McGUIREWOODS

A Guide to Regulation A+

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Introduction

Significant changes to Regulation A, generally referred to as Regulation A+, went into effect on June 19, 2015.

Old Regulation A

Regulation A is a previously existing exemption from the registration requirements of the Securities Act of 1933 (Securities Act) for nonpublic companies seeking to raise smaller amounts of capital. Even before the new rules went into effect, Regulation A already had several useful features. Regulation A gave smaller companies access to public markets without registration. There were no limitations on who could purchase the securities, and the securities sold were freely tradable by non-affiliates. General solicitations were allowed. Issuers could also “test the waters” and gauge investor interest before launching the offering (subject to certain state law requirements). Yet despite these features, Regulation A had been used relatively infrequently for several years. According to a recent GAO Report, there was just one qualified offering made in 2011, down from only 57 in 1998[1].

There are many reasons for Regulation A’s lack of popularity. First and foremost, the amount of money that could be raised in a Regulation A offering was capped at $5 million. Second, the qualification process was extremely cumbersome and costly. In addition to a lengthy federal review process, the offerings were also subject to state law securities registration and review requirements, otherwise known as the “blue sky” laws. The cost and time involved with working through both the federal qualification process and the various blue sky laws was significant. Simply put, Regulation A offerings were not cost-effective.

Regulation A+

Regulation A+ contains many changes designed to address these problems. The goal of the new rules is to transform Regulation A into a workable capital-raising tool for small private companies.

As mandated by the Jumpstart Our Business Startups Act (JOBS Act), the U.S. Securities and Exchange Commission (SEC) increased the amount that can be raised by an issuer under the exemption from $5 million to $50 million and created two offering categories:

Tier 1 for offerings up to $20 million

Tier 2 for offerings up to $50 million

Investor protections have been included for Tier 2 offerings, such as requiring audited financial statements in offering materials, ongoing reporting requirements and an investment cap for non-accredited investors.

Regulation A+ also dramatically transforms the regulatory review framework for these offerings. Tier 2 offerings preempt state securities regulatory review, a change strongly supported by business interests and vehemently opposed by state securities regulators. As is described below under “State Securities Regulation – Preemption of State Regulation for Tier 2,” the controversy surrounding state law preemption continues.

[1] Factors that May Affect Trends in Regulation A Offerings, GAO-12-839 (July 2012) (*available at*: http://www.gao.gov/assets/600/592113.pdf) (the “GAO Report”).

The SEC has also crafted an offering and disclosure regime unique to Regulation A+ and specifically designed with smaller startup companies in mind. The new rules modernize the qualification, communications and offering processes, incorporating into Regulation A+ offerings many features currently enjoyed by issuers in registered offerings, such as allowing for confidential submissions and adopting a notice-equals-access model.

In her October 28, 2015, keynote address to Practising Law Institute's 47th Annual Securities Regulation Institute, SEC Chair Mary Jo White indicated that it is too early to draw conclusions on Regulation A+ and stated:

> Companies are beginning to take advantage of the new rules in greater numbers than was the case under the prior version of the exemption, with approximately 34 companies publicly filing offering statements and 16 companies filing non-public draft offering statements. The staff has qualified three offerings so far, and it remains to be seen how investors will react to such offerings.

This white paper explains Regulation A+ and the considerations that should be taken into account in deciding whether to use it.

Regulation A+ Offering Size Options

Two offering size levels are available under Regulation A+.

Tier 1 – offerings of up to $20 million over a rolling 12-month period

Tier 2 – offerings of up to $50 million over a rolling 12-month period

As explained in more detail below, both tiers are subject to certain basic requirements, while Tier 2 offerings are subject to additional investor protections. Issuers raising up to $20 million can choose to use either Tier 1 or Tier 2. Tier 1 offerings can include no more than $6 million in securities offered by selling security holders who are affiliates of the issuer. Tier 2 offerings can include no more than $15 million in securities offered by selling security holders who are affiliates of the issuer.

If the issuer is selling convertible securities, and these securities are convertible within the first year after qualification or at the discretion of the issuer, the value of the underlying securities must be included in the aggregate offering size. If the price of the underlying securities uses a pricing formula, the issuer must use the maximum estimated price.

Congress built an adjustment feature into Regulation A+. Every two years the SEC must review the $50 million offering amount limitation and, if appropriate, increase it. If the SEC decides not to increase the offering limit it must report back to Congress its reasons supporting this decision. The first review is expected by April 2016.

Secondary Sales

One of the important features of Regulation A+ is the ability of selling security holders to participate in the offering, known as secondary sales. The SEC hopes to encourage investment in startup companies by giving investors access to liquidity through secondary sales as a part of a qualified Regulation A+ offering. However, the SEC acknowledged that such secondary sales could potentially place new investors at an informational disadvantage and noted that secondary sales do not directly provide any new capital to issuers. So the SEC built into the new rules some important restrictions on these sales.

In an issuer's first Regulation A+ offering and for the 12 months following its first offering, sales by security holders are limited to no more than 30 percent of the aggregate offering price of a particular offering. This limitation applies to sales by both affiliates and non-affiliates of the issuer.

