MACDONALD WEISS PLLC

Client Alert

August 5, 2015

TEACHING AN OLD DOG NEW TRICKS:

Regulation A+ - Final Rules Amending Regulation A

And the Creation of a Viable Small Issues Exemption

The benefits of increased offering size, state blue-sky law preemption, and application to secondary market resales, may transform Regulation A offerings under the new rules into a viable source of access to capital for small and emerging companies.

On June 19, 2015, the final rules[i] adopted by the Securities and Exchange Commission (SEC) modifying Regulation A[ii] became effective. The amendments were mandated under Title IV of the Jumpstart Our Business Startups Act ("JOBS Act"). Colloquially known as Regulation A+, the new rules intend to facilitate access to capital for smaller companies by expanding the exemption from registration under the existing Regulation A for certain offerings of up to $50 million, relieve certain regulatory burdens, and update the communications, qualification and offering process requirements.

Revised Regulation A: Key Points

Also known as the Conditional Small Issues Exemption, revised Regulation A provides for an exemption from registration under the Securities Act for offerings by US and Canadian companies that are not subject to the periodic reporting obligations under the Securities Exchange Act of 1934 ("Exchange Act"). As more fully described below, pursuant to the JOBS Act mandate, the new rules provide a framework that increases the potential offering size from the old-rule limit of $5 million in any 12-month period, to up to $50 million, giving issuers a choice between two tiers of offerings – Tier 1 for offerings up to 20 million and Tier 2 for offerings up to $50 million – each with different sets of obligation. Each Tier allows a certain amount of sales in the secondary market by selling security-holders, and in certain cases without any restrictions on the types of investors that can participate in the offering. Like the old rule, the new rules require the filing of a simplified offering statement with the SEC. As a general matter, holders of securities sold under Regulation A are counted toward the holder-of-record threshold that could trigger Exchange Act reporting requirements but the new rule provides a conditional exemption. Tier 1 securities are not "covered securities" which means they are not exempt from compliance with state blue sky laws[iii], but Tier 2 securities are exempt; however, Tier 2 offering investors may be subject to investment limits, Tier 1 investors are not (and there were no investment limits under the old rules). The final rules impose more disclosure requirements on Tier 2 offerings including the need for audited financial statements and ongoing periodic reporting, but the new rules provide a means for an issuer in a Tier 2 offering to concurrently list a class of securities on a national exchange using a short-form filing.

Offering Tier Limits Explained

The final rules amend Regulation A to create two tiers of exempt offerings, both of which allow for secondary sales by security-holders with certain limits depending on whether the security holder is an affiliate, and the timing of the offering:

- Tier 1 for offerings of up to $20 million in a 12-month period, which may include securities sold for the account of security-holders with the following limits:
  - The portion of the offering attributable to security- holders that are affiliates of the issuer is limited in the aggregate to $6 million; and
  - For the initial offering and any subsequent offering of the securities under Regulation A that is qualified within one year of the initial offering, the portion of the purchase price attributable to the account of all selling security-holders cannot in the aggregate exceed 30% of the offering price of the particular offering.
- Tier 2 for offerings of up to $50 million in a 12-month period, which may include securities sold for the account of security-holders with the following limits:
  - The portion of the offering attributable to security- holders that are affiliates of the issuer is limited in the aggregate to $15 million; and
  - For the initial offering and any subsequent offering of the securities under Regulation A that is qualified within one year of the initial offering, the portion of the purchase price attributable to the account of all selling security-holders cannot in the aggregate exceed 30% of the offering price of the particular offering.
- The final rules set out an approach for calculating the offering limit in the case of convertible or exchangeable securities. Issuance of the securities is predicated upon qualification of the offering by the SEC (described below). If convertible securities or warrants are being offered, the underlying securities must also be qualified by the SEC and the aggregate offering price must include the conversion, exercise or exchange price of such securities.

