

## SEC Radically Revamps Regulation A - Part 2

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### Contents of Offering Statement

For many years, SEC Regulation A languished as an exemption from registration that nobody really used. Although securities issued in a Regulation A offering are not “restricted securities” and are thus freely tradable (if there is a market), the exemption was cumbersome, unfamiliar to both investors and securities practitioners, and limited to \$5 million. Regulation D, particularly Rule 506, has been exponentially more important in the capital markets as a way for private companies to raise money.

Under the JOBS Act, which became law in April 2012, the SEC was directed to revise Regulation A so as to make it useable and available for offerings up to \$50 million. On March 25, 2015, the Commission promulgated final rules and regulations to amend Regulation A. The new rules will become effective **June 19, 2015**. The dramatically altered Regulation A has been nicknamed “Regulation A+” but in this Alert we will simply refer to it as Regulation A.

This Alert is in three parts ([click here](#) for Part 1, [click here](#) for Part 3). **Part 2** focuses primarily on the Regulation A offering statement and its contents, the availability of continuous or delayed offerings under Regulation A, qualification of the offering statement by the Commission, and rules about “testing the waters.”

## Offering Statement

### Electronic Filing/Delivery Requirements

Regulation A offering statements are filed on Form 1-A, which must be filed electronically on EDGAR. Form 1-A has three parts: (1) a fillable online form, similar to Form D or Form ID, that requires basic information about the issuer and the offering, (2) an offering circular (OC) that is used to market the offering to potential investors, and (3) exhibits required by Regulation A.

Regulation A has adopted an “access equals delivery” model for all documents. This means that issuers, intermediaries and dealers can satisfy delivery obligations by simply filing documents on EDGAR, provided that they have noted on any preliminary OC that any delivery obligation may be satisfied electronically. This allows “electronic-only” offerings, provided that there is investor consent or proof of e-delivery of either the preliminary OC or, if applicable, the final OC.

Issuers may use preliminary OCs to offer securities before qualification by the SEC, but the preliminary OC must be delivered 48 hours before the mailing of the confirmation of sale. There is an exception to this rule for issuers subject to Tier 2 reporting obligations, as they already provide continuous, ongoing information to the market.

Finally, issuers and participating broker-dealers must provide purchasers, within two days of the completion of the sale, with either a copy of the final OC or a notice that the sale occurred pursuant to a qualified OC, including the URL where the relevant document can be found on EDGAR.

### Confidential Submission of Draft Offering Statements

Issuers that have **not** previously sold securities under either Regulation A or an effective registration statement under the Securities Act may submit a draft offering statement for confidential review by the SEC. This filing must be substantially complete and must be submitted via EDGAR. All non-public filings made in this way must be **publicly** filed via EDGAR not less than 21 calendar days before the

## Form and Content

As noted above, Form 1-A has three distinct parts. The **first part** of the Form includes information about the issuer's identity, industry, size, capital structure, and financial statements. It also includes information about the issuer's eligibility to use Regulation A, any "bad actor" disqualifications under Rule 262, information about the offering, including size (including whether this is a Tier 1 or Tier 2 offering), information about underwriters, auditors and counsel, and the type of securities being offered.

The **second part** of Form 1-A is the OC, which is presented as disclosure that complies with either the requirements of Part II of Form 1-A, or the requirements of Part I of Form S-1 or S-11. An issuer choosing to follow Form 1-A must provide information as follows:

