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Amendments to Regulation A: Expanding Access to Capital

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One of the principal goals of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") was to increase access to capital for smaller companies. To that end, the JOBS Act mandated the adoption of several measures for improving access to capital. These measures included the creation of a new initial public offering process for "emerging growth companies," the removal of the prohibition against general solicitation for private placements under Regulation D, an exemption for crowdfunding transactions and an increase in the size of exempt offerings under Regulation A. The Securities and Exchange Commission ("SEC") previously adopted rules implementing the "emerging growth company" requirements of the JOBS Act and providing for the removal of the ban on general solicitation under Regulation D of the Securities Act of 1933, as amended (the "Securities Act"). The SEC has also issued proposed rules to implement an exemption for crowdfunding transactions. Most recently, on March 25, 2015, the SEC adopted final rules amending Regulation A of the Securities Act.

The amendments to Regulation A, informally referred to as Regulation A+, expand the exemption from registration under Regulation A to cover larger offerings. Prior to the amendment, Regulation A only exempted offerings of up to $5 million by private, non-reporting companies. As a result of the low maximum offering amount, Regulation A offerings have been rare. Regulation A+ attempts to remedy Regulation A's prior unattractiveness by increasing the maximum offering amount. This article summarizes the provisions of Regulation A+ and the framework for the new exemptions.

Expanded Offerings under Regulation A+

Regulation A+ establishes two tiers of exempt offerings:

- *Tier 1*: securities offerings of up to $20 million during a 12-month period, including no more than $6 million by selling securityholders that are affiliates of the issuer; and

- *Tier 2*: securities offerings of up to $50 million during a 12-month period, including no more than $15 million by selling securityholders that are affiliates of the issuer.

The final rules provide for the method of calculating the offering limit, including the manner of calculating the offering price for securities convertible into or exercisable or exchangeable for other securities. With respect to non-affiliated selling securityholders, sales under Regulation A+ must be limited to 30% of the aggregate offering price during the 12-month period following the initial Regulation A+ offering. After such 12-month period, there is no limit on sales by non-affiliated selling securityholders.

While offerings of up to $20 million may be conducted as either Tier 1 or Tier 2 offerings, issuers should consider the advantages and disadvantages of each tier in determining the tier of offering to use. Although Tier 1 offerings have the disadvantage of the lower maximum offering amount of $20 million, Tier 1 offerings have less requirements imposed than Tier 2 offerings. For example, Tier 2 offerings require audited financial statements and compliance with ongoing reporting obligations. On the other hand, Tier 2 offerings have the advantage of preempting state securities law requirements. Tier 1 offerings will be subject to state securities law requirements. Subject to certain conditions, issuers in Tier 2 offerings will also be exempt from the mandatory registration requirements under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In order for such exemption to apply, issuers must retain the services of a registered transfer agent, comply with the reporting requirements imposed on Tier 2 issuers and have a public float of less than $75 million.

Eligibility Requirements

Eligible Issuers
Both the Tier 1 and Tier 2 exemptions under Regulation A+ will be available to companies organized in and with their principal place of business in the United States or Canada. The exemptions will not be available to Exchange Act reporting companies, investment companies registered or required to be registered under the Investment Company Act of 1940 and non-Canadian foreign issuers, among others.

Eligible Securities
The securities that may be issued under the Regulation A+ exemptions consist of equity securities, debt securities and debt securities convertible or exchangeable into equity interests. The SEC's final rules made clear that such securities include warrants and convertible equity securities but exclude asset-backed securities.

Investment Limitations

Tier 1 offerings are not subject to any such investment limitations. The final rules, however, impose investment limitations on investors in Tier 2 offerings. The investment limitations will not apply to "accredited investors" (as defined in Regulation D of the Securities Act) or to the sale of securities that will be listed on a national securities exchange upon qualification. Individuals that are not accredited investors will be permitted to invest up to 10% of the greater of the individual's annual income and net worth. Non-natural persons that are not accredited investors will be permitted to invest up to 10% of the greater of its annual revenues and net assets. Issuers in Tier 2 offerings must notify investors of the investment limitations and may rely on a representation of compliance with such limitation from the investor, but are not required to verify compliance.