Integration, and Calculating the Aggregate Value of Offerings in a 12-month Period

All sales by selling security-holders under either Tier 1 or Tier 2 will be aggregated with all sales by the issuer under Regulation A when calculating the aggregate value of offerings conducted in a 12-month period. The proposed rules preserve the existing integration safe harbors for both Tier 1 and Tier 2 and add some additional safe harbors. The proposed rules provide that Regulation A offerings will not be integrated with:

- Prior offers or sales of securities; or
- Subsequent offers and sales of securities that are:
  - registered under the Securities Act, except as provided in Rule 255(e) which requires a 30-day cooling-off period in certain cases between and abandoned Regulation A offering and a registered offering;[iv]
  - made in reliance on Rule 701 under the Securities Act which provides for an exemption from registration for issuing securities pursuant to certain compensatory benefit plans or written agreements relating to compensation;

- ☐ made pursuant to an employee benefit plan;
- ☐ made in reliance on Regulation S related to off shore offers and sales;[v]
- ☐ made more than six months after completion of the Regulation A offering; or
- ☐ made pursuant to the proposed rules for securities-based crowdfunding transactions under Title III of the JOBS Act.[vi]

Consequently, it may be possible for an issuer to make a private offering under Section 4(a)(2) or Regulation D prior to commencing a Regulation A offering without risking integration of the private offering and the Regulation A offering. An offering made under Regulation A should not be integrated with another exempt offering, provided that each exempt offering complies with the requirements for the exemption that is being relied upon for that particular offering.

Who can use Regulation A: Issuer Eligibility Criteria

Regulation A remains available only to United States and Canadian companies that have their principal place of business in the US or Canada. Regulation A is not available to certain types of issuers, including:

- Issuers that are already SEC Exchange Act reporting companies;
- Investment companies or companies required to be registered under the Investment Company Act of 1940;
- Development stage companies without a specific business plan or purpose, or whose plan is to merge with or acquire an unidentified company (a "Blank Check Company");
- Issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights;
- Companies that are, or have been, subject to an order by the Commission denying, suspending or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act[vii] that was entered within five years before the filing of the offering statement.
- Companies that have failed to comply with the filing requirements under Rule 257 dictating the filing with the Commission of ongoing reports required by Regulation A during the two years immediately preceding the filing of a new offering statement;
- "Bad Actors" under Rule 262, which disqualifies issuers and other relevant persons that have demonstrated track records of non-compliance or abuse, such as having been convicted of or, at the time of filing the offering statement, are subject to court or administrative sanctions for securities fraud and other violations of specified laws dealing with the financial industry, insurance and banking. Under the proposed amendment, the bad actor disqualification provisions would apply to certain "covered persons," including managing members of an LLC, compensated solicitors of investors, executive officers and other officers participating in the offering, significant shareholders (20% or more of outstanding voting securities based on voting power), promoters and underwriters and their executive officers or directors, general partner or manager. The final rules include a reasonable care exception, in that an issuer will not lose the benefit of the Regulation A exemption if it can show that it did not know and, in the exercise of reasonable care, could not have known, of the existence of a disqualification.

The Commission explicitly deferred expanding the categories of eligible issuers to non-Canadian foreign issuers until it has the opportunity to assess the market impact of the amended rule.

Eligible Securities

Eligible securities are limited to those listed in Section 3(b)(3) of the Securities Act, which include equity securities, debt securities and debt securities convertible or exchangeable into equity interests, including any guarantees of such securities. Under the proposed rules, however, issuers offering asset-backed securities would not be able to rely on the Regulation A exemption.

Investment Limitations - Who can Purchase Regulation A Securities

The final rules, in the case of Tier 1 offerings, do not limit the type of investor who can purchase the securities or the amount that an investor could purchase. In the case of Tier 2 offerings that are not listed on a registered exchange upon qualification, the final Rules limit the amount an investor can purchase unless the purchaser is an accredited investor[viii], as follows:

- A non- accredited investor that is a natural person must limit purchases to no more than 10% of the greater of the investor's annual income or net worth excluding the value of such person's primary residence;
- A non-accredited, non-natural person must limit purchases to 10 percent of the greater of its annual revenue or net assets at fiscal year end.

