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NEWS

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Offerings of securities must be registered with the Securities and Exchange Commission under the Securities Act of 1933 or made in reliance on an available exemption. Understanding the costs associated with registration of offerings, the SEC used the small issues exemptive authority under Section 3(b) of the Securities Act to first adopt a version of Regulation A in 1936.¹ In 1941, Regulation A was reorganized and provided for an exemption from registration for offering under \$100,000.² Because such offerings are not restricted to particular investors or to the non-public markets, they are often referred to as “exempt public offers.”

Until 1996, both private placements and public offers had to comply with both federal and state securities laws. In that year, with the passage of the National Securities Markets Improvement Act, public offerings of securities listed on national securities exchanges and non-public offerings made under Section 4(a)(2) of the Securities Act were pre-empted from state registration requirements.³ Since 1997, the use of Regulation A to publicly offer securities without undergoing full registration has declined precipitously.⁴ A 2012 report by the Government Accountability Office concluded that certain aspects of Regulation A, including the cost of completing the qualification of the offering, inconsistency of state review, low offering limit and availability of other exemptions from registration, made the exemption unappealing to small- and medium-size businesses raising capital.⁵ In response, Congress directed the SEC to amend existing Regulation A as part of Title IV of the Jumpstart Our Business Startups Act of 2012.⁶ Specifically, Congress directed the SEC to increase the offering limit from \$5 million to \$50 million,⁷ and allow issuers to solicit interest from investors prior to making any filings with the SEC.⁸

The SEC issued its proposed rules to amend Regulation A Dec. 18, 2013.⁹ The SEC received more than 100 comment letters on the proposed rule and met with public policy organizations and state securities regulators.¹⁰ On March 25, the SEC issued final rules to amend Regulation A. The rules were published April 20 and will go into effect June 19.¹¹ This article will provide an overview of the new rules, popularly known as Regulation A+.

Summary of the Changes

The biggest change to Regulation A is the creation of two tiers of offerings with different requirements.

In Tier 1 offerings, issuers may raise up to \$20 million over a 12 month period, including no more than \$6 million on behalf of selling securityholders (such as founders looking for liquidity). Issuers begin the process with the SEC by filing an "Offering Statement," which includes a prospectus-like "Offering Circular," on Form 1-A.¹² These materials are subject to review by the SEC and any state in which the company is planning to offer its securities. This procedure is essentially the same as for the current version of Regulation A, but with a larger offering limit.

In Tier 2 offerings, issuers may raise up to \$50 million over a 12 month period, including no more than \$15 million on behalf of selling securityholders. While the issuer completes the same Form 1-A and Offering Circular as in Tier 1 offerings, the only review will be by the SEC. States are preempted from reviewing the offering. The price for this preemption is that companies will be required to provide audited financial statements in a specified format and be subject to ongoing reporting requirements. Additionally, individual investors in Tier 2 offerings who are not "accredited investors" will be limited to investing up to 10 percent of the greater of the investor's annual income or net worth.

Recognizing the potential for informational asymmetries, the SEC has created limitations on secondary sales of securities under Regulation A by affiliates of the issuer within the first year after qualification of the offering. During the first 12-month period after the qualification of a Regulation A offering statement, the aggregate value attributable to selling, affiliate security holders may not exceed 30 percent of the value of the particular offering.

An additional change is an increased ability to "test the waters" for interest in an offering under Rule 255,¹³ as discussed in more detail *below*, allowing issuers to freely communicate with prospective investors and solicit interest in the offering prior to spending the time and money necessary to prepare the Offering Statement.