After the end of this period, secondary sales by affiliates over a 12-month period will continue to be subject to this 30 percent limitation. At this point, secondary sales by non-affiliates will only be limited to the maximum offering amount permissible under each tier ($20 million for Tier 1 and $50 million for Tier 2). Nevertheless, such amounts will be aggregated with the sales by the issuer and affiliates when calculating the maximum amount allowed under the appropriate tier.

Previously, Rule 251(b) banned all affiliate resales under Regulation A unless the issuer had net income from continuing operations in at least one of its last two fiscal years. This rule was designed to address the information disadvantage issue for new investors. With Regulation A+ the SEC has eliminated this rule. The SEC described the rule as no longer necessary due to the increased sophistication and robust nature of its current disclosure review process, qualification procedure and enforcement programs.

See "Resale Issues" below for a discussion of several reasons why secondary sales outside of a qualified Regulation A+ offering may be complicated.

Who is Eligible to Use Regulation A+?

Eligible Issuers

Only companies that are organized in, and have their principal place of business in, the United States or Canada are eligible to engage in a Regulation A+ offering.

An issuer will be considered to have its "principal place of business" in the United States or Canada for purposes of determining eligibility to use Regulation A+ if its officers, partners or managers primarily direct, control and coordinate the issuer's activities from the United States or Canada.

The following entities are *not* able to use Regulation A+:

- Companies subject to reporting under the Securities Exchange Act of 1934 (Exchange Act), other than voluntary filers
- Investment companies and business development companies
- Blank check companies
- Certain bad actors
- Issuers of fractional undivided interests in mineral rights
- Issuers who failed to file ongoing reports required by Regulation A+
- Issuers subject to an SEC order within five years denying, suspending or revoking registration of a class of securities pursuant to Section 12(j) of the Exchange Act

A company that was previously required to file reports with the SEC under Section 15(d) of the Exchange Act, but has since suspended its Exchange Act reporting obligation, is eligible to use Regulation A+.

A private, wholly owned subsidiary of an Exchange Act reporting company is eligible to sell securities pursuant to Regulation A+, but the Exchange Act reporting company parent cannot be a guarantor or co-issuer.

While the SEC received many comment letters supporting expansion of the availability of Regulation A+, the SEC stated that it wanted to observe the market practices that will develop under these new rules before considering this kind of expansion.

Bad Actor Disqualification

Regulation A+ provides for the disqualification of certain "bad actors" (Rule 262). The Regulation A+ bad actor provisions are substantially the same as the recently adopted bad actor provisions of Rule 506 (except that in the case of certain orders, the order must bar the covered person at the time of filing the Regulation A+ offering statement).

Under Regulation A+, offerings that would have been disqualified from reliance on old Regulation A will continue to be disqualified. Triggering events that were not previously included in the bad actor rules for old Regulation A that predate effectiveness of Regulation A+ do not cause disqualification, but instead need to be disclosed in a manner similar to Rule 506(e).

The SEC also adopted a reasonable care exception to the Regulation A+ disqualification provisions on a basis consistent with Rule 506(d), so that an issuer will not be disqualified from using the Regulation A+ exemption if the issuer can show that it did not know, and in the exercise of reasonable care could not have known, of the disqualifying event.

What Securities Can Be Sold in a Regulation A+ Offering?

The following securities may be offered and sold in a Regulation A+ offering:

- equity securities
- debt securities
- securities convertible into or exchangeable into equity interests
- guarantees of these securities

Regulation A+ specifically excludes asset-backed securities from the types of eligible securities.

If an issuer is offering convertible securities or warrants that are exercisable within the first year of qualification or at the discretion of the issuer, the underlying securities must also be qualified and the value of these securities must be included in the aggregate offering price based on the actual or estimated exercise price of the convertible security. Any underlying securities not included in the original offering will need to be separately qualified, registered or exempt at the time of issuance.

Qualification Process

Electronic Filing

All Regulation A+ offering statements need to be filed electronically with the SEC on its Electronic Data Gathering, Analysis, and Retrieval system (EDGAR). Previously, Regulation A documents were filed in paper format.

There is no filing fee and Regulation A+ offering materials are not required to be posted on the issuer's website.

Nonpublic Submission and Review

Regulation A+ permits the non-public submission of offering statements and amendments for review by SEC staff before filing with the SEC, so long as all these documents are publicly filed no later than 21 calendar days before qualification.[2] However, only issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A+ or an effective registration statement under the Securities Act are permitted to submit draft offering statements for nonpublic review.

Non-publicly submitted offering statements need to be submitted electronically on EDGAR. The SEC and its staff will not make these offering statements publicly available on EDGAR; however, the SEC may, under certain circumstances, be compelled to provide these materials to a requesting party pursuant to the Freedom of Information Act (FOIA) before the date on which an issuer would otherwise have been required to publicly file on EDGAR. An issuer needs to use SEC Rule 83 to seek confidential treatment for non-publicly submitted offering materials, or portions of them, for which the issuer believes an exemption from FOIA exists.

[2] The 21-calendar-day filing requirement is intended to make sure that state securities regulators are able to require issuers that non-publicly submit draft offering statements to file these materials with the state regulators before potential sales in their states. Even though Regulation A+ provides for the preemption of state securities registration and qualification provisions, state securities regulators retain, among other things, their authority to require the filing with the state securities regulators of any documents filed with the SEC.

Qualification by Staff Order

Regulation A+ allows an offering statement to be qualified only by order of the SEC and eliminates the need for a delaying notation as previously used in Regulation A offering statements.

