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Non-U.S. Investment Crowdfunding Platforms Can Offer Securities to U.S. Investors under Current Securities Laws

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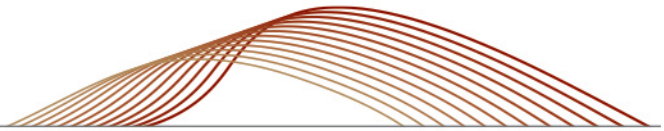
As a result of the capital formation innovations advanced by the U.S. Jumpstart Our Business Startups Act ("JOBS Act"), investment crowdfunding has increasingly emerged as a viable alternative for raising growth capital in the United States. Internet-based crowdfunding securities offerings are now permissible under three separate regulatory regimes that provide exemptions from registration under the Securities Act of 1933, as amended (the "Securities Act"):

- Regulation Crowdfunding, which governs nano-sized offerings to the general public of up to $1 million;
- Regulation D–Rule 506(c), which governs private offerings to "accredited investors"[1] of an unlimited amount undertaken with general solicitation and general advertising; and
- Regulation A–Tier 2 ("Regulation A+"), which governs public offerings to the general public of up to $50 million.

The long-awaited Regulation Crowdfunding is effective on May 16, 2016, marking the beginning of an era in which investment crowdfunding enthusiasts expect to revolutionize seed and early stage capital formation in the United States. Many investment crowdfunding platform operators located in Europe and elsewhere have witnessed the developments in the emerging U.S. investment crowdfunding market and view with interest the opportunity to add U.S. investors to the local-market investment crowdfunding offerings they already promote on their platforms. These investment crowdfunding platform operators will be disappointed to learn that the final Regulation Crowdfunding and Regulation A+ regulations apply only to the offerings of U.S. domestic issuers.

However, Regulation D–Rule 506(c) is not so limited and does permit investment crowdfunding platform operators operating outside the United States to access U.S. investors on behalf of non-U.S. companies. While Rule 506(c) limits the sale of securities to investors who qualify as "accredited investors," it bears noting that the U.S. Congress and the Securities and Exchange Commission ("SEC") are currently revisiting regulatory policy that could significantly expand the universe of individual "accredited investors" beyond the estimated eight million that exist today.[2] The Rule 506(c) regulatory regime provides a workable solution that enables crowdfunding platforms to employ



modern internet and social networking communications strategies to market securities offerings to the eight million strong accredited investor "crowd" located in the United States.[3]

Before embarking on crowdfunding offerings in the United States, foreign platform operators should understand and manage several regulatory considerations that arise from such investment offering activity. The most significant area of U.S. regulation that foreign platform operators planning to target U.S. investors should understand and manage involves the regulation of broker-dealers. Stated simply, any person engaged in the business of effecting transactions in securities for the account of others must register with the SEC as a broker-dealer and comply with the rules of the SEC and the Financial Industry Regulatory Authority ("FINRA") applicable to registered broker-dealers. We have identified three primary approaches that foreign platform operators may take to manage this broker-dealer regulatory requirement should they wish to access U.S. investors in connection with their investment crowdfunding offerings on behalf of non-U.S. companies:

- **Investment fund structure**. Structure each offering so that investors hold interests in an investment fund advised by the crowdfunding platform operator that in turn holds equity in the issuer. The investment fund would be organized for the single purpose of making the investment. The crowdfunding platform operator could operate as an exempt reporting adviser to "venture capital funds" or "private funds" under the Investment Advisers Act of 1940 (the "Investment Advisers Act"), as discussed below, or otherwise register as an investment adviser thereunder depending on the nature of its activities.

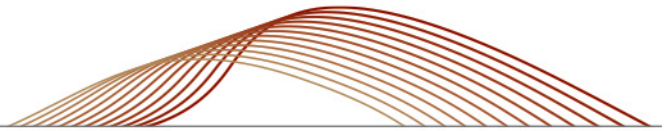
- **Inter-syndicate structure**. Divide each offering into tranches, so that offers and sales made to investors located outside the United States are facilitated by the crowdfunding platform while offers and sales made to investors located in the United States are made or intermediated by an unaffiliated registered broker-dealer with which the crowdfunding platform has entered into an inter-syndicate agreement. The crowdfunding platform earns fees on the non-U.S. tranche of the offering while the unaffiliated registered broker-dealer earns fees on the U.S. tranche of offerings.

