



Regulation A+: New Financing Opportunities for the U.S. Markets

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Old Regulation A

- Public offering of free trading securities
- Doesn't trigger ongoing SEC reporting obligations
- Limited to US or Canadian issuers
- Rarely used, because:
 - Limited to US \$5 million (last updated 1992)
 - Offering circular, submitted to SEC
 - Requires separate exemption or qualification at the state level

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Background to Regulation A+

- Jumpstart Our Business Startups Act of 2012 (JOBS Act) directed the SEC to adopt new exemptions:
 - Up to US \$50 million every 12 months
 - Public offering ok
 - Free trading securities
 - Testing the waters ok
 - SEC could require periodic reports
- Commonly called “Regulation A+”

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Background to Regulation A+

- SEC proposed rules in December 2013
- Final rules adopted in March 2015
- Structured as amendments to Regulation A
- Effective June 19, 2015
- Montana and Massachusetts seeking injunction

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Regulation A+ Overview: Key Features

- Public offering of free trading securities without becoming subject to full SEC reporting
- Offering circular filed and “qualified” prior to sales
- Tier 1: Up to US \$20 million every 12 months
- Tier 2: Up to US \$50 million every 12 months, plus preemption of state registration requirements
- Issuer can voluntarily become a full SEC reporting company and list on a national securities exchange (e.g., NYSE, NYSE MKT or Nasdaq) upon closing

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Regulation A+ Overview: Key Features

- Additional Tier 2 requirements:
 - Limits investment by non-accredited investors, unless listed on a US exchange at closing
 - Requires audited financials
 - Triggers some ongoing SEC reports
- Better than Form S-1 for an OTC company, due to the blue sky exemption

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Regulation A+ Overview: Who Can Use It?

- Only available to US or Canadian issuers with principal place of business in US or Canada
- Some issuers ineligible, including:
 - SEC reporting companies
 - Blank check companies
 - Investment companies
 - Companies subject to a “bad boy” disqualification (same test as under Rule 506 of Regulation D)

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Regulation A+ Overview: Deal Structures

- Cash or non-cash consideration, so M&A ok
- Selling shareholders that are “affiliates”:
 - Limited to US \$6 million under Tier 1 and US \$15 million under Tier 2
 - For first year, also limited to 30% of total offering
- At the market offerings are not permitted
 - Price may only be omitted at time of qualification if a cash offering with a bona fide price range within certain limits
 - If use a range, final price must be specified in final offering circular filed within 15 business days of qualification

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Regulation A+ Overview: Deal Structures

- Traditional issuer shelf is not permitted
- Some delayed offerings are allowed, including:
 - Selling shareholders
 - Exercise or conversion of outstanding securities
 - Continuous offerings that will begin within two days of qualification
- However, pricing requirement makes most delayed offerings impractical, except for exercise or conversion of outstanding securities

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Regulation A+ Overview: Non-Accredited Investors

- Under Tier 2, unless the security will be listed on a national securities exchange at closing, the maximum amount that can be sold to any non-accredited investor is the greater of:
 - If a natural person, 10% of annual income or net worth (determined as in Rule 501 under Regulation D), or
 - If a non-natural person, 10% of revenue or net assets for the purchaser's most recently completed fiscal year end
- Issuer can rely on purchaser's representations

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Regulation A+ Overview: Offering Circular

- Issuer must prepare and file an offering circular with the SEC (Form 1-A offering statement)
- Disclosure requirements are based on, but scaled down from, an SEC registration statement
- Subject to SEC review and comment
- Must be “qualified” by SEC prior to making sales
- Publicly filed on EDGAR
- For issuer’s first Regulation A+ offering, may be initially filed on a confidential basis

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Regulation A+ Overview: Offering Circular

- Financial statements
 - Two years
 - Tier 1 can be unaudited
 - Tier 2 requires audit in accordance with US GAAS or PCAOB standards
 - IFRS ok for Canadian issuers
 - Oil and gas issuers must comply with Rule 4-10 of Regulation S-X
 - Unaudited interims if more than nine months old
 - Acquired business financials may be required (similar to SEC registration)

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Regulation A+ Overview: Due Diligence

