

SEC Adopts Regulation A+: Permits Private Companies to Conduct Offerings of up to \$50 million without Registration

March 31, 2015

On March 25, 2015, the Securities and Exchange Commission adopted amendments to Regulation A. The amended regulation, which is popularly referred to as Regulation A+, permits eligible private companies to conduct “Tier 2 offerings” of up to \$50 million in any 12-month period without having to register the offering under federal or state securities law. This memorandum summarizes certain material elements of the new rules. We believe that amended Regulation A eliminates many of the impediments that prevented private companies from using Regulation A in the past and that the streamlined offering qualification procedure may offer private companies a viable means to raising capital from the public (including non-accredited investors) without full-blown federal registration. It remains to be seen whether the rule will be widely adopted or whether private companies seeking capital will continue to rely on Regulation D private placements. We think that private companies will at least wish to consider the amended Regulation A alternative.

Eligible Issuers

Regulation A is available to any issuer that is organized in and has its principal place of business in the United States or Canada and that is not (i) an Exchange Act reporting company, (ii) a blank check company, (iii) an investment company (including business development companies), or (iv) an issuer of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights.

Offering Limitations

Regulation A establishes two tiers of offering:

- Tier 1: offerings up to \$20 million in a 12-month period, of which no more than \$6 million may be offered on behalf of selling security holders who are affiliates of the issuer.
- Tier 2: offerings up to \$50 million in a 12-month period, of which no more than \$15 million may be offered on behalf of selling security holders who are affiliates of the issuer.

Sales by selling security holders in an issuer’s initial Regulation A offering and any subsequent Regulation A offering within the first 12-month period following the qualification of the initial offering are limited to no more than 30% of the aggregate offering.

After the first year following the qualification of an issuer's initial offering secondary sales by non-affiliates are not limited except by the maximum offering amount permitted by either Tier 1 or Tier 2.

Offerings of up to \$20 million may be structured as either Tier 1 or tier 2 offerings but in that case the issuer must comply with the Tier 2 offering and ongoing reporting requirements.

Investment Limits

There are no investment limits in Tier 1 offerings. For Tier 2 offerings there are no investment limits for accredited investors and no limits for non-accredited investors if the securities being sold in the offering are to be listed on a national securities exchange upon completion of the offering. If the securities are not to be listed on a national securities exchange, purchasers in a Tier 2 offering that are non-accredited may purchase, in the case of natural persons, no more than 10% of the greater of the investor's annual income and net worth or, in the case of entities, no more than 10% of the greater of the entity's annual revenues and net assets.

Offering Process

Issuers must file an offering statement electronically on Form 1A with the SEC using EDGAR. The offering statement is subject to the review and comment of the SEC and must be qualified before the issuer can make sales pursuant to Regulation A. Issuers may submit the offering statement to the SEC on a confidential basis but in that case must file the offering statement publicly not less than 21 calendar days before qualification by the SEC.

Issuers may "test the waters" with, or solicit interest in a potential offering from, the general public either before or after the filing of the Form 1A. Solicitation materials that are provided to potential purchasers after the offering statement has been filed publicly must be preceded or accompanied by a preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained. Testing the waters materials must be included as an exhibit to the offering statement when the offering statement is either submitted for non-public review or filed with the SEC (and updated for substantive changes in such material after the initial non-public submission or filing).

Offering Statement

The offering statement requires disclosure of basic information about the issuer, including material risks, use of proceeds, description of the business, management's discussion and analysis, executive officers and directors and compensation and beneficial ownership. In addition, issuers must file balance sheets and other required financial statements as of the two most recently completed fiscal year ends.

The financial statements in a Tier 1 offering are not required to be audited but must be provided if they have been obtained for other purposes and the audit was performed in accordance with U.S. GAAS or the standards of the Public Company Accounting Oversight Board and the auditors meet the independence standards.

The financial statements in a Tier 2 offering must be audited by an audit firm that satisfies the independence standards but need not be registered with the Public Company Accounting Oversight Board. The financial statements may be audited in accordance with either U.S. GAAS or the standards of the Public Company Accounting Oversight Board. If the securities are to be listed on a national securities exchange concurrent with the offering the financial statements must be prepared in accordance with the standards of the Public Company Accounting Oversight Board by a firm that is registered with the Public Company Accounting Oversight Board.

Ongoing Reporting Obligations

After the offering statement has been qualified by the SEC, issuers in Tier 1 and Tier 2 offerings must file a report describing the results of the offering.

Issuers in a Tier 2 offering become subject to continuing disclosure obligations which require the filing of:

- an annual report on Form 1K within 120 calendar days of the issuer's fiscal year-end;
- a semiannual report on Form 1SA within 90 days after the end of the first six months of the issuer's fiscal year end; and
- current reports on Form 1U to disclose certain fundamental events within four business days following the event.

An issuer may suspend its reporting obligations if it has filed all required reports for a specified period, offers and sales of securities are not ongoing and the securities covered by the offering statement are held of record by fewer than 300 persons.

Preemption of State "Blue Sky" Laws

Regulation A Tier 1 offerings do not preempt state law registration and qualification requirements and issuers in such offerings must comply with all state securities laws, including regulations with respect to solicitation of investors.

Regulation A Tier 2 offerings do preempt state law registration and qualification requirements and offerings are not subject to state review. However, pursuant to Section 18(c) of the Securities Act, state regulators retain their authority to require the filing of any document filed with the SEC and the payment of filing fees and may investigate and bring enforcement actions against fraudulent securities transactions.



Please contact Paul De Rosa by phone at (412) 297-4821 or by e-mail at pderosa@cohenlaw.com or Christie Tillapaugh by phone at (412) 297-4603 or by e-mail at ctillapaugh@cohenlaw.com for further information or if you have any questions concerning this topic.

The contents of this publication are for informational purposes only and do not constitute legal or other professional advice. Cohen & Grigsby, P.C. assumes no liability in connection with the use of this

publication. The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about Cohen & Grigsby's qualifications and experience.