- **Broker-dealer structure**. Purchase or establish a U.S. broker-dealer affiliate that is registered as a broker-dealer with the SEC and conduct offerings in compliance with SEC and FINRA rules.

Most foreign investment crowdfunding platforms will want to avoid the expense and regulatory burden of becoming and remaining a registered broker-dealer and therefore we focus herein primarily on the investment fund and inter-syndicate structures.

Regulation S

Absent an exemption, securities offerings directed to U.S. investors (including offerings marketed on non-U.S. investment crowdfunding platforms) require registration under the Securities Act. Since its adoption in the early 1990s, the SEC's Regulation S has been relied upon by market participants to exempt from registration foreign offerings conducted outside the United States. Regulation S takes a territorial approach and essentially provides that offers and sales of securities that take place within the United States are subject to such registration requirements, while offers and sales of securities that take place outside the United States are not subject to such requirements. As such, Regulation S is available to investment crowdfunding platform operators that can structure their offerings in a manner that satisfies the conditions of the regulation. Nearly all offerings of the equity securities of non-U.S. issuers marketed on foreign investment crowdfunding platforms to investors located outside



of the United States can be conducted as Category I offerings under Rule 903 of Regulation S. Category I has four primary conditions that must be satisfied to exempt the offering from registration.

Offshore Transaction

Offers made outside the United States must qualify as offshore transactions under Regulation S. An offer is considered an offshore transaction if (i) the offer is not made to a person in the United States and (ii) at the time the buy order is originated, the buyer is outside the United States or the seller or any person acting on its behalf reasonably believes the buyer is outside the United States.

No Directed Selling Efforts Made in the United States

No "directed selling efforts" relating to the offshore transaction may be conducted in the United States. Directed selling efforts are activities that could reasonably be expected, or are intended, to condition the U.S. market with respect to the securities being offered. In the case of offerings conducted online, the SEC has a long-standing interpretive policy whereby it does not consider an offshore internet offer to be directed at U.S. investors if the website:

- Contains a prominent disclaimer that the securities are not being offered in the United States or to U.S. persons or prominently lists the non-U.S. jurisdictions in which the offer is made; and
- Uses procedures reasonably designed to guard against making sales to U.S. persons in connection with the offshore offering, such as ascertaining the buyer's residence by obtaining information such as mailing addresses or telephone numbers before the sale. This helps the offeror to avoid sending securities and offering materials to a person at a U.S. address or telephone number.[4]

As a practical matter, in order to rely on Regulation S for the foreign tranche of an offering, crowdfunding platforms with generally accessible internet websites must preclude U.S. investors from accessing offering literature and investment terms for their offerings conducted online.

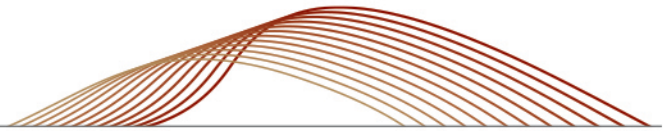
Issuer Must Be a Foreign Private Issuer

The issuer must be a foreign private issuer, which is any issuer incorporated or organized under the laws of a country other than the United States (other than a foreign government) unless:

- More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and
- Any of the following:
  - The majority of the executive officers or directors are U.S. citizens or residents;
  - More than 50 percent of the assets of the issuer are located in the United States; or
  - The business of the issuer is administered principally in the United States.

No Substantial U.S. Market Interest

There should be no substantial U.S. market interest if the issuer's securities do not trade through the facilities of securities exchanges or inter-dealer quotation systems in the United States. This requirement should not pose a problem for most offerings conducted through crowdfunding platforms



because, given their start-up status and early stage of development, the subject issuers will very rarely have equity securities trading on U.S. markets.

Regulation D–Rule 506(c)

Regulation D–Rule 506(c) provides an exemption from the registration requirements of the Securities Act. Rule 506(c) was added to Regulation D in order to permit private offerings to be conducted with "general solicitation or general advertising" as mandated by Title II of the JOBS Act. So long as the requirements of Rule 506(c) are met, general solicitation and advertising may be employed in the United States to raise an unlimited amount of capital from an unlimited number of accredited investors without the need to prepare a prospectus or obtain SEC clearance of the offering under the Securities Act.[5] An offering conducted under Regulation D–Rule 506(c) is subject to the following requirements and limitations.

All Purchasers of Securities Are Accredited Investors

All investors that purchase securities in a Regulation D–Rule 506(c) offering must be accredited investors.

