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More On Regulation A/A+; Thoughts On The Practical Effects And New SEC Guidance

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

On March 25, 2015, the SEC released final rules amending Regulation A. The new rules are commonly referred to as Regulation A+. The existing Tier I Regulation A, which does not preempt state law, has been increased to $20 million and the new Tier 2, which does preempt state law, allows a raise of up to $50 million. Issuers may elect to proceed under either Tier I or Tier 2 for offerings up to $20 million. The new rules went into effect on June 19, 2015.

On June 23, 2015, the SEC updated its Division of Corporation Finance Compliance and Disclosure Interpretations (C&DI) to provide guidance related to Regulation A/A+. The SEC published 11 new C&DI's and deleted 2 related to forms and in particular, related to paper filings and annotations which are no longer relevant or applicable.

Practical Effects of New Regulation A/A+

I believe, and the feedback I hear supports, that new Regulation A+ will be widely used. Tier 2 offerings in particular present a much-needed opportunity for smaller companies to go public without the added time and expense of state blue sky compliance but with added investor qualifications. Tier 2 offerings preempt state blue sky laws. To compromise with opponents to the state blue sky preemption, the SEC included investor qualifications for Tier 2 offerings. In particular, Tier 2 offerings have a limitation on the amount of securities non-accredited investors can purchase of no more than 10% of the greater of the investor's annual income or net worth. It is the obligation of the issuer to notify investors of these limitations. Issuers may rely on the investors' representations as to accreditation and investment limits with no added verification.

Tier 2 issuers that have used the S-1 format for their Form 1-A filing will be permitted to file a Form 8-A to register under the Exchange Act and become subject to its reporting

requirements. A Form 8-A is a simple registration form used instead of a Form 10 for issuers that have already filed the substantive Form 10 information with the SEC. Upon filing a Form 8-A, the issuer will become subject to the full Exchange Act reporting obligations, and the scaled-down Regulation A+ reporting will automatically be suspended. With the filing of a Form 8-A, the issuer can apply to trade on a national exchange.

This marks a huge change and opportunity for companies that wish to go public directly and raise less than $50 million dollars. An initial or direct public offering on Form S-1 does not preempt state law. By choosing a Tier 2 Regulation A+ offering followed by a Form 8-A, the issuer can achieve the same result – i.e., become a fully reporting trading public company, without the added time and expense of complying with state blue sky laws. The other consideration would be the added investor qualifications, but if the issuer meets the requirements for and lists on a national exchange, the added investor qualifications no longer apply.

Also, effective July 10, the OTCQB has amended their rules to allow a Tier 2 reporting entity to qualify to apply for and trade on the OTCQB; however, unless the issuer has filed a Form 8-A or Form 10, they will not be considered "subject to the Exchange Act reporting requirements" for purposes of benefiting from the shorter 6-month rule 144 holding period.

Moreover, as the guidance below illustrates, Regulation A/A+ is widely available for use by many existing "reporting entities" either because they voluntarily report (generally because they never filed a Form 8-A or Form 10 after an S-1 registration statement and the initial required reporting period has passed) or through a wholly owned subsidiary resulting in a complete or partial spin-off.

New CD&I Guidance

On June 23, 2015, the SEC updated its Division of Corporation Finance C&DI to provide guidance related to Regulation A/A+ by publishing 11 new questions and answers and deleting 2 from its forms C&DI which are no longer applicable under the new rules. The following is a summary of the new guidance.

Filing of non-public draft offering statements

Confidential submissions to the SEC are completed by choosing a "confidential" setting in the EDGAR system. Where a company submits its Form 1-A on a confidential basis, it must file all confidential submittals, including the original Form 1-A, exhibits and correspondence with the SEC at least 21 calendar days before the offering is qualified as effective. The company can do so by filing all prior confidential information as an exhibit

to its non-confidential filing, or by changing the setting in the EDGAR system on its prior filings, from "confidential" to "public." In the event the company chooses to change its EDGAR setting to "public," it would not have to re-file all prior confidential material as an exhibit to a new filing.