Issuers must disclose this investment limitation to investors, and issuers may rely on an investor's representation of compliance with the investment limitation provided that the issuer did not know, at the time of the sale, that the investor's representation was false. The revised Rules do not limit an investor's investment in a Tier 1 offering.

The Offering Process, Communications, and "Testing the Waters"

Testing the Waters. The final Rules allow issuers to "test the waters" – or publicly solicit interest in a potential offering – from all types of investors[ix] either before or after the filing of the offering statement, as long as any solicitation materials used after publicly filing the offering statement are preceded or accompanied by a preliminary offering circular or contain the URL where the most current preliminary offering circular may be obtained.

Further, the final rules require issuers and intermediaries that use testing the waters materials after publicly filing the offering statement to update and redistribute such material in a substantially similar manner as such materials were originally distributed to the extent that either the material itself or the preliminary offering circular attached thereafter becomes inadequate or inaccurate in any material respect.[x]

"Testing the waters" is subject to issuer compliance with the rules on filing and disclaimers, and solicitation material are subject to the antifraud and other civil liability provisions of the federal securities laws. Solicitation materials must be filed as exhibits to the offering statement once submitted for non- public review or filed, but issuers are not necessarily required to submit solicitation materials at or before the time of their first use.

The treatment of solicitation materials in Regulation A+ offerings is generally consistent with the treatment of solicitation materials used by emerging growth companies under Securities Act Section 5(d), with two notable exceptions:

- Solicitation materials used in Regulation A+ offerings must be included with the offering statement.
- Solicitation materials used by Regulation A+ issuers that file an offering statement with the Commission will be publicly available as a matter of course.

Non-public Confidential Review. The final Rules allow for a quiet filing—confidential, non-public review of draft offering statements prior to formal filing.[xi] An issuer may submit an offering statement for non-public review by the

SEC. As with emerging growth companies, should an issuer opt for confidential review, the offering statement must be filed publicly not less than 21 calendar days before qualification of the offering statement. The timing, in the case of a Regulation A offering, is not tied to an issuer's road show, but rather to the qualification of the offering statement. The SEC noted specifically that the 21-day public filing period will provide state securities regulators an opportunity to assure filing of offering materials when applicable (see below) at the state level in advance of an offering under Regulation A.

Filing Procedures. Issuers are required to file an offering statement with the SEC for review and qualification using EDGAR, the SEC's electronic filing system, on Form 1-A. Form 1-A consists of three parts: Part I (Notification) which is an XML-based fillable form with basic issuer information; Part II (Offering Circular) which will be a text file that will contain the disclosure document and financial statements; and Part III (Exhibits) which will be a text file containing exhibits and related materials. Issuers are permitted to incorporate by reference certain information that is already available on EDGAR. Other documents which must be submitted in conjunction with a Regulation A+ offering, such as ongoing reports, must generally be submitted or filed electronically on EDGAR as well.

Delivery Requirements. During the prequalification period, issuers and intermediaries must deliver a preliminary offering circular at least 48 hours in advance of sales. However, when an issuer is subject to, and current with respect to, ongoing Tier 2 reporting obligations, such delivery is not required and issuers and intermediaries are only subject to the general delivery requirements for offers.

With respect to the final offering circular, the rules reflect an "access equals delivery" model provided that sales are made on the basis of offers conducted during the prequalification period and the final offering circular is available on EDGAR. Within two business days after completing a sale, issuers and intermediaries must provide purchasers either with a copy of the final offering circular or a notice identifying where the final offering circular may be obtained on EDGAR along with instructions on how to contact the issuer or intermediary to request a copy of the final offering circular.

Qualification and Withdrawal. Offering statements must be "qualified" by the SEC before sales may be made pursuant to Regulation A+, and offering statements may be declared qualified by a "notice of qualification" issued by the Division of Corporation Finance. The notice of qualification is analogous to a notice of effectiveness in registered offerings.