Verification of Accredited Investor Status

The issuer must take reasonable steps to verify that the purchasers of securities sold in any offering under Regulation D–Rule 506(c) are accredited investors. The rule does not mandate that any particular steps be taken to verify a prospective investor's accredited investor status, nor does it proscribe a specified verification methodology. Third-party verification providers can be engaged to conduct the required verification and the issuer or third-party may rely on written confirmations obtained from registered broker-dealers, registered investment advisers, licensed attorneys, and certified public accountants.

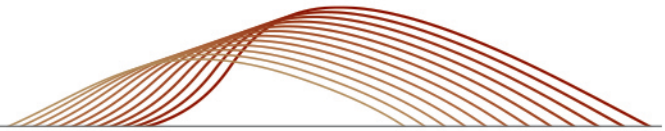
Limitation on Resale

Issuers must exercise reasonable care to assure that the purchasers of the securities are not underwriters, which may be demonstrated by the following:

- Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;
- Written disclosure to each purchaser prior to sale that the securities have not been registered under the Securities Act and, therefore, cannot be resold unless they are registered under the Securities Act or unless an exemption from registration is available; and
- Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Securities Act and setting forth or referring to the restrictions on transferability and sale of the securities.

Bad Actor Disqualification

Regulation D–Rule 506(c) is not available if the issuer or another offering participant has been convicted of a securities crime, is subject to regulatory sanctions by state and federal securities and other financial services industry regulators, is subject to an order restraining or enjoining the person from engaging in securities-related activities, or has engaged in other relevant bad acts. Disclosure of certain prior bad acts is also required.



File Form D for Each Offering

Form D requires basic information concerning the issuer and its offering. It must be completed and filed with the SEC and the state securities regulator of each state where any investor resides.

Integration

The SEC has reaffirmed its view that concurrent offshore offerings conducted in compliance with Regulation S will not be integrated with domestic unregistered offerings conducted in compliance with Rule 506 of Regulation D. However, investment crowdfunding platform operators that conduct concurrent Regulation S and Regulation D–Rule 506(c) offerings must maintain the separate nature of each offering. Given the similarities between general solicitation and directed selling efforts, platform operators must be cautious in their use of general advertising to ensure that the provisions of Regulation S relating to directed selling efforts (activities done for the purpose of conditioning the U.S. market) are not violated with respect to the offshore tranche of the offering. For a more comprehensive overview of the requirements of Regulation D–Rule 506(c), see our Stay Current: *SEC Eliminates Prohibition Against General Solicitation and Advertising in Rule 506 and Rule 144A Offerings*.

Limitation on Number of Investors

The JOBS Act amended Section 12(g)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), a provision that when triggered obligates private companies to register and commence periodic reporting as an SEC reporting company. This obligation is triggered when an issuer has assets in excess of $10 million and either (i) 2,000 or more total equity holders of record worldwide or (ii) 500 or more total holders of record who are not accredited investors worldwide. In the case of foreign private issuers, which benefit from Exchange Act Rule 12g3-2(a), registration is not required unless the issuer also has 300 or more U.S. resident equity holders.

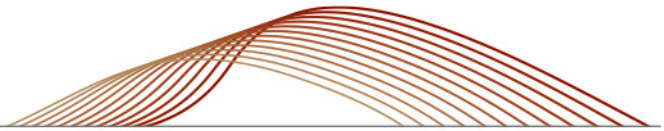
In the investment fund structure, note that in most instances, given how an investment fund is advised and invests, the investment fund would likely be treated as a single holder of record by the company in which it invests. An investment crowdfunding platform operator could therefore sponsor an investment fund and offer interests therein to up to 1,999 accredited investors and avoid triggering the registration obligation under Section 12(g)(1) of the Exchange Act.

Broker-Dealer Registration

Unless an exemption from registration is available, a crowdfunding platform engaged in the business of effecting transactions in securities for the account of others must register with the SEC as a broker-dealer and comply with the SEC and FINRA rules applicable to broker-dealers. The JOBS Act added Section 4(b) of the Securities Act, which sets forth the conditions for an exemption from broker-dealer registration for an online portal that engages in specific investment matchmaking services in connection with securities offered and sold under Rule 506 of Regulation D. This limited broker-dealer registration exemption requires compliance with conditions that (i) prohibit the payment of compensation to the matching service operator and its associated persons, (ii) preclude the matching service operator from possessing customers' funds or securities, and (iii) render ineligible any matching service operator or associated person that is subject to a statutory disqualification.

