Akin

Going from A to A+: SEC Approves Amendments to Regulation A

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Two-Tier System

The new exemption, commonly referred to as “Regulation A+,” establishes two distinct tiers of offerings. Tier 1 sets an annual offering limit of $20 million, including no more than $6 million on behalf of selling securityholders that are affiliates of the issuer. Tier 2 establishes an annual offering limit of $50 million, including no more than $15 million on behalf of selling securityholders that are affiliates of the issuer. In general, sales by selling securityholders are limited to no more than 30 percent of a particular offering in the issuer’s initial Regulation A offering and subsequent Regulation A offerings within the first 12-month period following the initial offering.

Tier 2 offerings are also subject to additional requirements, including: (1) a requirement to provide audited financial statements; (2) a requirement to file annual, semiannual and current event reports; and (3) a limitation on the amount of securities that may be purchased by nonaccredited investors (*see* “Investment Limitations” below).

Eligible Issuers

Both Tier 1 and Tier 2 exemptions will be available to issuers organized, and having their principal place of business, in either the United States or Canada. The new Regulation A exemption is not available to: (1) SEC reporting companies; (2) blank check companies; (3) certain investment companies; and (4) companies seeking to offer asset-backed securities or fractional undivided interests in oil, gas or other mineral rights.

The new Regulation A is also unavailable to: (1) issuers that have not filed ongoing reports required by Regulation A during the preceding two years; (2) issuers that have been subject to any SEC orders under Exchange Act Section 12(j) that was entered within the past five years; and (3) certain bad actors.

Investment Limitations

New Regulation A imposes an investment limitation for Tier 2 offerings. The investment limit is not applicable to accredited investors and will not apply if, at the consummation of the offering, the securities are to be listed on a national securities exchange.

Otherwise, nonaccredited investors must limit their investments to no more than (1) 10 percent of the greater of either the investor's annual income and net worth (in the case of a natural person) or (2) 10 percent of the greater of such investor's annual revenues and net assets at fiscal year-end (in the case of a nonnatural person).

State Blue Sky Laws

One of the highlytouted features of "Regulation A+" will be the preemption of registration and qualification requirements under state blue sky securities laws that are applicable for Tier 2 offerings. Tier 1 offerings are still required to comply with state securities law requirements, but Tier 2 offerings will not be subject to state review so long as the securities are sold to "qualified purchasers" or if such securities are listed on a national securities exchange.

However, in connection with any Tier 2 offering, state securities regulators will continue to have authority to require the filing of offering materials and to bring enforcement actions for fraudulent conduct.

Liability Concerns

Sellers of securities under the new rules will still have potential Section 12(a)(2) liability for offers or sales made by means of oral communications or for an offering circular that includes material misleading statements or omissions. Offerings will also still be subject to the antifraud provisions under federal securities laws, regardless of the fact that an exempt offering under Regulation A is excluded from coverage of Section 11 of the Securities Act.

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