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Will Regulation A+ Make the Grade? Explanation of Comments Received by the SEC

KATHERINE K. DELUCA
804-775-4385 | kdeluca@mcguirewoods.com
One James Center
901 East Cary Street
Richmond, VA 23219-4030

NOVA D. HARB
904-798-2639 | nharb@mcguirewood.com
Bank of America Tower
50 North Laura Street, Suite 3300
Jacksonville, FL 32202-3661

FRED T. ISAF
404-443-5712 | fisaf@mcguirewoods.com
1230 Peachtree Street N.E.
Suite 2100
Atlanta, GA 30309-3534

RACHEL WILLIAMS MANTZ
312-849-8233 | rmantz@mcguirewoods.com
77 West Wacker Drive
Suite 4100
Chicago, IL 60601-1818

CECIL E. MARTIN III
410-659-4419 | cmartin@mcguirewoods.com
7 Saint Paul Street
Suite 1000
Baltimore, MD 21202-1671

STEPHEN EDWARD OLDER
212-548-2122 | solder@mcguirewoods.com
1345 Avenue of the Americas
Seventh Floor
New York, NY 10105-0106

DAVID H. PANKEY
202-857-1716 | pankey@mcguirewoods.com
2001 K Street N.W.
Suite 400
Washington, DC 20006-1040

DAVID L. RONN
713-353-6671 | dronn@mcguirewoods.com
600 Travis Street
Suite 7500
Houston, TX 77002-2906

RICHARD W. VIOLA
704-343-2149 | rviola@mcguirewoods.com
Fifth Third Center
Suite 3000
Charlotte, NC 28202

SCOTT E. WESTWOOD
412-667-7989 | swestwood@mcguirewoods.com
EQT Plaza
625 Liberty Avenue, 23rd and 27th Floors
Pittsburgh, PA 15222-314

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www.mcguirewoods.com

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As required by the Jumpstart Our Business Startups Act (JOBS Act), the SEC has proposed changes to Regulation A that would increase the amount that could be raised from $5 million to $50 million. This change is generally referred to as “Regulation A+.” This white paper summarizes proposed Regulation A+ and explains the comments that the SEC has received on this proposal.

Reading this article will give you an excellent grasp of the issues currently being considered by the SEC concerning Regulation A+, and will significantly enhance your understanding of the final rule, when adopted.

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Executive Summary

What is Regulation A? Regulation A is an infrequently used exemption from registration under the Securities Act of 1933, as amended (Securities Act) that permits exempt public offerings. The JOBS Act required that the SEC increase the amount that can be raised in a Regulation A offering from $5 million to $50 million.

The SEC's Proposal. The SEC proposes to create two tiers of offerings under Regulation A+.

Tier 1 – an offering of up to $5 million over a rolling 12-month period, essentially like the current Regulation A exemption.

Tier 2 – an offering of up to $50 million over a rolling 12-month period.

As proposed, Tier 2 offerings would contain additional investor protections, and would preempt state securities regulatory review, as explained below.

Securities sold in both tiers could be offered publicly and would not be restricted securities. Both tiers could use a "test the waters" procedure.

Proposed Preemption of State Review. The SEC has proposed to eliminate state securities regulatory review of Tier 2 Regulation A+ offerings. A significant number of the state securities regulators have objected to this part of the proposal. While these state regulators have good legal arguments, the SEC's proposed approach is more practical.

Summary of Comments. The comment period has ended and the SEC has received approximately 90 comment letters. A significant number of comments deal with the preemption issue with state securities regulators, and some others, strongly opposed to preemption, and a number of industry participants and their representatives strongly in favor of preemption.

Some comment letters deal with the proposed categories of eligible issuers, supporting the ability, for example, of reporting companies, foreign issuers and business development companies (BDCs) to use Regulation A+. A number of comments deal with the proposed investment limitations for Tier 2 offerings, suggesting that these investment limitations be eliminated, or limited to individual investors and not be applicable to accredited investors. Several comment letters deal with the ongoing reporting proposed for Tier 2 issuers or the proposed offering process (such as testing the waters). A substantial number of comment letters argue that Regulation A+ issuers should be exempt from Exchange Act registration. There are also a number of accounting issues identified in the comment letters.

The comment letters are discussed below.

Next Steps. The SEC has identified completion of Regulation A+ as a priority for 2014. It can be expected that the SEC will finalize Regulation A+ as soon as the commissioners agree on the approach to be taken.

The Preemption/State Review Issue

Regulation A offerings are currently required to be registered or exempt from registration in each state where the offering is made, in addition to SEC review. Accordingly, if a Regulation A offering is made in 10 states, there would be 11 separate securities law analyses conducted, one in each state, as well as the federal securities process. Many states do not have exemptions suitable for small public offerings, and would require the registration of a Regulation A offering. In addition, in many states, the securities registration review includes a "merit" review as well as a disclosure-type review. This regulatory process can be lengthy, cumbersome and expensive, factors that many believe have contributed to the infrequent use of Regulation A.

The SEC has proposed that Tier 2 Regulation A+ offerings will be reviewed by only one regulator, the SEC, which would simplify the offering process for Regulation A+ considerably. The SEC proposes to base this elimination of any state review on a determination that all purchasers in a Tier 2 Regulation A+ offering are "qualified purchasers," under Section 18 of the Securities Act. Accordingly, the proposed rules would define "qualified purchaser" to include any offeree in a Regulation A+ offering and any purchaser in a Tier 2 offering.

State securities regulators strongly disagree with this approach. The North American Securities Administrators Association (NASAA), which is composed of the state securities regulators, has issued a position statement in opposition to preemption that argues that this legal position is flawed. NASAA argues that Congress intended for the qualified purchaser provision described above to be used only with respect to experienced "sophisticated" investors who can protect themselves in the financial markets. Because the SEC's preemption proposal for Tier 2 Regulation A+ offerings is based on the type of investment, rather than the qualifications of the purchaser, NASAA believes it is inconsistent with existing securities law. NASAA also points out that during the extensive debate on the JOBS Act, Congress considered and rejected calls to preempt the states from reviewing Regulation A offerings. Click here for access to the NASAA position statement.

The NASAA Coordinated Review Proposal

NASAA has approved a streamlined multistate review procedure for Regulation A+ offerings. In this program, Regulation A+ filings would be made in one place and distributed electronically to all states. Lead examiners would be appointed as the primary point of contact for a filer. One lead examiner would handle disclosure issues and one examiner would handle "merit" review. Only the lead examiners would interact with the issuer to resolve any deficiencies and once they determine an application should be cleared, the decision is binding on all participating states. This coordinated review procedure would result in a state regulatory review procedure with a time frame similar to the time period generally expected for federal review. Click here for access to the NASAA's coordinated review procedure.