Investment Fund Structure

A crowdfunding platform that uses the investment fund structure may be deemed a "broker" engaged in the business of effecting transactions in securities for the account of others. In the investment fund



structure, investors hold interests in an investment fund that is advised by the crowdfunding platform and the investment fund in turn holds an equity interest in the issuer. The crowdfunding platform receives compensation in the form of carried interest on any increase in the value in the investment fund. Because the SEC staff interprets the term "compensation" broadly to include any direct or indirect economic benefit to a person or any of its associated persons, it was originally thought that the broker-dealer exemption provided by Section 4(b) for investment matchmaking services may not be available to crowdfunding platforms that receive carried interest. In 2013, however, the SEC staff considered the investment fund structures advanced by FundersClub and AngelList and provided no-action letter relief pursuant to which neither platform operator was required to register as a broker-dealer.[6]

Note that crowdfunding platforms that rely on the AngelList and FundersClub no-action letters also need to address state securities regulations. Therefore, a platform operator will need to explore the availability of exemptions to state securities regulations or otherwise may need to qualify as a broker-dealer in the states in which it conducts business.

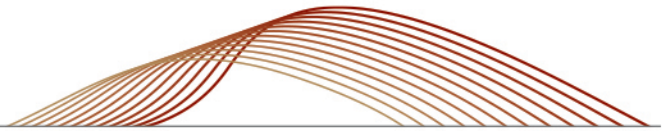
Inter-syndicate Structure

A crowdfunding platform that uses the inter-syndicate structure works with an unaffiliated registered broker-dealer in order to offer and sell securities in the United States. This is done by dividing the offering into two tranches so that offers and sales made to investors located outside the United States are made by the crowdfunding platform while offers and sales made to investors located in the United States are made or intermediated by an unaffiliated registered broker-dealer with which the crowdfunding platform has entered into an inter-syndicate agreement. The crowdfunding platform earns fees and commissions in connection with the non-U.S. tranche of the offering while the unaffiliated registered broker-dealer earns fees, which can include transaction-based compensation, in connection with the U.S. tranche of the offering. Due to FINRA Rule 2040, the unaffiliated registered broker-dealer cannot share the fees it receives with the crowdfunding platform, but the crowdfunding platform can share the fees it receives in connection with the non-U.S. tranche of the offering with the unaffiliated registered broker-dealer.

A crowdfunding platform can sidestep the issue of broker-dealer registration entirely if the unaffiliated registered broker-dealer offers securities on its own website and the crowdfunding platform does not involve itself in any way with offers or sales made to investors located in the United States. In this case, the crowdfunding platform would not be engaged in the business of effecting transactions in securities for the account of others and therefore would not be acting as a broker. Alternatively, if the crowdfunding platform uses its own website to promote an offering that is intermediated by an unaffiliated registered broker-dealer and intended for investors located in the United States, then the crowdfunding platform will need to comply with Section 4(b) of the Securities Act or otherwise operate in a manner consistent with the AngelList and FundersClub no-action letters. In particular, although the unaffiliated registered broker-dealer intermediary could collect transaction-related compensation and hold customer funds and securities, the crowdfunding platform itself could not engage in these activities. The crowdfunding platform would need to work closely with the unaffiliated registered broker-dealer to ensure the transaction is conducted in compliance with the SEC and FINRA rules to which the unaffiliated registered broker-dealer is subject.

Broker-dealer Structure

In a broker-dealer structure, the crowdfunding platform would need to purchase or establish a U.S. broker-dealer affiliate that is registered as a broker-dealer with the SEC and conduct offerings in



compliance with the SEC and FINRA rules applicable to registered broker-dealers. Most crowdfunding platforms will want to opt for the investment fund structure or the inter-syndicate structure due to the cost and regulatory burden associated with broker-dealer registration.

Whether a crowdfunding platform choses to purchase a broker-dealer or establish its own broker-dealer, the crowdfunding platform would be subject to regulations pertaining to insider trading, net capital requirements, supervisory responsibilities, books and records, advertising, and extensive reporting obligations.

If a crowdfunding platform wishes to establish its own broker-dealer, it will need to complete an application process that includes a business plan, financial statements, posting a surety bond, and establishing written supervisory procedures, an AML program, and privacy policies. In addition, personnel located in the United States will need to qualify for and pass an examination and the crowdfunding platform will need to register as a broker-dealer in each state in which it offers securities.

