

Publications

Securities Alert: SEC Amends Regulation A Exemption to apply to Offerings of up to \$50 Million of Securities Annually

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On March 25, 2015, the Securities and Exchange Commission (SEC) adopted amendments to Regulation A, which provides an exemption from the registration requirements of the Securities Act of 1933 (Securities Act) for smaller securities offerings by private (non-SEC reporting) companies.

Historically, issuers have relied on the existing Regulation A exemption relatively infrequently because of, among other things, certain disclosure requirements that were viewed as onerous, a requirement that Regulation A offerings must still comply with state securities laws, and the low dollar threshold for Regulation A offerings (\$5 million) relative to the fixed costs of conducting an offering. In an attempt to address these concerns, Title IV of the Jumpstart Our Business Startups Act (JOBS Act) authorized the SEC to promulgate regulations creating an exemption substantially similar to existing Regulation A for offerings of up to \$50 million of securities within a 12-month period. The amendments to Regulation A represent the SEC's adoption of final regulations under that delegated authority.

Overview of the Amendments

The amendments establish two “tiers” of securities offerings that issuers may elect to use, each with differing dollar limits, disclosure requirements and other requirements and limitations. In a Tier 1 offering, an issuer may offer up to \$20 million of securities within a 12-month period, including up to \$6 million on behalf of selling shareholders who are affiliates of the issuer. In a Tier 2 offering, an issuer may offer up to \$50 million of securities in a 12-month period, including up to \$15 million on behalf of selling shareholders who are affiliates of the issuer. The amount of securities sold by affiliate selling shareholders in the initial Regulation A offering and any subsequently qualified Regulation A offering within the first 12-month period following the date of qualification of the issuer's initial Regulation A offering may not exceed 30% of the aggregate offering price.

The amendments also modernize the framework for conducting offerings under Regulation A by, among other things:

- requiring that disclosure documents be filed on the SEC's online filing portal (EDGAR);
- allowing an issuer to submit its offering statement and amendments to the SEC for confidential review, provided that all such documents are publicly filed no later than 21 calendar days before qualification; and
- permitting certain "test-the-waters" communications in which the issuer may gauge the interest of the general public prior to filing an offering statement.

Only equity securities may be offered under Regulation A as amended, including warrants, debt securities and debt securities convertible into or exchangeable into equity interests, as well as any guarantees of such securities. Asset-backed securities are not eligible for offerings in reliance upon the Regulation A exemption.

The amendments permit continuous or delayed offerings, but require issuers in continuous or delayed Tier 2 offerings to be current in their annual and semi-annual reporting obligations in order to do so.

Certain persons are not eligible to avail themselves of Regulation A under the amendments, including, among others, SEC reporting companies, blank check companies, investment companies and certain "bad actors."

Issuer Disclosure Requirements

In connection with a Regulation A offering, issuers in both Tier 1 and Tier 2 offerings must disclose basic information about the issuer and certain financial statements. Issuers must also must file an exit report upon termination or completion of an offering. Issuers in Tier 2 offerings are subject to additional disclosure requirements, including a requirement to disclose audited financial statements.

Issuers and intermediaries are permitted to satisfy their delivery requirements as to the final offering circular in a Regulation A offering under the "access equals delivery" model when sales are made on the basis of offers conducted during the prequalification period and the final offering circular is filed and available on EDGAR.

An issuer in a Tier 2 offering will be subject to an ongoing reporting regime under which it must file annual, semi-annual and current event reports, as well as a special financial report to cover financial periods between the most recent period included in a qualified offering statement and the issuer's first required periodic report. A Tier 2 issuer is permitted to terminate or suspend its ongoing reporting obligations on a basis similar to the provisions for suspension or termination of reporting requirements for filers under the Securities Exchange Act of 1934 (Exchange Act).

Exchange Act Registration

The amendments conditionally exempt securities issued in a Tier 2 offering from the mandatory registration requirements of Section 12(g) of the Exchange Act, for so long as the issuer:

- engages the services of a registered transfer agent;
- remains subject to a Tier 2 reporting obligation;
- is current in its annual and semi-annual reporting at fiscal year-end; and
- had a public float of less than \$75 million as of the last business day of its most recently completed semi-annual 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.

The amendments facilitate the ability of a Tier 2 issuer to voluntarily register a class of Regulation A securities under the Exchange Act. A Tier 2 issuer that includes Part I of the Form S-1 narrative disclosure in the Form 1-A related to the Regulation A offering will be permitted to use a Form 8-A short-form registration statement concurrently with the qualification of the Regulation A offering statement in order to register the securities under Section 12(g) or Section 12(b) of the Exchange Act. This allows an issuer who seeks to list its securities on a national securities exchange to avoid the costs and timing delays which had historically been associated with preparing and filing a separate Exchange Act registration statement on Form 10.

Applicability of State Securities Laws to Regulation A Offerings

Tier 1 offerings will remain subject to state securities laws and pre-sale review by state securities regulators, but may take advantage of the North American Securities Administrators Association (NASAA) coordinated review program. Tier 2 offerings are not subject to state securities law review—a fact that could greatly enhance the appeal of a Tier 2 offering for many issuers. The SEC has indicated that states will continue to have authority to require filing of offering materials and to enforce anti-fraud provisions in connection with a Tier 2 offering.

Limitation on Amount of Investment by Certain Investors

Among other limitations and requirements, Tier 2 offerings will be subject to a limit on the amount of securities that may be purchased by persons and business entities who are not accredited investors. Natural persons who are not accredited investors may purchase no more than 10% of the greater of the person's annual income or net worth. Non-natural persons may purchase no more than 10% of the greater of the person's annual revenue or net assets at fiscal year end. Investors must be notified of the investment limitations. These limitations will not apply, however, to purchases of securities that will be listed on a national securities exchange.

Character of the Securities Sold in Regulation A Offerings

Securities issued in a Regulation A offering are not considered "restricted securities" under Securities Act Rule 144. As a result, sales of securities by persons who are not affiliates of the issuer will not be subject to any Rule 144 transfer restrictions. This creates the opportunity for an active trading market to develop for

the issuer's securities following completion of a Regulation A offering.

Integration of Regulation A Offerings with Other Offerings

Under the amendments, a Regulation A offering will not be integrated with prior offers or sales of securities or with subsequent offers or sales that are made in reliance on certain other exemptions, provided that each exempt offering complies with the requirements for the exemption that is being relied upon for that particular exempt offering. Abandoned offerings have a 30-day cooling off period.

Effective Date

The amendments will be effective 60 days after publication in the Federal Register.