The NASAA coordinated review proposal would be an improvement over the current review procedure for Regulation A offerings. There are, however, several remaining issues.

First, Regulation A+ as proposed would permit a confidential SEC review of the offering documents before filing. The NASAA coordinated review procedure would commence at the same time as the offering documents are filed with the SEC, potentially defeating the advantages of the confidential prefiling review.

Second, state securities law may not permit the "testing the waters" communications contemplated by Regulation A+. The SEC has proposed to allow "testing the waters" communications regardless of state law by treating all Regulation A+ offerees (Tier 1 and Tier 2) as qualified purchasers. Accordingly, in the absence of preemption, testing the waters communications might not be permitted in some states.

Third, depending on the states involved, state registration involves a "merit" component as well as a disclosure component. SEC review involves only a disclosure component.

Finally, if an issuer decides to add a state after completing the NASAA coordinated review, that issuer may need to register the offering separately in that state.

Summary of Comments

The comment period for proposed Regulation A+ ended on March 24, 2014. As of April 15, 2014, the SEC had received 94 comment letters. Click here for access to the comment letters.

State Preemption – A substantial number of the comment letters deal with preemption completely, almost totally or in part.

Comment Letters Opposing Preemption

Andrea Seidt, NASAA president and the Ohio Securities Commissioner, submitted a comment letter dated March 24, 2014, objecting to the preemption proposal. This letter includes extensive discussion of the legislative history of Regulation A+ intended to demonstrate that Congress explicitly rejected preemption when it considered and passed Regulation A+.

In an earlier comment letter, dated Feb. 19, 2014, also objecting to the preemption aspect of the Regulation A+ proposal, Ms. Seidt was joined by the securities administrators of 17 other states (Maryland, Minnesota, Washington, Maine, Tennessee, Arkansas, Alabama, Utah, Montana, Massachusetts, Texas, Illinois, Virginia, Nebraska, North Carolina, California and Wisconsin).

In a letter dated March 4, 2014, the securities regulators of the following states made similar arguments opposing preemption: Illinois, Indiana, Massachusetts, Mississippi, Nevada, New Hampshire, North Carolina and Wyoming.

In addition, the following state securities regulators have posted individual letters taking issue with the proposed preemption of state securities regulatory review of Regulation A+ offerings: Massachusetts (Dec. 18, 2013 and March 24, 2014), Nebraska (Feb. 10, 2014), Arkansas (Feb. 20, 2014), Texas (March 21, 2014), Missouri (March 24, 2014), Washington (March 24, 2014), Oklahoma (March 24, 2014) and Puerto Rico (March 5, 2014).

As of April 15, 2014, the securities regulators of 25 states, and Puerto Rico, had objected to the SEC's preemption proposal.

These state securities regulators have been joined by several others in opposing preemption.

The Consumer Federation of America strongly opposed preemption in a comment letter dated March 24, 2014, taking the view that the Regulation A+ proposal would be "extremely vulnerable to legal challenge."

In a comment letter dated March 24, 2014, William A. Jacobson, Cornell University Law School, opposed preemption and supported the NASAA coordinated review procedure. This comment letter also recommends that more stringent investor protection measures be incorporated into Regulation A+ if preemption is retained.

The CFA Institute also opposes preemption. See Kurt N. Schacht, managing director, Standards and Financial Market Integrity and Linda Rittenhouse, director, Capital Markets, CFA Institute, March 24, 2014. See also Tavakoli Structured Finance Inc., Feb. 24, 2014, which strongly opposes preemption.

In addition, William Carter, an investment banker with Moloney Securities Inc., in an email comment dated March 3, 2014, characterized coordinated blue sky registration as "essential" to the Regulation A+ proposal.

In an ironic twist, one person who supported preemption in preproposal comments changed his view based on the NASAA coordinated review proposal. See Mike Liles, Jan. 17, 2014.

(See Jason Coombs, co-founder and CEO Public Startup Company, Inc., March 26, 2014, for the view that state, but not federal, review should be required for "local" offerings.)

It should also be noted that one SEC commissioner, Kara Stein, opposed preemption at the SEC meeting where the Regulation A+ proposal was discussed and voted on. Click here for access to the statement by SEC commissioner Stein.

Commissioner Aguilar recently addressed Regulation A+ and preemption in a speech delivered on April 8, 2014, entitled "NASAA and the SEC: Presenting a United Front to Protect Investors." In this speech, Commissioner Aguilar stated that he had an "open mind" on the preemption issue. However, he also stated that he had asked the SEC's Office of General Counsel to address whether the SEC had the authority to use preemption as proposed. As explained above, several commenters have questioned the ability of the SEC to impose preemption under these circumstances. Commissioner Aguilar suggested that advice on this issue would be available to the SEC before a vote is taken on the final rule. Click here for access to the statement by SEC commissioner Aguilar.

A significant question is what will happen if the SEC decides to adopt the preemption approach: will any state regulator sue the SEC seeking to block the implementation of the preemption aspect of the proposal? Several comment letters have argued that preemption might not withstand a legal challenge and one state has implied that it may litigate the issue. "Massachusetts must consider all our options to oppose this proposal." William F. Galvin, Secretary, Commonwealth of Massachusetts, March 24, 2014. In recent years, business interests have had success suing the SEC to block regulations on various theories. However, this type of litigation is expensive, and a state might have difficulty getting funding for this effort.

Comment Letters Supporting Preemption

A fairly significant number of comments have been posted supporting preemption. Some of these comment letters support preemption generally because they believe it is important to the practical viability of Regulation A+. Some comment letters are skeptical of the NASAA coordinated review proposal. A few of the comment letters recommend extending preemption to Tier 1 offerings and to resales of Regulation A+ securities. One comment letter suggests that preemption should apply where the offering is directed only to accredited investors.

For general support of preemption see, for example, Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014 ("We do not believe that having one or more separate reviews by state securities commissioners would contribute materially to investor protection."); Andrew F. Viles, Canaccord Genuity, Inc., March 27, 2014; Mark Kosanke, president, Real Estate Investment Securities Association, March 24, 2014; Jason Coombs, co founder and CEO, Public Startup Company Inc., two comment letters dated March 26, 2014 and one letter March 24, 2014; Morrison & Foerster, March 26, 2014; Michael Zuppone, March 24, 2014; Bill Soby, Silicon Valley Global Shares, March 24, 2014; Daniel Zinn, general counsel, OTC Markets Group Inc., March 24, 2014; Mark Goldberg, chairman, Investment Program Association, March 24, 2014; Brett Palmer, president, Small Business Investor Alliance, March 24, 2014; John Rodenrys, Leading Biosciences, Inc., March 24, 2014; Salomon Kamalodine, director, Investment Banking, B. Riley & Co., March 24, 2014 ("We believe the data reveals that retaining Tier 2 federal preemption is the key factor to ensure that Reg. A utilization increases in a way that makes Reg. A+ a significant game-changer for growth companies on the cusp of economically-measurable expansion."); Ryan C. Gilman, March 24, 2014; and William Klehm, chairman and CEO, Fallbrook Technologies, March 22, 2014.

