

date of enactment of this Act [Apr. 5, 2012], the Securities and Exchange Commission (in this title [enacting section 77d-1 of this title, amending sections 77d, 77r, 78c, 78l, and 78o of this title, and enacting provisions set out as notes under sections 77d, 77r, 78c, and 78l of this title] referred to as the ‘Commission’) shall issue such rules as the Commission determines may be necessary or appropriate for the protection of investors to carry out sections 4(6) [probably means ‘section 4(a)(6)’] and section 4A of the Securities Act of 1933 [15 U.S.C. 77d(a)(6), 77d-1], as added by this title. In carrying out this section, the Commission shall consult with any securities commission (or any agency or office performing like functions) of the States, any territory of the United States, and the District of Columbia, which seeks to consult with the Commission, and with any applicable national securities association.’

DISQUALIFICATION

Pub. L. 112-106, title III, §302(d), Apr. 5, 2012, 126 Stat. 320, provided that:

“(1) IN GENERAL.—Not later than 270 days after the date of enactment of this Act [Apr. 5, 2012], the [Securities and Exchange] Commission shall, by rule, establish disqualification provisions under which—

“(A) an issuer shall not be eligible to offer securities pursuant to section 4(6) [probably means ‘section 4(a)(6)’] of the Securities Act of 1933 [15 U.S.C. 77d(a)(6)], as added by this title; and

“(B) a broker or funding portal shall not be eligible to effect or participate in transactions pursuant to that section 4(6).

“(2) INCLUSIONS.—Disqualification provisions required by this subsection shall—

“(A) be substantially similar to the provisions of section 230.262 of title 17, Code of Federal Regulations (or any successor thereto); and

“(B) disqualify any offering or sale of securities by a person that—

“(i) is subject to a final order of a State securities commission (or an agency or officer of a State performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or an agency or officer of a State performing like functions), an appropriate Federal banking agency, or the National Credit Union Administration, that—

“(I) bars the person from—

“(aa) association with an entity regulated by such commission, authority, agency, or officer;

“(bb) engaging in the business of securities, insurance, or banking; or

“(cc) engaging in savings association or credit union activities; or

“(II) constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the 10-year period ending on the date of the filing of the offer or sale; or

“(ii) has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission.”

DISQUALIFYING FELONS AND OTHER “BAD ACTORS” FROM REGULATION D OFFERINGS

Pub. L. 111-203, title IX, §926, July 21, 2010, 124 Stat. 1851, provided that: “Not later than 1 year after the date of enactment of this Act [July 21, 2010], the Commission shall issue rules for the disqualification of offerings and sales of securities made under section 230.506 of title 17, Code of Federal Regulations, that—

“(1) are substantially similar to the provisions of section 230.262 of title 17, Code of Federal Regulations, or any successor thereto; and

“(2) disqualify any offering or sale of securities by a person that—

“(A) is subject to a final order of a State securities commission (or an agency or officer of a State

performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or an agency or officer of a State performing like functions), an appropriate Federal banking agency, or the National Credit Union Administration, that—

“(i) bars the person from—

“(I) association with an entity regulated by such commission, authority, agency, or officer;

“(II) engaging in the business of securities, insurance, or banking; or

“(III) engaging in savings association or credit union activities; or

“(ii) constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the 10-year period ending on the date of the filing of the offer or sale; or

“(B) has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission.”

[For definitions of terms used in section 926 of Pub. L. 111-203, set out above, see section 5301 of Title 12, Banks and Banking.]

§ 77d-1. Requirements with respect to certain small transactions

(a) Requirements on intermediaries

A person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others pursuant to section 77d(6)¹ of this title shall—

(1) register with the Commission as—

(A) a broker; or

(B) a funding portal (as defined in section 78c(a)(80)² of this title);

(2) register with any applicable self-regulatory organization (as defined in section 78c(a)(26) of this title);

(3) provide such disclosures, including disclosures related to risks and other investor education materials, as the Commission shall, by rule, determine appropriate;

(4) ensure that each investor—

(A) reviews investor-education information, in accordance with standards established by the Commission, by rule;

(B) positively affirms that the investor understands that the investor is risking the loss of the entire investment, and that the investor could bear such a loss; and

(C) answers questions demonstrating—

(i) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers;

(ii) an understanding of the risk of illiquidity; and

(iii) an understanding of such other matters as the Commission determines appropriate, by rule;

(5) take such measures to reduce the risk of fraud with respect to such transactions, as established by the Commission, by rule, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than

¹ See References in Text note below.

² So in original. Two pars. (a)(80) of section 78c have been enacted.