Issuers Eligible to Use Regulation A

The final rules do not change the type of issuers that are eligible to use Regulation A. Regulation A is limited to issuers organized in and with their principal place of business in the U.S. or Canada. The exemption is unavailable to issuers that are already subject to the reporting requirements of the Securities Exchange Act of 1934, investment companies or funds (including business development companies), blank-check companies, and companies issuing fractional interests in oil and gas developments.¹⁴

The new rules adopt the more stringent Bad Actor disqualification provisions that the SEC previously adopted for Rule 506 of Regulation D.¹⁵ The disqualification provision prevents any issuer from using the exemption if the issuer or any of its "covered persons" have committed any one of the enumerated bad acts. Covered persons include the issuer and any predecessor of the issuer or affiliated issuer; any director, executive officer, other officers participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities; any promoter connected with the issuer; any underwriter or person paid for solicitation of purchasers (as well as any general partner, managing member, officer or director of the underwriter or solicitor).¹⁶ The new Bad Actor prohibition expands the scope of the bad acts that were previously included

in Rule 262 to include regulatory orders of the SEC, federal financial regulators and state financial regulators.¹⁷

Additionally, the SEC has created disqualifications for any issuer that is or has been subject to an SEC order under Section 12(j) of the Exchange Act within the past five years, as well as issuers that are required to file, but have not filed, ongoing reports under the new Regulation A rules.¹⁸ Unlike the Bad Actor rules, which attach to the principals of an issuer and follow them to new issuers, the disqualification that results from being subject to an order under Section 12(j) of the Exchange Act or failure to file ongoing reports under Regulation A is only attached to the issuer.

Of note, the restriction on use of Regulation A by investment companies has important implications for issuers that would otherwise have used a special purpose vehicle (SPV). Issuers in the Regulation D private placement market frequently use the SPV structure in order to maintain clean capitalization tables without lots of small investors, and some online platforms use a fund structure for their investments in order to avoid registration as a broker-dealer.¹⁹ Under Regulation A, an issuer will not be able to use a special purpose fund that takes direct investments from investors and invests into the underlying company, because that fund would be an "investment company."²⁰ Exemptions from registration as an investment company that are available for offerings to fewer than 100 investors or to "Qualified Purchasers" only are often relied on for offerings under Regulation D.²¹ These exemptions are only available for non-public (even if "generally solicited") offerings, and Regulation A is a public offering.²² Instead, issuers will likely want to carefully craft the terms of any investor agreements to provide maneuverability if future plans involve being acquired or taking on a large, strategic investor. Similarly, real estate projects that in Regulation D offerings often use SPVs as part of the capital stack will be likely have to allow investors to invest directly in the property-owning entity in order to make equity offerings under Regulation A.

Regulation A Is Limited To Debt and Equity Securities

Regulation A restricts the types of securities that may be sold to investors. However, the allowable securities are likely to satisfy the capital raising needs of most operating companies (whether they are C corporations or LLCs). The types of securities that are eligible for Regulation A are equity securities, debt securities, and debt securities convertible or exchangeable into equity interests, including guarantees of such securities.²³ Warrants are permitted as well. In effect, this limitation only restricts companies from selling exotic asset-backed securities and derivatives.

Investor Limitations

As with Regulation A in its original form, there are no limitations on the amount an investor can invest in a Tier 1 offering. Individual investors in Tier 2 offerings who are not accredited investors²⁴ are limited to investing up to 10 percent of the greater of the investor's income or net worth in any one offering.²⁵ The individual investor limitations of Tier 2, which were not mandated by the JOBS Act, are similar to the limitations imposed in the "crowdfunding" provisions of the JOBS Act.²⁶ Investors may self-certify as to their accredited status or the fact that they are not exceeding the investment limits.²⁷ Doubtless anticipating arguments that investors in offerings made under Rule 506(c) of Regulation D should be able to self-certify as to their accredited status, as opposed to requiring issuers to take "reasonable steps to verify" that status,²⁸ the Commission cited the additional investor protections of Regulation A as a reason for not requiring issuer verification of investor status.²⁹

There is no limit on the number of people to whom a company can sell. Some of the comments on the proposed revisions to Regulation A expressed concern that there would be an implicit limit on the number of potential equity investors because under Section 12(g) of the Exchange Act, if a company acquires 2,000 shareholders of record, or 500 shareholders who are not accredited and meets specified asset tests, it is required to become a fully reporting company under the Exchange Act.³⁰ The SEC has granted a conditional exemption from full registration. So long as a company engages a registered transfer agent³¹ to keep its shareholder records, complies with the continuing disclosure requirements outlined below and does not have a "public float" (total value of traded shares) more than \$75 million, or revenues more than \$50 million, it does not have to become an SEC-reporting company.³² Keeping accurate records of the shares that were issued, and the type of offering they were issued in, will be essential.