In a comment letter dated March 24, 2014, Tom Quaadman, vice president, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, supported the preemption proposal, noting in particular the challenge of merit review at the state level.

Preemption is also supported by a commenter from Canada. Daniel McElroy, Du Moulin Black LLP, April 1, 2014 ("We believe that preemption of state securities laws is crucial in order to entice Canadian companies to conduct offerings under Tier 2 of the Proposed Rules.")

In addition, a number of individuals have posted short comments in support of preemption. Several of these comments are in the form of very brief emails: Bruce E. Methven (March 23, 2014), Daniel Eng (March 20, 2014), Robert Kisel (March 18, 2014), Jason Akel (March 12, 2014), Akbert P. Kretz (March 11, 2014), Howard Pham (February 28, 2014), Jesse J. Palomino (Feb. 25, 2014), Charles Haynh (Feb. 24, 2014), John Warren (Feb. 24, 2014), Chris Sugai (Feb. 21, 2014), Ryan Hawxhurst (Feb. 21, 2014) and Bradley L. Staples (Feb. 21, 2014).

Several comment letters have taken the view that the NASAA-coordinated review procedure should not cause the SEC to drop the preemption component of the Regulation A+ proposal. For example, in a letter dated March 11, 2014, the Biotechnology Industry Organization (BIO) strongly supported preemption as proposed by the SEC. It is worth quoting a portion of this comment letter, which discussed the proposed NASAA coordinated review procedure:

> BIO has serious concerns about the utility and usability of a coordinated review program. It is unclear at this point to what standard the examiners in the program would adhere — consolidating review would do little good if NASAA or the examiners simply adopt the most stringent, burdensome option available. Further, the comments or corrections submitted by the participating jurisdictions to the lead examiner could lead to a morass of conflicting, state-specific questions for the issuer.
>
> BIO believes that the SEC's proposed qualified purchaser definition is a much simpler and more effective approach to "protect offerees and investors in Regulation A securities, while streamlining compliance and reducing transaction costs." BIO's strong preference is to preempt state securities law by maintaining a qualified purchaser definition that encompasses all offerees and purchasers in a Tier 2

> offering, regardless of whether NASAA moves forward in implementing a coordinated review program at the state level.
>
> A requirement to comply with 50 sets of regulations, even under the guise of coordinated review, could dissuade growing biotechs from considering a Tier 2 offering as a capital formation option and undercut the effectiveness of Title IV of the JOBS Act. The SEC should maintain its proposed qualified purchaser definition.

Somewhat similar statements relating to the proposed NASAA coordinated review procedure, or otherwise supporting preemption, are contained in the following comment letters: Kendall Almerico, Fund Hub and ClickStartMe (Feb. 11, 2014); Scott Kupor and Jeffrey M. Solomon, Cowen and Company (Feb. 26, 2014); William R. Hambrecht, WR Hambrecht & Co. (March 5, 2014); Tom Quaadman, vice president, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, March 24, 2014 ("…we are concerned that relying on an untested and unproven review program will only add delays and complexity to issuers that are looking to take advantage of the modernized Regulation A"); and David R. Burton, The Heritage Foundation, March 21, 2014.

To the effect that preemption should also apply for Tier 1, see David R. Burton, The Heritage Foundation, March 21, 2014; Michael Lempres, assistant general counsel, SVB Financial Group, March 21, 2014; and Rutherford B. Campbell, Jr., Spears-Gilbert Professor of Law, University of Kentucky, March 5, 2014. Another comment letter recommends that preemption apply for Tier 1 offerings but that the initial filing include audited financials, see Daniel Gorfine, director, Financial Markets Policy and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 19, 2014. See also Samuel S. Guzik, March 24, 2014 and Ford C. Ladd, March 19, 2014.

Several commenters have recommended that preemption be available for resales by shareholders. See Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014 ("A key benefit of the proposed Regulation A exemption for Tier 2 issuers is the likelihood that the offerings of unrestricted securities will give rise to a liquid secondary trading market for these securities. For this to happen, resales of securities issued in Tier 2 offerings must be exempt from Blue Sky registration requirements, at least for so long as the issuer is providing ongoing reports pursuant to Regulation A or the Exchange Act."); Mark Goldberg, chairman, Investment Program Association, March 24, 2014; Michael Lampres, assistant general counsel, SVB Financial Group, March 21, 2014; Scott Kupor, managing partner, Andreessen Horowitz, and Jeffrey M. Solomon, chief executive officer, Cowen and Company, Feb. 26, 2014. For a discussion of the significant blue sky issues impacting secondary trading, see Daniel Zinn, general counsel, OTC Markets Group, Inc. March 24, 2014. See also Michael Zuppone, March 24, 2014.

One interesting comment letter recommends that the SEC retain the concept of preemption in the final rule, but limit it to situations in which the offering is directed only to accredited investors. In other words, state regulatory review would be required for offerings to nonaccredited investors. Stanley Keller, April 3, 2014. This approach would put Tier 2 offerings in a position similar to Rule 506(c) offerings and would address some of the legal arguments made by state securities regulators in opposing preemption. However, even with this approach, there would be practical issues remaining (testing the waters not available in all states and lack of coordination of confidential prefiling review with NASAA coordinated review proposal).

Eligible Issuers

Public Companies and MicroCap Issuers

Several comment letters have argued that existing public companies should be permitted to use Regulation A+. See, for example, David Zinn, general counsel, OTC Markets Group, Inc., March 24, 2014; E. Cartier Esham, executive vice president, Emerging Companies, Biotechnology Industry Organization, March 11, 2014; and Jack H. Brier, president & founder, US Alliance Corporation, March 19, 2014. A few commenters have recommended that public reporting companies with an annual revenue of up to $250 million be eligible to use Regulation A+. See, for example, William R. Hambrecht, WR Hambrecht & Co., March 5, 2014; Scott Kupor, managing partner, Andreessen Horowitz; and Jeffrey M. Solomon, chief executive officer, Cowen and Company, Feb. 26, 2014. Currently, public reporting companies are not eligible to use the Regulation A exemption.

