

States Challenge SEC Regulation A+

September 28, 2015

Massachusetts and Montana have taken the highly unusual step of suing the SEC over a recent amendment to Regulation A under the Securities Act of 1933. The SEC adopted "Regulation A+" (as the amended regulation is commonly called) in reliance on new authority granted to it by the Jumpstart Our Business Startups Act (JOBS Act). Regulation A previously provided simplified filing procedures for offerings of not more than \$5 million of a company's securities. Regulation A+ increased this threshold in a new two-tiered structure. Now, Tier 1 issuers may offer and sell up to \$20 million of securities in a 12-month period, while Tier 2 issuers may offer and sell up to \$50 million of securities in a 12-month period. The JOBS Act also empowered the SEC to preempt state securities registration requirements for Regulation A+ offers to "qualified purchasers." In adopting Regulation A+, the SEC defined purchasers in Tier 2 Regulation A+ offerings to be "qualified purchasers" for this purpose, thus rendering state registration unnecessary for offerings to such purchasers. The states' lawsuits, which have been consolidated in the United States Court of Appeals for the District of Columbia, seek vacatur of Regulation A+, and a permanent injunction to prevent its enforcement by the SEC. They allege, among other things, that the preemption of state securities laws for Tier 2 offerings is "inconsistent with the public interest and the protection of investors" and that the SEC did not sufficiently consider such matters. They also allege that the SEC acted arbitrarily, capriciously, and in contravention of the Administrative Procedures Act. They challenge in particular the SEC's definition of "qualified purchaser," which was novel compared to the way similar terms are generally defined for securities law purposes.

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