

## SEC ADOPTS REGULATION A AMENDMENT TO FACILITATE SMALLER COMPANIES' ACCESS TO CAPITAL

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On March 25, 2015, the SEC adopted amendments to Regulation A and other rules and forms to implement Section 401 of the Jumpstart Our Business Startups Act. (Click [here](#) for the SEC's final rules adopting release.) The new version of the rules, commonly referred to as Regulation A+, seeks to modernize and expand the relatively rarely used former Regulation A, which provided a longstanding registration exemption to permit an unregistered public offering of up to \$5 million of securities in any 12-month period, including no more than \$1.5 million of securities offered by security-holders of the company. Companies interested in raising capital in a manner short of a full-blown IPO may find the new Regulation A+ rules attractive because:

- unlike old Regulation A, a Tier 2 offering can be as large as \$50 million (as opposed to the old \$5 million limit) and is not subject to state securities law qualifications; and
- unlike a Rule 506 offering, in a Tier 2 offering there is no limit on the number of non-accredited investors (provided a non-accredited investor invests no more than 10 percent of income or net worth) and the securities are not restricted on resale.

### SCOPE OF AMENDED REGULATION A

The final rules provide an issuer a choice between two tiers in offering securities under amended Regulation A:

- *Tier 1*: will be available for offerings of up to \$20 million in a 12-month period, including up to \$6 million on behalf of selling security-holders that are affiliates of the issuer; or
- *Tier 2*: will be available for offerings of up to \$50 million in a 12-month period, including up to \$15 million on behalf of selling security-holders that are affiliates of the issuer.

Under the final rules, an issuer can elect to proceed under either Tier 1 or Tier 2 for offerings of up to \$20 million.

In addition to the selling security-holders limitation described above, the final rules further restrict sales by all selling security-holders to no more than 30 percent of a particular offering in the issuer's initial offering and subsequent offerings for the first 12 months following the initial offering.

### REQUIREMENTS TO CONDUCT AN OFFERING UNDER AMENDED REGULATION A

An issuer that conducts an offering under either Tier 1 or Tier 2 will be subject to basic requirements as previously set forth under the former version of Regulation A, including eligibility, disclosure, and other matters. In addition, an issuer under either tier can submit draft offering statements for a confidential, non-public review by the SEC before filing. Further, the amendment permits an issuer to "test the waters" before or after the filing of the offering statement so long as any solicitation materials used after the filing of the offering statement are sent prior to or in conjunction with the offering circular or contain a notice directing potential investors where the offering circular can be obtained. The final

rules require the electronic filing of offering materials and otherwise generally align amended Regulation A with current practices for registered offerings.

In addition to these basic requirements, a Tier 2 issuer is subject to further obligations, including (i) the inclusion of two years of audited financial statements in its offering circular, (ii) the filing of annual, semiannual, and current event reports, and (iii) limiting sales to either accredited investors (as defined by Rule 501(a) of Regulation D) or persons who limit their investment amount to no more than 10 percent of the greater of their annual income or net worth (for natural persons) or 10 percent of the greater of their annual revenue or net assets at fiscal year-end (for non-natural persons). An issuer is required to make a non-accredited investor aware of the investment limitations, but is otherwise permitted to rely on a non-accredited investor's representation of compliance with the investment limitation unless the issuer knew, at the time of the sale, that such representation was untrue.

The final rules also exempt a Tier 2 issuer from the registration requirements under Section 12(g) of the Exchange Act if the issuer (i) engages a transfer agent registered with the SEC, (ii) remains subject to Tier 2 reporting obligations, (iii) is current in its annual and semiannual reporting at fiscal year-end, and (iv) has a public float of less than \$75 million as of the last business day of its most recently completed semiannual period or, in the absence of a public float, had annual revenues of less than \$50 million as of its most recently completed fiscal year.

#### **ELIGIBILITY**

The amended Regulation A exception is available to companies that are organized in and have their principal place of business within the United States or Canada. The exemption, however, is not available to companies that:

- are already SEC reporting companies under the Exchange Act or companies required to be registered under the Investment Company Act;
- do not have a specific business plan or purpose, or indicate a business plan to engage in a merger or acquisition with an unidentified company;
- seek to offer and sell asset-backed securities or fractional undivided interests in oil, gas, or other mineral rights;
- are subject to, or have been subject to, an SEC order denying, suspending, or revoking the registration of a class of securities under Section 12(j) of the Exchange Act within five years before the filing of the offering statement;
- have not filed ongoing reports required by the final rules of amended Regulation A during the preceding two years; or
- are disqualified under the "bad actor" disqualification rules.

#### **PREEMPTION OF BLUE SKY LAWS**

The final rules for amended Regulation A preempt the registration and qualification requirements of state blue sky laws under a Tier 2 offering; however, the final rules do not provide such an exemption under a Tier 1 offering. Therefore, a Tier 1 issuer remains subject to blue sky laws regarding registration and qualification in each state the issuer offers or sells its securities.

The final rules become effective 60 days after publication in the *Federal Register*, which we expect will be in mid-June 2015.

**ADDITIONAL INFORMATION**

Our Securities and Capital Markets attorneys will be pleased to meet with you to discuss the impact of the rules. Please contact your attorney at Tucker Ellis or any of the following attorneys.

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