Foreign Issuers

Several comment letters have recommended that foreign private issuers be permitted to use Regulation A+. Scott Kupor, managing partner, Andreessen Horowitz, and Jeffrey M. Solomon, chief executive officer, Cowen and Company, Feb. 26, 2014; Daniel Zinn, general counsel, OTC Markets Group Inc., March 24, 2014; Bill Soby, managing director, Silicon Valley Global Shares, March 24, 2014; and Michael Lempres, assistant general counsel, SVB Financial Group, March 21, 2014. One comment letter recommended including as eligible issuers companies organized in jurisdictions with “robust securities regulation systems,” such as the UK, other countries in the European Union, Australia and Asian markets, such as Singapore and Hong Kong. Andrew F. Viles, Canaccord Genuity, Inc., March 27, 2014.

Business Development Companies

Several commenters recommended that Regulation A+ be available to business development companies (BDCs). See Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014; Brett Palmer, president, Small Business Investor Alliance, March 24, 2014; Mark Kosanke, president, The Real Estate Investment Securities Association, March 24, 2014; Michael Savante, executive director, Commonwealth Fund, LLC, March 21, 2014 and March 22, 2014; David Gorfine, director, Financial Markets Policy; and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 19, 2014. BDCs are specialized types of registered investment companies that generally focus on providing capital to small and emerging businesses.

Mineral Rights

One comment letter recommends that established issuers of fractional interests in oil or gas rights or other mineral rights should be able to use Regulation A+. Mark Kosanke, president, The Real Estate Investment Securities Association, March 24, 2014.

Others

A few comment letters also recommended that blank check companies and special purpose acquisition companies be permitted to use Regulation A+. A couple also supported the ability of REITs to use Regulation A+.

Investment Limitations in Tier 2 Offerings

A few comment letters have suggested that there be no investment limitation in Tier 2 at all or with respect to accredited investors who purchase securities in Tier 2 offerings. See Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014 (The investment limitations should be eliminated, and if not eliminated, should apply only to natural persons who are not accredited investors.); Scott Kupor, managing partner, Andrressen Horowitz; and Jeffrey M. Solomon, chief executive officer, Cowen and Company, Feb. 26, 2014. See also Andrew F. Viles, Canaccord Genuity Inc., March 27, 2014 (investment limitations should apply only to natural persons who are not accredited investors); Morrison & Foerster, March 26, 2014 (The investment limitations should apply only to individual investors who are not accredited.); Christopher Cole, senior vice president and senior regulatory counsel, Independent Community Bankers of America, March 25, 2014; Mark Zuppone, March 24, 2014 (there should be no investment limitation for shares sold through broker-dealers.); John Rodenrys, executive director R&D, Leading Biosciences Inc., March 24, 2014 (the investment limitation should be doubled or eliminated, and should not apply to accredited investors); Salomon Kamalodine, director, Investment Banking, B. Riley & Co., March 24, 2014 (the investment limitations should only apply to natural persons who are not accredited investors); William Klehm, chairman and CEO, Fallbrook Technologies, March 22, 2014 (the investment limitations should be raised substantially or eliminated and should not apply to accredited investors.); David R. Burton, The Heritage Foundation, March 21, 2014 (the investment limitations should be eliminated, and in any event should not apply to any accredited investor); Michael Lempres, assistant general counsel, SVB Financial Group, March 21, 2014 (the investment limitations should be eliminated or revised so that they do not apply to accredited investors.); and Ford C. Ladd, March 19, 2014 (The investment limitations are inconsistent with the legislative history and should be eliminated; in the alternative, the investment limitations should not apply to accredited investors or persons associated with the issuer.).

One comment letter has recommended more stringent investment limitations if preemption is retained. See William A. Jacobson, Clinical Professor of Law, Cornell Law School, March 24, 2014, to the effect that the investment limitation should apply as an annual cap on investment in Regulation A+ securities.

One comment letter recommends that the investment limitations should be reevaluated after a year, should apply only to natural persons (not entities) and should not apply to Regulation A+ securities purchased on an exchange. See David Gorfine, director, Financial Markets Policy and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 19, 2014.

Two comment letters recommend that there be verification requirements for an issuer with respect to compliance with these investment limitations (similar to the verification procedures in advertised private placements using Rule 506(c)). See William M. Beatty, Securities Administrator, Washington Department of Financial Institutions, March 24, 2014 and Paul Sigelman, president and CEO, Accredited Assurance, March 24, 2014. Two comment letters have recommended that an issuer not be permitted to rely on investor certification of compliance with the investment limitation if the issuer has “reason to believe” that the certification is wrong. See William A. Jacobson, Clinical Professor of Law, Cornell Law School, March 24, 2014 and Andrew M. Hartnett, Missouri Commissioner of Securities, March 24, 2014.

Several comment letters recommended retaining the “actual knowledge” approach contained in the SEC’s Regulation A+ proposal.

Percentage limitations on including sales by shareholders in a Regulation A+ offering

A few comment letters have argued that there should be no limit on including shares owned by shareholders in a Regulation A+ offering. See, for example, Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014; Andrew F. Viles, Canaccord Genuity Inc., March 27, 2014; Morrison & Foerster, March 26, 2014; Mark Kosanke, president, Real Estate Investment Securities Association, March 24, 2014; and Salomon Kamalodine, director, Investment Banking, B. Riley & Co., March 24, 2014.

One comment letter recommends that the 30 percent restriction on sales by shareholders be reevaluated after a year, and in any event that this restriction should not apply to shareholders who are not affiliates of the issuer. David Gorfine, director, Financial Markets Policy, and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 19, 2014. Another comment letter, after arguing that there should be no limit on sales by shareholders in a Regulation A+ offering, recommends that these limitations be reevaluated on a periodic basis if adopted. Andrew F. Viles, Canaccord Genuity, Inc., March 27, 2014.

One comment letter recommended that shares owned by shareholders should not be permitted in Regulation A+ offerings. Pw Carey, March 24, 2014.

Form of Offering Circular

A few comment letters recommend retaining the Q & A format. See, for example, William A. Beatty, Securities Administrator, Washington Department of Financial Institutions, March 24, 2014; Andrea Seidt, president, NASAA and Ohio Securities Commissioner, March 24, 2014; and E. Cartier Esham, executive vice president, Emerging Companies, Biotechnology Industry Organization, March 11, 2014.

One comment recommended requiring the use of Form S-1 type disclosure for offerings greater than $10 million on the theory that this procedure would speed up the SEC review process. Ford C. Ladd, March 19, 2014.

Access Equals Delivery

Two comment letters object to the proposed use of the “access equal delivery” model. See William M. Beatty, Securities Administrator, Washington Department of Financial Institutions, March 24, 2014 and William F. Galvin, Secretary, Commonwealth of Massachusetts, March 24, 2014.