Disclosure Requirements

The disclosure requirements that apply to companies raising funds under either Tier 1 or Tier 2 are essentially a scaled down version of Form S-1 (although the disclosure requirements of Form S-1 can be followed instead).³³ Some of the elements of a full S-1 filing that prove most burdensome, such as the "Compensation discussion and analysis,"³⁴ "Internal controls over financial reporting"³⁵ and "Quantitative and qualitative analysis about market risk"³⁶ are not included in the Form 1-A. The item that may prove most difficult for early-stage companies to comply with is likely to be "Management's discussion and analysis of financial condition and results of operations" (MD&A), which call for more detailed analysis of the company's financial status than is common in the private placements that early-stage companies generally make.

The issuer must produce financial statements for the two most-recently completed fiscal years, including balance sheets, income statements, cash flow and changes in stockholders' equity. If the issuer is less than two years old, it must produce financial statements for the period since inception. If more than nine months has elapsed since the last fiscal year, interim financial statements covering a date no sooner than six months after the fiscal year-end are required.³⁷ These timings apply to both the date of filing with the SEC, and the time the Offering Statement is qualified by the SEC, so an update of financial statements may be required midway through the process.

The financial statements must be prepared in accordance with U.S. Generally Accepted Accounting Principles (GAAP) unless the issuer is Canadian, in which case it may use international standards.³⁸

Tier 2 financial statements must be audited and must be prepared in accordance with Article 8 of Regulation S-X, which specifies the content and format of financial statements produced by smaller companies (except for the provisions of Article 8 relating to age of financials).³⁹ Special rules apply to oil and gas producers. Tier 1 financial statements need not be audited, unless an audit has been prepared for other purposes, and they do not have to comply with Regulation S-X.

The absence of the audit requirement may make Tier 1 look like a more attractive option for companies raising a smaller amount of money and only intending to target investors in one state. This may prove illusory, however. Financial statements even for Tier 1 must be prepared in accordance with U.S. GAAP. Many small companies do not have personnel who are experienced in the application of accounting

principles, and it is easy to imagine circumstances in which SEC comments during the review process, either on the financials themselves or on the MD&A informed by such financials,⁴⁰ would lead to questions with respect to GAAP compliance of financials produced—for example, by popular accounting software such as QuickBooks. In order to ward off delays created by having to revise or reformat financial statements, having a qualified accountant at least compile the financial statements, even if the company cannot afford an audit, might prove wise.

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Further, even though audited financial statements may not be required to qualify a Tier 1 offering under Regulation A with the SEC, many states require audited financials in order for the offering to be qualified in the specific state.⁴¹ Even in states that do not require audited financials, the absence of audited financials may create concerns for regulators in merit review states where regulators believe that the unaudited financial statements do not present a fair picture of the issuer's operations.

Ongoing Reporting Requirements for Tier 2

For Tier 1 offerings, the only required disclosure after a qualification of an Offering Statement under Regulation A is the filing of the Form 1-Z exit report within 30 calendar days after the termination or completion of the offering.⁴² The Form 1-Z includes information such as the date the offering was qualified and commenced, the amount of securities qualified, the amount of securities sold in the offering, the price of the securities, the portions of the offering that were sold on behalf of the issuer and any selling securityholders, any fees associated with the offering, and the net proceeds to the issuer. That is the end of the reporting obligation after a Regulation A offering under Tier 1.

