

In this issue:

- **U.S. Securities and Exchange Commission Votes to Approve Major New Regulation A + With Substantial Impact on Raising of Equity Capital**
- **U.S. Small Business Administration (SBA) Publishes Proposed Rule to Create Expanded, All-Agency Mentor-Protégé Program for Small Businesses To Develop Capacity to Seek, Obtain, and Perform on Federal Contracts**

U.S. Securities and Exchange Commission (SEC) Votes to Approve Major New Regulation A + With Substantial Impact on Raising of Equity Capital

The JOBS Act of 2012 raised the limit for registered offerings of securities under Regulation A from \$5 million to \$50 million. The law gave no deadline, however, for rules to implement the change and most SEC and investor attention was directed to rule changes to Regulation D, Rule 506, now in effect, and to the development of new rules allowing for no-registration online crowdfunding to both accredited and unaccredited investors. Those latter rules were proposed more than a year ago but have not yet been finalized.

On March 26 the SEC voted unanimously to approve a final version of its Regulation A+ introduced last November. The rule addresses the major issue that has impeded use of Regulation A even with the increased offering level provided by the JOBS Act; that is the requirement that offerors had to register with both federal regulators and the state regulators in every state where the securities would be sold. Such state regulation was a lengthy and expensive process. As originally proposed in November the rule would have pre-empted state regulation entirely touching off a debate about whether such total pre-emption was appropriate given concerns about investor protection and fraud deterrence. Arguing that such state review provided another level of investor protection the states introduced a coordinated review process which was itself criticized as being prompted only by the threat of federal pre-emption and as being ineffective.

In the final version of March 26, the SEC rule creates two tiers of offerings: Tier 1 with offerings up to \$20 million in a 12 month period and Tier 2 with offerings up to \$50 million in a 12 month period. The rule pre-empts state regulation for Tier 2 offerings but keeps in place the coordinated review regulation for Tier 1 offerings.

The rule has several other substantial and significant elements:

No limit on investors. Offerings may be made to both accredited and non-accredited investors subject to the investment limits noted below.

Investment limits. There are no limits to how much any investor may invest in a Tier 1 offering. In a Tier 2 offering investors may invest a maximum of the greater of 10 percent of their net worth or 10 percent of their net income.

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Investors can self-certify income or net worth; no documentation is required .

SEC approval of offering circular required. The issuer must file a disclosure document and financials with the SEC. This offering document must be approved by the SEC prior to any sales. For Tier 1 offerings reviewed financials are sufficient but for Tier 2 offerings audited financials are required.

Ongoing disclosure requirements. There are no ongoing disclosure requirements for Tier 1 offerings. Tier 2 issuers must provide an annual disclosure, a semi-annual report, and current reports which will be equivalent to, but less extensive versions of, current Form 10-K, Form 10-Q and Form 8-k.

Unrestricted securities. The securities offered under the new rule will be unrestricted and transferable assuming a secondary market for these securities develops.

For those who have been awaiting the final rulemaking on crowdfunding, it is important to note that no mention was made of crowdfunding in the March 26 meeting – even as a comparison with the new rule. It may be that the unrestricted sales feature of the new rule will be seen as a replacement for a complicated set of new crowdfunding rules.

U.S. Small Business Administration (SBA) Publishes Proposed Rule to Create Expanded, All-Agency Mentor-Protégé Program for Small Businesses To Develop Capacity to Seek, Obtain, and Perform on Federal Contracts

On February 6, 2015, the SBA published a proposed rule [80 Federal Register, No. 24, pp. 6618-644] to implement the direction of Congress in the Jobs Act of 2010 and the National Defense Authorization Act of 2013 to create a federal government wide mentor-protégé program in which prime contractor mentors would provide capacity building expertise and assistance to protégé small firms to enable them to become federal prime contractors or subcontractors. The new program would be patterned on SBA's existing 8(a) mentor-protégé program for minority firms but would be available to all small businesses.

The program as proposed will have mentor firms provide assistance to mentor firms to include management assistance; assistance with seeking and securing federal contracts; financial assistance (to include both loans and equity participation in the protégé firm by the mentor firm not to exceed a 40 percent ownership interest; and actual structuring of joint ventures between the mentor and protégé firms to obtain and perform on federal contracts.

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The rule proposes that all businesses interested in the program undergo a formal size determination to establish eligibility and that only for-profit businesses be able to qualify as mentors.

Assistance will be delivered according to the terms of a written mentor-protégé agreement valid for no more than three years. In addition no one protégé can have more than two three year agreements in place either as two sequential agreements with one mentor or one agreement running concurrently with two mentors.

SBA is accepting comments on the proposed rule until April 6, 2015. Full details are in the notice referenced above.

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