Testing the Waters

The SEC’s Regulation A+ proposal would allow issuers to “test the waters” to gauge investor interest in a potential offering. The proposal would preempt state securities regulations that might otherwise prohibit testing the waters communications.

Several commenters objected to the SEC’s proposed requirement that testing the waters materials be filed with the SEC and made available to the public. E. Cartier Esham, executive vice president, Emerging Companies, Biotechnology Industry Organization, March 11, 2014.

A few comment letters recommend that the SEC require an issuer to file any testing the waters materials before they are used. See, for example, William F. Galvin, Secretary, Commonwealth of

Massachusetts, March 24, 2014, and William M. Beatty, Securities Administrator, Washington Department of Financial Institutions, March 24, 2014.

One comment letter recommends that state securities regulators be given immediate access to any filing of testing the waters materials. Ford C. Ladd, March 19, 2014.

Several commenters suggested that the filing of testing the waters solicitation materials should not be a condition of the Regulation A+ exemption, and that there should be a cure period for inadvertent failures to submit or file solicitation materials. E. Cartier Esham, executive vice president, Emerging Companies, Biotechnology Industry Organization, March 11, 2014.

Some commenters have recommended that the SEC provide safe harbors from the Regulation A+ "testing the waters" requirements to permit regular business-related communications by Tier 2 issuers to continue and incentivize broker-dealers to initiate research coverage for Tier 2 issuers. See Catherine A. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014, and Andrew F. Viles, Canaccord Genuity, Inc., March 27, 2014.

Exchange Act Registration

The SEC's Regulation A+ proposal does not provide an exemption from registration under the Securities Exchange Act of 1934, as amended (the Exchange Act). Exchange Act registration is generally required if an issuer has more than $10 million in assets and has 2,000 record holders or 500 record holders who are not accredited investors. A company could become subject to Exchange Act registration as a result of a Regulation A+ offering.

For a discussion of various scenarios that might result in a Regulation A+ offering requiring Exchange Act registration, see Mark Goldberg, chairman, Investment Program Association, March 24, 2014.

The SEC has stated that it is not likely that Regulation A+ offerings will result in a requirement to register under the Exchange Act because securities sold in Regulation A+ offerings probably will be held in street name. In general, the "record holders" provisions of the Exchange Act look to the brokers, rather than the beneficial owners, where shares are held in street name. Several comment letters have questioned whether brokerage firms will be willing to hold Regulation A+ securities in street name accounts. See, for example, Ford C. Ladd, March 19, 2014.

Exchange Act registration for Regulation A+ issuers would normally involve filing a Form 10, and would result in the need to comply with the more detailed Exchange Act reporting. Commenters have proposed two different approaches to this issue. One suggested approach is to make it easy for Regulation A+ issuers to register under the Exchange Act and the other is to exempt Regulation A+ issuers from registration under the Exchange Act.

To the effect that Regulation A+ issuers should have a simplified path to Exchange Act registration, see Catherine T. Dixon, chair, Federal Regulation of Securities, Committee, Business Law Section, American Bar Association, April 3, 2014, (Tier 2 issuers should be able to use Form 8-A if they wish to register under the Exchange Act), so long as they use the Part 1 of Form S-1 narrative approach in the offering circular.); Morrison & Foerster, March 26, 2014 (use of Form 8-A should be permitted for a period of time after a Regulation A+ offering circular is qualified); Jonathan Frutkin, March 24, 2014 (Form 8-A should be permitted for 12 months after a Regulation A+ offering); and Daniel Zinn, general counsel, OTC Markets Group Inc., March 24, 2014 (use of Form 8-A should be permitted).

To the effect that Regulation A+ securities should be exempt from Exchange Act registration, see, for example, Tom Quaadman, vice president, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, March 24, 2014; Samuel S. Guzik, March 24, 2014; Salomon Kamalodine, director, Investment Banking, B. Riley & Co., March 24, 2014; and David R. Burton, The Heritage Foundation, March 21, 2014. See also William Klehm, chairman and CEO, Fallbrook Technologies, March 22, 2014.

One commenter recommends that Regulation A+ issuers have a conditional exemption from filing periodic reports under Section 13(a) of the Exchange Act so long as the issuer's nonaffiliate market capitalization had not reached $250 million. Michael Zuppone, March 24, 2014. This proposal, however, would subject Regulation A+ issuers to the provisions of Sections 13(d), 13(g) and 14(d) of the Exchange Act relating to tender offers, insider beneficial ownership reporting and short swing profit recovery under Section 16 of the Exchange Act, and the proxy rules under Section 14(a) of the Exchange Act.

In comment letter dated March 24, 2014, Brett Palmer, president, Small Business Investor Alliance, recommended that the SEC reconsider the Exchange Act regulation triggers for Regulation A+ securities. For a comment letter to the same effect that includes a discussion demonstrating the interaction between the investment limitation and Exchange Act registration, see Mark Goldberg, chairman, Investment Program Association, March 24, 2014.

See also Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014 (The SEC should consider a phase-in period of 24 months during which a Tier 2 issuer would be exempt from Exchange Act registration, unless the issuer crossed the Exchange Act threshold as a result of other issuances or the resale of other securities.); Morrison & Foerster, March 26, 2014 (Exchange Act registration should not be required for a Regulation A+ issuer as long as it is current in its Tier 2 reporting obligations, or provide for a phase in period.); and Daniel Gorfine, director, Financial Markets Policy; and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 19, 2014 (Tier 2 reporting should be all that is required of Regulation A+ issuers, even if Exchange Act registration is required). See also Samuel S. Guzik, March 24, 2014, to the effect that all Regulation A+ offerings should be conditionally exempt from Exchange Act registration.

Ongoing Reporting

One comment letter recommended that the disclosure requirements be structured to encourage Tier 2 issuers to adopt internal controls and that all Regulation A+ issuers should be required to maintain a corporate website where copies of all nonconfidential SEC filings can be accessed. Ford C. Ladd, March 19, 2014.

A few comment letters have suggested changes to the ongoing reporting requirements for Tier 2 issuers. For example, several comment letters have recommended that the current report on Form 1-U be required to be filed within 15 calendar days instead of 4 business days. Catherine T. Dixon, chair, Federal Regulation of Securities, Business Law Section, American Bar Association, April 3, 2014; David Gorfine, director, Financial Markets Policy; and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 14, 2014. It has also been recommended that the current report on Form 1-U be eliminated for the smallest Tier 2 issuers, based on a measure such as asset size or capitalization. Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014.

A number of comment letters recommended that the standard for filing Form 1-U should be a material event, rather than a fundamental change as proposed. See, for example, William F. Galvin, Secretary, Commonwealth of Massachusetts, March 24, 2014.

