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Legal Update
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# SEC Expands Regulation A Exemption to Exchange Act Reporting Companies

On December 19, 2018, the US Securities and Exchange Commission (the Commission) amended Rule 251 and Rule 257 of the Securities Act of 1933, as amended (the Securities Act), which are part of Regulation A, in order to allow companies subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended (the Exchange Act) to make offerings in reliance on the Regulation A exemption. The rule changes were mandated by the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2017 (the Economic Growth Act).

Regulation A is an exemption from registration under the Securities Act for smaller public offerings. It includes two overlapping tiers: Tier 1, for offerings of up to $20 million in a 12-month period and Tier 2, for offerings of up to $50 million in 12-month period. Prior to the Commission's amendments, reporting companies were not eligible to rely on Regulation A.

The Commission is adding a new paragraph to Rule 257(b) in order to specify that for Tier 2 issuers the duty to file periodic reports under Rule 257 of Regulation A shall be deemed to have been satisfied if a public company, as of each Form 1-K and Form 1-SA due date, has filed all reports required to be filed under the Exchange Act during the 12 months preceding such due dates. The amendments use a 12-month lookback period consistent with the standard applied in Commission rules in other contexts, including for the determination of eligibility to use a registration statement on Form S-8 and for satisfaction of the "current public information" requirement of Rule 144. The requirement that an issuer be current in, rather than merely subject to Exchange Act reporting, in order to meet its Rule 257(b) obligations, is expected to encourage more regular periodic disclosures following a reporting company's Regulation A offering. However, if at the relevant Form 1-K or Form 1-SA due date the issuer is not current in its Exchange Act reporting, the issuer's Rule 257 reporting obligation will not be deemed to have been met, and at that time the issuer will be required to file Regulation A related reports. In addition, the Commission is deleting current Rule 257(d)(1), which provides for an automatic suspension of the duty to file reports under Rule 257 if and so long as the issuer is subject to the duty to file reports pursuant to Section 13 or 15(d) of the Exchange Act. The Commission also made minor amendments to Rule 251(b)(6) and Rule 257(e) to conform Regulation A to the requirements of the Economic Growth Act.

The Commission's adopting release also clarifies that for Canadian issuers that rely on Regulation A and file reports with the Commission under the multijurisdictional disclosure system (MJDS), the Rule 257 reporting obligations will have been deemed met to the extent such issuers are current in their applicable Exchange Act reporting obligations.

The Commission did not make any change to the Regulation A financial statement requirements.

## Expected use of Regulation A

Reporting companies that are newly eligible to rely on Regulation A may realize several benefits from

this offering alternative. For example, access to Regulation A may make it easier and less costly for reporting companies to raise capital in smaller offerings of up to $50 million in any 12-month period. Issuers may solicit indications of interest (*i.e.*, "test-the-waters communications") from any investor before qualification of an offering statement, which may allow them to gauge investor interest prior to deciding whether to incur the full cost of the offering. This is particularly relevant for reporting companies that do not qualify as emerging growth companies (EGCs). Additionally, reporting companies not listed on an exchange whose offerings fall within Tier 2 can now benefit from blue sky preemption, which can expedite certain offerings and enable offers of securities across states to a wide variety of investors. Regulation A also contains a safe harbor from integration of Regulation A offerings with any other prior or subsequent offers or sales of securities registered under the Securities Act. However, Regulation A does not permit at-the-market offerings, which limits its attractiveness for some reporting companies.

In the Commission's adopting release, the Commission notes that it anticipates that Exchange Act reporting companies the securities of which are not exchange listed are likely to consider the Regulation A offering alternative. Issuers that are not eligible to use a registration statement on Form S-3 also may consider reliance on Regulation A. An issuer that is subject to the one-third limitation on primary issuances pursuant to a registration statement on Form S-3 also might consider a Regulation A Tier 2 offering. Finally, an issuer might consider a Regulation A offering instead of a private placement, although the costs associated with a Regulation A offering are likely to be higher than those associated with a private placement even after taking into account the costs associated with any registration statement that may be required to cover the resales of securities held by private placement purchasers.

## Effective date

The amendments to Regulation A will become effective upon publication in the Federal Register. The adopting release can be found here.

Finally, it is worth noting that the Commission is required by the JOBS Act to review periodically the $50 million offering limit under Tier 2 of Regulation A. The next review is scheduled to begin in 2019.

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