Investment Advisers Act

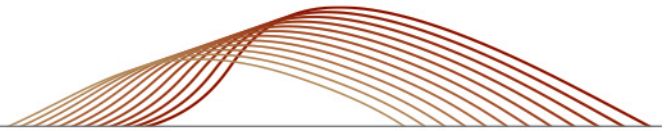
An investment adviser is defined in the Investment Advisers Act in relevant part as any person or firm that for compensation is engaged in the business of providing securities advice to others. Due to its advisory role, an investment crowdfunding platform operator that operates with the investment fund structure may be deemed to be acting as an investment adviser under the Investment Advisers Act. A crowdfunding platform may be treated as an exempt reporting adviser if it either (i) advises only private funds and has less than $150 million of total "assets under management in the United States" as calculated under Investment Advisers Act Rule 203(m)-1,[7] or (ii) advises only venture capital funds (regardless of the amount of assets managed but subject to various conditions imposed by rule). Exempt reporting advisers are subject to less regulation than registered investment advisers. Given that an investment fund sponsored by a crowdfunding platform operator most likely invests in Investment Advisers Act Rule 203(l)-1 qualifying non-public portfolio company equity investments, the crowdfunding platform operator would typically operate as an exempt reporting adviser to "venture capital funds."[8] An exempt reporting adviser relying on the venture capital adviser exemption is required to file annually with the SEC a report on Form ADV and is subject to examination, but is not subject to the more extensive regulatory requirements that are imposed on registered investment advisors under the Investment Advisers Act. An investment adviser must also generally register with the state securities regulator of any state in which it has both a place of business and more than five clients.

Investment Company Act

The Investment Company Act of 1940, as amended (the "Investment Company Act") imposes a strict regulatory regime on investment companies that are required to register under the Investment Company Act.

Investment Fund Structure

The investment fund structure directly implicates the Investment Company Act. Each investment fund should be structured as a private fund that benefits from the exclusions from the definition of "investment company" provided under Section 3(c)(1) or 3(c)(7) of the Investment Company Act. Most crowdfunding platforms that use the investment fund structure will want to rely on the exemption provided by Section 3(c)(1) of the Investment Company Act, which excludes from the definition of "investment company" any non-U.S. investment fund with no more than 100 U.S.



resident investors and that does not engage in a "public offering" in the United States.[9] Controlling the number of U.S. resident beneficial owners should be relatively straightforward for privately-held investment funds, where transfers of securities can easily be monitored and restricted. Alternatively, a crowdfunding platform could rely on the exemption provided by Section 3(c)(7) of the Investment Company Act, which excludes from the definition of "investment company" any fund that limits its U.S. resident investors exclusively to "qualified purchasers" and does not engage in a "public offering" in the United States.[10] A "qualified purchaser" is defined as an individual, married couple, family business or family trust with qualified investments in excess of $5,000,000 or a business entity with qualified investments in excess of $25,000,000.

Although Sections 3(c)(1) and 3(c)(7) both preclude an issuer relying on these exclusions from making a public offering of its securities, the SEC has confirmed that private funds that engage in general solicitation and advertising in accordance with Rule 506(c) can rely on the exclusions afforded by Sections 3(c)(1) and 3(c)(7). A foreign investment fund undertaking a non-public offering to U.S. residents in reliance on either Section 3(c)(1) or Section 3(c)(7) may also simultaneously engage in a public offering outside of the United States, and may have an unlimited number of investors outside of the United States.

Inter-syndicate and Broker-dealer Structures

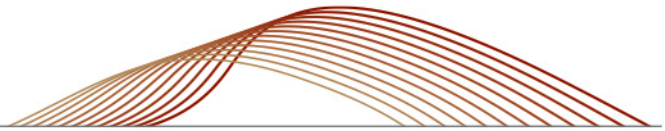
Under the inter-syndicate and broker-dealer structures, investments by investors are made directly in the issuer rather than indirectly through an investment fund. Accordingly, the Investment Company Act would be implicated in these structures only if the issuer itself were an investment company required to register under the Investment Company Act. Although an Investment Company Act analysis should be made when necessary, most crowdfunding platforms facilitate investment in issuers that operate or plan to operate businesses that involve the commercialization of products and services as opposed to making investments in securities and therefore generally will not be investment companies that are required to register under the Investment Company Act.