Issuers may withdraw an offering statement, with the consent of the Director of the Division of Corporation Finance, if none of the securities that are the subject of such offering statement have been sold and such offering statement is not the subject of temporary suspension order issued by the SEC.

Continuous or Delayed Offerings under the final Rules are permitted, but require issuers in a Tier 2 offering to be current in their annual and semiannual reporting obligations, described below. Additionally, issuers may qualify additional securities in reliance on Regulation A+ by filing a post-qualified amendment to a qualified offering statement. The proposed rules provide for continuous or delayed offerings for the following types of securities:

- securities offered or sold by or on behalf of a person other than the issuer or its subsidiary;
- securities offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;
- securities issued upon the exercise of outstanding options, warrants, or rights;
- securities issued upon conversion of other outstanding securities;
- securities pledged as collateral; or

- securities the offering of which commences within two calendar days after the qualification date, will be made on a continuous basis, may continue for a period in excess of 30 days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the initial qualification date. The securities may be offered I certain circumstances, including if a new offering statement is filed, up to three years after the initial qualification date of the offering statement.

The final Rules do not allow a continuous offering to be done "at the market" (defined as an offering made into an existing trading market for outstanding securities of the same class at other than a fixed price), even if a secondary market develops with fluctuating market prices.

Disclosure Requirements - The Offering Statement and Form 1-A

As noted above, an issuer that seeks to rely on Regulation A must file and qualify an offering statement. The offering statement is intended to be a disclosure document that provides potential investors with information that will form the basis for their investment decision. A notice of "qualification" is similar to a notice of effectiveness in an SEC-registered offering.

Part I

As noted above, Part I requires certain basic information regarding the issuer, its eligibility, the offering details, the jurisdictions where the securities will be offered, and sales of unregistered securities.

Part II

Part II contains the narrative portion of the Offering Circular, and is fairly similar to Part I of Form S-1 and, as such, is akin to what is required of smaller reporting companies in a prospectus for a registered offering. The required disclosure will be scaled and includes the following subject areas:

Key disclosure data includes:

- Information about the issuer and the offering, including identification of any underwriters and their discounts or commissions;
- Material risks;
- Material disparities between the public offering price and the effective cash costs for shares acquired by insiders during the past year;
- Plan of distribution for the offering;
- Use of proceeds;
- Overview of the issuer's business, including description of business operations for three prior fiscal years (or since inception),and material physical properties;
- Management discussion and analysis of issuer's liquidity and capital resources, financial condition and results of operations covering the two most recent fiscal years, and if the issuer did not have revenue from operations during each of the three immediately preceding fiscal years, a plan of operations for the twelve months following qualification of the offering including whether it will be necessary to raise more funds within six months;

- Identify executive officers, directors and significant employees with a discussion of family relationships, business experience and involvement in certain legal proceedings;
- Executive compensation;
- Beneficial ownership of voting securities by officers, directors and 10% owners;
- Related party transactions;
- Description of the securities;
- Financial statements for two preceding years, as described below; and
- Any events that would have triggered disqualification of the offering under the "bad actor" provisions but occurred before the effective date of the proposed rules.

Financial Statement Disclosure Requirements.

Tier 1 and Tier 2 issuers must file balance sheets and other required financial statements as of the two most recently completed fiscal year ends (or for such shorter time as they have been in existence). The financial statements for an issuer in a Tier 1 offering are not required to be audited unless the Tier 1 issuer already obtained an audit of its financial statement for other purposes and such audit was performed in accordance with U.S. GAAS or the Public Company Accounting Oversight Board (PCAOB) standards and the auditors meet the independence standards, in which case the audited financial statements must be filed. The financial statements for an issuer in a Tier 2 offering are required to be audited. The audit firm must satisfy the independence standard but need not be PCAOB-registered. The financial statements may be audited in accordance with either U.S. GAAS or PCAOB standards. An issuer in a Tier 2 offering that seeks to have a class of securities listed on a national securities exchange concurrent with the Regulation A offering must include financial statements prepared in accordance with PCAOB standards by a PCAOB-registered firm.