One comment letter recommended that the disclosure and reporting requirements should be simplified to reduce costs. See Mark Goldberg, chairman, Investment Program Association, March 24, 2014.

A couple of comment letters recommended a quarterly reporting requirement. See Daniel Zinn, general counsel, OTC Markets Group Inc., March 24, 2014; William F. Galvin, Secretary, Commonwealth of Massachusetts, March 24, 2014; and Salomon Kamalodine, director, Investment Banking, B. Riley & Co., March 24, 2014. Two comment letters recommend that the SEC provide a form for voluntary quarterly reporting by Tier 2 issuers. See Catherine T. Dixon, Federal Regulation of Securities, Business Law Section, American Bar Association, April 3, 2014 and Andrew F. Viles, Canaccord Genuity Inc., March 27, 2014.

One commenter recommended that the 12g 3-2(h) exemption or Form 6-K be available for Canadian issuers using Regulation A+, rather than the proposed ongoing reporting for Tier 2 issuers. Daniel McElroy, Du Moulin Black LLP, April 1, 2014.

Beneficial Ownership Reporting

One comment letter recommends that officers, directors and controlling shareholders of Regulation A+ issuers should be required to make ongoing disclosure of transactions in company securities, like existing Forms 3, 4 and 5, as well as Schedules 13D and 13G, and that institutional investors should be required to include ownership of Regulation A+ securities on Form 13F. Daniel Zinn, general counsel, OTC Markets Group Inc., March 24, 2014.

Current Information Requirements under Rule 144, Rule 15c2-11 and Rule 144A

Several comment letters have argued that compliance with the proposed Tier 2 reporting obligations should be deemed to satisfy the requirements of “current information” under Rule 144(c)(2) and “reasonably current” financial information under Rule 15c2-11(g) and Rule 144A(d)(4)(ii)(A). See, for example, Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014; Andrew F. Viles, Canaccord Genuity Inc., March 27, 2014; Morrison & Foerster, March 26, 2014; Michael Zuppone, March 24, 2014; Daniel Zinn, general counsel, OTC Markets Group, March 24, 2014; Mark Kosanke, president, The Real Estate Investment Securities Association, March 24, 2014; David Gorfine, director, Financial Markets Policy; and Staci Warden, executive director, Center for Financial Markets, Milken Institute, March 19, 2014.

Number and Size of Tiers

During the meeting at which the SEC proposed the Regulation A+ rules, there was discussion of the possibility of revising the rules to provide for three tiers, rather than two, with the goal of better structuring the disclosure and reporting requirements to various issuer and offering sizes. Several commenters have made suggestions along these lines.

Three Tiers Instead of Two

One commenter supported the basic idea that there should be three tiers, rather than two, and made several specific recommendations as to how this concept might work. Jason Coombs, co-founder and CEO, Public Startup Company, Inc., March 26, 2014.

Expansion of Tier 1 to $10 Million

One comment letter recommends that the SEC increase the maximum offering size of a Tier 1 offering from $5 million to $10 million. Christopher Cole, senior vice president and senior regulatory counsel, Independent Community Bankers of America, March 25, 2014.

Another comment letter also recommends that Tier 1 be expanded from $5 million to $10 million in permitted offering size, that preemption apply to Tier 1 offerings and that there be simplified reporting requirements for Tier 1 offerings, with annual and current reports, but not semiannual reports. Samuel S. Guzik, March 24, 2014.

Accounting Issues

The comment letters have identified several accounting issues.

Independence Issues

The financial statements included in Tier 2 Regulation A+ offerings need to be prepared in accordance with generally accepted accounting principles (GAAP). The auditor does not need to be registered with the Public Company Accounting Oversight Board (the PCAOB) but the audit needs to be completed in accordance with PCAOB standards. The PCAOB standards include SEC independence requirements, which are more stringent than the independence requirements of the American Institute of Certified Public Accountants (AICPA). The SEC's proposal would also require the auditor of financials included in Tier 1 offering circulars to satisfy the SEC independence standards. Several commenters recommend that audits be accepted if the auditor meets the less stringent AICPA independence standards. Cynthia M. Fornelli, executive director, Center for Audit Quality, March 24, 2014; Ernst & Young, LLP, March 24, 2014; Deloitte & Touche, March 24, 2014; KPMG, March 24, 2014; BDO, March 20, 2014; and McGladry, March 19, 2014.

Transition Issues

U.S. GAAP distinguishes between public and private companies in terms of disclosure requirements. Issuers of securities under Regulation A+ would meet the FASB's definition of a public business entity (PBE). The SEC's Regulation A+ proposal would require a domestic issuer to include in its offering circular financial statements that are prepared in accordance with GAAP, and audited for Tier 2 offerings. Accordingly, absent clarification, Regulation A+ issuers would be PBEs and would not be permitted to use certain private company accounting alternatives available under GAAP. Several commenters have recommended that the SEC explicitly state whether issuer financial statements in Regulation A+ offerings may include private company accounting policy alternatives. Commenters have also recommended that Regulation A+ issuers be provided a period of time to transition from private company reporting to the public company policies required for PBEs. See, for example, Cynthia M. Fornelli, executive director, Center for Audit Quality, March 24, 2014; Ernst & Young, LLP, March 24, 2014; Deloitte & Touche, March 24, 2014; and KPMG, March 24, 2014.

Disclosure that Auditor is not PCAOB Registered

Another commenter recommends either that auditors be required to be PCAOB registered or that there be disclosure to the effect that the auditor is not PCAOB registered. BDO, March 20, 2014.

Disclosure as to Unaudited Financials

Several comment letters recommend that the SEC require unaudited financials to be labeled as unaudited. KPMG, March 24, 2014.

Startups

One commenter recommended that audited financials should not be required for “pre-revenue” companies and startups, Ted J. Coombs, chief technology officer, Workers on Call, Kurtistown, Hawaii, March, 24, 2014. Ernst & Young LLP in a comment letter dated March 24, 2014, also recommended that Regulation A+ issuers formed within nine months of the offering date should not be required to provide any financial statements. Instead, these companies should be allowed to provide a narrative discussion of their financial condition and operations since inception.

Semi-Annual Report for Tier 2 issuers

A few comment letters recommended auditor involvement in review of the Tier 2 Semi-Annual Report, or disclosure to the effect that there was no auditor involvement. KPMG, March 24, 2014.

In addition, several comment letters seek clarification of some of the accounting terms or concepts used in the proposal and recommended structuring the accounting requirements to use existing accounting regulations and guidance. See, for example, Ernst & Young, March 24, 2014. There are also issues relating to the use of financial statements of acquired businesses and guarantors. See Ernst & Young, March 24, 2014.

