




# FAQs ABOUT REGULATION A+ SECURITIES OFFERINGS

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NASHVILLE KNOXVILLE MEMPHIS WASHINGTON DC

[bassberry.com](https://bassberry.com)

## 1. WHAT IS REGULATION A+?

Regulation A+ is the colloquial name given to a recently adopted SEC rule that amended and expanded a rarely used offering exemption named Regulation A. Regulation A+ can be thought of as an alternative to a small registered IPO and as either an alternative or a complement to other securities offering methods that are exempt from registration under the Securities Act of 1933. As amended, Regulation A+ provides an exemption for non-public U.S. and Canadian companies to raise up to \$50 million in a 12-month period. The rules also make the exemption available, subject to limitations on the amount, for the sale of securities by existing stockholders. The new rules modernize the existing Regulation A framework by, among other things, requiring disclosure documents be filed on EDGAR, allowing the confidential review of offering documents, and permitting certain “testing the waters” communications.

Regulation A+ provides two tiers of offerings:

- ✦ Tier 1, which consists of securities offerings of up to \$20 million in any 12-month period, and
- ✦ Tier 2, which consists of securities offerings of up to \$50 million in any 12-month period.

For offerings of up to \$20 million, the issuer could elect whether to proceed under Tier 1 or Tier 2. According to a November 2016 study, around 60 percent of companies who use Regulation A+ use a Tier 2 offering. See the question below titled, “*What are differences between a Tier 1 offering and a Tier 2 offering?*” for additional information about Tier 1 and Tier 2 offerings.

## 2. WHICH COMPANIES ARE ELIGIBLE TO USE REGULATION A+?

The exemption is generally available to any non-public U.S. and Canadian company. However, the following issuers are not eligible to use the exemption:

- ✦ an investment company registered or required to be registered under the Investment Company Act of 1940 or a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940;
- ✦ a blank check company; and
- ✦ an issuer that is disqualified under the SEC’s “bad actor” disqualification rules.

## 3. WHAT SECURITIES ARE ALLOWED TO BE SOLD?

The securities that may be offered under Regulation A+ are limited to equity securities, including warrants, debt securities and debt securities that are convertible into or exchangeable into equity interests, including guarantees of such securities.

## 4. WHAT IS THE GENERAL PROCESS FOR A REGULATION A+ OFFERING?

The Regulation A+ offering process is initiated when a company “files” an offering statement known as Form 1-A with the SEC. After SEC review, the Form 1-A offering statement is declared “qualified” by a “notice of qualification” (as opposed to “effective” in a traditional IPO context). After a Regulation A+ offering statement has been “qualified,” companies may begin selling securities.

Companies that have not previously sold securities under a qualified Regulation A+ offering may submit a draft offering statement for confidential SEC staff review. The non-public draft offering statement and any amendments to it must be publicly filed on EDGAR no less than 21 calendar days prior to the qualification of the public filing.

## 5. WHAT ARE DIFFERENCES BETWEEN A TIER 1 OFFERING AND A TIER 2 OFFERING?

Tier 1 and Tier 2 offerings under Regulation A+ have different requirements concerning financial statements, ongoing reporting obligations and investor eligibility standards. **The table on the following page highlights the key provisions of Tier 1 and Tier 2 offerings.**

## 6. ARE THERE ANY OFFERING COMMUNICATION RESTRICTIONS?

A company engaged in a Regulation A+ offering has substantial flexibility regarding offering communications. At any time before the qualification of the offering statement, including the filing of the offering statement with the SEC, a company or any person authorized to act on behalf of a company may communicate orally or in writing with potential investors to determine whether there is any interest in the contemplated securities offering. This is referred to as “testing the waters.” Testing the waters involves oral or written communications to determine whether prospective investors could be interested in the offering. By soliciting potential investors, businesses can gauge the market interest in their securities before formally launching the offering. Testing the waters may not involve solicitation or acceptance of payment or a commitment to future payment for securities. The anti-fraud provisions of the federal securities laws apply to these communications as well as certain legend requirements.