Confidential treatment requests

If a company wants to keep certain information confidential, even after the required time to make such information public, it will need to submit two confidential requests, one as part of the registration review process and one when prior confidential filings are made public. During the confidential Form 1-A review process, the company should submit a request under Rule 83 in the same manner it would during a typical review of a registered offering. Once the company is required to make the prior filings "public" (21 days prior to qualification), the company would make a new request for confidential treatment under Rule 406 in the same manner other confidential treatment requests are submitted. In particular, for a confidential treatment request under Rules 83 and 406, a company must submit a redacted version of the document via EDGAR with the appropriate legend indicating that confidential treatment has been requested. Concurrently, the company must submit a full, unredacted paper version of the document to the SEC using the ordinary confidential treatment procedure (such filings are submitted via a designated fax line to a designated person to maintain confidentiality).

Definition of "principal place of business"

A company will be considered to have its "principal place of business" in the U.S. or Canada for purposes of determination of Regulation A/A+ eligibility if its officers, partners, or managers primarily direct, control and coordinate the company's activities from the U.S. or Canada, even if the actual operations are located outside those countries.

Eligibility of companies with suspended Exchange Act reporting requirements

A company that was once subject to the Exchange Act reporting obligations but suspended such reporting obligations by filing a Form 15 is eligible to utilize Regulation A/A+. The determination of eligibility is made at the time of the offering.

Eligibility of companies that voluntarily report under the Exchange Act

A company that voluntarily files reports under the Exchange Act is not "subject to the Exchange Act reporting requirements" and therefore is eligible to rely on Regulation A/A+.

Eligibility of wholly owned subsidiaries of Exchange Act reporting companies

A wholly owned subsidiary of an Exchange Act reporting company parent is eligible to complete a Regulation A/A+ offering as long as the parent reporting company is not a guarantor or co-issuer of the securities being issued.

Eligibility for business combination (merger/reverse merger) transactions

Regulation A/A+ can be used for business combination transactions, but is not available for shelf SPAC's (special purpose acquisition companies).

Balance sheet requirements for recently created entities

A recently created entity may choose to provide a balance sheet as of its inception date as long as that inception date is within nine months before the date of filing or qualification and the date of filing or qualification is not more than three months after the entity reached its first annual balance sheet date. The date of the most recent balance sheet determines which fiscal years, or period since existence for recently created entities, the statements of comprehensive income, cash flows and changes in stockholders' equity must cover. When the balance sheet is dated as of inception, the statements of comprehensive income, cash flows and changes in stockholders' equity will not be applicable.

Test the waters via social media

A company can use Twitter and other social media that limit the number of characters in a communication, to test the waters as long as the company provides a hyperlink to the required disclaimers. In particular, a company can use a hyperlink to satisfy the disclosure and disclaimer requirements in Rule 255 as long as (i) the electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication; (ii) including the entire disclaimer and other required disclosures would exceed the character limit on that particular platform; and (iii) the communication has an active hyperlink to the required disclaimers and disclosures and, where possible, prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

State law preemption for resales of Tier 2 securities

State securities registration and exemption requirements are only preempted as to the Tier 2 offering and securities purchased pursuant to the qualified Tier 2 for 1-A offering circular. Subsequent resales of such securities are not preempted.

Use of registered transfer agents

The new Regulation A+ exempts securities in a Tier 2 offering from the Section 12(g) registration requirements if the issuer, among other requirements, engaged the services of an SEC registered transfer agent. Such transfer agent must be engaged at the time the company is relying on the exemption from Exchange Act registration.

Deleted C&DI

Also on June 23, 2015, the SEC deleted two Securities Act forms C&DI's. In particular, questions 128.01 relating to paper filings for Form 1-A and 128.03 relating to notations on paper filings have been deleted. Regulation A/A+ offerings are now made via the EDGAR system, and references to paper filings are no longer relevant.