See also Catherine T. Dixon, chair, Federal Regulation of Securities Committee, Business Law Sections, American Bar Association, April 3, 2014.

Detailed Description of Proposed Regulation A+

Differences between Tier 1 and Tier 2 Offerings

Tier 1 Offering

A Tier 1 offering is very similar to the existing Regulation A exemption and provides for the offering and sale of up to $5 million over a rolling 12-month period, of which up to $1.5 million can be for the account of selling security holders.

The financials in a Tier 1 offering do not need to be audited (unless audited financials are available), there are no investment limitations and the issuer is not subject to ongoing reporting requirements with the SEC. Tier 1 issuers would be required to complete a Form 1-Z upon completion or termination of the offering, which provides sales information and updates on issuer information.

Tier 2 Offering

Tier 2 would provide for the offering and sale of up to $50 million over a rolling 12-month period, of which up to $15 million can be for the account of selling shareholders.

<u>Audited financial statements</u>. Financial statements included in the offering circular would need to be audited.

<u>Investment limitation</u>. Investors would be limited in the amount they could purchase to 10 percent of the greater of the investor’s annual income or net worth. For this purpose, annual income and net worth would be calculated for individual purchasers as provided in the accredited investor definition under Rule 501 of Regulation D.

Issuers would be required to make investors aware of the investment limitations, but would otherwise be able to rely on an investor’s representation of compliance with the proposed investment limitation unless the issuer knew, at the time of sale, that the representation was untrue.

Ongoing reporting requirements. The issuer would be required to file annual and semiannual ongoing reports and current event updates that are similar to the requirement for public company reporting. See Ongoing Reporting for Tier 2 Companies below.

Provisions Applicable to Tier 1 and Tier 2

Company Eligibility

Eligible companies generally include those organized in, or with their principal place of business in, the United States and Canada. The following companies would *not* be able to use Regulation A+:

- Exchange Act reporting companies;
- investment companies;
- blank check companies;
- certain bad actors;
- issuers of fractional undivided interests in mineral rights;
- issuers who failed to meet ongoing reporting requirements; and
- issuers subject to SEC orders terminating Exchange Act registration pursuant to Section 12(j).

Eligibility of Securities

The following securities could be sold in a Regulation A+ offering:

- equity securities;
- debt securities;
- debt securities convertible into or exchangeable into equity interests; and
- guarantees of these securities.

The proposed rule release suggests that Regulation A+ is "meant for ordinary – and not exotic – securities." The proposal specifically excludes asset-backed securities from the types of eligible securities.

Regulation A+ Filing and Review Process

Regulation A+ offering statements on Form 1-A would be filed electronically with the SEC on EDGAR, which is a change from current Regulation A documents that are filed in paper format.

Form 1-A consists of three parts: Part I (Notification), Part II (Offering Circular) and Part III (Exhibits). Part I contains basic information about the issuer and the proposed offering needed to determine if Regulation A is available. Part II of the offering statement consists of the offering circular. The offering circular is similar to the prospectus in a registration statement and is the main disclosure document.

Confidential Prefiling Submission. The Regulation A+ proposal would permit the nonpublic submission of offering statements and amendments for review by SEC staff before filing with the SEC, so long as all such documents are publicly filed not later than 21 calendar days before qualification.

"Qualification" by Staff Order. The Regulation A+ proposal would allow an offering statement to be qualified only by order of the SEC rather than, in the absence of a delaying notation on the offering statement, without SEC action on the 20th calendar day after filing, which is the case under the current rule.

Content of Form 1-A. The Regulation A+ proposal updates the content of Form 1-A and would eliminate the Model A (Question-and-Answer) disclosure format under Part II (Offering Circular) of Form 1-A. The proposal would also update and clarify the Model B (Narrative) disclosure format under Part II of Form 1-A (the offering circular), while continuing to permit the use of Part I of Form S-1 narrative disclosure as an alternative.

The SEC's Regulation A+ proposal retains the three-part structure of Form 1-A, but would make revisions to the required content.

The current paper version of Part I of Form 1-A would be converted into an online XML-based fillable form with indicator boxes or buttons and text boxes and would be filed online with the SEC. Part I would include the following information:

- Item 1 – Issuer Information
- Item 2 – Issuer Eligibility
- Item 3 – Bad Actor Certification
- Item 4 – Summary Information
- Item 5 – Jurisdiction Where Securities Will be Offered
- Item 6 – Unregistered Securities Issued or Sold Within the Last Year

As proposed, the offering circular (Part II of Form 1-A) would include:

- basic information about the issuer and the offering;
- material risks associated with the offering;
- material disparities between the public offering price and the effective cash cost for shares acquired by insiders during the last year;
- plan of distribution;
- use of proceeds;
- business operations of the issuer for the last three fiscal years;
- material physical properties description;
- discussion and analysis of issuer liquidity, capital resources and results of operation;
- information about directors, executive officers and significant employees;
- executive compensation information;
- beneficial ownership of voting securities by executive officers, directors and 10 percent owners;
- transactions with related persons, promoters and certain control persons;
- description of securities offered;
- financial statement; and
- bad actor information.

Incorporation by reference would be permitted as to documents publicly filed or submitted on EDGAR under Regulation A.

"Access Equals Delivery" Model. The proposed rules would permit issuers and intermediaries to satisfy their delivery requirements as to the final offering circular under an "access equals delivery" model when the final offering circular is filed and available on EDGAR.

Communications and Offering Process. The Regulation A+ proposal requires issuers and intermediaries in the prequalification period to deliver the preliminary offering circular to prospective purchasers at least 48 hours in advance of sale. The proposal also requires issuers that sell to prospective purchasers in reliance on the delivery of a preliminary offering circular to, not later than two business days after completion of the sale, provide the purchasers with a copy of the final offering circular or a notice that the sale occurred pursuant to a qualified offering statement that includes the URL where the final offering circular or to the offering statement of which such final offering circular is part may be obtained and contact information sufficient to notify a purchaser where a request for a final offering circular can be sent and received in response.

Testing the Waters Permitted. The Regulation A+ proposal permits issuers to "test the waters" or solicit interest in a potential offering with the general public either before or after the filing of the offering statement, so long as any solicitation materials used after publicly filing the offering statement are preceded or accompanied by a preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained. This requirement could be satisfied by providing the URL where the preliminary offering circular or the offering statement may be obtained on EDGAR.

Continuous or Delayed Offerings. Rule 251(d)(3) currently allows continuous or delayed offerings under Regulation A if permitted by Rule 415. Regulation A requires every revised or updated offering circular in a continuous offering to be filed as an amendment to the offering statement to which it relates and "requalified" in a process similar to the SEC staff review, comment and qualification process for the initial offering document. This requalification process can be costly and time consuming.