## KEY PROVISIONS OF TIER 1 VS TIER 2 OFFERINGS

	TIER 1 OFFERING	TIER 2 OFFERING
Annual Offering Limits	\$20 million, including no more than \$6 million on behalf of selling securityholders that are affiliates of the issuer.	\$50 million, including no more than \$15 million on behalf of selling securityholders that are affiliates of the issuer.
Preemption of State Securities Laws	No preemption.	Preemption of state securities law registration and qualification requirements for securities offered or sold to "qualified purchasers," which is defined to be any person to whom securities are offered or sold in a Tier 2 offering, or where securities are listed on a national securities exchange
Limitations on Investors	No limit.	Impose an investment limit for non-accredited investors. A non-accredited investor may invest no more than: (1) 10 percent of the greater of annual income or net worth (for natural persons); or (2) 10 percent of the greater of annual revenue or net assets at fiscal year-end (for non-natural persons). The investment limit does not apply if the securities are to be listed on a national securities exchange at the consummation of the offering.
SEC Filing Requirements	<ul style="list-style-type: none"> <li>• Issuers must file with the SEC a Form 1-A (named, the Offering Circular), which is reviewed and qualified with the SEC.</li> <li>• Confidential SEC review of the Offering Circular is permitted, so long as the Offering Circular is publicly filed not later than 21 calendar days before qualification.</li> <li>• Permit continuous or delayed offerings.</li> </ul>	Same as Tier 1.
Solicitation Materials	Issuers may "test the waters" with the general public either before or after the filing of the Offering Circular.	Same as Tier 1.
Required Financial Statements	<p><i>Periods:</i></p> <ul style="list-style-type: none"> <li>• Balance sheets and related financial statements for the two previous fiscal year ends (or for such shorter time that they have been in existence).</li> <li>• Financial statements must be dated not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months. If interim financial statements are required, they must cover a period of at least six months.</li> <li>• <i>Unaudited.</i> The financial statements prepared for Tier 1 offerings need not be audited. However, if an audit was obtained for other purposes and that audit was performed in accordance with U.S. generally accepted auditing standards or the standards of the Public Company Accounting Oversight Board (PCAOB) by an independent auditor, those audited financial statements must be filed. The auditor does not need / to be registered with the PCAOB.</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Periods:</i> Same as Tier 1.</li> <li>• <i>Audited.</i> The financial statements prepared for Tier 2 offerings must be audited in accordance with either U.S. generally accepted auditing standards or the standards of the PCAOB by an independent auditor. The auditor does not need to be registered with the PCAOB. Interim financial statements may be unaudited.</li> </ul>
Ongoing Reporting	Tier 1 offerings require a company to file an exit report on EDGAR not later than 30 calendar days after termination or completion of an offering.	Tier 2 offerings require a company to file annual and semiannual reports, as well as current event reports, on EDGAR.

## 7. ARE THERE ANY ONGOING REPORTING REQUIREMENTS?

Companies who complete a Tier 1 offering are not required to file ongoing reports with the SEC, other than an exit report (Form 1-Z) at the completion of an offering.

Companies who complete Tier 2 offerings are subject to an ongoing reporting regime and are required to file annual, semi-annual and current event reports with the SEC. Tier 2 companies are required to file:

- ✦ Annual reports on Form 1-K;
- ✦ Semi-annual reports on Form 1-SA;
- ✦ Current reports on Form 1-U;
- ✦ Special financial reports on Form 1-K and Form 1-SA; and
- ✦ Exit reports on Form 1-Z.

The Form 1-K annual report is due within 120 calendar days of the company's fiscal year end and requires disclosures about the company's business and operations for the preceding three fiscal years (or since inception if less than three years), related-party transactions, beneficial ownership, executive officers and directors, executive compensation, MD&A, and two years of audited financial statements. The Form 1-SA semi-annual report is similar to a Form 10-Q, although with scaled disclosure requirements. The current report on Form 1-U is required to announce fundamental changes in the company's business, entry into bankruptcy or receivership proceedings, material modifications to the rights of security holders, changes in accountants, non-reliance on audited financial statements, changes in control, changes in key executive officers, and sales of 10 percent or more of outstanding equity securities in exempt offerings. Form 1-U must be filed within four business days of the triggering event.