Issuers will receive a notice of qualification issued by the Division of Corporation Finance (Division) similar to the notice of effectiveness received in registered offerings.

Issuers are permitted to withdraw an offering statement, with the consent of the Director of the Division, if no securities that are subject to the offering have been sold and the offering statement is not subject to a temporary order by the SEC.

The SEC may declare an offering statement abandoned if it is on file for at least nine months without amendment or qualification.

Offering Statement on Form 1-A

The primary Regulation A+ filing is the offering statement on Form 1-A. The new Regulation A+ rules retain the three-part structure of Form 1-A, but make revisions to the required content.

Form 1-A consists of three parts:

- Part I (the Notification)
- Part II (the Offering Circular)
- Part III (the Exhibits)

Part I − Notification

The Notification is an XML-based online fillable form similar to Form D designed to capture basic information about the issuer and the proposed offering. This information generally confirms the issuer's eligibility to use Regulation A+.

Part II − Offering Circular

The Offering Circular is similar to the prospectus in a registration statement and is the main Regulation A+ disclosure document. The Offering Circular is a text file attachment containing the body of the disclosure document and financial statements (discussed below) formatted in HTML or ASCII.

The disclosure requirements of the Offering Circular are unique to Form 1-A. Unlike the forms used for registration statements, each item in Part II of Form 1-A specifically describes the information to be included in the Offering Circular and does not reference Regulation S-K standards. The disclosure requirements of the Offering Circular include basic information about the issuer and the offering, risk factors, material disparities between the public offering price and the price of shares acquired by insiders during the last year; the plan of distribution; the use of proceeds; an MD&A; and other subjects generally covered in registration statements.

However, the scope of these disclosures generally is reduced in relation to the comparable provisions of Regulation S-K. For example, in Tier 1 offerings an issuer is required to disclose only group-level compensation data concerning its three highest-paid executives or directors. Furthermore, the MD&A requirements of the Form 1-A are less extensive than the disclosure requirements of Item 303 of Regulation S-K.

Alternatively, an issuer can provide the information required by Part I of Form S-1 or Form S-11 (for real estate investment trusts and similar issuers) rather than the information outlined in the specific items of Part II of Form 1-A.

Incorporation by reference is permitted for documents publicly available on EDGAR. The issuer needs to describe the information incorporated by reference and include a hyperlink to the relevant documents on EDGAR.

Part III – Exhibits

Part III contains the exhibits to the offering statement, formatted in HTML or ASCII. Required exhibits include organizational documents, underwriting agreements, instruments defining the rights of security holders, material contracts, consents, legal opinions and "testing the waters" materials.

Signatures

The offering statement must be signed by the issuer, its principal executive officer, principal financial officer, principal accounting officer and a majority of the issuer's board of directors. Canadian issuers are not required to have an authorized U.S. representative sign the offering statement, which was the case under the old Regulation A rules.

Financial Statements

Required Financials

As part of the Offering Circular, Tier 1 and Tier 2 issuers generally need to file balance sheets, statements of income, cash flows and stockholders' equity as of the two most recently completed fiscal year ends (or such shorter time during which they have been in existence).

Regulation A+ permits issuers to provide financial statements in Form 1-A that are dated no more than nine months before the date of nonpublic submission or filing, and requires issuers to include financial statements in Form 1-A that are dated no more than nine months before qualification, with the most recent balance sheet not older than nine months. If interim financial statements are required, they must cover a period of at least six months.

If the filing is made, or the offering statement is qualified, within three months of the most recently completed fiscal year end, the financials should include a balance sheet as of the two fiscal year ends preceding the most recently completed fiscal year end and an interim balance sheet as of a date no earlier than six months after the date of the most recent fiscal year end balance sheet that is required.

If the filing is made, or the offering statement is qualified, more than three months but no more than nine months after the most recently completed fiscal year, the issuer is required to include a balance sheet as of the two most recently completed fiscal year ends. The financial statements should cover each of the two fiscal years preceding the date of the most recent balance sheet being filed.

For filings made more than nine months after the end of the issuer's most recently completed fiscal year end, the balance sheet is required to be dated as of the two most recently completed fiscal year ends, the financial statements should cover the two fiscal years preceding the most recently completed fiscal year end, and interim financial statements must be included with the interim balance sheet dated no earlier than six months after the date of the most recent fiscal year end.

A recently created entity may choose to provide a balance sheet as of its inception date, as long as the inception date is within nine months before the date of filing or qualification and the date of filing or qualification is not more than three months after the entity reached its first annual balance sheet date. The date of the most recent balance sheet determines which fiscal years, or period since existence for recently created entities, the statements of comprehensive income, cash flows and changes in stockholders' equity must cover. When the balance sheet is dated as of inception, the statements of comprehensive income, cash flows and changes in stockholders' equity will not be applicable.

Financial statements in Regulation A+ offerings are not required to be in XBRL format.

Required Financial Statement Preparation Standards

Financial statements for U.S.–domiciled issuers are required to be prepared in accordance with generally accepted accounting principles in the United States (U.S. GAAP), as is currently the case. Canadian issuers, however, may prepare financial statements in accordance with either U.S. GAAP or International Financial Reporting Standards.