The SEC's Regulation A+ proposal would condition the ability to sell securities in a continuous or delayed offering on being current with ongoing reporting obligations at the time of sale.

Continuous Regulation A+ offerings would be permitted in a manner similar to registered offerings, except for those that are not available under Regulation A, for example, offerings on Form S-3 or Form F-3 or offerings by ineligible issuers.

Under the proposed rules, changes in the information in the offering statement would no longer trigger an obligation to amend. Offering circulars would continue to be required to be updated, and the offering statements to which they relate requalified annually to include updated financial statements and otherwise as necessary to reflect facts or events arising after qualification, which, in the aggregate, represent a fundamental change in the information contained in the offering statement.

In addition, the SEC proposes to allow issuers to use offering circular supplements in certain situations. The SEC also proposes to permit issuers in continuous offerings to qualify additional securities in reliance on Regulation A+ by a post-qualification amendment.

Financial Statement Requirements. The Regulation A+ proposal would require all issuers to file balance sheets for the two most recently completed fiscal years (or for such shorter time that they have been in existence).

The Regulation A+ proposal would permit issuers to provide financial statements in Form 1-A that are dated not more than nine months before the date of nonpublic submission or filing, and require issuers to include financial statements in Form 1-A that are dated not more than nine months before qualification, with the most recent annual or interim balance sheet not older than nine months. If interim financial statements are required, they must cover a period of at least six months.

Integration. Existing Rule 251(c) of Regulation A governs the integration of Regulation A offerings with other offerings. This provision provides that offerings under Regulation A will not be integrated with any of the following:

- prior offers or sales of securities; or
- subsequent offers and sales of securities that are:
  - registered under the Securities Act except as provided in Rule 254(d);
  - made in reliance on Rule 701 under the Securities Act;
  - made pursuant to an employee benefit plan;
  - made in reliance on Regulation S; or
  - made more than six months after completion of the Regulation A offering.

Currently, the note to Rule 251(c) indicates that, if the provisions of the safe harbor are unavailable, offers and sales may still not be integrated with the Regulation A offering depending on the particular facts and circumstances, so there is no presumption that offerings outside the integration safe harbor should be integrated. Additionally, the SEC believes that an offering made in reliance on Regulation A should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the exemption that is being relied upon for the particular offering.

In addition to this approach to integration, the SEC proposes to add to the list of safe harbor provisions subsequent offers or sales of securities made pursuant to the proposed rules for securities-based crowdfunding transactions under Title III of the JOBS Act.

The SEC also proposes to amend Rule 254(d) to provide that where an issuer decides to register an offering after soliciting interest in a contemplated, but abandoned, Regulation A+ offering, any offers made pursuant to Regulation A+ would not be subject to integration with the registered offering, unless the issuer engaged in solicitations of interest in reliance on Regulation A+ to persons other than qualified institutional buyers (QIBs) and institutional accredited investors permitted by Section 5(d) of the Securities Act. An issuer (and any underwriter, broker, dealer or agent used by the issuer in connection with the proposed offering) soliciting interest in a Regulation A+ offering to persons other than QIBs and institutional accredited investors must wait at least 30 calendar days between the last such solicitation of interest in the Regulation A+ offering and the filing of the registration statement with the SEC.

Liability Issues

Consistent with current Regulation A, sellers of Regulation A+ securities would have liability under Section 12(a)(2) of the Securities Act to investors for any offer or sale by means of an offering circular or an oral communication that includes a material misleading statement or material misstatement of fact. In addition, various other securities law antifraud provisions would apply.

The preemption of state regulatory review would also have the effect of preempting state securities law registration requirements and the liabilities and remedies associated with those provisions. As a result, state liability would generally be based on misrepresentation type provisions.

Bad Actor Disqualification

Regulation A currently provides for the disqualification of certain “bad actors” (Rule 262). The SEC’s Regulation A+ proposal would revise the existing Regulation A bad actor provisions to put them in substantially the same form as the recently adopted bad actor provisions of Rule 506, except for the categories of covered persons specific to fund issuers, because fund issuers would not be eligible to use Regulation A+.

Ongoing Reporting for Tier 2 Companies

Annual reports on Form 1-K

Part I of Form 1-K would be an online XML-based fillable form that would include certain basic information about the issuer, previously disclosed in Part 1 of Form 1-A, to be updated by the issuer at the time of filing.

Part II of Form 1-K would be submitted electronically by the issuer as a text file containing the body of the disclosure document and financial statements, formatted in HTML or ASCII to be compatible with the EDGAR system. Part II of Form 1-K would cover:

- business operations of the issuer;
- transactions with related persons, promoters and certain control persons;
- beneficial ownership of voting securities by executive officers, directors and 10 percent owners;
- information about directors, executive officers and significant employees;
- executive compensation;
- MD&A; and
- two years of audited financials.

Form 1-K would need to be filed within 120 days after the issuer's fiscal year-end.

Semiannual Report on Form 1-SA

Similar to Form 10-Q, Form 1-SA would consist mainly of financial statements and MD&A. However, unlike Form 10-Q, Form 1-SA would not require disclosure about quantitative and qualitative market risk, control or procedures, updates to risk factors or defaults on senior securities.

Financial statements included in semiannual reports on Form 1-SA would not need to be audited.

Form 1-SA would permit issuers to incorporate by reference certain information previously filed on EDGAR, but would require issuers to include a hyperlink to that material on EDGAR.

Current Reports on Form 1-U

Tier 2 issuers would be required to submit current reports on Form 1-U in the event of any of the following:

- fundamental changes in the nature of the business;
- bankruptcy or receivership;
- material modification of the rights of security holders;
- changes in the certifying accountant of the issuer
- nonreliance on previous financial statements or a related audit report or completed interim review;
- changes in control of the issuer;
- departures of principal executive officers, principal financial officers or principal accounting officers; and
- unregistered sales of 5 percent or more of outstanding equity securities.

A Form 1-U would need to be filed within four business days after the applicable event.

Issuers would be permitted to incorporate by reference certain information previously filed on EDGAR, but would need to include a hyperlink to such material on EDGAR.

The proposed rules also permit Tier 2 issuers to exit ongoing reporting at any time by filing a Form 1-Z exit report after completing reporting for the fiscal year in which the offering statement was qualified, so long as the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers and sales made in reliance on a qualified offering statement are not ongoing. An issuer's obligations to file ongoing reports in a Tier 2 offering would also be automatically suspended upon registration of a class of securities under Section 12 of the Exchange Act.

Click here for access to the SEC's Regulation A+ proposal.