## 8. WILL THE OFFERING BE INTEGRATED WITH PREVIOUS OR FUTURE SECURITIES OFFERINGS?

Regulation A+ offerings will not be integrated with any prior offers or sales of securities. Subsequent offers and sales of securities will not be integrated with securities offerings that are

- ✦ registered under the Securities Act, except as provided in Rule 255(e) (related to abandoned offerings),
- ✦ made in reliance on Rule 701,
- ✦ made pursuant to an employee benefit plan,
- ✦ made in reliance on Regulation S,
- ✦ made pursuant to Section 4(a)(6) of the Securities Act (crowdfunded offerings), or
- ✦ made more than six months after completion of the Regulation A+ offering.

The rules also address abandoned offerings in much the same way that these are handled by Rule 155, with a 30-day cooling-off period.

## 9. AFTER THE OFFERING, WILL THE SECURITIES BE FREELY TRADEABLE?

Yes, the securities sold in a Regulation A+ offering are not considered "restricted securities" under Securities Act Rule 144. As a result, sales of securities by persons who are not affiliates of the issuer are not subject to any transfer restrictions under Rule 144. Affiliates continue to be subject to the limitations of Rule 144, other than the holding period requirement. This is important when an issuer seeks to develop an active trading market for its securities. However, the company's securities may not be listed or quoted on a securities exchange without registration under Section 12(b) of the Exchange Act. See the question below titled, "*Can the company also list its securities on the NYSE or Nasdaq for trading?*" for additional information.

## 10. IF THERE ARE TOO MANY SHAREHOLDERS AFTER THE OFFERING, WILL THE COMPANY NEED TO REGISTER ITS CLASS OF SECURITIES UNDER SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934?

Section 12(g) of the Securities Exchange Act of 1934 provides that an issuer must register a class of equity securities with the SEC if, on the last day of the issuer's fiscal year, the issuer had total assets in excess of \$10 million and a class of equity securities held of record by either (1) 2,000 persons or (2) 500 persons who are not accredited investors. In the case of a bank, savings and loan holding company, or a bank holding company with total assets in excess of \$10 million, Section 12(g) requires the issuer to register any class of equity securities held of record by 2,000 or more persons. Regulation A+ provides a limited exemption for securities issued in a Tier 2 offering from this Section 12(g) holder of record threshold when the issuer is subject to, and current in, its Regulation A+ periodic reporting obligations. To benefit from this conditional exemption, an issuer must retain the services of a transfer agent and have a public float of less than \$75 million or, in the absence of a float, revenues of less than \$50 million. An issuer that exceeds the Section 12(g) threshold will have a two-year transition period before it is required to register its class of securities under Section 12(g) of the Exchange Act.

## 11. CAN THE COMPANY ALSO LIST ITS SECURITIES ON THE NYSE OR NASDAQ TRADING?

Yes. Regulation A+ permits an issuer in a Tier 2 offering to voluntarily register a class of Regulation A+ securities under the Exchange Act. In the absence of the relief

provided in the rules, an issuer that completed a Regulation A+ offering and sought to list a class of securities on a national securities exchange would have incurred the costs and the timing delays associated with preparing and filing a separate long form registration statement on Form 10. A company engaged in a Tier 2 offering that has provided disclosure in Part II of Form 1-A that complies with Part I of Form S-1 (or for REITs, Form S-11) is permitted to file a Form 8-A short form registration statement to list its securities on a national securities exchange. This short form registration statement process is similar to a traditional IPO where a Form 8-A is filed along with a Form S-1 (or S-11 for REITs). A company that follows this path would thereafter be subject to Exchange Act reporting requirements and enters the reporting regime as an emerging growth company.

## 12. WHERE CAN I FIND MORE INFORMATION?

The adopting release for Regulation A+ can be found [here](#).

The Form 1-A offering circular can be found [here](#).

Bass, Berry & Sims' *Blueprint for an IPO* can be downloaded [here](#).

*For more information about this topic, please reach out to any member of our [Corporate & Securities Practice Group](#).*

## AUTHORS



### JAY H. KNIGHT

*Member*

(615) 742-7756

[jknight@bassberry.com](mailto:jknight@bassberry.com)



### WILLIAM N. LAY

*Associate*

(615) 742-7829

[william.lay@bassberry.com](mailto:william.lay@bassberry.com)

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