

Regulation A Offerings

FINRA Filing Requirements and Review of Regulation A Offerings

Executive Summary

FINRA is publishing this *Notice* to provide guidance regarding the FINRA filing requirements and review procedures that apply to firms that participate in Regulation A+ offerings. Specifically, FINRA's Corporate Financing Rules require firms that participate in Regulation A+ offerings to file with FINRA information specified in the rules. FINRA's Communications with the Public Rule and its Suitability Rule also apply to a firm's participation in these offerings. FINRA also reminds firms that communications with the public concerning a Regulation A+ offering of direct participation program (DPP) securities must be filed with FINRA.

Questions regarding this *Notice* may be directed to:

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- ▶ Kathryn M. Moore, Associate General Counsel, Office of General Counsel, at (202) 728-8200.

Background and Discussion

Regulation A+

Regulation A under the Securities Act of 1933 has been a longstanding exemption from the registration requirement for offerings of up to \$5 million of securities in any 12-month period.¹ Pursuant to Title IV of the Jumpstart Our Business Startups (JOBS) Act,² the SEC recently updated and expanded Regulation A with amendments that became effective on June 19, 2015. The new amendments, popularly known as Regulation A+, allow offerings of up to \$50 million of securities in a 12-month period. Below, FINRA highlights a few of the amendments to Regulation A.

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Notice Type

- ▶ Guidance

Suggested Routing

- ▶ Advertising
- ▶ Corporate Finance
- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Senior Management
- ▶ Syndicate
- ▶ Underwriting

Key Topics

- ▶ Communications with the Public
- ▶ Compensation Limitations
- ▶ Confidential Treatment
- ▶ EDGAR
- ▶ Investment Banking
- ▶ Public Offerings
- ▶ Suitability
- ▶ Supervision
- ▶ Underwriting

Referenced Rules

- ▶ FINRA Rule 2111
- ▶ FINRA Rule 2210
- ▶ FINRA Rule 2310
- ▶ FINRA Rule 3110
- ▶ FINRA Rule 5110
- ▶ FINRA Rule 5121
- ▶ SEA Rule 144
- ▶ SEC Regulation A

While Regulation A continues to require that an offering statement must be prepared on Form 1-A, the amendments provide that the offering statement must be filed electronically with the SEC on EDGAR. Offering statements continue to be subject to review and comment by the SEC and must be qualified by the SEC in a “notice of qualification” prior to any sales of securities. Under the Regulation A+ amendments, certain issuers³ also have an option to submit a draft offering statement to the SEC for non-public review, which must be filed electronically on EDGAR, and all non-public submissions must be filed publicly no less than 21 calendar days before qualification of the offering statement.

Amendments to an offering statement must be filed with the SEC in the same manner as the initial filing. A post-qualification amendment must be filed to reflect any facts or events arising after the qualification date that represent a fundamental change in the information in the offering statement.

In addition, Regulation A+ provides that eligible issuers and intermediaries in Regulation A+ offerings may conduct a solicitation of interest in an offering (testing the waters), including solicitation of non-accredited investors, both before or after the filing of the offering statement.⁴ Solicitation materials must be filed with the SEC as exhibits to the offering statement.

Corporate Financing Rules

FINRA’s Corporate Financing Rules—Rules 5110, 2310 and 5121—generally: (1) require the filing of specified information in connection with public offerings in which FINRA member firms will participate; (2) prohibit unfair terms and arrangements in connection with public offerings of securities; and (3) impose requirements on offerings in which there is a specified conflict of interest.⁵ The Corporate Financing Rules require firms that participate in the distribution of securities in a Regulation A+ offering to file documents and other information with the Corporate Financing Department.⁶ These documents include an offering statement and its exhibits and amendments.⁷ The documents are required to be submitted no later than one business day after they are filed or submitted to the SEC.⁸ FINRA accords confidential treatment to all filed documents and information.⁹ No sales of securities subject to the rules, including Regulation A+ offerings, may commence until FINRA has provided a “no objections” opinion.¹⁰

When FINRA issues a “no objections” opinion to proposed underwriting terms and arrangements, the opinion relates solely to the Corporate Financing Rules and does not purport to express any determination regarding compliance with FINRA’s suitability or supervision rules, or any other statutory or regulatory requirements, including that the offering is a qualified Regulation A offering.¹¹

Communications with the Public Rule

FINRA Rule 2210 governs firms' communications with the public. The rule requires that communications be fair, balanced and not misleading.¹² The rule also requires that an appropriately qualified registered principal approve retail communications distributed to investors prior to use.¹³ A "retail communication" is defined as any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.¹⁴ Firm communications made available to 25 or fewer retail investors within any 30 calendar-day period are defined as correspondence and are also subject to the content standards of Rule 2210.¹⁵

Regulation A+ solicitation materials also may need to be filed with FINRA, depending upon the product being offered.¹⁶ Rule 2210 requires that retail communications concerning public direct participation programs (as defined in Rule 2310) be filed with the Advertising Regulation Department within 10 business days of first use or publication.¹⁷ If a firm uses Regulation A+ solicitation materials concerning a direct participation program security with more than 25 retail investors, the materials would be subject to the rule's filing requirement and must be approved by an appropriately qualified registered principal of the firm.

Endnotes

1. The SEC has stated that securities purchased by investors in a Regulation A offering are not "restricted" securities for purposes of the federal securities laws. See 80 FR 21806, at 21866.
2. See Pub. L. No. 112-106, 126 Stat. 306 (2012).
3. Regulation A only permits issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A or an effective registration statement under the Securities Act to submit to the SEC a draft offering statement for non-public review.
4. See Securities Act Rule 255 for the timing and requirements for the use of solicitation materials.
5. Rule 5110 governs offerings of debt and equity securities. Rule 2310 governs offerings of direct participation plans. Rule 5121 governs offerings in which firms participating in a distribution have a conflict of interest with the issuer.
6. See, e.g., Rule 5110(b)(9)(G), which specifically lists securities offered pursuant to SEC Regulation A as among the types of offerings for which documents and information must be filed with FINRA.

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7. Rule 5110(b)(5). *See also* Rule 5110(b)(5)(B) that provides that documents that are filed with the SEC through EDGAR that are referenced in FINRA's electronic filing system shall be treated as filed with FINRA.
8. Rule 5110(b)(4).
9. Rule 5110(b)(3).
10. Rule 5110(b)(4)(B).
11. FINRA Rule 2111 (Suitability) requires that a member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. FINRA Rule 3110 (Supervision) requires each member to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.
12. *See* Rule 2210(d) for additional content standards, including that the member must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.
13. *See* Rule 2210(b)(1)(A). The rule also requires principal approval prior to filing with FINRA's Advertising Regulation Department.
14. Rule 2210(a)(5).
15. Rule 2210(a)(2). Correspondence must be supervised in accordance with the firm's procedures adopted pursuant to Rule 3110(b)(4).
16. *See* Rule 2210(c) for the types of retail communications that require filing, including those concerning public direct participation programs, registered investment companies, registered derivatives and collateralized mortgage obligations.
17. Rule 2210(c)(3)(B).