U.S. issuers are required to prepare financial statements in accordance with U.S. GAAP. Canadian issuers may use U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB IFRS). As with emerging growth companies (EGCs), an issuer may elect to delay implementation of new accounting standards to the extent such standard permits delayed implementation by non-public business entities. The election is a one-time election and must be disclosed.

The permissible age of financial statements is nine months before the date of non-public submission or filing of offering statement in order to comport with the timetable for the proposed requirement for semiannual interim reporting. The proposed rules also require that financial statements be no older than nine months for qualification of the offering.

Ongoing Reporting Obligations

Regulation A offerings do not subject an issuer to the periodic reporting obligations under the Exchange Act, which means that issuers would not be subject to Sarbanes-Oxley, insider trading and reporting rules, or SEC proxy rules.

Tier 1 issuers will be required to provide certain information about their Regulation A offerings on a new form, Form 1-Z for exit reports when the offer is completed; otherwise, Tier 1 issuers have no ongoing reporting obligations.

Issuers in Tier 2 offerings, on the other hand, will be subject to an ongoing reporting regime. Similar to the ongoing reporting regime that the SEC proposed in connection with issuers that conduct crowdfunded offerings. Tier 2 issuers would be required to file:

- • annual reports on Form 1-K;
- • semi-annual reports on Form 1-SA;
- • current reports on Form 1-U;
- • special financial reports on Form 1-K and Form 1-SA; and
- • exit reports on Form 1-Z.

The annual report on Form 1-K must be filed within 120 calendar days of the issuer's fiscal year-end, and covers the following information:

- Business operations of the issuer for the prior three fiscal years (or, if in existence for less than three years, since inception);
- Transactions with related persons, promoters, and certain control persons;
- Beneficial ownership of voting securities by executive officers, directors, and 10% owners;
- Identities of directors, executive officers, and significant employees, with a description of their business experience and involvement in certain legal proceedings;
- Executive compensation data for the most recent fiscal year for the three highest paid officers or directors;
- MD&A of the issuer's liquidity, capital resources, and results of operations covering the two most recently completed fiscal years; and
- Two years of audited financial statements.

The semi-annual report would be similar to a Form 10-Q, although it would be subject to scaled disclosure requirements. The semi-annual report is required to be filed within 90 days after the end of the first six months of the issuer's fiscal year end, commencing immediately following the most recent fiscal year for which full financial statements were included in the offering circular or, if the offering circular included six-month interim financial statements for the most recent full fiscal year, then for the first six months of the following fiscal year.

A current report on Form 1-U is required to announce fundamental changes in the issuer's business and covers the following information:

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

An exit report on Form 1-Z would be required to be filed within 30 days after the termination or completion of a Regulation A-exempt offering.

The Commission anticipates that issuers would generally be able to use the offering materials as a basis to prepare their ongoing disclosure.

The proposed ongoing disclosure requirements would apply to successor issuer entities, i.e., succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise.

Terminating or Suspending Tier 2 Ongoing Reporting Obligations. The final Rules permit an issuer to exit the ongoing reporting regime by filing Form 1-Z on a basis similar to the provisions for suspension or termination of reporting requirements for Exchange Act filers. A Tier 2 issuer that has filed all required ongoing reports for the shorter of: (1) the period since the issuer became subject to such reporting obligations, or (2) its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z (termination or exit form) will be permitted to suspend its reporting obligations at any time after completing reporting for the fiscal year in which the offering statement was qualified if the following conditions are met:

- The securities of each class to which the offering statement relates are held of record by fewer than 300 persons, and
- Offers or sales made in reliance on a qualified offering statement are not ongoing.

Further, the Regulation A on-going reporting requirements would be automatically suspended if an issuer registers a class of securities under Section 12 of the Exchange Act.

Tier 2 Offering with Concurrent Exchange Listing.

