



Securities Law ALERT ■

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Q & A+: The SEC Offers New Route to Capital

At an open meeting on March 25, 2015, the Securities and Exchange Commission (SEC) adopted final rules (Regulation A+) to facilitate smaller companies' access to capital. Regulation A+ exempts certain companies offering up to \$50 million in securities within a 12-month period from the registration requirements of the Securities Act of 1933.¹

How did the previous Regulation A work?

The SEC previously created an exemption (Regulation A) from the registration requirements of the Securities Act permitting unregistered public offerings of up to \$5 million of securities in any 12-month period, including no more than \$1.5 million of securities offered by existing security holders of the issuer. However, Regulation A required that a Form 1-A offering statement be filed with the SEC and prescribed the contents of that offering statement; in addition, Regulation A offerings were still subject to oversight by state securities regulators. Thus, use of Regulation A was relatively rare.

Since Regulation A was an exemption from Securities Act registration, securities issued under it after filing the Form 1-A offering statement were known as having been issued in a "qualified" rather than "registered" offering.

How does Regulation A+ change things?

The final rule for Regulation A+ provides for two types of offerings that are exempt under the Securities Act:

- Offerings for up to \$20 million in securities in a 12-month period, with not more than \$6 million in offers by existing security holders that are affiliates of the issuer (a "Tier 1 Offering").
- Offerings for up to \$50 million in securities in a 12-month period, with not more than \$15 million in offers by existing security holders that are affiliates of the issuer (a "Tier 2 Offering").

¹ Final Rule: <http://www.sec.gov/rules/final/2015/33-9741.pdf>; SEC Press Release: <http://www.sec.gov/news/pressrelease/2015-49.html>. The final rule amends previous rules and forms relating to the offer and sale of securities under Section 3(b) of the Securities Act. Regulation A+ implements Section 401 of the Jumpstart Our Business Startups Act of 2010 (the "JOBS Act") which amended Section 3(b) of the Securities Act to require the SEC to adopt rules exempting certain companies offering up to \$50 million in securities within a 12-month period from the registration requirements of the Securities Act.

Sales by all selling security holders in Tier 1 and Tier 2 Offerings are limited to no more than 30 percent of the offering.

The most notable differences between the two types of Regulation A+ offerings are:

- Issuers that engage in Tier 2 Offerings are subject to additional ongoing reporting obligations.
- Purchasers in Tier 2 Offerings are subject to higher suitability standards or investment limitations.
- Tier 2 Offerings are federally pre-empted from oversight by state securities regulators.

What issuers are permitted to use Regulation A+?

Regulation A+ is limited to companies organized in and with their principal place of business in the United States or Canada. Regulation A+ is not available to companies that:

- Are already SEC reporting companies and certain investment companies.
- Have no specific business plan or purpose or have indicated their business plan is to engage in a merger or acquisition with an unidentified company.
- Are seeking to offer and sell asset-backed securities or fractional undivided interests in oil, gas or other mineral rights.
- Have been subject to any order of the SEC under Section 12(j) of the Securities Exchange Act of 1934 (suspension or revocation of securities registration) entered within the past five years.
- Have not filed ongoing reports required by the rules during the preceding two years.
- Are disqualified under the “bad actor” disqualification rules.

Are Tier 1 Offerings still subject to state securities review?

Yes. Only offerings of securities sold to “qualified purchasers” are pre-empted from state securities law requirements. A “qualified purchaser” is defined as any person to whom securities are offered and sold in a Tier 2 Offering.

Are there limitations on how much a Tier 1 purchaser or Tier 2 purchaser may invest?

There are no limitations on how much a purchaser may invest in a Tier 1 Offering. However, Regulation A+ imposes a limitation on the amount of securities non-accredited investors in Tier 2 Offerings can purchase of no more than 10 percent of the greater of the investor’s annual income or net worth. This limitation does not apply if the securities will be listed on a national securities exchange upon qualification.

What are the Tier 1 reporting requirements?

Issuers conducting Tier 1 Offerings are required to provide information about sales in such offerings and to update certain issuer information by electronically filing a new form (a Form 1-Z exit report) with the SEC not later than 30 calendar days after termination or completion of an offering.