Tier 2 offerings, in anticipation of a more active trading market in the securities, include an ongoing reporting regime that is robust, but less burdensome than for fully reporting companies. The various reports must be filed following specific events, on an annual basis and on a semi-annual basis.

The annual reports for Tier 2 offerings are required to be filed on Form 1-K and filed within 120 calendar days after the end of the issuer's fiscal year.⁴³ Form 1-K includes two parts. Part I includes identification that is based on the previously disclosed identifying information about the issuer previously filed Part I of Form 1-A when the offering was qualified. Part I also includes the reporting information required by the Form 1-Z exit report for Tier 1 offerings. Part II includes a greater amount of detail on the company's operations, including audited financial statements.

The semi-annual reports for Tier 2 offerings are required to be filed on Form 1-SA and are most similar to the 10-Q quarterly reports for registered companies. The semi-annual reports primarily consist of unaudited financial statements and MD&A. The Form 1-SA must be filed within 90 calendar days after the end of the first six months of the issuer's fiscal year.

The current event reports for Tier 2 offerings are required to be filed on Form 1-U.⁴⁴ Current reports must be filed with the issuer experiences events such as the following:

- fundamental changes;
- 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 interim review;
- changes in control of the issuer;
- departure of the principal officers of the issuer;
- unregistered sales of 10 percent or more of outstanding equity securities; and
- other events issuers would want to disclose to the market.

The Form 1-U must be filed within four business days after the occurrence of any triggering events.

Additionally, when there is an extended gap between the financial statements included in the offering circular under a Tier 2 offering and the first periodic report, a special financial report will be required of issuers.

Expanded Communication Before And After Filing With the SEC

The new rules for Regulation A modernize the scope of allowable communications for offerings and do so in a way to reflect analogous provisions of the Securities Act registration process. For Tier 2 offerings, the SEC has preempted state securities laws registration and qualification requirements in such a way that companies may communicate relatively freely with potential investors about their offerings using the Internet, social media and other means of widespread communication, without concern that such communications might trigger registration requirements under state law. The ability to solicit interest in offerings under revised Regulation A was specified in the JOBS Act,⁴⁵ and the SEC has expanded the ability of companies to "test the waters" for a Regulation A offering in Rule 255.⁴⁶

An issuer may test the waters ("TTW") and solicit interest in its offering from potential investors at any time before the qualification of an offering under Regulation A. It may ask whether an investor might be interested in investing and in what amounts, which securities would be of most interest, and where the

investor lives, in order to determine whether it is worth the cost of hiring lawyers and accountants to file an Offering Statement with the SEC.

The TTW communications may continue even after the Offering Statement is filed and SEC review has begun, so issuers have the ability to use the feedback from the TTW process to decide whether any changes to the offering need to be made prior to finalization of terms, although it should be noted that major changes may result in additional review time by the SEC.

Issuers should bear in mind that these communications are offers of securities that are subject to the antifraud provisions of state and federal securities laws. However, these offers will not trigger a violation of federal or state securities registration requirements so long as the issuer includes the required notices. Any solicitation made during the testing the waters period must include specific notices to prospective investors that:

- no money or consideration is being solicited and will not be accepted until after the offering is qualified;
- no offer to buy can be accepted nor can any part of the purchase price be accepted prior to qualification; and
- that a person's indication of interest involves no obligation or commitment of any kind.⁴⁷

If a preliminary Offering Circular has been filed, but is not yet qualified, any TTW communication must include information on how to obtain the Offering Circular.

The SEC has adopted an "access equals delivery" model of document delivery for Regulation A, which means that requirements that investors be provided with an Offering Circular can be complied with by delivering the document or linking to where the document is posted. Thus, issuers will be able to effectively use social media, e-mail and targeted advertising where character limits apply. In those communications, issuers may provide the URL where the Final Offering Circular or the offering statement in which the Final Offering Circular was filed may be obtained.⁴⁸ However, issuers should be very careful that the communication that contains the link to the Offering Circular or materials does not include any misleading statements or any information inconsistent with the materials it links to.