20 percent of the outstanding equity of every issuer whose securities are offered by such person;

(6) not later than 21 days prior to the first day on which securities are sold to any investor (or such other period as the Commission may establish), make available to the Commission and to potential investors any information provided by the issuer pursuant to subsection (b);

(7) ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest, as the Commission shall, by rule, determine appropriate;

(8) make such efforts as the Commission determines appropriate, by rule, to ensure that no investor in a 12-month period has purchased securities offered pursuant to section 77d(6)¹ of this title that, in the aggregate, from all issuers, exceed the investment limits set forth in section 77d(6)(B)¹ of this title;

(9) take such steps to protect the privacy of information collected from investors as the Commission shall, by rule, determine appropriate;

(10) not compensate promoters, finders, or lead generators for providing the broker or funding portal with the personal identifying information of any potential investor;

(11) prohibit its directors, officers, or partners (or any person occupying a similar status or performing a similar function) from having any financial interest in an issuer using its services; and

(12) meet such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.

(b) Requirements for issuers

For purposes of section 77d(6)¹ of this title, an issuer who offers or sells securities shall—

(1) file with the Commission and provide to investors and the relevant broker or funding portal, and make available to potential investors—

(A) the name, legal status, physical address, and website address of the issuer;

(B) the names of the directors and officers (and any persons occupying a similar status or performing a similar function), and each person holding more than 20 percent of the shares of the issuer;

(C) a description of the business of the issuer and the anticipated business plan of the issuer;

(D) a description of the financial condition of the issuer, including, for offerings that, together with all other offerings of the issuer under section 77d(6)¹ of this title within the preceding 12-month period, have, in the aggregate, target offering amounts of—

(i) \$100,000 or less—

(I) the income tax returns filed by the issuer for the most recently completed year (if any); and

(II) financial statements of the issuer, which shall be certified by the principal

executive officer of the issuer to be true and complete in all material respects;

(ii) more than \$100,000, but not more than \$500,000, financial statements reviewed by a public accountant who is independent of the issuer, using professional standards and procedures for such review or standards and procedures established by the Commission, by rule, for such purpose; and

(iii) more than \$500,000 (or such other amount as the Commission may establish, by rule), audited financial statements;

(E) a description of the stated purpose and intended use of the proceeds of the offering sought by the issuer with respect to the target offering amount;

(F) the target offering amount, the deadline to reach the target offering amount, and regular updates regarding the progress of the issuer in meeting the target offering amount;

(G) the price to the public of the securities or the method for determining the price, provided that, prior to sale, each investor shall be provided in writing the final price and all required disclosures, with a reasonable opportunity to rescind the commitment to purchase the securities;

(H) a description of the ownership and capital structure of the issuer, including—

(i) terms of the securities of the issuer being offered and each other class of security of the issuer, including how such terms may be modified, and a summary of the differences between such securities, including how the rights of the securities being offered may be materially limited, diluted, or qualified by the rights of any other class of security of the issuer;

(ii) a description of how the exercise of the rights held by the principal shareholders of the issuer could negatively impact the purchasers of the securities being offered;

(iii) the name and ownership level of each existing shareholder who owns more than 20 percent of any class of the securities of the issuer;

(iv) how the securities being offered are being valued, and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions; and

(v) the risks to purchasers of the securities relating to minority ownership in the issuer, the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties; and

(I) such other information as the Commission may, by rule, prescribe, for the protection of investors and in the public interest;

(2) not advertise the terms of the offering, except for notices which direct investors to the funding portal or broker;

(3) not compensate or commit to compensate, directly or indirectly, any person to

promote its offerings through communication channels provided by a broker or funding portal, without taking such steps as the Commission shall, by rule, require to ensure that such person clearly discloses the receipt, past or prospective, of such compensation, upon each instance of such promotional communication;

(4) not less than annually, file with the Commission and provide to investors reports of the results of operations and financial statements of the issuer, as the Commission shall, by rule, determine appropriate, subject to such exceptions and termination dates as the Commission may establish, by rule; and

(5) comply with such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.

(c) Liability for material misstatements and omissions

(1) Actions authorized

(A) In general

Subject to paragraph (2), a person who purchases a security in a transaction exempted by the provisions of section 77d(6)¹ of this title may bring an action against an issuer described in paragraph (2), either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if such person no longer owns the security.

(B) Liability

An action brought under this paragraph shall be subject to the provisions of section 77l(b) of this title and section 77m of this title, as if the liability were created under section 77l(a)(2) of this title.

(2) Applicability

An issuer shall be liable in an action under paragraph (1), if the issuer—

(A) by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by any means of any written or oral communication, in the offering or sale of a security in a transaction exempted by the provisions of section 77d(6)¹ of this title, makes an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission; and

(B) does not sustain the burden of proof that such issuer did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

(3) Definition

As used in this subsection, the term “issuer” includes any person who is a director or partner of the issuer, and the principal executive officer or officers, principal financial officer, and controller or principal accounting officer of the issuer (and any person occupying a

similar status or performing a similar function) that offers or sells a security in a transaction exempted by the provisions of section 77d(6)¹ of this title, and any person who offers or sells the security in such offering.

