $50,000. The offering will remain open until July 4, 2021.

  This offering is being made pursuant to Section 4(a)(6) of the Securities Act.

  For additional information please visit: https://www.SuperPortal.com/companyx

- Freddy's Ferret Food Company is making a Regulation CF Offering of Preferred Shares on FundCrowdFund.com. Freddy's Ferret Food Company was incorporated in Delaware in 2006 and has its principal office in Los Angeles, California. Freddy's Ferret Food Company makes ferret food out of its four manufacturing plants located in Trenton, New Jersey. Freddy's Ferret Food is offering up to 500,000 shares of Preferred Stock at $2 a share and the offering will remain open until February 2, 2021. For more information on the offering please go to www.fundcrowdfund.com/freddysferretfoodcompany.

Sample "non-terms" communications

- We are doing a crowdfunding offering! We planning to Make America Great Again by selling a million extra large red hats and extra small red gloves with logos on them, and to bring jobs back to Big Bug Creek, Arizona. The more stuff we make, the greater our profits will be. We think we are poised for significant growth. Already we've received orders from 100,000 people in Cleveland. Invest in us TODAY, while you still can and Make Capitalism Great Again! [LINK TO PLATFORM].

- Feel the "Burn"! We are making a crowdfunding offering on SuperPortal.com to raise funds to expand our hot sauce factory. Be a part of history. Small investors have been screwed for years.This is your chance to Stick it to the Man and buy securities in a business that has grown consistently for the last five years.

Sample Communications on Social Media:

Note all these communications will have a link to the platform.

- Company Y has launched its crowdfunding campaign; click here to find out more.

- Interested in investing in Company Y? Click here.

Sample Landing Page:

Thanks to Regulation CF, now everyone can own shares in our company.

[Button] Invest in our Company
[Button] Continue to our Website