What are the additional reporting requirements for Tier 2 issuers?

Issuers that conduct Tier 2 Offerings are required to do the following:

- File annual reports on Form 1-K, semiannual reports on Form 1-SA and current event reports on Form 1-U.
- Provide audited financial statements in a Form 1-A offering statement and annual reports.
- File a special financial report to cover financial periods between the most recent period included in a qualified Form 1-A offering statement and the issuer's first required reporting period.
- Include information about sales in the terminated or completed offering and to update certain issuer information in their first annual report after termination or completion of a qualified offering, or in their Form 1-Z exit report.

Are Tier 1 or Tier 2 issuers subject to registration and reporting under the Exchange Act?

No. Issuers that engage in Tier 1 Offerings are not required to register or file reports under the Exchange Act as a result of such offering.

Issuers that engage in Tier 2 Offerings are exempt from registration under Section 12(g) of the Exchange Act so long as the issuer:

- Engages the services of a transfer agent registered under the Exchange Act.
- Remains subject to Tier 2 reporting obligations.
- Is current in its annual and semiannual reporting at fiscal year-end.
- Had a public float of less than \$75 million as of the last business day of its most recently completed fiscal year or, if the issuer has no public float, had less than \$50 million of revenues as of its most recently completed fiscal year.

Regulation A+ also permits a Tier 2 issuer to register a class of securities under Section 12(g) or 12(b) of the Exchange Act by using a Form 8-A short form registration statement concurrently with the qualification of a Regulation A offering statement. The offering statement, however, must include the narrative disclosure that follows Part I of Form S-1 or Form S-11.

Are issuers permitted to test the waters before conducting an offering to determine investor interest?

Yes. Regulation A+ permits issuers to test the waters with, or solicit interest in a potential offering from, the general public either before or after the filing of the Form 1-A offering statement, provided any solicitation materials used after publicly filing the Form 1-A offering statement are preceded or accompanied by a preliminary offering circular contained in the Form 1-A offering statement (analogous to a prospectus in a registration statement) or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained.

How do the content requirements of the new Form 1-A offering statement differ from the previous Form 1-A offering statement under the previous Regulation A exemption?

Regulation A+ changes the Form 1-A offering statement by:

- Requiring issuers to file Form 1-A offering statements with the SEC electronically on EDGAR.
- Permitting the nonpublic submission of Form 1-A offering statements and amendments for review by SEC staff before filing such documents with the SEC, so long as all such documents are publicly filed not later than 21 calendar days before qualification.
- Eliminating the Q&A disclosure format under Part II of the Form 1-A offering statement.
- Updating and clarifying the Model B (narrative) disclosure format under Part II of the Form 1-A offering statement while continuing to permit Part I of the Form S-1 narrative disclosure as an alternative.
- Permitting real estate investment trusts and similarly eligible companies to provide the narrative disclosure required by Part I of the Form S-11 in Part II of the Form 1-A offering statement.
- Requiring that all Form 1-A offering statements be qualified by the SEC before sales may be made.
- Requiring Tier 1 and Tier 2 issuers to file balance sheets and related financial statements for the previous two fiscal year-ends (or for such shorter time that they may have been in existence).
- Requiring Tier 2 issuers to include audited financial statements in their offering circulars that are audited in accordance with U.S. generally accepted auditing standards or the standards of the Public Company Accounting Oversight Board.
- Requiring Tier 1 and Tier 2 issuers to include financial statements in Form 1-A offering statements that are dated not more than nine months before the date of nonpublic submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months. If interim financial statements are required, they must cover a period of at least six months.

Will the SEC revisit or alter the Regulation A+ exemption?

The SEC is required to review the Tier 2 Offering limitations every two years and intends to review the Tier 1 Offering limitation at the same time. The SEC staff is also required to undertake and submit a report to the SEC, no later than five years following the adoption of the exemption, on the impact of Tier 1 and Tier 2 Offerings on capital formation and investor protection. Based on this report, the SEC may propose to either decrease or increase the offering limits for Tier 1 Offerings.

When does the Regulation A+ exemption take effect?

Regulation A+ becomes effective 60 days after publication in the *Federal Register*.

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