Where applicable, issuers can delay the implementation of new accounting standards to the extent such standards provide for delayed implementation by nonpublic business entities. An issuer that elects to use this extended transition period must elect it for all applicable standards. However, issuers that offer securities pursuant to Regulation A+ will be considered "public business entities" as defined by the Financial Accounting Standards Board and, as a result, will not be able to use alternative accounting standards for nonpublic business entities.

Issuers conducting Tier 1 offerings need to follow the requirements for the form and content of their financial statements contained in Part F/S of Form 1-A, rather than following the requirements of Regulation S-X. In certain less common circumstances, such as for an acquired business or subsidiary guarantors, Part F/S directs issuers conducting Tier 1 offerings to certain portions of Regulation S-X that provide guidance on when financial statements for entities other than the issuer are required. The final rules also direct issuers to Rule 8-05 of Regulation S-X for pro forma information disclosure requirements.

The final rules require Tier 2 issuers to follow the financial statement requirements of Article 8 of Regulation S-X, as if the issuer were a smaller reporting company, unless otherwise noted in Part F/S.

Audit Requirements

Tier 2 issuers need to have their financial statements audited in accordance with either generally accepted auditing standards in the United States or the standards issued by the Public Company Accounting Oversight Board (PCAOB). The auditor needs to be independent under Rule 2-01 of Regulation S-X, but does not need to be PCAOB-registered.

An issuer conducting a Regulation A+ offering that seeks to concurrently register its securities under the Exchange Act will be required to file audited financial statements that are prepared in accordance with the standards of the PCAOB by an auditor that is PCAOB-registered.

Financial statements in a Tier 1 offering are not required to be audited. However, previously obtained audited financial statements need to be used if they meet certain requirements. Issuers in Tier 1 offerings that do not provide audited financial statements need to label their financial statements as unaudited.

Offering Process

Testing the Waters

Regulation A+ permits issuers to "test the waters" or solicit interest in a potential offering with the general public either before or after the filing of the offering statement, so long as any solicitation materials used after publicly filing the offering statement are preceded or accompanied by a preliminary offering circular or contain a notice informing potential investors how to obtain the most current preliminary offering circular. This requirement could be satisfied by providing the URL to the preliminary offering circular or the offering statement on EDGAR.

Issuers must include solicitation materials as an exhibit when the offering statement is either submitted for nonpublic review or filed (and update for substantive changes in such material after the initial public submission or filing). As a result, Regulation A+ solicitation materials generally will be publicly available unless confidential treatment has been separately obtained. (The SEC staff has published guidance on the procedures to be used to seek confidential treatment. *See* CDI 182.02.) Regulation A+ issuers are not required to submit solicitation materials at or before the time of first use, a change from the previous requirements under Regulation A.

Solicitation materials need to contain specific risk disclosures or disclaimers and are subject to applicable liability provisions of the securities laws.

The SEC has provided guidance allowing an issuer to "test the waters" in a Regulation A+ offering on a platform that limits the number of characters or amount of text that can be included (like Twitter), and thereby prevents the inclusion in such communication of the disclosures required for solicitation materials under Regulation A+ if:

- the electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- including the required statements in their entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- the communication contains an active hyperlink to the required statements that otherwise satisfy the disclosure requirements of Regulation A+ and, where possible, prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

See CDI 182.09.

In the case of Tier 1 offerings, testing the waters will also be subject to applicable state securities provisions, which vary from state to state, and as a result, testing the waters may not be feasible in all states. Tier 2 offerings are preempted from state securities registration requirements, as described under "State Securities Regulation – Preemption of State Regulation for Tier 2."

In the Regulation A+ adopting release the SEC confirms, consistent with Rule 169's existing exemption from Sections 2(a)(10) and 5(c) of the Securities Act for regulating released factual business communications, that the SEC does not believe such communications constitute solicitation of interest material under Regulation A+. However, whether a communication constitutes factual business information, as opposed to a solicitation of interest, depends on the facts and circumstances. Factual business information generally means information about the issuer, its business, financial condition, products, services, or advertisement of those products or services.

Factual business information generally does not include items like predictions, projections, forecasts or opinions concerning the value of a security.

Access Equals Delivery

Regulation A+ permits issuers and intermediaries to satisfy their delivery requirements as to the final offering circular under an "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. Issuers, however, are required to include a notice in the preliminary offering circular that informs potential investors that the issuer may deliver the final offering circular electronically.

Communications and Offering Process

Regulation A+ requires issuers and intermediaries in the prequalification period to deliver the preliminary offering circular to prospective purchasers at least 48 hours in advance of sale, unless the issuer is already subject to a Tier 2 reporting obligation. An issuer subject to, and current in, a Tier 2 ongoing reporting obligation is only required to comply with the general delivery requirements for offers.

Regulation A+ also requires issuers to, no later than two business days after completion of the sale, provide purchasers with a copy of the final offering circular or a notice that the sale occurred pursuant to a qualified offering statement. Any such notice must include the URL where the final offering circular or the offering statement may be obtained and contact information sufficient to notify a purchaser where to send a request for a final offering circular.

"Electronic-only" Regulation A+ offerings are permitted, provided that issuers and intermediaries comply with relevant SEC guidance.

