

### CROWDFUNDING IN MAINE EFFECTIVE JANUARY 1, 2015

On January 1, 2015, Maine's crowdfunding rule went live. Maine enacted 2014 P.L. Ch. 452 "An Act to Increase Funding for Start-ups" (referred to as Maine's "crowdfunding law") on March 2, 2014, but companies in Maine have been waiting to raise capital under the new law until Maine's Office of Securities published a final rule setting forth details for implementation. With the recent adoption of Rule 523, "Rule Regarding Short-Form Seed Capital Registrations," Maine-based companies can now use crowdfunding as a means of raising capital.

#### The Regulatory Environment Giving Rise to Crowdfunding in Maine

Maine's crowdfunding law operates within the existing framework of securities laws, which require that any offer or sale of securities (1) at the federal level, be either registered with the U.S. Securities and Exchange Commission (the "SEC") or exempt from registration; and (2) at the state level, be either registered with an applicable state office of securities or exempt from registration. Under current law, the most frequently relied upon federal registration exemption limits a company's pool of prospective investors to "accredited investors" (as defined under the SEC's rules) and simply pre-empts state registration requirements. Finding and qualifying interested accredited investors, however, can be difficult, particularly since most private securities offerings are still subject to the federal prohibition on "general solicitation" (*i.e.*, advertising, in a very broad sense of the word).

Crowdfunding generally is a concept that would enable companies to broadly distribute offering materials and to seek a limited amount of capital from the public – without having to go through as rigorous a process of conducting an initial public offering (IPO) or limiting investors to "accredited investors". Crowdfunding has stirred a tremendous amount of excitement in the entrepreneurial community. As a capital raising strategy, it first garnered national attention as a key component of the Jumpstart Our Business Startups Act (JOBS Act) enacted April of 2012. However, because the SEC is still working to finalize a "crowdfunding" rule, crowdfunding is not yet permitted federally. A number of states have now attempted to fill the void resulting from the delays in the SEC's rulemaking and its set of cumbersome proposed rules that many believe will reduce the utility of the federal legislation.

Maine is now one of fifteen states to adopt a state-version of crowdfunding. Maine's version of crowdfunding relies on an exemption from federal registration for offerings raising \$1,000,000 or less (Rule 504) and abbreviates the registration process in Maine provided certain criteria are met. As of the date of this alert, Maine is the only state to adopt a version that relies on federal Rule 504 rather than the federal intrastate offering exemption. This is notable, because Rule 504 provides certain flexibility to a company seeking to raise capital that the intrastate offering exemption does not.

What this means for Maine-based companies is that there is now a new avenue to raise capital from investors located within the state of Maine and, in some cases, from

certain types of investors around the country.<sup>1</sup> This path may be helpful for some companies seeking new capital; for others, there may be much more favorable alternatives. A subsequent alert will focus on the pros and cons of crowdfunding in Maine, with a description of what types of companies may benefit most from the new law.

### **The Basics of Maine's Crowdfunding Statute**

The statute sets forth the basic criteria for crowdfunding in Maine, described briefly below. Rule 523 (discussed in the next section) builds from these general requirements to provide more specific guidance to companies that plan to raise capital in reliance on the new law.

1. Offering must be Rule 504 compliant. The offering must meet the requirements of the federal exemption for limited offerings and sales of securities not exceeding \$1,000,000 under Rule 504.<sup>2</sup> Such requirements include, for instance, the filing of a Form D with the SEC.

2. Company must have principal place of business in Maine. A company offering its securities for sale (often referred to as the issuer) can either be formed as a Maine company or formed under the laws of another state – but in either case, it must have its principal place of business in Maine.

3. \$1,000,000 Cap in 12-month period. The aggregate amount of securities sold to all investors within a 12-month period is capped at \$1,000,000.

4. \$5,000 Maximum for Non-Accredited Investors. In any 12-month period, the aggregate amount of securities sold to any individual non-accredited investor is capped at \$5,000. Accredited investors, however, are not subject to the \$5,000 limit. Accredited investors can invest any amount, provided that the total amount raised does not exceed the cap.

5. Short-Form Registration Statement Filed. The company must file a short-form registration statement (with various attachments) with the Maine Office of Securities. These documents, and the corresponding registration process, were the subject of the new rule, discussed in more detail below.

6. Escrow of Funds. The company must escrow funds raised as part of the offering until such time as the company raises at least the minimum offering amount (an amount no less than 30% of the offering maximum set by the company).

### **Rule 523: Providing a Blue Print for Maine Crowdfunding**

The newly-adopted Rule 523 adopts and/or clarifies requirements of crowdfunding in Maine, and also adopts template documents for use in the process. To take advantage of the streamlined method of registration with the Maine Office of

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<sup>1</sup> Assuming compliance with the securities laws in the applicable investor's state of residence.

<sup>2</sup> Rule 504 of SEC Regulation D, 17 CFR §230.504, promulgated pursuant to the Securities Act of 1933, 15 U.S.C. §77a et seq.