The expansion of the TTW provisions is of most use in Tier 2 offerings. TTW communications are "offers" of securities⁴⁹ and thus must be made in accordance with both federal and, unless pre-empted, state law. State law is only pre-empted for Tier 2 offerings, so TTW communications must comply with state law regarding the offering of securities. Since some states impose substantive requirements on such communications,⁵⁰ the ability to use the Internet to make TTW communications is much more limited for Tier 1 offerings, a fact criticized by Commissioner Gallagher.⁵¹

The preliminary Offering Circular may also be used to solicit interest in the offering from the time it is filed with the SEC, and once the offering is qualified by the SEC, only the Offering Circular may be used.⁵²

Liability

The applicable anti-fraud provisions of the federal securities laws include Section 12(a)(2) of the Securities Act, Section 17 of the Securities Act and Rule 10b-5 under the Securities Exchange Act of 1934. State anti-fraud rules are also applicable.

By statute and convention, offers under Regulation A are subject to the strict anti-fraud provisions of Section 12(a)(2), which allows for a private right of action. This liability provision extends to all persons who "offers or sell" the security, which includes the issuer itself, any broker-dealer involved in the transaction,⁵³ and any compensated solicitor selling on behalf of the issuer. In an action proceeding under Section 12(a)(2), any claim for damages is limited to the recovery of any consideration paid plus interest. As there is no requirement that a plaintiff demonstrate scienter on the part of a defendant under Section 12(a)(2), the only defense available is for the defendant to show that it did not know, and in the exercise of reasonable care could not have known of the misstatement or omission.⁵⁴ This is known as the "due diligence defense" to a securities fraud claim.

Offerings made under Regulation A are also subject to the anti-fraud liability provisions of Section 17. Similarly to Section 12(a)(2), Section 17 does not require a demonstration of intent. However, there is no private right of action under Section 17, and actions may only be brought by the SEC.

Issuers in offerings relying on Regulation A are also subject to Rule 10b-5. An action under Rule 10b-5 may be brought by the SEC or private plaintiffs. In a private action under Rule 10b-5, the plaintiff must demonstrate that the defendant has the intent to deceive and that the plaintiff relied on the deception when making the decision to buy or sell securities. The damages in a private action under Rule 10b-5 are limited to the actual damages incurred by the plaintiff.

Intermediaries

Regulation A offerings are not required to be made online or through intermediaries, in contrast to offerings under the "crowdfunding" provisions of Title III of the JOBS Act, codified as Section 4(a)(6) of the Securities Act (still awaiting implementing regulations at the time of writing).⁵⁵ However, in the event an intermediary is used, that intermediary is likely to be required to be a broker-dealer, registered under the Exchange Act, to the extent the intermediary solicits sales of securities.⁵⁶

While the series of no-action letters that relates to the use of "passive bulletin boards" to sell privately placed securities may give some general indication of the principles that apply to determination of broker-dealer status,⁵⁷ it is important to note that these specifically apply to securities sold in reliance on Regulation D. No equivalent guidance yet exists in the context of Regulation A. Therefore, although it may seem logical to assume that the placement of TTW materials or an Offering Circular on an online site that does no more than host those materials, and which does not solicit investors to invest in the offerings posted, is no more a broker-dealer than a newspaper in which the same materials are published, it is not advisable to rely on that logic without SEC guidance. In any case, any such sites will be subject to the payment disclosure requirements of Section 17(b) of the Securities Act.⁵⁸

Integration of Offerings

Generally, securities offerings made at the same time, or close in time, may be "integrated"--treated as if they were part of the same offering, and subject to all the conditions that apply to each type of offering. For small- and medium-sized companies relying on the new Regulation A rules, the most likely type of offering

that would be occurring on a contemporaneous basis is a private offering to accredited investors relying on Rule 506(b) or 506(c). However, offerings under Rule 506 are not covered by the express non-integration safe harbor contained in Rule 251(c) of Regulation A.⁵⁹