Continuous or Delayed Offerings

Continuous Regulation A+ offerings are permitted in a manner similar to registered offerings. Continuous or delayed offerings are generally available for:

- securities that are part of an offering that starts within two days after the qualification date, will be made on a continuous basis, may continue for more than 30 days from the initial qualification date, and at the time of qualification, are reasonably expected to be completed within two years of the initial qualification date;
- securities to be offered or sold solely by or on behalf of a person or persons other than the issuer (or a parent or subsidiary of the issuer);
- securities to be offered or sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;
- securities to be issued upon the exercise of outstanding options, warrants or rights;
- securities to be issued upon the conversion of other outstanding securities; or
- securities that are pledged as collateral.

Regulation A+ conditions the ability to sell securities in a continuous or delayed offering on being current with applicable Tier 2 reporting obligations at the time of sale.

However, continuous or delayed offerings are not permitted where they are not available under Regulation A+, for example, offerings requiring primary eligibility to use Form S-3 or Form F-3 or offerings by ineligible issuers.

In addition, Regulation A+ does not currently permit "at the market" offerings.

Changes in the information in the offering statement do not always trigger an obligation to amend. Offering circulars continue to be required to be updated, and the offering statements to which they relate must be requalified annually to include updated financial statements and otherwise as necessary to reflect facts or events arising after qualification, which, in the aggregate, represent a fundamental change in the information contained in the offering statement.

Regulation A+ allows issuers to use offering circular supplements in certain situations. The rule also permits issuers in continuous offerings to qualify additional securities in reliance on Regulation A+ by a post-qualification amendment.

Integration

The integration doctrine seeks to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings so that Securities Act exemptions would apply to the multiple offerings that would not be available for the combined offering.

Regulation A+ includes an integration safe harbor in order to provide issuers with some certainty as to when and how Regulation A+ offerings will be integrated with other offerings. This is particularly important for smaller companies whose capital needs are likely to change and who will need to understand when separate offerings will be treated as a single offering.

Under the safe harbor, offerings under Regulation A+ will not be integrated with any of the following:

- Prior offers or sales of securities
- Subsequent offers and sales of securities that are
  - registered under the Securities Act (although a 30-day waiting period may be applicable under Rule 255(e) in the case of Regulation A+ offerings that are abandoned);
  - made pursuant to certain compensatory benefit plans under Rule 701 of the Securities Act;
  - made pursuant to an employee benefit plan;
  - offshore sales made in reliance on Regulation S;
  - made pursuant to crowdfunding transactions conducted pursuant to Section 4(a)(6) of the Securities Act; or
  - made more than six months after completion of the Regulation A+ offering.

If an issuer wishes to abandon a Regulation A+ offering and instead engage in a registered offering it may need to wait for 30 days in order to avoid integration issues. The 30-day waiting period under the integration safe harbor is applicable if an issuer engaged in solicitations of interest with respect to persons other than qualified institutional buyers or institutional accredited investors in a possible Regulation A+ offering that is later abandoned.

Multiple offerings that fall outside this safe harbor may still not be subject to the integration doctrine depending on the particular facts and circumstances. In addition, the SEC has stated that an offering made in reliance on Regulation A+ should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the respective exemption upon which it relies.

Investment Limitation in Tier 2 Offerings

A purchaser in a Tier 2 offering can invest no more than 10 percent of the greater of annual income or net worth (calculated in accordance with the accredited investor definition in Rule 501 of Regulation D) unless the purchaser is an accredited investor or the securities will be listed on a national securities exchange upon qualification.

The limitation for non-accredited, non-natural persons is no more than 10 percent of the greater of the purchaser's revenue or net assets (as of the purchaser's most recent fiscal year end).

Where a Tier 2 purchase includes options exercisable within a year, the investment limitation also needs to include in the calculation the value of the securities which would be received upon exercise of the options based on the exercise price.

While issuers are required to make investors aware of the investment limitations, they can rely on an investor's representation of compliance unless the issuer knows, at the time of sale, that the representation is untrue.

Registration Under Exchange Act Section 12(g)

Exchange Act Section 12(g) requires, among other things, that an issuer with total assets exceeding $10,000,000 and a class of equity securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register that class of securities with the SEC. Exchange Act registration subjects the issuer to a number of provisions, including:

- periodic reporting requirements (10-Ks, 10-Qs and 8-Ks),
- proxy solicitation regulation,
- tender offer regulation, and
- beneficial ownership reporting.

Many thought the possibility of triggering Section 12(g) due to the record holder count would push issuers to sell to accredited investors only or opt to sell securities in a Regulation D offering instead of using Regulation A+. In response to these concerns and in order to increase the utility of Regulation A+, the SEC added to the final rules a conditional exemption to the Section 12(g) registration requirements for securities issued in a Tier 2 offering.

Conditional Exemption from Exchange Act Registration for Tier 2

Securities issued in a Tier 2 offering will be exempt from Section 12(g) for so long as the issuer remains subject to, and is current in (as of its fiscal year end), its Regulation A+ periodic reporting obligations.

In order for this conditional exception to apply, issuers are also required to:

- engage the services of a transfer agent registered with the SEC pursuant to Section 17A of the Exchange Act; and

- meet requirements similar to those of a "smaller reporting company" under the Securities Act and the Exchange Act (public float of less than $75 million, or in the absence of a public float, annual revenues of less than $50 million).

An issuer that does not meet these smaller reporting company requirements will be able to rely on a two-year transition period before it must register a class of securities under Section 12(g) and as long as it timely files required Regulation A+ reports.

