

Securities Regulation Daily Wrap Up, JOBS ACT—D.C. Cir.: Two states challenge Regulation A+, (May 27, 2015)

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By Matthew Garza, J.D.

Massachusetts and Montana have filed petitions for court review of Regulation A+, adopted unanimously by the SEC on March 25 to raise the dollar limit for smaller offerings that are exempt from Securities Act registration. The rule created two tiers of offerings and also preempted Tier 2 offerings of up to \$50 million from state law registration. Officials from both states argued that the rule is arbitrary, capricious, and otherwise not in accordance with the Administrative Procedure Act, the Securities Act, and other law. Montana sought a stay of the rule and Massachusetts requested vacatur of the rule and a permanent injunction prohibiting the SEC from implementing and enforcing the rule (*Lindeen v. SEC*, May 22, 2015, *Galvin v. SEC*, May 21, 2015).

The expanded version of Regulation A, known as Regulation A+, was adopted in Release No. 33-9741 and becomes effective on June 19. The rulemaking was mandated by the Jumpstart Our Business Startups (JOBS) Act, signed by the president on April 5, 2012, to make the rarely used Regulation A more attractive as a capital raising tool for small companies.

Preemption. The two tiers of offerings created by the rule are Tier 1 offerings of up to \$20 million in a 12-month period and Tier 2 offerings of up to \$50 million in a 12-month period. Tier 1 offerings remain subject to state registration and qualification requirements but Tier 2 offerings, which are subject to more SEC disclosure and reporting requirements including audited financial statements, are exempt from state pre-sale review. States can, however, require offering documents to be filed, and all Regulation A offerings remain subject to state anti-fraud rules. Tier 1 issuers may also take advantage of the coordinated review program developed by the North American Securities Administrators Association.

Addressing the controversial preemption provision, Chair White said in a statement at the open meeting, “Existing Regulation A is rarely used by issuers. A 2012 GAO Report cited various factors that have contributed to its lack of use, including the overlapping requirements of federal and state law over such offerings. Our goal in this rulemaking is to make Regulation A+ an effective, workable path to raising capital that also provides strong investor protections.”

Full coverage of the SEC’s adoption of Regulation A+ was provided in the *Securities Regulation DailyWrap-Up* for March 25.

Attorneys: Seth Schofield, assistant attorney general, for William F. Galvin. Jesse Laslovich, special assistant Montana attorney general, for Monica J. Lindeen.

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