- Section 12(a)(2)
 - Any person who offers or sells a security
 - Offering circular or oral communication
 - Untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading
 - Defense: prove did not know and in the exercise of reasonable care could not have known, of the untruth or omission
 - Defense: prove wasn't the cause of the loss
- Underwriters likely to require negative assurance (10b-5) letters

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Regulation A+ Overview: Mechanics of Offers and Sales

- No integration with prior offers and sales
- Prior to filing
 - Ok to test the waters
 - Specific format and disclosures required
- After filing
 - Ok to make offers
 - If written, must include preliminary offering circular and notice
- After qualification
 - Ok to make sales
 - For first offering, not until 48 hours after delivering preliminary offering circular

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Regulation A+ Overview: State Laws

- Tier 1: No state law exemption
 - Offer outside the United States
 - Comply with institutional investor exemptions
 - Qualify, if necessary (e.g., New York M-11)
- Tier 2: State law exemption
 - States may require a notice filing and a fee, but may not require registration
 - No filings or fees required if approved for listing by a national securities exchange
 - Anti-fraud rules are not pre-empted

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Regulation A+ Overview: Post-Closing

- Tier 1: No ongoing reports
 - File Form 1-Z to disclose offering completed
- Tier 2: Ongoing reports
 - Form 1-K abbreviated annual report within 120 days after each fiscal year end
 - Form 1-SA abbreviated semi-annual report within 90 calendar days after second fiscal quarter
 - Form 1-U current report within four business days of:
 - Change of control, “fundamental” change, private placement of +10%
 - Material change in shareholder rights
 - Change in auditor, non-reliance upon audit opinion, bankruptcy
 - Key officer departure

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Regulation A+ Overview: Post-Closing

- Tier 2 reporting does NOT trigger other SEC public company requirements, such as
 - Section 16 reporting and short-swing trading liability
 - Section 13D/G beneficial ownership reports
 - Proxy statement requirements
 - Tender offer requirements
 - “Going private” rules
 - Internal control requirements
 - Disclosure control requirements
 - Other Sarbanes-Oxley rules

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Regulation A+ Overview: Post-Closing

- Tier 2 issuer may suspend reporting by filing a Form 1-Z if less than 300 holders of record
 - But cannot suspend reporting in year of offering, or until first Form 1-K annual report is filed after offering
 - Holders of record requires a one-level look through of Cede & Co. and CDS, but does not require look through of brokers
 - Many public companies have fewer than 300 holders of record
- Tier 2 reporting suspended if become full reporting

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US Trading of Regulation A+ Securities

- Markets that do not require full SEC reporting:
 - OTCQX or OTCQB currently allow non-reporting US issuers, and Canadian issuers with a TSX, TSXV or CSE listing
 - OTC Markets has proposed rule changes to be effective July 10 to allow Reg A+ Tier 2 reporting issuers on the OTCQB, or the OTCQX if they voluntarily report quarterly
 - Nasdaq market for non-reporting international companies being rolled out (not yet announced)
- Regulation A+ allows “flip” to full SEC reporting at closing, permitting listing on a national securities exchange:
 - NYSE, NYSE MKT, Nasdaq Global or Capital Market

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Upshot

- Potentially very valuable tool for certain private companies
- Facilitates public offerings with fewer requirements
- Facilitates crowdfunding

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Profiles of Companies For Which Regulation A+ May Be Attractive

- Significant raise:
 - Company looking to raise a significant amount of money
 - One discrete financing for a specific purpose, such as building a new plant or developing a new product
 - Funds are not readily available from private sources
- Crowdfunding:
 - Company sees significant retail interest in its stock
 - Interested in crowdfunding
 - Frustrated with the restrictions on crowdfunding private placements

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Profiles of Companies For Which Regulation A+ May Be Attractive

- Regulation shy, or frugal:
 - Company wants to do an IPO
 - Would rather ease into public reporting requirements, and avoid full SEC compliance and Sarbanes-Oxley for at least a while
- Too small to list:
 - Company wants to do an IPO
 - Too small to list on Nasdaq or NYSE MKT

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Profiles of Companies For Which Regulation A+ May Be Attractive

- Foreign offering:
 - Company wants to do an overseas IPO (Toronto, London, Hong Kong ...)
- Acquiring a broadly held private company:
 - Company will acquire a U.S. private company
 - Target is too broadly held for private placement exemptions
 - Prefer not to become full SEC reporting

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Questions?

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