



The JOBS Act

The key to a kinder, gentler public offering?

For most companies, making a public offering of their shares is nearly impossible. Historically, this has been the case because the costs and challenges of going public, let alone *being* public, significantly outweighed the potential benefits for all but the largest companies. Now, however, that tide seems to be starting to turn.

In 2012, Congress enacted the Jumpstart Our Business Startups Act (the JOBS Act), which contained a number of measures, big and small, intended to ease access to capital investment for smaller companies. As part of the JOBS Act, Congress directed the Securities and Exchange Commission (SEC) to revise its moribund Regulation A in the hope that it might become a meaningful alternative to a traditional public offering. The SEC's response to Congress is Regulation A+ — the rules for which became effective June 19. While many uncertainties remain, these amendments to Regulation A may

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provide smaller companies wishing to tap the public markets a new alternative to do just that. Here is how it works.

By taking advantage of Regulation A, a company can make a small public offering of its debt or equity securities to potential investors. “Public” is the key word here, as the company will be permitted to sell its securities using advertising and other forms of general solicitation that are typically prohibited in a traditional private placement. As a bonus, because Regulation A is not technically a private placement under federal securities laws, the securities received by investors (at least investors who are not company insiders and affiliates) will generally be freely tradable after the offering. Of course, there are some hoops to jump through, and the first among those is that the issuer will need to comply with the SEC's Regulation A offering process. That means that the issuer will need to prepare a disclosure document on SEC Form 1-A and have that filing qualified for use by the SEC before actually offering to sell

the securities described in the filing.

Assuming that the issuer wishes to take advantage of Regulation A+, it can select from two different tiers of offerings. Under a Tier 1 offering, the issuer can sell up to \$20 million in securities in a 12-month period. Included within that \$20 million are up to \$6 million in secondary sales of securities owned by insiders or other affiliates of the issuer. Alternatively, by undertaking a Tier 2 offering, the issuer can sell up to \$50 million in securities in a 12-month period, including up to \$15 million in secondary sales.

Of course, these alternatives come with strings attached. Under either Tier 1 or Tier 2, the issuer will come away from the offering with some ongoing securities reporting obligations. For Tier 1, those obligations are relatively modest. For Tier 2, they are robust, but companies electing to comply with the Tier 2 structure are entitled to some added benefits. First, a Tier 2 offering is intended in most cases to be exempt from the requirement to qualify the offering under state securities laws. This is significant because state laws would otherwise require a company making this type of public offering to qualify the offering and pay state filing fees in every state in which the offering is made. Second, Tier 2 issuers are also allowed a simplified path to registration of their shares under the Securities Exchange Act of 1934 — meaning they could be listed on a securities exchange after the offering.

As with any new regulation, questions and criticisms remain. Shortly after the SEC proposed these amendments to Regulation A, the states of Massachusetts and Montana filed suit against the SEC. At the time of this writing, that suit is pending. The states seek to have declared invalid the provisions of Tier 2 offerings that preempt state law. Unfortunately, the fact that state law remained applicable was one of the reasons that Regulation A (prior to these amendments) was rarely used. If the states prevail on their lawsuit, the utility of amended Regulation A will be severely affected.

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