The final rule permits a Tier 2 issuer that has provided disclosure in Part II of Form 1-A that follows Part 1 of Form S-1 (or for REITs, Form S-11) to file the short form Form 8-A in order to list its securities on a national securities exchange, rather than experience the cost and delay of preparing a Form 10 registration statement. Of course, thereafter, the issuer would be subject to Exchange Act reporting requirements. An issuer that enters the Exchange Act reporting regime in this manner will be deemed an EGC.

No Transfer Restrictions, Secondary Market Exchanges

Based on the reasoning that a Regulation A offering is a kind of registered public offering, securities sold thereunder are not "restricted securities" under Rule 144, meaning that they are not subject to the resale restrictions that apply to securities sold in private offerings, and can be resold immediately if the holder is a non-affiliate. The proposed rules are designed to facilitate the development of secondary trading markets for Regulation A securities. Affiliates would continue to be subject to the limitations of Rule 144[xii], other than the holding period requirement. Additionally, brokers will be permitted to rely upon information contained in reports filed by Regulation A issuers prior to publishing quotations, to satisfy the broker's obligations under Exchange Act Rule 15c2-11.[xiii]

The Commission solicited comments on the proposed rules regarding whether it should pass rules that encourage the development of "venture exchanges" or other trading venues focused on attracting such issuers, or facilitate separate security markets for small and emerging companies. In its adopting release, the Commission noted that it is considering venture exchanges as a way to provide liquidity for smaller issuers, including for Regulation S securities.

Effect on Tally of Holders for Exchange Act Registration Requirements

Securities sold pursuant to Regulation A will not be exempt from being counted toward the Exchange Act registration requirements under Section 12(g) which requires, among other things, that an issuer with total assets exceeding $10 million and a class of securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class with the SEC – meeting those thresholds subjects the issuer to Exchange Act periodic reporting requirements. However, The final rule provides a limited exemption for securities issued in a Tier 2 offering from being counted toward the Section 12(g) "holder of record" threshold where the issuer is subject to, and current in its, Regulation A periodic reporting obligations. In order to benefit from this conditional exemption, an issuer must retain the services of a transfer agent and meet requirements similar to those in the "smaller reporting company" definition (public float under US$75 million[xiv] as of the end of the most recent semi-annual reporting period, or, in the absence of a public float, had annual revenues of less than US$50 million as of the most recent fiscal year end). An issuer that exceeds the Section 12(g) threshold will have a two-year transition period before it would be required to register its class of securities pursuant to Section 12(g), provided it timely files all ongoing reports due pursuant to Rule 257 during such period. An issuer entering Exchange Act reporting will be considered an EGC to the extent the issuer otherwise qualifies for such status.

Note that beneficial owners who hold shares through a broker who is a record holder are not counted, so that each broker who is a record holder for one or more beneficial owner constitutes one shareholder of record. It behooves an issuer to pay close attention to the number of shareholders of record if an active secondary trading market develops for its shares, because Reg A securities are unrestricted and freely tradable as noted above.

Statutory Liability

Regulation A+ offerings expose issuers to increased liability in private litigation as compared to private placements under Section 4(a)(2) of the Securities Act or Regulation D because Regulation A offerings will be subject to the statutory liability provisions of Section 12(a)(2) of the Securities Act, which prohibits an offer or sale of a security by means of an offering circular or oral communication that includes a material misleading statement or material misstatement of fact. The Section 12(a)(2) formulation does not require a potential private plaintiff in a Regulation A+ offerings to show *scienter* (intent to deceive, manipulate or defraud) when conducting private litigation against Regulation A+ issuers. By contrast, Section 12(a)(2) does not apply to other unregistered offerings, where the plaintiff must prove that the issuer had scienter.[xv] Other anti-fraud and civil liability provisions, including Section 10(b) of the Exchange Act and Rule 10b-5, also apply.

"Covered Securities" and Blue Sky Preemption

Under the final rules, preemption of state blue sky law[xvi] is not available for Tier 1 offerings, which consequently will be subject to state registration requirements. However, the final rules allows for the preemption of registration and qualification requirements of state blue sky securities laws for Tier 2 offerings sold to "qualified purchasers" or, as provided by statute in the JOBS Act, are listed on a national securities exchange. The final rule (circularly) defines the term "qualified purchaser" in a Regulation A offering to include all offerees and purchasers in a Tier 2 offering. States will, of course, continue to have authority to require filing of offering materials and enforce anti-fraud provisions in connection with a Tier 2 offering.