Conclusion

What sort of market will develop under the new Regulation A is completely unknown. At this point it is easier to list just a few of the "known unknowns" rather than make any predictions:

- Will Regulation A steal the crowdfunding thunder from the yet-to-be adopted Regulation CF?
- Will complete start-ups use Regulation A?
- Will Tier 1 be used by any company?
- Will any companies choose to use Regulation A instead of Regulation D?
- Will the SEC review process be flexible enough to encourage the use of Regulation A?
- Will the primary users of Regulation A be larger issuers making traditionally underwritten offerings at the \$50 million limit, or smaller issuers making smaller online offerings?

¹ See, e.g., Luis Aguilar, Commissioner, Securities and Exchange Commission, The Important of Small Business Capital Formation (Nov. 20, 2014), *available at* http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370543532516#_ednref5.

² *Id.* at n.5.

³ National Securities Markets Improvement Act, Pub. L. No. 104-290, §102, 110 Stat. 3416, 3417-20.

⁴ GAO, Factors That May Affect Trends in Regulation A Offering 9, GAO-12-839, July 3, 2012, *available at* <http://www.gao.gov/assets/600/592113.pdf>.

⁵ *Id.* at 16-20.

⁶ JOBS Act, Pub. L. No. 112-106, 126 Stat. 306.

⁷ Securities Act §3(b)(2)(A), 15 U.S.C. §77c(b)(2)(A).

⁸ Securities Act §3(b)(2)(E), 15 U.S.C. §77c(b)(2)(E).

⁹ Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act Rel. No. 33-9497 [79 FR 3925] (Dec. 18, 2013) [hereinafter the "Proposing Release"], *available at* <http://www.sec.gov/rules/proposed/2013/33-9497.pdf>.

¹⁰ Comments on Proposed Rule: Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, <http://www.sec.gov/comments/s7-11-13/s71113.shtml> (last visited

May 6, 2015).

¹¹ Amendments for Small and Additional Issues Exemption Under the Securities Act, 80 Fed. Reg. 21,806 (April 20, 2015) [hereinafter the "Final rules"]; (13 CARE 660, 3/27/15).

¹² *Id.* at 21, 895-96; Scope of exemption, 17 C.F.R. §230.251.

¹³ Final rules at 21,898-99; Solicitation of interest and other communications, 17 C.F.R. §230.255.

¹⁴ Final rules at 21,895; Scope of exemption, 17 C.F.R. §230.251(b).

¹⁵ See Exemption for limited offers and sales without regard to dollar amount of offering, 17 C.F.R. §230.506(d).

¹⁶ Final rules at 21,901-92, Disqualification provisions, 17 C.F.R. §230.262(a).

¹⁷ *Id.*

¹⁸ Final rules at 21,895; Scope of exemption, 17 C.F.R. §230.251(b).

¹⁹ See, e.g., FundersClub Inc. and FundersClub Management LLC, SEC No-Action Letter (March 26, 2013).

²⁰ Final rule at 21,895, Scope of exemption, 17 C.F.R. §230.251(b).

²¹ Investment Company Act §§3(c)(1), 3(c)(7), 15 U.S.C. §§80a-3(c)(1), 80a-3(c)(7).

²² The statutory underpinning for Regulation A is Section 3(b) of the Securities Act as opposed to Section 4(a)(2).

²³ Securities Act §3(b)(3), 15 U.S.C. §77c(b)(3).

²⁴ Definitions and terms under in Regulation D, 17 C.F.R. §230.501(a).

²⁵ Final rule at 21,895-96; Scope of exemption, 17 C.F.R. §230.251(d)(2)(i)(C).

²⁶ See Securities Act §4(A)(6)(B); 15 U.S.C. §77d(a)(6)(B).

²⁷ Final rule at 21,896; Scope of exemption, 17 C.F.R. §230.251(d)(2)(i)(D).

²⁸ See 17 C.F.R. §230.506(c)(2)(ii).

