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Regulation A+ Could Go to the Head of the Class

On March 25, the Securities and Exchange Commission (SEC) adopted final rules implementing Title IV of the JOBS Act by adopting amendments to Regulation A. This new and improved version of Regulation A, which provides an exemption from the registration requirements of Section 5 of the Securities Act of 1933, for private companies raising up to $50 million in a 12-month period, is commonly referred to as "Regulation A+." The final rules address several of the limitations of the current Regulation A, including the low dollar threshold and the requirement to comply with state blue sky laws. Regulation A+ may offer an attractive alternative to conducting a private placement pursuant to Regulation D or making an initial public offering for companies seeking to raise capital.

Regulation A+ will provide for two tiers of offerings. Under Tier 1, an issuer may offer and sell up to $20 million within a 12-month period (including up to $6 million by selling security-holders that are affiliates of the issuer). Under Tier 2, an issuer may offer and sell up to $50 million within a 12-month period (including up to $15 million by selling security-holders that are affiliates of the issuer). Only U.S. and Canadian companies that are not required to file reports under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), are eligible to offer or sell securities under Regulation A+. A company's existing security-holders may sell securities in reliance on Regulation A+, subject to certain limitations. Selling security-holders cannot sell more than 30 percent of the aggregate offering in the issuer's first Regulation A+ offering and in any subsequent Regulation A+ offering for 12 months following the initial offering. An issuer can choose whether to conduct a Tier 1 or Tier 2 offering for offerings up to $20 million.

While issuers opting for Tier 2 offerings can raise significant amounts of capital, Regulation A+ imposes a number of reporting and disclosure requirements on companies conducting Tier 2 offerings. Those requirements include (1) inclusion of audited financial statements in the offering circular and annually, and (2) annual, semiannual and current event reporting. In addition, nonaccredited investors must limit purchases to no more than 10 percent of the greater of the investor's annual income or net worth. This investment limit does not apply if the securities are to be listed on a national securities exchange at the consummation of the offering. Companies seeking capital will need to determine whether the opportunity to raise funds from a larger and more diverse group of investors rather than in a private placement offered via general solicitation (wherein all purchasers must be accredited investors) outweighs the disclosure and reporting requirements of Regulation A+.

Notably, state securities law registration and qualification requirements are preempted in Tier 2 offerings, as all investors in Tier 2 offerings will be considered "qualified purchasers." The final rule defines qualified purchaser to include any person to whom securities are offered or sold in a Tier 2 offering. Tier 1 offerings will continue to be subject to both federal and state oversight, although the coordinated review program for Regulation A offerings instituted by the North American Securities Administrators Association may alleviate some of the burden.

Also easing the regulatory burden on issuers, securities issued in a Tier 2 offering will be exempt from the "holder of record" calculation for purposes of Section 12(g) of the Exchange Act if the issuer remains subject to, and is current in, its Regulation A+ periodic reporting obligations, engages a transfer agent registered with the SEC, and has a public float of less than $75 million or annual revenues less than $50 million. Short-Form 8-A registration remains an option for issuers, especially those looking to become listed on a national securities exchange.

The final rule includes bad actor disqualifications that are substantially the same as those included in Rule 506(d). The covered person's status for the purpose of the disqualification is tested at the time of filing the offering statement.

Regulation A+ becomes effective 60 days after publication in the Federal Register.

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