Refresher: The Final Rules – Summary of Regulation A+

The final rules provide for two tiers of offerings: (i) Tier I for offerings of securities up to $20 million in any 12-month period, of which not more than $6 million can be resale by affiliate selling shareholders; and (ii) Tier 2 for offerings of securities up to $50 million in any 12-month period, of which not more than $15 million can be resale by affiliate selling shareholders. Tier 2 offerings require additional disclosures and ongoing reporting requirements.

Securities issued to non-affiliates in a Regulation A+ offering will be freely tradable. Securities issued to affiliates in a Regulation A+ offering will be subject to the affiliate resale restrictions in Rule 144, except for a holding period. The same resale restrictions for affiliates and non-affiliates apply to securities registered in a Form S-1.

Tier 2 offerings will preempt state blue sky laws for securities offered or sold to "qualified purchasers" defined as all Tier 2 purchasers, while Tier 1 offerings will be subject to full state registration and qualification requirements. The SEC, in its press release, encouraged issuers to utilize the NASAA-coordinated review program for Tier I blue sky compliance. For a brief discussion on the NASAA-coordinated review program, see my blog HERE.

Both Tier I and Tier 2 offerings have minimum basic requirements, including issuer eligibility provisions and disclosure requirements. In addition to the affiliate resale restrictions, resales of securities by selling security holders are limited to no more than 30% of a total particular offering for all Regulation A+ offerings. For offerings up to $20 million, an issuer can elect to proceed under either Tier I or Tier 2. Both tiers will allow companies to submit draft offering statements for non-public SEC staff review before a

public filing, permit continued use of solicitation materials after the filing of the offering statement and use the EDGAR system for filings. As part of the new Regulation A+ rules, the SEC has made changes to align the Regulation A+ offering process with the current registered offering process and practice.

The final rule release also amends Section 12(g) of the Securities Exchange Act of 1934, as amended ("Exchange Act") to allow issuers to rely on a conditional exemption from mandatory registration and amend Rule 15c2-11 to allow broker-dealers to rely on the Tier 2 ongoing reports to satisfy the information requirements to support the quotation of the issuers' securities on the OTC Markets.

Eligibility Requirements

Regulation A+ will be available to companies organized and operating in the United States and Canada. The following issuers will not be eligible for a Regulation A+ offering:
Companies currently subject to the reporting requirements of the Exchange Act;
Investment companies registered or required to be registered under the Investment Company Act of 1940, including BDC's;
Blank check companies, which are companies that have no specific business plan or purpose or whose business plan and purpose is to engage in a merger or acquisition with an unidentified target; however, shell companies are not prohibited, unless such shell company is also a blank check company. A shell company is a company that has no or nominal operations; and either no or nominal assets, assets consisting of cash and cash equivalents; or assets consisting of any amount of cash and cash equivalents and nominal other assets. Accordingly, a start-up business or minimally operating business may utilize Regulation A+;
Issuers seeking to offer and sell asset-backed securities or fractional undivided interests in oil, gas or other mineral rights;
Issuers that have been subject to any order of the SEC under Exchange Act Section 12(j) denying, suspending or revoking registration, entered within the past five years;
Issuers that became subject to Exchange Act reporting requirements, such as through a Tier 2 offering, and did not file required ongoing reports during the preceding two years; and
Issuers that are disqualified under the "bad actor" rules and, in particular, Rule 262 of Regulation A+.

Eligible Securities

The final rule limits securities that may be issued under Regulation A+ to equity securities, including common and preferred stock and options, warrants and other rights convertible into equity securities, debt securities and debt securities convertible or exchangeable into

equity securities, including guarantees. If convertible securities or warrants are offered that may be exchanged or exercised within one year of the offering statement qualification (or at the option of the issuer), the underlying securities must also be qualified and the value of such securities must be included in the aggregate offering value. Accordingly, the underlying securities will be included in determining the offering limits of $20 million and $50 million, respectively.

Asset-backed securities are not allowed to be offered in a Regulation A+ offering. REIT's and other real estate-based entities may use Regulation A+ and provide information similar to that required by a Form S-11 registration statement.