Offering Statement and Form 1-A

Issuers relying on Regulation A+ must file with the SEC an offering statement on Form 1-A via EDGAR. The Form 1-A generally will include basic information relating to the issuer, the offering, including financial statements of the issuer, and any exhibits. The offering statement

must be qualified by the SEC before sales commence. The SEC will declare an offering statement qualified by a "notice of qualification," similar to a notice of effectiveness for a registered offering. The final rules permit issuers to confidentially submit the offering statement for review by the SEC. In such a case, as with the confidential registration process available to emerging growth companies, the offering statement must be publicly filed no later than 21 calendar days before qualification.

If a preliminary offering statement is used to make offers, other than by Tier 2 issuers that are already subject to the ongoing Tier 2 reporting obligations described below, issuers and their intermediaries must deliver the preliminary offering statement to the prospective investor at least 48 hours before a sale. For final offering statements, the SEC adopted an "access equals delivery" model for Regulation A+ offering statements. Accordingly, for sales that occur after qualification on the basis of offers made during the pre-qualification period, issuers and intermediaries may satisfy their delivery requirement by filing the final offering statement on EDGAR. Within two business days after a sale, the issuer and intermediaries must provide investors with a copy of the final offering statement or a notice of where the final offering statement may be obtained on EDGAR as well as contact information where investors can request a copy of the final offering statement.

Ongoing Reporting Obligations

Tier 1 issuers are not subject to ongoing reporting obligations. However, Tier 1 issuers must file a Form 1-Z within 30 days of completion or termination of an offering in order to report certain information relating to the offering.

Regulation A+ establishes new ongoing reporting obligations for issuers in Tier 2 offerings. These ongoing reporting obligations include the filing of annual reports, semi-annual reports and current reports. The reports must be filed with the SEC via EDGAR on Form 1-K, Form 1-SA and Form 1-U, respectively. The annual report must include two years of audited financial statements and be filed within 120 days of the issuer's fiscal year end. The semi-annual report must include six-month interim financial statements and be filed within 90 days after the end of the first six months of the issuer's fiscal year. Current reports must be filed upon the occurrence of certain significant events, including a fundamental change in the issuer's business, entry into bankruptcy, non-reliance on previous financial statements and changes in control. The current report must be filed within four days of the triggering event. Tier 2 issuers that are current in their reporting obligations may suspend their ongoing reporting obligations at any time after the of completion of reporting for the fiscal year in which the offering statement was qualified, provided that the securities to which the offering statement relates are held of record by fewer than 300 persons and offers or sales are not ongoing.

The final rules also provide that Tier 2 issuers may file a Form 8-A (a short form registration statement under the Exchange Act) in order to list on a national securities exchange, and register under the Exchange Act, securities offered in a Tier 2 offering. Following filing of a Form 8-A, the issuer would then become subject to Exchange Act reporting requirements, at which point the issuer's ongoing reporting obligations under Regulation A+ would be suspended.

Final Considerations

The final rules adopting Regulation A+ also implemented provisions relating to, among others, integration of offerings, voluntary Exchange Act registration by Tier 2 issuers and bad actor disqualifications. Issuers should consider these factors, along with the general offering rules and process described above, in determining whether to utilize an exemption under Regulation A+.

In adopting Regulation A+, the SEC modernized the offering exemptions previously available under Regulation A, and in doing so, hopefully revitalized the previously underutilized exemption provided by Regulation A. In addition, by allowing non-accredited investors to participate in offerings made pursuant to Regulation A+ (subject to the investment limitations for Tier 2 offerings), the exemption will for the first time allow issuers to solicit investors via a form of crowdfunding. Crowdfunding service providers are already implementing services aimed towards Regulation A+ offerings. Although this change may provide a new avenue by which companies can raise capital, in light of the extensive regulatory framework, companies will need to consider the Regulation A+ requirements described above before proceeding under the new exemptions. For companies capable of managing such requirements, Regulation A+ may prove to be an attractive and effective alternative for capital raising.

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