

AN ALERT FROM THE BDO NATIONAL ASSURANCE PRACTICE

BDO FLASH REPORT

SEC MATTERS



SUBJECT

SEC ADOPTS AMENDMENTS TO REGULATION A

SUMMARY

On March 25, the Securities and Exchange Commission unanimously approved amendments to Regulation A. The amendments, known as “Regulation A+,” were required by Section 401 of the JOBS Act. They are intended to increase access to capital for smaller companies by modernizing Regulation A and expanding it to provide a streamlined process by which a private company can offer and sell up to \$50 million of securities in a twelve-month period. The adopting release, No. 33-9741, is available [here](#). The amendments take effect on June 19.

Regulation A allows private companies to make small public offerings without having to register them with the SEC. Instead, the offering document must be reviewed and “qualified” by the SEC staff. Regulation A offerings have historically been subject to state-level registration and qualification requirements as well. Previously, Regulation A permitted offerings of up to \$5 million of securities in a twelve-month period. Very few offerings have been made pursuant to Regulation A. A U.S. Government Accountability Office study identified the costs and complexity of state law compliance as one of the reasons for this.

The amendments are intended to enhance the usefulness of Regulation A by increasing the amount of securities that can be offered in a twelve-month period to \$50 million and streamlining the offering process by preempting state-level registration and qualification requirements if certain requirements are met.

Regulation A is available to U.S. and Canadian issuers that are not Exchange Act registrants. There are several other eligibility restrictions and rules governing the offering process and the amounts of securities that can be sold to various categories of investors in various scenarios.

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The amendments created two tiers of offerings:

- ▶ Tier 1 - A modernized version of the historical Regulation A, Tier 1 permits offerings of up to \$20 million in a twelve-month period. State securities regulators will continue their current role in Tier 1 offerings.
- ▶ Tier 2 - This new tier permits offerings of up to \$50 million in a twelve-month period. State securities law requirements are preempted for these offerings.

Because Tier 2 offerings may generally involve larger dollar amounts and less state regulation, they are subject to more stringent requirements than Tier 1 offerings. Generally, the offering process and the ongoing reporting required after a Tier 2 offering are essentially scaled down versions of the offering and ongoing reporting processes used during and after registered offerings. This flash report provides a brief and general overview of Regulation A's revised financial reporting requirements.

OFFERING CIRCULARS

Offering circulars must comply with the information requirements of revised Form 1-A, which requires the following:

- ▶ Offering circulars must contain two years of annual financial statements for the issuer and its predecessors. The financial statements must comply with U.S. GAAP or, for Canadian companies, IFRS as issued by the IASB; however, they need not comply with the incremental requirements of Regulation S-X. Financial statements must be updated every six months after they become nine months old. For example, an issuer with a December 31, 2014 year-end would need to provide comparative half year financial statements for the six months ended June 30, 2015 if its offering circular is filed or qualified after September 30, 2015. Similarly, that issuer would need to provide 2015 annual financial statements if its offering circular is filed or qualified after March 31, 2016.
- ▶ Offering circulars must contain financial statements of certain other entities (businesses and real estate operations acquired or to be acquired, guarantors and collateral entities (but not equity method investees)) and pro forma information.
- ▶ For new accounting standards that apply to both public and non-public business entities, an issuer may elect to delay complying with the standards until the dates non-public business entities must apply them, similar to the approach emerging growth companies may use. However, issuers in Regulation A offerings are considered public business entities, so they are not eligible to use alternative accounting standards available only to non-public business entities.
- ▶ Offering circulars must be filed via the SEC's EDGAR system. Exhibits providing data in XBRL format are not required.
- ▶ Issuers may submit offering circulars to the SEC staff for review on a confidential basis before they are filed publicly, similar to the process used in registered offerings by emerging growth companies.

The audit requirements for the historical financial statements discussed above vary depending on whether the offering is a Tier 1 or a Tier 2 offering.

- ▶ In Tier 1 offerings, the financial statements must be audited only if an audit has been obtained for another purpose. Such audits may be performed (a) in accordance with U.S. GAAS or PCAOB standards, (b) by auditors who are not registered with the PCAOB, and (c) by auditors who are independent pursuant to either AICPA or SEC independence standards.
- ▶ In Tier 2 offerings, the financial statements must be audited. Similar to the audit requirements for Tier 1 offerings, such audits may be performed in accordance with U.S. GAAS or PCAOB standards and by auditors who are not registered with the PCAOB. In contrast, the auditors' report must comply with Article 2 of Regulation S-X and the auditor must meet the SEC's independence standards.

ONGOING REPORTING

The only subsequent reporting required of an issuer that has conducted a Tier 1 offering is to file a new Form 1-Z. This report is due 30 days after termination or completion of the offering and provides information about the results of the offering (e.g., number of securities sold, proceeds, etc.).

An issuer that has conducted a Tier 2 offering must file the following reports on an ongoing basis:

- ▶ Annual reports on new Form 1-K - Form 1-K is due no later than 120 days after year-end. The report must contain two years of issuer audited financial statements and audited financial statements of guarantors and collateral entities. The audit requirements are the same as discussed above for a Tier 2 offering.
- ▶ Semiannual reports on new Form 1-SA - Form 1-SA is due no later than 90 days after the end of the first half of an issuer's fiscal year. The report must contain financial statements similar to those in a Form 10-Q, except only year to date financial statements are required (i.e., no quarterly financial statements are required) and the financial statements are not required to be reviewed.
- ▶ Current reports on new Form 1-U - Similar to Form 8-K, Form 1-U requires reporting of significant current events and is due four business days after a reportable event occurs. The types of events to be reported are similar to Form 8-K, but the threshold for reporting acquisitions and divestitures is much higher and no historical or pro forma financial statements are required.
- ▶ Similar to the requirements for offering circulars, ongoing reports must be filed via the SEC's EDGAR system, exhibits providing data in XBRL format are not required, and the financial statements may not be prepared using alternative accounting standards available only to non-public business entities.

Issuers in Tier 2 offerings also use Form 1-Z, but generally for a different purpose than that for which Tier 1 issuers use it. An issuer in a Tier 2 offering uses this form to notify the SEC when its reporting obligations have terminated and it will stop ongoing reporting.

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