



LEGAL ALERT

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Full Benefit of JOBS Act Just Now Becoming Available to Community Bank Holding Companies

Many might remember that the Jumpstart Our Business Startups Act (JOBS Act) of 2012 was heralded as a significant step forward in reducing regulatory requirements related to raising capital. However, many of the provisions of the JOBS Act required rulemaking by the U.S. Securities & Exchange Commission ("SEC").

Initial SEC rulemaking under the JOBS Act was to increase the number of shareholders of record for bank holding companies from 500 to 2,000 that would trigger a requirement for an issuer to register a class of securities with the SEC under the Securities Exchange Act of 1934, as amended ("1934 Act") and thereby become subject to SEC periodic reporting and filing requirements (eg filing of Forms 10-K, 10-Q, 8-K, etc.) ("1934 Act Reporting").

What's New?

The second major SEC rulemaking under the JOBS Act was to expand the securities registration exemption in SEC Regulation A. These rules, which will be available to bank holding companies that are not subject to 1934 Act Reporting, became effective on June 19, 2015.

Although Regulation A is an exemption from registration under the Securities Act of 1933, as amended ("1933 Act"), there is no restriction on the resale or transfer of securities sold in reliance on Regulation A or use of general advertising or general solicitation. Securities that may be offered under Regulation A include debt securities, equity securities and debt securities convertible or exchangeable into equity interests.

The SEC has revised Regulation A to establish two sets of conditions based upon the dollar amount of securities to be offered. Tier 1 conditions apply to offerings of up to \$20 million of securities in a 12-month period and Tier 2 conditions apply to offerings of up to \$50 million of securities in a 12-month period.

Absent acquiring more than 2,000 shareholders of record, issuers undertaking an offering in reliance on Regulation A will not become subject to 1934 Act Reporting. However, an issuer engaging in a Tier 2 offering under Regulation A will become subject to filing certain ongoing reports with the SEC as a condition of the availability of the exemption, including annual reports on Form 1-K, semi-annual reports on Form 1-SA and current events reports on Form 1-U.

Issuers intending to rely on Regulation A must file an offering statement (including an offering circular) electronically through EDGAR that meets certain disclosure and financial statement requirements. Securities cannot be sold prior to the SEC declaring the offering statement effective.

Regulation A – Tier 1

An offering statement for a Tier 1 offering must include a balance sheet and related financial statements for the two previous fiscal year ends as well as those dated not more than nine months before the date of the offering statement. These financial statements need not be audited but, if unaudited, must

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be labeled as such. However, if audited statements have been prepared by the issuer for other purposes and the audit was performed in accordance with US GAAP or PCAOB standards, those financial statements and the auditor's opinion must be included in the offering statement and the offering circular distributed to investors.

Securities offered under Tier 1 may be sold to any person, are not subject to any restriction on resale or transfer and may be the subject of general advertising and general solicitation conducted in accordance with SEC rules.

Regulation A – Tier 2

Financial statements to be included in the offering statement and the offering circular distributed to investors is the same as for Tier 1 offerings except that they must be audited by an independent auditor registered with the PCAOB. Upon the conclusion of a Tier 2 offering, the issuer does become subject to the aforementioned ongoing filing requirements.

Although securities sold in a Tier 2 offering are not subject to any restriction on resale, they may be sold only to (1) Accredited Investors or (2) persons whose purchase of securities in the offering does not exceed 10% of the greater of their annual income or net worth. Issuers in a Tier 2 offering may use general advertising and general solicitation in accordance with applicable SEC rules.

Testing the Waters

Issuers and financial intermediaries may use solicitation materials to “test the waters” to gauge investor receptivity to a proposed Regulation A offering. The concept is to elicit the level of potential investor interest before incurring the costs of preparing and filing an offering statement. “Testing the waters” materials must contain the following disclaimers and disclosures:

- No money or other consideration is being solicited and, if sent, will not be accepted;
- No offer to buy the securities can be accepted and no part of the purchase price may be received until the offering statement is qualified and any such offer may be withdrawn or revoked, without obligation of any kind, at any time before notice of its acceptance given after the qualification date;
- A person's indication of interest involves no obligation or commitment of any kind; and
- After public filing of the offering statement:

- ◊ State from whom a copy of the most recent version of the preliminary offering circular may be obtained, including address and phone number;
- ◊ Provide a URL address where the preliminary offering circular or the offering statement was filed or may be obtained; or
- ◊ Include a complete copy of the preliminary offering circular.

Bad Actor Disqualification

With respect to the availability of the exemption in Regulation A, the SEC has adopted rules substantially similar to those applicable to Rule 506 offerings under SEC Regulation D as enacted under Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Therefore, if a person designated as a “bad actor” under these rules is involved in an offering, the exemption under Regulation A generally will not be available.

Registration with State Securities Administrators

Each state has its own securities law and state securities administrative agency. In Pennsylvania, it is the Pennsylvania Department of Banking and Securities. Generally, no securities may be offered or sold in a state without registration under the applicable state securities law or an exemption therefrom or qualification of the security as a “covered security” under Section 18(b) of the 1933 Act. The SEC, however, has authority to preempt state laws relating to the registration of securities under certain circumstances.

With respect to offerings made in reliance on Regulation A, all offers of securities in connection with a Tier 1 or Tier 2 offering are preempted from state securities registration requirements. This is to permit use of “testing the waters” material and preliminary offering circulars without triggering registration requirements under any state securities law.

With respect to sales of securities, state laws requiring securities registration have been preempted with respect to Tier 2 offerings but not Tier 1 offerings. Therefore, an issuer engaging in a Tier 1 offering must register the sale of those securities in each state where it expects to sell the securities.



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Amendments to the Pennsylvania Securities Act of 1972 in 2014 adopted a registration exemption that may apply to a Tier 1 offering.

Need More Information?

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