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Can You Use the New Regulation A+ in Your Securities Offerings?

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With the passage of the JOBS Act in 2012, medium to smaller businesses – including many bank holding companies – now have additional ways to raise capital. The most recent changes relate to Regulation A, creating the so-called Regulation A+. The primary draw to the new Regulation A+ will be the ability to sell to a higher number of non-accredited investors than a traditional Regulation D private placement allows. There are some tradeoffs, however, and your holding company will need to evaluate whether the trade offs are worth it in the end.

Regulation A+ is now split into two separate categories of offerings, Tier 1 and Tier 2 offerings. In a Tier 1 offering, issuers are able to offer up to $20 million in a 12-month period with not more than $6 million in offers by selling security-holders that are affiliates of the issuer. In a Tier 2 offering issuers are able to offer up to $50 million in a 12-month period with not more than $15 million in offers by selling security-holders that are affiliates of the issuer. With the higher threshold, Tier 2 offerings also have additional financial reporting requirements and periodic filing requirements.

Issuers participating in either a Tier 1 or Tier 2 Regulation A+ offering must file an offering statement with the SEC. The offering statement and any required reports must be filed on the Education Department General Administrative Regulations (EDGAR). Those issuers that have not previously sold securities through Regulation A+ are able to submit a draft offering statement to the SEC for non-public review. However, all non-public submissions must be publicly filed and available on EDGAR at least 21 days before qualification of the securities. The requirements for the Regulation A+ offering statement are a simplified and scaled version of the S-1 registration statement requirements. Tier 1 and Tier 2 issuers are required to file balance sheets and other required financial statements for the two most recently completed fiscal year ends, or for such period of time that they have been in existence. Tier 2 issuers are required to follow the

financial statement requirements of a smaller reporting company found in Article 8 of Regulation S-X. Unlike a Tier 2 offering, financial statements in a Tier 1 offering are not required to be audited and must be specifically labeled as such.

Upon termination of a Tier 1 offering, the issuer must file a Form 1-Z informing the SEC of the termination of the offering. No other ongoing reporting requirements are necessary for a Tier 1 offering. Tier 2 issuers are required to file annual reports on Form 1-K, semiannual reports on Form 1-SA, and current event reports on Form 1-U. Each of these forms are similar to forms 10-K, 10-Q and 8-K respectively, with scaled disclosures requirements. A Tier 2 issuer that has filed all reports required by Regulation A+ for the shorter of: (1) the period since the issuer became subject to such reporting obligation, or (2) its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z, is permitted to immediately suspend its ongoing reporting obligation under Regulation A+ at any time after completing reporting for the fiscal year in which the offering statement was qualified. At such time, a Tier 2 issuer would provide notice to the Commission of the suspension of their ongoing reporting obligations on Part II of Form 1-Z.

In the past, Regulation A was rarely, if ever, utilized by issuers because there were simply better exemptions from registration, such as those widely used under Regulation D. However, Regulation A+ now provides two separate methods to raise capital through exempt public offerings, one with a lower dollar amount, but with substantially simplified filing requirements and another with a higher dollar amount, but more filing requirements. Time will tell if issuers decide to stick with the familiar Regulation D exemptions, or if they will find the new Regulation A+ exemptions more advantageous under certain capital raise scenarios.

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