Continuous or Delayed Offerings

Continuous or delayed offerings (a form of a shelf offering) will be allowed if (i) they commence within two days of the offering statement qualification date, (ii) are made on a continuous basis, (iii) will continue for a period of in excess of thirty days following the offering statement qualification date, and (iv) at the time of qualification are reasonably expected to be completed within two years of the qualification date.

Issuers that are current in their Tier 2 reporting requirements may make continuous or delayed offerings for up to three years following qualification of the offering statement. Moreover, in the event a new qualification statement is filed for a new Regulation A+ offering, unsold securities from a prior qualification may be included, thus carrying those unsold securities forward for an additional three-year period.

Continuous or delayed offerings are available for all securities qualified in the offering, including securities underlying convertible securities, securities offered by an affiliate or other selling security holder, and securities pledged as collateral.

Additional Tier 2 Requirements; Ability to List on an Exchange

In addition to the basic requirements that will apply to all Regulation A+ offerings, Tier 2 offerings will also require: (i) audited financial statements (though I note that state blue sky laws almost unilaterally require audited financial statements, so this federal distinction may not have a great deal of practical effect); (ii) ongoing reporting requirements including the filing of an annual and semiannual report and periodic reports for current information (new Forms 1-K, 1-SA and 1-U, respectively); and (iii) a limitation on the number of securities non-accredited investors can purchase to no more than 10% of the greater of the investor's annual income or net worth.

It is the obligation of the issuer to notify investors of these limitations. Issuers may rely on the investors' representations as to accreditation (no separate verification is required) and investment limits.

This third provision provides additional purchaser suitability standards and the Regulation A+ definition of "qualified purchaser" for purposes of allowing state law preemption. During the proposed rule comment process many groups, including certain U.S. senators, were very vocal about the lack of suitability standards of a "qualified purchaser." Many pushed to align the definition of "qualified purchaser" to the current definition of "accredited investor." The SEC's final rules offer a compromise by adding suitability requirements to non-accredited investors to establish quantitative standards for non-accredited investors.

The new rules allow Tier 2 issuers to file a Form 8-A to be filed concurrently with a Form 1-A, to register under the Exchange Act, and the immediate application to a national securities exchange. Where the securities will be listed on a national exchange, the accredited investor limitations will not apply.

Although the ongoing reporting requirements will be substantially similar in form to a current annual report on Form 10-K, the issuer will not be considered to be subject to the Exchange Act reporting requirements. Accordingly, such issuer would not qualify for a listing on the OTCQB or national exchange, but would also not be disqualified from engaging in future Regulation A+ offerings.

Tier 2 issuers that have used the S-1 format for their Form 1-A filing will be permitted to file a Form 8-A to register under the Exchange Act and become subject to its reporting requirements. A Form 8-A is a simple (generally 2-page) registration form used instead of a Form 10 for issuers that have already filed the substantive Form 10 information with the SEC (generally through an S-1). The Form 8-A will only be allowed if it is filed concurrently with the Form 1-A. That is, an issuer could not qualify a Form 1-A, wait a year or two, then file a Form 8-A. In that case, they would need to use the longer Form 10.

Upon filing a Form 8-A, the issuer will become subject to the full Exchange Act reporting obligations, and the scaled-down Regulation A+ reporting will automatically be suspended.

General Solicitation and Advertising

All Regulation A+ offerings will be allowed to engage in general solicitation and advertising, at least according to the SEC. However, Tier I offerings will be required to

review and comply with applicable state law related to such solicitation and advertising, including any prohibitions related to same.

Solicitation of Interest ("Testing the Waters")

Regulation A+ allows for pre-qualification solicitations of interest in an offering, commonly referred to as "testing the waters." Issuers can use "test the waters" solicitation materials both before and after the initial filing of the offering statement. In the event that materials are issued after the filing of an offering circular, the materials must include a current preliminary circular or information on where one can be obtained. Moreover, solicitation material used before qualification of the offering circular must contain a legend stating that no money or consideration is being solicited and none will be accepted, no offer to buy securities can be accepted and any offer can be withdrawn before qualification, and a person's indication of interest does not create a commitment to purchase securities.

