

## SEC Adopts Final Regulation A+ Rules

March 30, 2015

On March 25, 2015, the SEC adopted [amendments to Regulation A](#), a Securities Act exemption for offerings by nonpublic US and Canadian companies. The final rules (colloquially called “Regulation A+”) enable companies to offer and sell up to \$50 million of securities in a rolling 12-month period in public offerings without complying with the normal registration requirements of the Securities Act. The rules, which are required by the JOBS Act of 2012, are one piece of Congress’s efforts to facilitate capital-raising by smaller companies.

As adopted, Regulation A+ will offer some nonpublic companies a middle way between remaining private and going public. The final rules provide for two tiers of offerings:

- **Tier 1** offerings of up to \$20 million in a rolling 12-month period, of which no more than \$6 million may be sold by affiliated shareholders.
- **Tier 2** offerings of up to \$50 million in a rolling 12-month period, of which no more than \$15 million may be sold by affiliated shareholders.

A company issuing up to \$20 million of securities can elect to do so under Tier 1 or Tier 2.

We discussed the substantive Regulation A+ requirements originally proposed by the SEC in our [January 2014 client memorandum](#). There are several differences between the proposed rules and the final rules adopted by the SEC last week. Most notably, the final rules:

- Increase the ceiling for Tier 1 offerings from the proposed \$5 million to \$20 million.
- Impose a limit on the amount of securities that shareholders (including non-affiliates) can sell at the time of the issuer’s first Regulation A offering, or any subsequent Regulation A offering within the following 12 months, to no more than 30% of the particular offering. After this 12-month period, secondary sales by non-affiliates are not limited except by the Tier’s maximum offering amount.
- Provide an exemption for securities issued in a Tier 2 offering from the registration requirements of Section 12(g) of the Exchange Act as long as the issuer hires a registered transfer agent, remains subject to and current in its Tier 2 periodic reporting obligations, and had a public float of less than \$75 million as of its most recently completed semiannual period (or for an issuer without a public float, annual revenues of less than \$50 million as of its most recently completed fiscal year). Without this exemption, Section 12(g) would otherwise require the issuer to comply with public company reporting obligations once a class of equity securities is held of record by more than 500 holders who are not accredited investors or who did not receive the securities under a compensation plan. An issuer that exceeds both the exemption’s public float or revenue threshold and Section 12(g)’s 500 holders threshold would be granted a two-year transition period before being required to register its securities under Section 12(g).
- Permit an issuer’s financial statements to be audited in accordance with either U.S. generally accepted auditing standards or the standards of the PCAOB.
- Permit an issuer conducting a Tier 2 offering to list the securities on a national securities exchange by using a Form 8-A registration statement concurrently with qualification of the Regulation A offering statement. However, an issuer that elects this approach must provide disclosure in the Regulation A offering statement that follows Part 1 of Form S-1 (except for financial statement and selected financial information requirements) and include financial

statements that are audited in accordance with, and by an accounting firm that is registered with, the PCAOB. Thereafter, the issuer will be subject to Exchange Act reporting obligations.

The factors that companies considering a Regulation A+ offering should weigh will vary depending on whether the offering will be Tier 1 or Tier 2. Although the \$20 million ceiling adopted by the SEC may make Tier 1 offerings a more attractive option than under the originally proposed \$5 million ceiling, Tier 1 offerings continue to have significant drawbacks. State securities or “Blue Sky” registration requirements are not preempted for Tier 1 offerings. Accordingly, Tier 1 offerings will be subject to both federal and state registration and qualification requirements. In contrast, Blue Sky requirements for Tier 2 offerings are preempted. While the SEC notes that companies conducting a Tier 1 offering may take advantage of a coordinated review program developed by the North American Securities Administrators Association (NASAA) that aims to reduce Blue Sky compliance burdens on Regulation A issuers, the ability of NASAA to achieve the program’s goals remains to be seen. In addition, a secondary trading market is not expected to develop for Tier 1 securities.

Companies considering a Tier 2 offering should note that requirements apply beyond those for Tier 1 offerings. The amount of securities that a non-accredited investor can purchase in a Tier 2 offering is limited to no more than 10% of the greater of the investor’s annual income or net worth unless the securities are listed on a national securities exchange. In addition, companies that conduct Tier 2 offerings are required to provide audited financial statements in the offering statement. Companies that conduct Tier 2 offerings are also subject to ongoing disclosure requirements, including filing annual, semiannual and current reports with the SEC via EDGAR. These ongoing reporting requirements are not as comprehensive as those imposed on public companies, though they are not imposed on companies engaging in Regulation D, Rule 144A or other traditional private placements (except where ongoing obligations are required by contract). Given the investor investment limitations and the disclosure obligations imposed on companies that conduct Tier 2 offerings, which are only somewhat less onerous than ordinary public company reporting requirements, time will tell whether Tier 2 offerings will prove popular.

The final rules are expected to go into effect by early June at the latest.

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