United States Tax Considerations

The tax laws of the United States affect each of the crowdfunding offering structures described herein. Due to certain adverse U.S. tax consequences, U.S. investors may be concerned with an investment in a non-U.S. investment fund or a non-U.S. start-up company where there is a risk that such fund or company will be classified as a passive foreign investment company ("PFIC") or a controlled foreign corporation ("CFC"). Crowdfunding platforms should understand and mitigate these risks to the extent possible.

Passive Foreign Investment Company

A non-U.S. investment fund or issuer, such as a start-up company, will be treated as a PFIC if such non-U.S. entity is classified as a corporation for U.S. federal tax purposes and holds significant passive assets or generates significant passive income ("income and asset tests"). If the investment fund is classified as a partnership for U.S. federal tax purposes, the fund itself would not be a PFIC. A start-up company classified as a corporation for U.S. federal tax purposes, which is involved in an apparently active business, such as the commercialization of products or services, as opposed to making passive investments, may nevertheless be classified as a PFIC if it holds a large amount of cash relative to other assets in the early years of operation. A U.S. investor who directly or indirectly (*e.g.*, as a partner in the investment fund) holds stock in a PFIC is required to pay, as additional tax, an interest charge on the deemed deferred tax liability on any distributions made, or gain recognized, with



respect to such stock. The options for avoiding or minimizing PFIC issues under each crowdfunding offering structure are as follows:

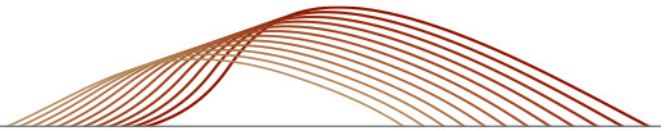
- **Investment fund structure**. Either (i)(a) the investment fund is treated as a corporation for U.S. federal tax purposes and holds 25% or more of the issuer and the issuer's activities are structured to satisfy the income and asset tests and thereby avoid PFIC classification or (b) the investment fund is treated as a partnership for U.S. federal tax purposes and the issuer's activities are structured to satisfy the income and asset tests and thereby avoid PFIC classification or (ii) the investment fund and issuer either (a) make qualified electing fund ("QEF") elections so that their income is treated on a pass-through basis or (b) "check-the-box" so that they are both treated as pass-through entities for U.S. federal tax purposes.

- **Inter-syndicate and broker-dealer structures**. Either (i) the issuer's activities are structured to satisfy the income and asset tests and thereby avoid PFIC classification or (ii) the issuer either (a) makes a QEF election so that its income is treated on a pass-through basis or (b) "checks-the-box" so that it is treated as a pass-through entity for U.S. federal tax purposes.

The check-the-box option contained in clause (ii)(b) is likely the preferred choice with respect to addressing PFIC concerns. By checking the box, the investment fund and/or issuer would be treated as a pass-through entity classified as a partnership for U.S. federal taxation purposes. Checking the box to be classified as a partnership should not affect the tax status of the entity under any jurisdiction outside the United States and should not generally by itself result in any U.S. tax or tax filing obligation. It should be noted that an entity classified as a partnership that is publicly traded will be treated as a corporation for U.S. federal income tax purposes regardless of a check-the-box election.[11] The option which avoids PFIC classification on the basis of the income and asset tests contained in clause (i) would depend on the nature of the issuer's financial assets and the development of its technology and business. Ultimately, even though smaller accounting firms can typically provide a start-up company with simple financial statements containing a yearly PFIC determination at low cost, whether the income and asset tests can be satisfied each year may not be within the control of the issuer, and even if in the issuer's control, actions to satisfy such tests may not be commercially desirable. The QEF election option contained in clause (ii)(a) would require the investment fund and/or the issuer to calculate the income attributable to U.S. investors each year. The administrative burden associated with the necessary calculation could be significant because the calculation would need to be made according to U.S. tax rules.

