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SEC Adopts Enhanced Exempt Securities Offering Rules

As directed by Congress in the Jump Start Our Business Startups (JOBS) Act, the Securities and Exchange Commission has adopted rules substantially increasing amounts that companies can raise through exempt public offerings. Amended Regulation A, nicknamed “Reg A+,” permits non-reporting U.S. and Canadian issuers to conduct “Tier 1” offerings of up to \$20 million and “Tier 2” offerings of up to \$50 million, in 12 months, without registration, beginning June 19, 2015.

A Reg A+ offering statement must be qualified with the SEC before an issuer can make any securities sales, but the rules permit “testing-the-waters” solicitations of interest without any filing. Qualification procedures and disclosure requirements parallel those for registered offerings, but are simplified:

- An offering statement, with exhibits, must be signed by the issuer’s chief executive, financial, and accounting officers and a majority of the board of directors and filed on EDGAR.
- A first-time Reg A+ issuer may submit drafts of the offering statement on a confidential basis, but must file the offering statement publicly at least 21 days before qualification.
- Issuers may choose between two nonfinancial disclosure formats—Form S-1, using smaller reporting company requirements, if applicable, or disclosure prescribed in Reg A+.
- Two years of GAAP financial statements are required (IFRS permitted for Canadian issuers), but generally need not be audited, in the case of Tier 1 offerings; financial statements for Tier 2 offerings must be audited, but the auditor need not be PCAOB-qualified. Interim financial statements also may be required in either a Tier 1 or Tier 2 offering.
- Final pricing and related information that can be omitted from a prospectus under Securities Act Rule 430A may be omitted from the offering circular included in the qualified offering statement.
- An offering may be made on a continuous or delayed basis, but at-the-market offerings are not authorized.
- Securities sold pursuant to Reg A+ are not “restricted securities” under Securities Act rules.

FINRA’s Corporate Financing Rule, requiring filing and review, applies to Regulation A offerings.

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Tier 2 offerings are exempt from Blue Sky requirements. Following a Tier 2 offering, the issuer must file annual, semiannual, and current reports, unless the offered securities are listed upon qualification, in which case the issuer becomes subject to the Exchange Act reporting regime. Listing upon qualification requires the Form S-1 disclosure format and annual financial statements audited by a PCAOB-registered auditor. In a Tier 2 offering of securities that are not listed upon qualification, an

investor that is not an “accredited investor” under Securities Act rules may not invest an amount exceeding 10 percent of the greater of income or net worth (for individuals), or revenue or assets (for companies).

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