"Test the waters" solicitations may be made both orally and in writing.

All solicitation material must be submitted to the SEC as an Exhibit under Part III of Form 1-A. This is a significant difference from S-1 filers, who are not required to file "test the waters" communications with the SEC.

Unlike the "testing of the waters" by emerging growth companies that are limited to QIBs and accredited investors, a Regulation A+ company could reach out to retail and non-accredited investors. After the public filing but before SEC qualification, a company may use its preliminary offering circular to make written offers.

Of course, all "test the waters" materials are subject to the antifraud provisions of federal securities laws.

Like registered offerings, ongoing regularly released factual business communications, not including information related to the offering of securities, will be allowed and will not be considered solicitation materials.

Integration

The final rules include a limited integration safe harbor such that offers and sales under Regulation A+ will not be integrated with prior or subsequent offers or sales that are (i) registered under the Securities Act; (ii) made under compensation plans relying on Rule 701; (iii) made under other employee benefit plans; (iv) made in reliance on Regulation S; (v) made more than six months following the completion of the Regulation A+ offering;

or (vi) made in crowdfunding offerings exempt under Section 4(a)(6) of the Securities Act (Title III crowdfunding, which is not yet legal).

In the absence of a clear exemption from integration, issuers would turn to the five-factor test. In particular, the determination of whether the Regulation A+ offering would integrate with one or more other offerings is a question of fact depending on the particular circumstances at hand. In particular, the following factors need to be considered in determining whether multiple offerings are integrated: (i) are the offerings part of a single plan of financing; (ii) do the offerings involve issuance of the same class of securities; (iii) are the offerings made at or about the same time; (iv) is the same type of consideration to be received; and (v) are the offerings made for the same general purpose.

Offering Statement – General

A company intending to conduct a Regulation A+ offering must file an offering statement with, and have it qualified by, the SEC. The offering statement will be filed with the SEC using the EDGAR database filing system. Prospective investors must be provided with the filed pre-qualified offering statement 48 hours prior to a sale of securities. Once qualified, investors must be provided with the final qualified offering circular. Like current registration statements, Regulation A+ rules provide for an "access equals delivery" model, whereby access to the offering statement via the Internet and EDGAR database will satisfy the delivery requirements.

There are no filing fees for the process. The offering statement will be reviewed much like an S-1 registration statement and declared "qualified" by the SEC with an issuance of a "notice of qualification." The notice of qualification can be requested or will be issued by the SEC upon clearing comments. The SEC has indicated that reviewers will be assigned filings based on industry group.

Issuers may file offering circular updates after qualification in lieu of post-qualification amendments similar to the filing of a post-effective prospectus for an S-1. To qualify additional securities, a post-qualification amendment must be used.

Offering Statement – Non-Public (Confidential) Submission

As is allowed for emerging growth companies, the rules permit an issuer to submit an offering statement to the SEC on a confidential basis. However, only companies that have not previously sold securities under a Regulation A or a Securities Act registration statement may submit the offering confidentially.

Confidential submissions will allow a Regulation A+ issuer to get the process under way while soliciting interest of investors using the "test the waters" provisions without negative publicity risk if it alters or withdraws the offering before qualification by the SEC. However, the confidential filing, SEC comments, and all amendments must be publicly filed as exhibits to the offering statement at least 21 calendar days before qualification. When an S-1 is filed confidentially, the offering materials need be filed 21 calendar days before effectiveness, but the SEC comment letters and responses are not required to be filed. This, together with the requirement to file "test the waters" communications, are significant increased pre-offering disclosure requirements for Regulation A+ offerings.

Offering Statement – Form and Content

The rules require use of new modified Form 1-A. Form 1-A consists of three parts: Part I – Notification, Part II – Offering Circular and Part III – Exhibits. Part I calls for certain basic information about the issuer and the offering, and is primarily designed to confirm and determine eligibility for the use of the Form and a Regulation A offering in general. Part I will include issuer information; issuer eligibility; application of the bad actor disqualification and disclosure; jurisdictions in which securities are to be offered; and unregistered securities issued or sold within one year.

