

# Small Business Notes

Minnesota Department of Employment and  
Economic Development (DEED)

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## **U.S. Securities and Exchange Commission Prevails in Litigation by States on Regulation A+ Securities Offerings**

As reported in *Small Business Notes* for March 2015, the U.S. Securities and Exchange Commission voted unanimously in March 2015 to adopt a rule relating to registration and review of offerings under Regulation A+. That rule created two tiers of offerings: Tier 1 with offerings of 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-empted state registration and regulation for the Tier 2 offerings but kept in place the originally proposed coordinated state/federal review for Tier 1 offerings. The states of Montana and Massachusetts petitioned the District of Columbia Court of Appeals for review of the rule as it related to Tier 2 claiming that the SEC had exceeded its authority in adopting a definition of “qualified investor” that did not provide that the investor be either accredited or sophisticated and that failure to have such definition put more investors at risk for offerings which were more likely to be fraudulent. (The states relied on statistics for federal Rule 506 offerings which are also subject to federal pre-emption and which have a higher fraud rate than offerings subject to state registration and regulation.)

On June 24, 2016 the Court denied the petition and upheld the Tier 2 regulations confirming that the SEC did have authority under the JOBS Act of 2012 to adopt a definition of “qualified investor” which –though not using the elements of an accredited or sophisticated investor –limited an investor’s purchases to an amount no greater than ten percent of the investor’s annual income or net worth. In acknowledging that the rule “stripped a layer of state review” away, the Court nevertheless stated that investors would still be adequately protected.

It remains to be seen if Regulation A+ will—for offerings in excess of \$20 million but less than \$50 million—replace Rule 506(c) offerings with its permission of general solicitation of accredited investors.

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