Simplified Exchange Act Registration for Tier 2

Tier 2 issuers can register their Regulation A+ securities under the Exchange Act by filing a Form 8-A in connection with the qualification of a Form 1-A.

Only issuers that follow Part 1 of Form S-1 (or the Form S-11) disclosure in the offering circular are permitted to use Form 8-A.

A Tier 2 issuer registering a class of securities under the Exchange Act concurrently with the qualification of a Regulation A+ offering statement will become an Exchange Act reporting company upon effectiveness of the Form 8-A.

The issuer's obligation to file ongoing reports under Regulation A+ is suspended for the duration of the reporting obligation under Section 13 of the Exchange Act.

A Regulation A+ issuer entering Exchange Act reporting will be considered an "emerging growth company" to the extent the issuer otherwise qualifies for this status.

Liability Issues

Consistent with previous Regulation A, sellers of Regulation A+ securities will have liability under Section 12(a)(2) of the Securities Act to investors for any offer or sale by means of an offering circular or an oral or other communication that includes a material misleading statement or material misstatement of fact. (This specific liability provision is not available in private offerings as a result of the 1995 U.S. Supreme Court decision in *Gustafson v. Alloyd*, 513 U.S. 561, 569 (1995)).

In addition, the anti-fraud liability provisions of Section 17 of the Securities Act will also apply to a Regulation A+ offering, as will Section 10(b) and Rule 10b-5 of the Exchange Act. These liability provisions also apply to solicitation materials.

The preemption of state securities registration and qualification requirements in Tier 2 offerings will also have the effect of preempting the liabilities and remedies associated with those provisions. As a result, state liability will generally be based on misrepresentation-type provisions in Tier 2 offerings.

State securities law liability provisions associated with offerings registered or qualified at the state level will generally also be applicable in Tier 1 offerings.

Insignificant Deviations from a Term, Condition or Requirement

Insignificant deviations from a term, condition or requirement of Regulation A+ will not result in the loss of the exemption for any particular offer or sale, if the person or entity relying on the exemption establishes that:

- the failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular offeree or purchaser;

- the failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with the offering limitations, issuer eligibility criteria or requirements for offers or continuous or delayed offerings will be deemed to be significant to the offering as a whole; and

- a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Regulation A+.

Ongoing Reporting for Tier 2 Companies

Tier 2 issuers have ongoing reporting responsibilities:

- Annual Reports on Form 1-K
- Semiannual Reports on Form 1-SA
- Current Event Reports on Form 1-U

Tier 2 issuers are also required to file a special financial report in certain situations to cover financial periods between the most recent period included in a qualified offering statement and the issuer's first periodic report.

Annual Reports on Form 1-K

Form 1-K needs to be filed within 120 days after the issuer's fiscal year end.

Form 1-K consists of two parts.

Part I of Form 1-K is an online XML-based fillable form that includes certain basic information about the issuer, previously disclosed in Part 1 of Form 1-A, which can be updated by the issuer at the time of filing. The issuer will not be required to obtain special software to file Part 1 of Form 1-K on EDGAR.

Part II of Form 1-K is submitted electronically by the issuer as a text file containing the body of the disclosure document and financial statements, formatted in HTML or ASCII to be compatible with the EDGAR system. Part II of Form 1-K covers:

- business operations of the issuer;
- transactions with related persons, promoters and certain control persons;
- beneficial ownership of voting securities by executive officers, directors and 10-percent owners;
- information about directors, executive officers and significant employees;
- executive compensation;
- MD&A; and
- two years of audited financials.

Form 1-K permits issuers to incorporate by reference certain information previously filed on EDGAR, but requires issuers to include a hyperlink to that material on EDGAR.

Semiannual Reports on Form 1-SA

Form 1-SA needs to be filed within 90 calendar days after the end of the first six months of the issuer's fiscal year.

Similar to Form 10-Q, Form 1-SA consists mainly of financial statements and MD&A. However, unlike Form 10-Q, Form 1-SA does not require disclosure about quantitative and qualitative market risk, controls or procedures, updates to risk factors or defaults on senior securities.

Financial statements included in semiannual reports on Form 1-SA do not need to be audited.

Form 1-SA permits issuers to incorporate by reference certain information previously filed on EDGAR, but requires issuers to include a hyperlink to that material on EDGAR.

Current Reports on Form 1-U

Tier 2 issuers are required to submit current reports on Form 1-U in the event of any of the following:

- Fundamental changes in the nature of the business
- Bankruptcy or receivership
- Material modification of the rights of security holders
- Changes in the certifying accountant of the issuer
- Non-reliance on previous financial statements or a related audit report or completed interim review
- Changes in control of the issuer
- Departures of the principal executive officer, principal financial officer or principal accounting officer
- Unregistered sales of 10 percent or more of outstanding equity securities

A Form 1-U needs to be filed within four business days after the applicable event.

Issuers are permitted to incorporate by reference certain information previously filed on EDGAR, but need to include a hyperlink to that material on EDGAR.

Issuers that elect to provide information on a quarterly basis can use Item 9 (Other Events) of Form 1-U for this purpose.

Special Financial Reports on Form 1-K and Form 1-SA

In certain circumstances, a Tier 2 issuer needs to file a special financial report.