Securities offered by Maine's crowdfunding law, and in conjunction with the above requirements, companies raising capital via Maine's crowdfunding laws must satisfy the following conditions:

1. Company must file a short-form registration statement (Form Fund-ME) and related documents with the Maine Office of Securities. In lieu of a full-blown registration statement, the company must file a short-form registration statement with the Maine Office of Securities. Rule 523 includes template documents that are the starting point for each required filing. A complete filing must include the following documents (***bold italics*** indicate the documents available on the Maine Office of Securities' website):

(a) ***Fund-ME - Short-Form Seed Capital Registration Filing Checklist.***

(b) ***Form Fund-ME - Offering Circular.*** This document (with attachments) is the short-form registration statement filed with the Maine Office of Securities. It must include information such as the following: (i) the company's name, legal status, address and website address; (ii) the names of directors, officers, and other persons performing similar functions; (iii) the name of each person holding more than 20% of the company's equity; (iv) a description of the company's business and its anticipated business plan; (v) a description of the company's financial condition; (vi) a description of the intended use of proceeds raised in the offering; (vii) the offering amount and the deadline; (viii) the price of the securities; and (ix) a description of the company's ownership and capital structure, including the terms of the securities being offered and risks to investors. Other documents that must be filed with the Form Fund-ME are the following:

(A) *Appendix A - Business Plan.* The company should prepare and include a business plan. It is important to note that once the short-form registration statement is filed, the company's business plan is a public document.

(B) *Appendix B - Financial Statements.* The type of financial statements required to be provided varies depending on the amount to be raised in the offering:

<u>Offering Amount (within preceding 12 months)</u>	<u>Type of Financial Statements Required</u>
\$0 - \$100,000	<ul style="list-style-type: none"><li>• Income tax returns for most recent tax year</li><li>• Financial statements certified by the company's principal executive officer</li></ul>
\$100,001 - \$500,000	<ul style="list-style-type: none"><li>• Financial statements reviewed by an independent public accountant</li></ul>
\$500,001 - \$1,000,000	<ul style="list-style-type: none"><li>• Audited financial statements</li></ul>

(C) *Appendix C – Capitalization Table*

(D) *Appendix D – Biographical Information*

(c) ***Subscription Agreement.*** The template form of Subscription Agreement is provided by the Maine Office of Securities and will need to be tailored for the offering and used with each investor.

(d) ***Impoundment Agreement.*** A fully-executed Impoundment Agreement, pursuant to which the company escrows offering proceeds until the minimum offering amount is achieved, must be filed with the Form Fund-ME. While the Maine Office of Securities has provided a form of Impoundment Agreement, this form is a model and may be modified to suit a particular situation, provided the modifications are in compliance with the statute and the rule.

2. **“Bad Actors” Not Eligible.** A company will be disqualified from being able to use the short-form registration process if it, any of its officers and directors (or persons in similar roles), its beneficial owners holding more than 10% of the company’s outstanding equity, its promoters, its selling agents, or persons affiliated with promoters or selling agents previously committed certain “bad acts.” These disqualifying acts are specified in more detail in Rule 523.

3. **Payment of Fees.** The registration statement must be accompanied by a filing fee of \$300 per type and/or class of security offered in the offering.

4. **Delivery of Offering Document.** Once the registration statement is effective, the company must be sure to deliver to each prospective investor the completed Form Fund-ME, together with all attachments, as well as a copy of the subscription agreement. Within the state of Maine, the Company may broadly distribute offering documents and generally advertise the ongoing offering. Careful attention to applicable federal and state laws and consultation with legal counsel is recommended before soliciting any offers or distributing any offering materials outside the state of Maine.

5. **Escrow of Funds and Impoundment Agreement.** Using the Impoundment Agreement (or similar form) described above, the company must set aside funds raised in the offering until (a) the minimum offering amount is achieved, (b) the Maine Office of Securities has suspended or revoked the registration, or (c) twelve (12) months have passed from the effective date of the offering and the company has not achieved the minimum offering amount (in which case all subscription funds are returned to investors).

Under the current law, the Maine Office of Securities will review the documents filed by a company. The Maine Office of Securities staff will declare the registration statement to be effective if it determines the filing is adequate. Once a company has an effective registration statement, it can begin raising the capital on the terms and conditions set forth in the Form Fund-ME and corresponding documents. It is

important to note that in the course of its review, the Maine Office of Securities will not separately verify the accuracy or completeness of the information provided in the offering materials. Thus, in conducting the offering, companies remain subject to the anti-fraud provisions of both federal and state securities laws.

### **More Information about Crowdfunding in Maine**

As illustrated above, raising or investing capital generally involves a complex interplay of federal and state securities laws and regulations. There are many different ways to legally raise and invest capital. We encourage you to think carefully and consult as appropriate with legal counsel, tax experts and accounting advisers.

This alert is one of several that will be focused on various aspects of crowdfunding. The overall purpose of this brief alert was to help provide an overview of crowdfunding in Maine and to set forth an overview of what the new laws require. Stay tuned for the next publication, which will evaluate some of the pros and cons of raising capital under Maine's new crowdfunding law.

For more information or questions about crowdfunding or other ways to raise capital for your company, contact Joel Shaw at 207 228-7308 or [jshaw@bernsteinshur.com](mailto:jshaw@bernsteinshur.com) or Helen Sterling Coburn at 207 228-7284 or [hcoburn@bernsteinshur.com](mailto:hcoburn@bernsteinshur.com). As experienced business and securities counsel and members of Bernstein Shur's Private Capital Team, they advise operating companies, private funds, family offices and individuals seeking to raise and invest capital.