Part II is the offering circular and is similar to the prospectus in a registration statement. Part II requires disclosure of basic information about the issuer and the offering; material risks; dilution; plan of distribution; use of proceeds; description of the business operations; description of physical properties; discussion of financial condition and results of operations (MD&A); identification of and disclosure about directors, executives and key employees; executive compensation; beneficial security ownership information; related party transactions; description of offered securities; and two years of financial information.

The required information in Part 2 of Form 1-A is scaled down from the requirements in Regulation S-K applicable to Form S-1. Issuers can complete Part 2 by either following the Form 1-A disclosure format or by including the information required by Part I of Form S-1 or Form S-11 as applicable. Note that only issuers that elect to use the S-1 or S-11 format will be able to subsequently file an 8-A to register and become subject to the Exchange Act reporting requirements.

Moreover, issuers that had previously completed a Regulation A offering and had thereafter been subject to and filed reports with the SEC under Tier 2 could incorporate by reference from these reports in future Regulation A offering circulars.

Form 1-A requires two years of financial information. All financial statements for Regulation A offerings must be prepared in accordance with GAAP. Financial statements

of a Tier I issuer are not required to be audited unless the issuer has obtained an audit for other purposes. Audited financial statements are required for Tier 2 issuers. Audit firms for Tier 2 issuers must be independent and PCAOB-registered. An offering statement cannot be qualified if the date of the balance sheet is more than nine months prior to the date of qualification.

Part III requires an exhibits index and a description of exhibits required to be filed as part of the offering statement.

Offering Price

All Regulation A+ offerings must be at a fixed price. That is, no offerings may be made "at the market" or for other than a fixed price.

Ongoing Reporting

Both Tier I and Tier 2 issuers must file summary information after the termination or completion of a Regulation A+ offering. A Tier I company will need to file certain information about the Regulation A offering, including information on sales and the termination of sales, on a new Form 1-Z exit report, no later than 30 calendar days after termination or completion of the offering. Tier I issuers will not have any ongoing reporting requirements.

Tier 2 companies are also required to file certain offering termination information and would have the choice of using Form 1-Z or including the information in their first annual report on new Form 1-K. In addition to the offering summary information, Tier 2 issuers are required to submit ongoing reports including: an annual report on Form 1-K, semiannual reports on Form 1-SA, current event reports on Form 1-U and notice of suspension of ongoing reporting obligations on Form 1-Z (all filed electronically on EDGAR).

The ongoing reporting for Tier 2 companies is less demanding than the reporting requirements under the Securities Exchange Act. In particular, there are fewer 1-K items and only the semiannual 1-SA (rather than the quarterly 10-Q) and fewer events triggering Form 1-U (compared to Form 8-K). The SEC anticipates that companies would use their Regulation A+ offering circular as the groundwork for the ongoing reports, and they may incorporate by reference text from previous filings.

The annual Form 1-K must be filed within 120 calendar days of fiscal year end. The semiannual Form 1-SA must be filed within 90 calendar days after the end of the semiannual period. The current report on Form 1-U must be filed within 4 business days

of the triggering event. Successor issuers, such as following a merger, must continue to file the ongoing reports.

The rules also provide for a suspension of reporting obligations for a Regulation A+ issuer that desires to suspend or terminate its reporting requirements. Termination is accomplished by filing a Form 1-Z and requires that a company be current over stated periods in its reporting, have fewer than 300 shareholders of record, and have no ongoing offers or sales in reliance on a Regulation A+ offering statement. Of course, a company may file a Form 10 to become subject to the full Exchange Act reporting requirements.

The ongoing reports will qualify as the type of information a market maker would need to support the filing of a 15c2-11 application. Accordingly, an issuer that completes a Tier 2 offering could proceed to engage a market maker to file a 15c2-11 application and trade on the OTC Pink tier of the OTC Markets. Such issuer, however, would not be deemed to be "subject to the Exchange Act reporting requirements" to support a listing on the OTCQB or OTCQX levels of the OTC Markets.