The special financial report needs to contain audited financial statements for the issuer's most recent fiscal year (or for the life of the issuer if less than a full fiscal year) to be filed on Form 1-K not later than 120 calendar days after qualification of the offering statement, if the offering statement does not include these financials.

The special financial report needs to contain semiannual financial statements for the first six months of the issuer's fiscal year, which can be unaudited, to be filed on Form 1-SA not later than 90 calendar days after qualification of the offering statement, if the offering statement did not contain these financials and was qualified in the second half of the issuer's current fiscal year.

Exit Report on Form 1-Z

Regulation A+ also permits Tier 2 issuers to stop ongoing reporting at any time after completing reporting for the fiscal year in which the offering statement was qualified by filing a Form 1-Z exit report, so long as the securities of each class to which the offering statement relates are held of record by fewer than 300 persons (1,200 persons for banks or bank holding companies), offers and sales made in reliance on a qualified offering statement are not ongoing, and the issuer has filed its required reports for specified periods.

An issuer's obligation to file ongoing reports in a Tier 2 offering would also be automatically suspended upon registration of a class of securities under Section 12 of the Exchange Act.

Resale Issues

Securities sold in a Regulation A+ offering are not "restricted" securities, but certain resale issues remain.

In addition, Regulation A+ does not preempt state securities law requirements with respect to resales.

Exchange Act Rule 15c2-11

Exchange Act Rule 15c2-11 prohibits broker-dealers from publishing quotations (or submitting quotations for publication) in a "quotation medium" for covered over-the-counter securities without first reviewing basic information about the issuer, subject to certain exceptions.

Under the new rules, an issuer's ongoing reports filed under Tier 2 will satisfy the specified information about an issuer and its security that a broker-dealer must review before publishing a quotation for a security (or submitting a quotation for publication). Tier 1 issuers are not required to file these reports, and may not be eligible for broker quotes.

Rules 144 and 144A

Affiliates of a Regulation A+ issuer will need an exemption for resales made outside the offering process itself. The most common exemption in this regard is Rule 144. Ongoing reporting required of Tier 2 issuers will need to be supplemented by voluntary quarterly reporting in order to use 144.

Timely ongoing Regulation A+ reporting under Tier 2 will not by itself constitute "adequate current public information" for purposes of Rule 144(c) or "reasonably current information" under Rule 144A(d)(4).

However, an issuer that is current in its semiannual reporting required under Tier 2 and voluntarily provides required quarterly information on Form 1-U will have provided reasonably current public information under Rule 144(c) and reasonably current information under Rule 144A(d)(4). In addition, Tier 1 issuers would not satisfy the "reasonably current information" provisions of Rule 144 unless similar information is publicly available.

Trading

OTC Markets has established procedures to allow Regulation A+ securities to be traded through its alternative trading system. In general, issuers need to be Tier 2 compliant in order to use this system.

There are two Regulation A+ trading categories in the OTC Markets system: OTCQX and OTCQB. OTCQX involves established companies and requires quarterly reporting. OTCQB involves development stage companies.

Generally, listing on a larger exchange, such as NASDAQ and the NYSE would require that an issuer be an Exchange Act reporting company.

State Securities Regulation

Preemption of State Regulation for Tier 2

The SEC has eliminated state securities registration or qualification requirements for Tier 2 Regulation A+ offerings.

All Regulation A offerings were previously required to be registered or exempt from registration in each state where the offering was made, in addition to SEC review. Accordingly, if a Regulation A offering was made in 10 states, there would be 11 separate securities law analyses conducted, one by each state, as well as the federal securities process. Many states do not have exemptions suitable for small public offerings and would have required the registration of a Regulation A offering. In addition, in many states, the securities registration review includes a "merit" review as well as a disclosure-type review. This regulatory process was perceived to be lengthy, cumbersome and expensive.

The new rule provides that Tier 2 Regulation A+ offerings will be reviewed by only one regulator, the SEC, which should simplify the offering process for Regulation A+ considerably. The SEC based this preemption of state review on a determination that all offerees and purchasers in a Tier 2 Regulation A+ offering are "qualified purchasers," under Section 18 of the Securities Act. (There is ongoing litigation concerning this aspect of Regulation A+. Two states, Massachusetts and Montana, have sued the SEC seeking to require the application of state securities law registration and qualification requirements to Tier 2 offerings, as well as Tier 1 offerings, under Regulation A+. As of the time of this white paper, various briefs have been submitted in this case, but oral argument has not been scheduled.)

Tier 1 offerings remain subject to state securities registration and qualification requirements.

The NASAA Coordinated Review Program

The North American Securities Administrators Association (NASAA) has implemented a multistate review procedure for Regulation A+ offerings in order to try to simplify the Regulation A+ process at the state level.

In the NASAA coordinated review program, Regulation A+ filings are made in one place and distributed electronically to all states. Lead examiners are appointed as the primary point of contact for a filer. One lead examiner handles disclosure issues and one examiner handles "merit" review. Only the lead examiners interact with the issuer to resolve any deficiencies, and once they determine an application should be cleared, the decision is binding on all participating states.

This coordinated review procedure is designed to result in a state regulatory review procedure with a timeframe similar to the time period generally expected for federal review.

According to NASAA, as of September 2, 2015, 47 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands participate in this coordinated review program.