²⁹ Final rules at 21,817 n. 157.

³⁰ Securities Exchange Act §12(g); 15 U.S.C. §78l(g).

³¹ Securities Exchange Act §17A(c); 15 U.S.C. §78q-1(c).

³² Final rules at 21,923-24; Definition of securities "held of record", 17 C.F.R. §240.12g5-1(7).

³³ Final rules at 21,906-13.

³⁴ Executive compensation, 17 C.F.R. §229.402.

³⁵ Internal control over financial reporting, 17 C.F.R. §229.308.

³⁶ Quantitative and qualitative disclosures about market risk, 17 C.F.R. §229.305.

³⁷ Final rules at 21,912; Form 1-A Part F/S, 17 C.F.R. §239.90.

³⁸ *Id.*

³⁹ Article 8 Financial Statements of Smaller Reporting Companies, 17 C.F.R. §210.8-01 et seq.

⁴⁰ Final rules at 21,908-09; Form 1-A Part II, Item 9, 17 C.F.R. §239.90.

⁴¹ A non-exhaustive search reveals that audited financials are required for Regulation A offerings to be qualified in certain states under the following circumstances:

- Arizona: offerings for any size must include audited financial statements. See Arizona Corporations Commission, Regulation A, http://www.azcc.gov/divisions/securities/licensing_and_registration/reg-rega.asp (last visited May 27, 2015)
- Kentucky: offerings over \$5 million must include audited financial statements. See KRS 293.370.
- New Mexico: offerings for any size must include audited financial statements. See New Mexico Securities Division, Raising Capital, <http://www.rld.state.nm.us/securities-division/registration-by-qualification-1.aspx> (last visited May 27, 2015)
- Washington: offerings over \$1 million must include audited financial statements. See RCW 21.20.210.

⁴² Final rules at 21,922; Form 1-Z, 17 C.F.R. §239.94,

⁴³ Final rules at 21,915-17; Form 1-K, 17 C.F.R. §239.91.

⁴⁴ Final rules at 21,918-22; Form 1-U, 17 C.F.R. §239.93.

⁴⁵ JOBS Act, Pub. L. No. 112-106, §401(a), 126 Stat. 323-24.

⁴⁶ Final rules at 21,898-99; Solicitation of interest and other communications, 17 C.F.R. §230.255(a).

⁴⁷ 17 C.F.R. § 230.255(b).

⁴⁸ Final rules at 21,898; 17 C.F.R. §230.254..

⁴⁹ Final rules at 21,898; 17 C.F.R. §230.255(a).

⁵⁰ For example, in Virginia, issuers are required to file a Solicitation of Interest form 10 days prior to any testing the waters communication being made. See 21 VAC 5-40-70. Other states, like California, do not allow for any testing the waters until after a Regulation A offering statement has been filed with the SEC. See CAL. CORP. CODE §25102.

⁵¹ Daniel Gallagher, Commissioner, Securities and Exchange Commission, Grading the Commission's Record on Capital Formation: A+, D, or Incomplete? (March 27, 2015).

⁵² Final rules at 21,898; 17 C.F.R. §230.254.

⁵³ See *Pinter v. Dahl*, 486 U.S. 622, 646 (1988).

⁵⁴ Securities Act §12(a)(2), 15 U.S.C. §77l(a)(2).

⁵⁵ JOBS Act, Pub. L. No. 112-106, §301 et seq, 126 Stat. 315-23.

⁵⁶ See, e.g., Securities and Exchange Commission, Guide to Broker-Dealer Registration, April 2008, <http://www.sec.gov/divisions/marketreg/bdguide.htm>.

⁵⁷ See, e.g., Angel Capital Electronic Network, SEC No-Action Letter (publicly available Oct. 25, 1996).

⁵⁸ Securities Act §17(b), 15 U.S.C. §77q(b).

⁵⁹ Final rules at 21,895; Scope of the exemption, 17 C.F.R. §230.251(c).



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