Freely Tradable Securities

Securities sold in a Regulation A+ offering are not subject to transfer restrictions and are not restricted under Rule 144. Accordingly, it is contemplated that Regulation A+ issuers could have a market maker file a 15c2-11 application on their behalf and establish a secondary trading market in their securities.

However, since neither Tier 1 nor Tier 2 Regulation A+ issuers are subject to the SEC reporting requirements, the shareholders of issuers would not be able to rely on Rule 144 for prior shell companies. Moreover, the Tier 2 reports do not constitute reasonably current public information for the support of the use of Rule 144 for affiliates in the future.

Treatment under Section 12(g)

Exchange Act Section 12(g) requires that an issuer with total assets exceeding $10,000,000 and a class of equity securities held of record by either 2,000 persons or 500 persons who are not accredited register with the SEC, generally on Form 10, and thereafter be subject to the reporting requirements of the Exchange Act.

The new Regulation A+ exempts securities in a Tier 2 offering from the Section 12(g) registration requirements if the issuer meets all of the following conditions:
The issuer utilizes an SEC-registered transfer agent;
The issuer remains subject to the Tier 2 reporting obligations;

The issuer is current in its Tier 2 reporting obligations, including the filing of an annual and semiannual report; and
The issuer has a public float of less than $75 million as of the last business day of its most recently completed semiannual period or, if no public float, had annual revenues of less than $50 million as of its most recently completed fiscal year end.

Moreover, even if a Tier 2 issuer is not eligible for the Section 12(g) registration exemption as set forth above, that issuer will have a two-year transition period prior to being required to having to register under the Exchange Act, as long as during that two-year period, the issuer continues to file all of its ongoing Regulation A+ reports in a timely manner with the SEC.

State Law Preemption

Tier I offerings do not preempt state law and remain subject to state blue sky qualification. The SEC, in its press release, encouraged issuers to utilize the NASAA-coordinated review program for Tier I blue sky compliance. For a brief discussion on the NASAA-coordinated review program, see my blog HERE.

Tier 2 offerings are not subject to state law review or qualification – i.e., state law is preempted. As mentioned, state law preemption was the biggest topic of debate surrounding the proposed rules. The text of Title IV of the JOBS Act provides, among other items, a provision that certain Regulation A securities should be treated as covered securities for purposes of the National Securities Markets Improvement Act (NSMIA). Federally covered securities are exempt from state registration and overview. For a discussion on the NSMIA, see my blogs HERE and HERE.

Title IV of the JOBS Act related to the revamp of Regulation A provides that "(b) Treatment as covered securities for purposes of NSMIA… Section 18(b)(4) of the Securities Act of 1933… is further amended by inserting… (D) a rule or regulation adopted pursuant to section 3(b)(2) and such security is (i) offered or sold on a national securities exchange; or (ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale." In other words, Title IV of the JOBS Act provides that the Regulation A/A+ securities will be considered covered securities and therefore not subject to state registration or overview as long as they are sold on a national securities exchange or sold to qualified purchasers.

The definition of "qualified purchaser" became the subject of debate and contention during the comment process associated with the initially issued Regulation A+ proposed rules. In a compromise, the SEC has imposed a limit on Tier 2 offerings such that the amount of securities non-accredited investors can purchase is to be no more than 10% of the

greater of the investor's annual income or net worth. In light of this investor suitability limitation, the SEC has then defined a "qualified purchaser" as any purchaser in a Tier 2 offering.

Federally covered securities, including Tier 2 offered securities, are still subject to state antifraud provisions, and states may require certain notice filings. In addition, as with any covered securities, states maintain the authority to investigate and prosecute fraudulent securities transactions.

Broker-dealer Placement

Broker-dealers acting as placement or marketing agent will be required to comply with FINRA Rule 5110 regarding filing of underwriting compensation, for a Regulation A+ offering.

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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