NASAA's coordinated review program should be available for Tier 1 offerings.

State Participation in SEC Review of Regulation A+ Filings?

The SEC stated in the Regulation A+ adopting release that it was exploring the possibility of establishing a program in which a representative of NASAA or of a state securities regulator would work with the SEC to assist in implementing Regulation A+. Commissioner Luis Aguilar and Chair White made similar statements at the March 25, 2015, meeting of the SEC at which Regulation A+ was adopted.

It remains to be seen how this concept will play out in a practical sense.

Practical Considerations

Regulation A+ is intended to be a way for companies that are not already publicly owned to raise capital publicly without a full registration in a traditional initial public offering (IPO). Some people refer to it as a kind of "IPO-lite" alternative.

Issuers who are eligible to use Regulation A+ may also consider a private offering as an alternative for raising capital, as well as an IPO. These alternatives present significantly different considerations which should be taken into account.

Regulation A+ Compared to Rule 506

Regulation 506 is the most popular capital-raising exemption. Rule 506 provides two distinctly different approaches:

- Traditional private placements, in which general solicitation is prohibited and which can include up to 35 non-accredited investors and an unlimited number of accredited investors (Rule 506(b))

- Offerings which allow general solicitation but in which only accredited investors can be purchasers (Rule 506(c))

There are a number of factors that should be considered when comparing the possibility of a Regulation A+ offering and a private offering under Rule 506.

The advantages of Regulation A+ in relation to Rule 506 are as follows:

- Regulation A+ securities are not "restricted securities." Securities purchased in a Rule 506 offering are restricted securities, and not freely tradable. The potential for a trading market actually developing for a Regulation A+ security should also be considered.

- Regulation A+ securities can be offered to the general public. General solicitation is permitted under Rule 506(c), but sales pursuant to Rule 506(c) can only be made to accredited investors and the issuer needs to take reasonable steps to verify the status of purchasers as accredited investors. Other Rule 506 offerings are subject to limitations on the manner in which the offering can be made.

- Issuers are not required to use reasonable methods to verify accredited investor status for purposes of the investment limitation in Tier 2 Regulation A+ offerings. Unlike Rule 506(c), issuers in a Regulation A+ offering can rely on purchaser self-certification unless the issuer knows that the purchaser's self-certification is wrong.

- There is no limit to the number of non-accredited investors in a Regulation A+ offering. Non-accredited investors are not permitted in Rule 506(c) offerings. In traditional private placements (Rule 506(b) offerings), only 35 non-accredited investors can be purchasers.

The advantages of Rule 506 in relation to Regulation A+ are the following:

- There are no limitations on the amounts that can be raised. Regulation A+ offerings are subject to the Tier 1 and Tier 2 ceilings.

- Rule 506 always preempts state securities registration requirements (other than notice filings and anti-fraud provisions). Tier 1 Regulation A+ offerings are subject to state securities registration requirements.

- There are no mandatory disclosure provisions if sales are made only to accredited investors. Regulation A+ contains various required disclosures.

- Rule 506 offerings do not involve any review of the offering documents by the SEC. Regulation A+ offerings documents are required to be filed with and are subject to review by the SEC (and state securities regulators in Tier 1 offerings).

- Rule 506 does not require ongoing reporting by the issuer, unlike the Regulation A+ Tier 2 provisions.

The relevant considerations in comparing the potential use of Regulation A+ and a Rule 506 offering are very context specific. Issuers that wish to remain privately held, that wish to raise more capital than Regulation A+ permits or that wish to proceed faster than is practically feasible in a Regulation A+ offering would generally prefer Rule 506.

Issuers that expect to generate significant potential interest among non-accredited investors would generally lean toward Regulation A+.

Regulation A+ Compared to an IPO

There are also a number of considerations that might impact an issuer's decision whether to proceed with a Regulation A+ offering or an IPO.

The advantages of Regulation A+ compared to an IPO include the following:

- Potentially less expensive
- Potentially faster
- Less extensive disclosure documents (unless the issuer wishes to use the simplified Exchange Act registration procedure)
- No ongoing reporting for Tier 1 and simpler ongoing reporting for Tier 2

The advantages of an IPO compared to Regulation A+ include the following:

- There are no limitations on the amounts that can be raised in an IPO. Regulation A+ contains the Tier 1 and Tier 2 offering amount limitations.
- There are no limitations on purchases by non-accredited investors in an IPO. Tier 2 Regulation A+ offerings are subject to the investment limitation provisions.

- The IPO provisions require less public disclosure of solicitation materials for emerging growth companies.
- There are similar disclosure requirements where the issuer lists on a national securities exchange.
- Issuers have the benefit of information in Schedules 13D and 13G.

As with the comparison of Regulation A+ and Rule 506, the factors influencing the decision here are very content specific.

Regulation A+ provides a potentially faster and cheaper way to go public, but has limitations on the amounts that can be raised and, in Tier 2 offerings, on amounts that may be purchased by any non-accredited investors. Ongoing reporting in Tier 2 is simpler than Exchange Act reporting. However, if the issuer wishes to use the simplified Exchange Act registration procedure, the disclosure and ongoing reporting provisions are the same as for an IPO.

In addition, issuers considering Regulation A+ need to have a plan to deal with resale issues.

Click here for access to the SEC's Regulation A+ as adopted.