(d) Information available to States

The Commission shall make, or shall cause to be made by the relevant broker or funding portal, the information described in subsection (b) and such other information as the Commission, by rule, determines appropriate, available to the securities commission (or any agency or office performing like functions) of each State and territory of the United States and the District of Columbia.

(e) Restrictions on sales

Securities issued pursuant to a transaction described in section 77d(6)¹ of this title—

(1) may not be transferred by the purchaser of such securities during the 1-year period beginning on the date of purchase, unless such securities are transferred—

(A) to the issuer of the securities;

(B) to an accredited investor;

(C) as part of an offering registered with the Commission; or

(D) to a member of the family of the purchaser or the equivalent, or in connection with the death or divorce of the purchaser or other similar circumstance, in the discretion of the Commission; and

(2) shall be subject to such other limitations as the Commission shall, by rule, establish.

(f) Applicability

Section 77d(6)¹ of this title shall not apply to transactions involving the offer or sale of securities by any issuer that—

(1) is not organized under and subject to the laws of a State or territory of the United States or the District of Columbia;

(2) is subject to the requirement to file reports pursuant to section 78m of this title or section 78o(d) of this title;

(3) is an investment company, as defined in section 80a-3 of this title, or is excluded from the definition of investment company by section 80a-3(b) of this title or section 80a-3(c) of this title; or

(4) the Commission, by rule or regulation, determines appropriate.

(g) Rule of construction

Nothing in this section or section 77d(6)¹ of this title shall be construed as preventing an issuer from raising capital through methods not described under section 77d(6)¹ of this title.

(h) Certain calculations

(1) Dollar amounts

Dollar amounts in section 77d(6)¹ of this title and subsection (b) of this section shall be adjusted by the Commission not less frequently than once every 5 years, by notice published in the Federal Register to reflect any change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics.

(2) Income and net worth

The income and net worth of a natural person under section 77d(6)(B)¹ of this title shall

be calculated in accordance with any rules of the Commission under this subchapter regarding the calculation of the income and net worth, respectively, of an accredited investor.

(May 27, 1933, ch. 38, title I, §4A, as added Pub. L. 112-106, title III, §302(b), Apr. 5, 2012, 126 Stat. 315.)

REFERENCES IN TEXT

Section 77d(6) of this title, referred to in text, was redesignated section 77d(a)(6) of this title by Pub. L. 112-106, title II, §201(b)(1), (c)(1), Apr. 5, 2012, 126 Stat. 314.

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

(d) Limitation

Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors

that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission, subject to the requirement of subsection (b)(2).

(e) Security-based swaps

Notwithstanding the provisions of section 77c or 77d of this title, unless a registration statement meeting the requirements of section 77j(a) of this title is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of title 7.

(May 27, 1933, ch. 38, title I, §5, 48 Stat. 77; June 6, 1934, ch. 404, title II, §204, 48 Stat. 906; Aug. 10, 1954, ch. 667, title I, §7, 68 Stat. 684; Pub. L. 111-203, title VII, §768(b), July 21, 2010, 124 Stat. 1801; Pub. L. 112-106, title I, §105(c), Apr. 5, 2012, 126 Stat. 311.)

AMENDMENTS

2012—Subsecs. (d), (e). Pub. L. 112-106 added subsec. (d) and redesignated former subsec. (d) as (e).

2010—Subsec. (d). Pub. L. 111-203 added subsec. (d).

1954—Subsec. (a)(1). Act Aug. 10, 1954, struck out “or offer to buy” after “to sell”.

Subsec. (b). Act Aug. 10, 1954, in par. (1) substituted “with respect to which a registration statement has been filed” for “registered” and in par. (2) omitted “to” after “to carry or” and inserted “subsection (a) of” before “section 77j of this title”.

Subsec. (c). Act Aug. 10, 1954, added subsec. (c).

1934—Act June 6, 1934, repealed subsec. (c), the provisions of which were replaced by section 77c(a)(11) of this title.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111-203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761-774) of title VII of Pub. L. 111-203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111-203, set out as a note under section 77b of this title.

EFFECTIVE DATE OF 1954 AMENDMENT

Amendment by act Aug. 10, 1954, effective 60 days after Aug. 10, 1954, see note under section 77b of this title.

ENCOURAGING EMPLOYEE OWNERSHIP

Pub. L. 115-174, title V, §507, May 24, 2018, 132 Stat. 1363, provided that: “Not later than 60 days after the date of the enactment of this Act [May 24, 2018], the Securities and Exchange Commission shall revise section 230.701(e) of title 17, Code of Federal Regulations, so as to increase from \$5,000,000 to \$10,000,000 the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which the issuer is required under such section to deliver an additional disclosure to investors. The Commission shall index for inflation such aggregate sales price or amount every 5