- Cover Page – including name, address, date, title and amount of securities offered, price, underwriting discount and commissions, proceeds to the issuer, and proceeds to others
- Table of Contents
- Summary (optional) and Risk Factors
- Dilution
- Plan of Distribution – underwriter commitments, dealer discounts and commissions, any distribution other than through underwriters, any selling security holders and related details
- Intended Use of Proceeds
- Business Description – narrative description of the issuer's business over the past three years (or the period of existence, if shorter)
- Property Description – narrative description of the issuer's principal plants or other material physical properties
- Management's Discussion and Analysis of Financial Condition and Results of Operations, including:
  - ▶ Operating results that affect income, revenue or expenses, including a discussion of material changes in price, volume, or products that result in material changes in net sales or revenues.
  - ▶ Liquidity and capital resources.
  - ▶ Plan of Operations – any issuer that has not received revenue from operations during any of the three previous years must describe a plan of operation for the following 12 months and whether additional capital will be necessary during the following 6 months.
  - ▶ Trend information related to production, sale, and inventory.
- Details on directors, executive officers, and significant employees
- Compensation of Directors and Executive Officers (in Tier 1 offerings, this information can be provided in the aggregate rather than individually)
- Ownership of securities by executive officers, directors, and 10% holders
- "Interested" or related party transactions (any transaction greater than \$50,000 for Tier 1, and greater than \$120,000 or 1% of total assets for Tier 2, with any executive officers, directors, and greater than 10% shareholders, or promoters)
- Description of the material terms of the securities being offered
- Financial Statements
  - ▶ For all offerings, financial statements must be prepared in accordance with GAAP (unless the issuer is a Canadian company, in which case the statements may be prepared in accordance with GAAP or under International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB)).
  - ▶ For Tier 1 offerings, the financial statements need not be audited, and thus must be labeled "unaudited." However, if the issuer obtained an audit for other purposes, those audited results must be filed in a Tier 1 offering. In Tier 2 offerings, the issuer must provide audited financial statements under GAAS or PCAOB standards.

- ▶ Issuers in Tier 2 offerings must comply with Article 8 of Regulation S-X (Financial Statements of Smaller Reporting Companies).
- ▶ Financial statements must be provided for the previous two years. Any interim statement must cover at least six months.

An issuer may elect to provide disclosure based on Part 1 of Form S-1 or Form S-11 in lieu of Part II of Form 1-A. Issuers that would qualify as “smaller reporting companies” under those forms may rely on the reduced disclosure obligations required for such companies.

The **third part** of Form 1-A calls for required exhibits, to the extent applicable, as follows:

- Underwriting Agreement
- Charter and By-laws
- All instruments defining security holder rights
- Subscription Agreement
- Voting Agreement
- Material Contracts
- Plan of acquisition, reorganization, arrangement, liquidation, or succession
- Escrow Agreements
- Any letters regarding the issuer’s change of its certifying accountant
- Power of Attorney
- Consents
- Legal Opinion
- Any “Testing the Waters” Materials
- Any non-public draft offering statement

Form 1-A must then be signed on behalf of the issuer.

## Continuous or Delayed Offerings and Offering Statement Supplements

If an issuer is current in filing its annual and semiannual reports pursuant to Regulation A (discussed in Part 3), the issuer is permitted to sell securities in a continuous or delayed offering. In that case, the offering statement must be amended annually to provide updated financial statements. The offering statement must also be updated whenever a fact or event arises that represents a “fundamental change” to the information in Form 1-A.

Continuous or delayed offerings are limited to the following types:

- Securities offered or sold by or on behalf of a person other than the issuer or its subsidiary or a person of which the issuer is a subsidiary
- Securities offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer
- Securities issued upon the exercise of outstanding options, warrants, or rights
- Securities issued upon conversion of other outstanding securities
- Securities pledged as collateral
- Securities that are part of an offering that commences within two calendar days after the qualification date, will be offered on a continuous basis, may continue to be offered for a period in excess of 30 days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the initial qualification date.

Offering statement supplements may be filed by issuers after qualification. Supplements must be filed no later than two days from the earlier of the date of first use of the OC after qualification or the date of determination of pricing information. These supplements contain

information omitted from the OC, which can include:

- Final pricing information for offerings where the OC is qualified based on a bona fide price estimate
- Underwriter syndicate information
- New information regarding the volume/price range, provided that this new information does not materially change the disclosure

## Qualification

An offering statement is qualified under Regulation A only when it is declared qualified by the Commission or by the Division of Corporate Finance. An offering statement cannot be qualified by the passage of time after including a delaying notation. The SEC Staff must have the opportunity to review and comment on an offering statement before it can become qualified.

## Solicitation of Interest (Testing the Waters)

Under Regulation A, issuers may “test the waters” by soliciting investors to determine interest in an offering before Form 1-A is qualified. Issuers may use solicitation materials before and after the offering statement is qualified. After the offering statement is filed, the current preliminary OC must accompany (including, if applicable, delivery by EDGAR URL) any “testing the waters” materials. If any information in the post-filing “testing the waters” materials is or becomes materially inadequate or inaccurate, the issuer must distribute revised information. Issuers must submit or file these solicitation materials as an exhibit to Form 1-A.

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