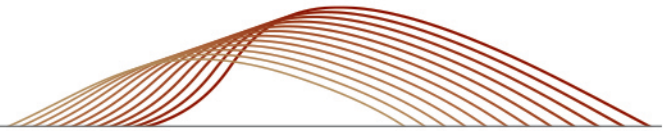
Controlled Foreign Corporation

A non-U.S. corporation will be a CFC if more than 50% of the shares of the corporation, by vote or value, are held by U.S. Shareholders. A "U.S. Shareholder" is a U.S. person who owns directly or indirectly 10% or more of the voting stock of the corporation. An investment fund classified as a partnership for U.S. federal tax purposes is not subject to CFC classification, but a U.S. investor in such fund would be treated as a U.S. Shareholder of the issuer if, on a look-through basis, it owned 10% or more of the voting stock of the issuer. A U.S. Shareholder of a CFC must include in its income a share of the CFC's Subpart F income (*i.e.*, passive income such as dividends and interest) for the taxable year. The consequences of CFC status can be avoided by either (i) limiting each U.S. investor to an interest of less than 10% in the issuer or (ii) limiting U.S. investors' ownership such that five or fewer U.S. investors do not own interests of more than 50% in the issuer.



Summary

	Investment fund structure	Inter-syndicate structure	Broker-dealer structure
Offering to investors located outside the United States	Regulation S–Category I	Regulation S–Category I	Regulation S–Category I
Exemption from registration under the Securities Act	Regulation D–Rule 506(c)	Regulation D–Rule 506(c)	Regulation D–Rule 506(c)
Shareholder limit for Exchange Act registration purposes for each fund or issuer with assets exceeding $10,000,000	300 U.S. resident holders and either (i) 2,000 holders worldwide or (ii) 500 holders who are not accredited investors worldwide	300 U.S. resident holders and either (i) 2,000 holders worldwide or (ii) 500 holders who are not accredited investors worldwide	300 U.S. resident holders and either (i) 2,000 holders worldwide or (ii) 500 holders who are not accredited investors worldwide
Broker-dealer registration	Exempt under Section 4(b) of the Securities Act; see also FundersClub and AngelList no-action letters	Either exempt under Section 4(b) of the Securities Act or not a broker subject to the Securities Act	Registered broker-dealer
Investment Advisers Act	Either (i) register as an investment adviser or (ii) file as an exempt reporting adviser if the crowdfunding platform either (a) advises only private funds and has less than $150 million under management or (b) advises only venture capital funds	Not applicable	Not applicable
Investment Company Act	Investment fund to qualify for either 3(c)(1) exemption (not over 100 U.S. resident investors and no public offering in the United States) or 3(c)(7) exemption (investors only qualified purchasers and no public offering in the United States)	Issuer cannot be an investment company that is required to register under the Investment Company Act	Issuer cannot be an investment company that is required to register under the Investment Company Act



Passive foreign investment company	Either (i) the investment fund holds 25% or more of the issuer and the issuer is not a PFIC or (ii) the investment fund and issuer either (a) make QEF elections or (b) “check the box” for treatment as pass-through entities	Either (i) the issuer is not a PFIC or (ii) the issuer either (a) makes a QEF election or (b) “checks the box” for treatment as a pass-through entity	Either (i) the issuer is not a PFIC or (ii) the issuer either (a) makes a QEF election or (b) “checks the box” for treatment as a pass-through entity
Controlled foreign corporation	Either (i) limit each U.S. investor to an interest of less than 10% in the investment fund or (ii) limit ownership such that five or fewer U.S. investors do not own interests of more than 50% in the investment fund	Either (i) limit each U.S. investor to an interest of less than 10% in the issuer or (ii) limit ownership such that five or fewer U.S. investors do not own interests of more than 50% in the issuer	Either (i) limit each U.S. investor to an interest of less than 10% in the issuer or (ii) limit ownership such that five or fewer U.S. investors do not own interests of more than 50% in the issuer

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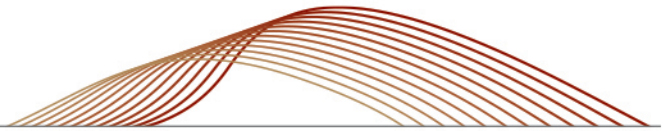

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[1] An "accredited investor" is defined in Rule 501 of Regulation D and generally includes: (a) a bank or savings and loan association, a registered broker or dealer, insurance company, registered investment company, business development company, or small business investment company; (b) an employee benefit plan, within the meaning of the Employee Retirement Income Security Act, if the investment decisions are made by a plan fiduciary or if the plan has total assets in excess of $5 million; (c) a charitable organization, corporation, or partnership with assets exceeding $5 million; (d) a director, executive officer, or general partner of the issuer (or a director, officer, or general partner of a general partner of that issuer); (e) any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1 million (not including a primary residence); (f) any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year; (g) any trust, with total assets in excess of $5 million, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person; and (h) any entity in which all of the equity owners are accredited investors.