It is important to note that the North American Securities Administrator Association ("NASAA") and other groups have strongly opposed the preemption of state law on anti-fraud grounds. Since the time that the rules were proposed, NASAA has introduced a coordinated review process for Regulation A offerings, but in the Regulation A final rules release, the SEC noted that the coordinated review process is relatively new and it remains largely untested.

Early Indications of Market Impact

Historically, Regulation A filings have been rarely used due to the cost and burden of preparing the documents to be filed with the SEC, and the blue sky law compliance issues, when the maximum amount that could be raised was only $5 million. For example, from 2005 to 2013, the eight-year period immediately preceding the release of the proposed amendments to Regulation A, there were only thirteen completed regulation A offerings with an aggregate offering price of $73 million. Within one week of the effectiveness of revised Regulation A, the first offering was filed with the SEC, for a proposed raise of $50 million. Six weeks later we see that there have been four offerings filed with a stated anticipated raise of $71.25 million excluding the one company that has not yet indicated a raise amount. These four filings include both Tier 1 and Tier 2 offerings. In a few short weeks, we have nearly blown past a 13-year aggregate statistic. At this pace, Regulation A may prove to be a leading method for companies to raise capital.

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[i] The proposed rules can be found at https://www.sec.gov/rules/final/2015/33-9741.pdf

[ii] Regulation A is promulgated pursuant to Section 3(b)(2) of the Securities Act of 1933, as amended.

[iii] The term "blue sky laws" refers to the state legislation governing the regulation of securities offerings and sales. If securities fall within the parameters of "covered securities" as set forth in the federal securities laws then the federal laws pre-empt state law.

[iv] Rule 255(e) provides a safe harbor to issuers that have a bona fide change of intention and decide to register an offering under the Securities Act after soliciting interest in a Regulation A offering without filing the required offering statement. ***Abandoned offerings***. Where an issuer decides to register an offering under the Securities Act after soliciting interest in a contemplated, but subsequently abandoned, Regulation A offering, the abandoned Regulation A offering would not be subject to integration with the registered offering if the issuer engaged in solicitations of interest pursuant to this rule only to qualified institutional buyers and institutional accredited investors permitted by Section 5(d) of the Securities Act. If the issuer engaged in solicitations of interest to persons other than qualified institutional buyers and institutional accredited investors, an abandoned Regulation A offering would not be subject to integration if the issuer (and any underwriter, broker, dealer, or agent used by the issuer in connection with the proposed offering) waits at least 30 calendar days between the last such solicitation of interest in the Regulation A offering and the filing of the registration statement with the Commission.

[v] Regulation S provides a safe harbor exemption from the registration requirements of the Securities Act for offers or sales, by issuers and secondary resellers, if (1) the securities are sold in an offshore transaction and (2) there are no directed selling efforts in the United States. Rule 902(c)(1) [17 CFR 230.902(c)(1)] broadly defines "directed selling efforts" as: any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities offered in reliance on Regulation S. Such activity includes placing an advertisement in a publication "with a general circulation in the United States" that refers to the offering of securities being made in reliance upon Regulation S.

[vi] For a summary of the SEC's proposed rules implementing the crowdfunding provisions of Title III of the JOBS Act, please see "REGULATION CROWDFUNDING: Proposed Rules by the SEC to give effect to the Crowdfunding Provisions of Title III under the JOBS Act," November 15, 2013.

[vii] Section 12(j) of the Exchange Act authorizes the Commission to deny, suspend or revoke registration of an issuer, after notice and opportunity of a hearing, if the Commission finds that the company failed to comply with any of the provisions, rules or regulations of the Exchange Act.

