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SEC Adopts Regulation A+ to Provide New Exemption for Smaller Capital-Raising Transactions

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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On March 25, 2015, the U.S. Securities and Exchange Commission (SEC) adopted the final rules for the new Regulation A+ exemption, which will permit eligible issuers to conduct securities offerings of up to \$50 million without Securities Act registration. The new exemption, which was mandated by the JOBS Act, will provide these issuers with an important new avenue for raising capital.

The Regulation A+ exemption will be available for companies organized and with their principal place of business in the United States and Canada. It will not be available, however, for Exchange Act reporting companies, investment companies (including business development companies), and non-Canadian foreign issuers.

The final rules will establish two tiers of offerings that can be made under the Regulation A+ exemption:

- **Tier 1:** securities offerings of up to \$20 million in a 12-month period, with no more than \$6 million on behalf of selling security holders who are affiliates of the issuers.
- **Tier 2:** securities offerings of up to \$50 million in a 12-month period, with no more than \$15 million on behalf of selling security holders who are affiliates of the issuers.

Issuers can choose to conduct offerings of up to \$20 million under either Tier 1 or Tier 2. Issuers conducting Tier 2 offerings, however, will be subject to additional requirements, such as:

- audited financial statements in the offering circulars and annual reports;
- ongoing reporting obligations that require the filing of annual reports (new Form 1-K), semiannual reports (new Form 1-SA) and current event reports (new Form 1-U); and
- investment limits on persons who are not accredited investors (as defined by Rule 501(a) of Regulation D) to no more than (i) 10 percent of the greater of the person's annual income or net worth (for natural persons) or (ii) 10 percent of the greater of annual revenue or net assets at the end of the fiscal year (for entities).

Securities issued through a Tier 2 offering will be exempt from the mandatory registration requirements of Exchange Act Section 12(g) — and full Exchange Act reporting — as long as the issuer satisfies certain conditions, such as retaining the services of a registered transfer agent and remaining subject to the ongoing reporting obligations imposed on Tier 2 issuers. Tier 2 issuers will be allowed to register their securities for listing on a national securities exchange by filing a short-form Exchange Act registration statement on Form 8-A as long as certain conditions are satisfied.

Capital Markets Alert

State securities law registration and qualification requirements will be pre-empted for securities offered or sold to “qualified purchasers,” which the SEC defined as any person to whom securities are offered or sold under Tier 2. Tier 1 offerings will therefore remain subject to these state law requirements.

Finally, the final rules will update the overall Regulation A+ offering process in a manner consistent with the current practice for registered offerings, such as the submission of confidential

draft offering statements for nonpublic review by the SEC staff before filing, the use of “testing the waters” communications and the electronic filing of offering materials on EDGAR.

The final rules for the Regulation A+ exemption will be effective 60 days after publication in the Federal Register. The final rules and the SEC adopting release can be found [here](#).

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