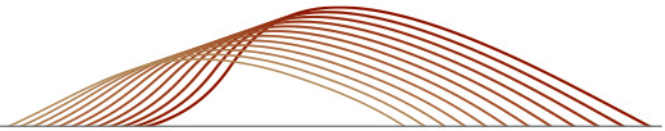
[2] *See Fair Investment Opportunities for Professional Experts Act*, H.R. 2187, 114th Cong. (February 2, 2016), *available at* https://www.congress.gov/bill/114th-congress/house-bill/2187/text; SEC Investor Advisory Committee, *Accredited Investor Definition Recommendation* (October 19, 2014), *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-advisor-accredited-definition.pdf; and U.S. Government Accountability Office, *Alternative Criteria for Qualifying as an Accredited Investor Should Be Considered* (July 18, 2013), *available at* http://www.gao.gov/assets/660/655963.pdf.

[3] *Net Worth Standard for Accredited Investors*, SEC Release No. 33-9177 (January 25, 2011), *available at* http://www.sec.gov/rules/proposed/2011/33-9177.pdf; *Net Worth Standard for Accredited Investors*, SEC Release No. 33-9287 (December 21, 2011), *available at* http://www.sec.gov/rules/final/2011/33-9287.pdf.

[4] *See Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore*, SEC Release No. 33-7516 (March 23, 1998), *available at* https://www.gpo.gov/fdsys/pkg/FR-1998-03-27/pdf/98-8001.pdf.

[5] As discussed under "Limitation on Number of Investors" below, an issuer that seeks to avoid SEC public reporting obligations would as a practical matter be limited to selling its securities to no more than 1,999 accredited investors.

[6] See SEC No-Action Letters of *AngelList LLC* (March 28, 2013), *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2013/angellist-15a1.pdf, and *FundersClub Inc.* (March 26, 2013), *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2013/funders-club-032613-15a1.pdf.



[7] Under Rule 203(m)-1, all of the private fund assets of an adviser with a principal office and place of business in the United States are considered to be "assets under management in the United States" even if the adviser has offices outside of the United States. Otherwise the $150 million threshold is calculated by counting all of the private fund assets managed by the adviser at a "place of business" in the United States. A place of business is any office where the adviser "regularly provides advisory services, solicits, meets with, or otherwise communicates with clients," and "any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients." The executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser is considered its principal office and place of business. Thus, it is likely that a non-U.S. crowdfunding platform operator that employs the investment fund structure would not maintain a principal office and place of business in the United States. Whether or not a non-U.S. crowdfunding platform operator's U.S. activities or arrangements might result in such platform operator having a "place of business" in the United States will depend on the facts and circumstances of the U.S. operations. The primary focus of the analysis is whether the platform operator manages assets or has "assets under management" at a U.S. place of business.

[8] To qualify as a "venture capital fund," a fund must be a "private fund" that:

1. represents to investors that the fund pursues a venture capital strategy;
2. does not provide investors with redemption rights;
3. holds no more than 20% of its assets in non-"qualifying investments" (excluding cash and certain short-term holdings); and
4. does not borrow (or otherwise incur leverage) of more than 15% of the fund's assets, and then only on a short-term basis (*i.e.*, for no more than 120 days).

"Qualifying investment" generally means directly acquired investments in equity securities of private companies (generally, companies that at the time of investment have not made a public offering) that do not incur leverage or borrow in connection with the venture capital fund investment and distribute proceeds of such borrowing to the fund (i.e., have not been acquired in a leveraged buy-out transaction).A "private fund" is an issuer of securities that would be an investment company "but for" the exceptions provided for in Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended.

[9] *See* SEC No-Action Letter, *Touche Remnant & Co.* (August 27, 1984).

[10] *See* SEC No-Action Letter, *Goodwin, Procter & Hoar* (February 28, 1997).

[11] A partnership is considered "publicly traded" if (a) its interests are traded on an established securities market (*e.g.*, a foreign stock exchange) or (b) its interests are readily tradable on a secondary market, subject to exceptions. Interests in an investment fund are typically subject to transfer provisions that require consent and impose other restrictions on transfer. As a practical matter, if an investment fund sponsored by a crowdfunding investment platform imposes such transfer restrictions, it is unlikely that it will be treated as a publicly traded partnership. Similarly, most start-up companies typically impose transfer restrictions that prevent the ready trading of their securities, which would likely prevent their treatment as publicly traded partnerships.