[viii] "Accredited investor" is defined in Rule 501 of Regulation D (§230.501) and includes most categories of institutional investors such as banks, broker dealers and pension funds, and natural persons who are presumed to have an adequate level of financial sophistication and are able to bear investment risks based on income and net worth tests. Pursuant to the current definition, a natural person qualifies as an accredited investor if he or she has individual net worth – or joint net worth with a spouse – that exceeds $1 million at the time of the purchase, excluding the value of the primary residence of such person, or, if he or she has income exceeding $200,000 in each of the two most recent years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year. The Dodd-Frank Act requires the SEC to review the definition every five years. The SEC has been actively engaged at the committee level and through public meetings, with a process of reviewing this definition and whether and how it should be revised.

[ix] Note that testing the waters for emerging growth under Section 5(d) of the Securities Act companies is limited to communications with QIBs and institutional accredited investors.

[x] Issuers would not, however, be required to update and redistribute solicitation materials to the extent that: (i) any such changes occur only with respect to the preliminary offering circular, (ii) no similar changes are required in the solicitation materials previously relied upon, and (iii) such materials included (when originally distributed) a URL where the preliminary offering circular or the offering statement may be obtained and that URL continues to link to the most recent version of the preliminary offering circular. *See* Rule 255(d).

[xi] A request for confidential treatment may be made under Rule 406 (§ 230.406) for information required to be filed, and Rule 83 (§ 200.83) for information not required to be filed.

[xii] Rule 144 prescribes a non-exclusive safe-harbor for selling restricted securities, whether they are restricted because they were acquired in an unregistered, private placement by the issuer or an affiliate, or whether they are "control securities" which are securities held by an affiliate such as an executive officer, director or large shareholder, in a relationship of control (direct management or policies) with the issuer. Generally, if the issuer is not a reporting issuer, the holding period before securities become freely tradeable is one year (they can trade within this period only in compliance with an exemption from the registration requirements); if the issuer is a reporting company and the issuer is current in its periodic reporting requirements, the holding period is six months. Holdings periods of non-affiliates may be tacked together. For anyone, including affiliates, who acquire securities in the public market, there is no holding period because securities acquired in the public market are not restricted; however, if an affiliate acquires them, they become control securities subject to the elements of Rule 144 other than the holding period. In order for an affiliate to sell such securities, there must be adequate current information about the issuing company publicly available before the sale can be made; for public companies, this means that they are in compliance with periodic reporting requirements. Additionally, affiliates are limited in any three-month period to selling the number of equity securities that does not exceed 1% of the outstanding shares of the same class being sold, of if it is as traded security than the limit is the greater of 1% of the average reported weekly trading volume during the four weeks preceding the filing of the notice of sale on From 144. Affiliates must handle the sale as a routine transaction and a broker may not receive more than a normal commission. Affiliates must also file a notice of the sale with the SEC on Form 144 if the sale involves more than 5,000 shares of the aggregate dollar amount is greater than $50,000 in any three-month period.

[xiii] Rule 15c2-11 requires market makers to review basic issuer information prior to publishing quotations for that issuer's securities. Market makers must have a reasonable basis for believing that the information is accurate and from reliable sources. The Rule describes the kind of information that the broker-dealer must review.

[xiv] Consistent with the smaller reporting company definition, an issuer will calculate "public float" by multiplying the aggregate worldwide number of shares of its common equity securities held by non-affiliates by the price at which such securities were last sold (or the average bid and asked prices of such securities) in the principal market for such securities. Rule 12g5-1(a)(7). See also, e.g., Item 10(f)(1)(i) of Regulation S-K.

[xv] See US Supreme Court's 1995 decision in *Gustafson v. Alloyd Co*., 513 US 561, 564, 584 (1995).

[xvi] The blue sky preemption provisions are found in Section 18 of the Securities Act, 15 U.S.C. 77 et seq. Securities are exempt from the application of state securities laws if they are designated as "covered securities", and one type of covered security are securities to "qualified purchasers" as defined in Section 18(b)(3) of the Securities Act, 15 U.S.C. 77r(b)(3).

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