Regulation A+ Securities Offerings – Comparison with Alternatives and Recent Developments

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Mini-IPOs under new Reg A+ are increasingly popular for capital formation. Since the JOBS Act revamped old Regulation A in SEC rules that took effect in June 2015, 69 Reg A+ offerings raising over $611 million in total were completed through September 2017. Comparing Reg A+ with its main alternatives helps explain why.

Reg A+ provides a limited-offering exemption from Securities Act registration, yet it has similarities with registered offerings. Both involve offering statements with audited financials, ongoing disclosures, and unrestricted securities, which are freely tradeable and can be quoted over-the-counter or listed on exchanges. Registered IPOs are expensive and time-consuming, although their amount is not capped. By contrast, Reg A+ offerings are less expensive and easier, but they can only raise up to $20 million under Tier 1 and up to $50 million under Tier 2 in a 12-month period. Legislation pending in Congress might raise the Tier 2 maximum to $75 million.

Unlike registered IPOs and follow-on offerings, Reg A+ offerings do not require engaging underwriters to line up initial purchasers. An issuer can avoid hefty underwriting fees by conducting a Reg A + offering by itself on an ongoing, best-efforts basis. On the other hand, without an underwriter's connections and road show, finding investors can be a challenge for an issuer on its own. In addition, foregoing an underwriter's due diligence process, combined with a SEC review and comment process that is less intensive than in public offerings, puts a greater burden on a Reg A+ issuer to ensure the accuracy of its disclosures.

Old Regulation A was rarely used due to its low $5 million maximum offering amount combined with relatively onerous disclosure requirements. Similar flaws afflict another JOBS Act exemption, Regulation Crowdfunding (Reg CF), which limits offerings to $1,070,000 despite requiring audited financials for offerings over $535,000 (except by first-time Reg CF issuers), offerings to be conducted via intermediary brokers or funding portals, and a one-year holding period before resale. The higher limits on offering amounts make new Reg A+ a better deal than Reg CF in terms of the amount of capital raised compared with offering

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New Reg A+, like Reg CF and Rule 506(c) of Reg D, permits general solicitation and advertising. Thus it has no 30-day cooling-off period before issuers can sell securities to investors without substantive pre-existing relationships, unlike in private placements exempt under Rule 506(b). Also securities issued under Rule 506(b) or 506(c) are restricted from resale under Rule 144, another disadvantage compared with Reg A+.

Rule 506(c) permits sales only to accredited investors, and the issuer must reasonably verify their status, whereas non-accredited investors may also participate in Reg A+ offerings. An individual counts as an accredited investor if his or her income for the past two years is at least $200,000 (or $300,000 with his or her spouse), with the expectation of the same during the current year, or if his or her net worth is at least $1 million (not including the value of his or her primary residence). Under Tier 1 of Reg A+, the amount non-accredited investors may invest is not limited. Under Tier 2, their investments are limited to 10% of their annual income (or annual revenue) or net worth (or net assets), whichever is more.

While Rule 506(b) allows unlimited investments by non-accredited investors, they must be “sophisticated” (alone or with a purchaser representative). Also, having a single non-accredited investor in a Rule 506(b) offering requires the issuer to provide increased financial statement disclosure to all investors.This often makes issuers decide that non-accredited investors are not worth the trouble in a Rule 506(b) offering. In a Reg A+ offering, though, there is no increased disclosure burden on issuers as a result of non-accredited investors participating in the offering. This greatly widens the pool of potential investors.

Another advantage of Reg A+ over Rule 506(b) or 506(c) is that the issuer may use funds raised in a Reg A+ offering right away, whereas in a private offering the issuer must hold invested funds separately and may not “break escrow” until the minimum offering amount stated in its private placement memo has been reached, and funds must be returned to investors if that amount is not reached.

SEC-reporting companies may conduct PIPE offerings under Rule 506(b) or 506 (c), but not under Reg CF or Reg A+. However, the House Financial Services Committee has approved a bill that would let public companies offer securities under Reg A+. Reg A+ offerings are also not available to investment companies or development-stage companies without a specific business plan or purpose. Such “blank-check companies” do not include real estate funds that have not yet identified specific properties to develop, which have conducted Reg A+ offerings.

Selling security holders such as founders and other insiders may sell their shares in a total amount of up to 30% of a Reg A+ offering, unlike in offerings under Rule 506(b) or 506(c) or Reg CF, in which only the issuer may sell securities. Also, “testing the waters” (i.e., soliciting indications of investor interest) is permitted under Reg A+, so long as no securities are sold prior to qualification of the offering statement by the SEC. In addition, the SEC permits first-time Reg A+ issuers to submit draft offering statements for staff review on a non-public basis, provided they are filed publicly at least 21 days before qualification.

Tier 2 offerings preempt state blue sky laws, although state-level anti-fraud and notice-filing requirements still apply. Tier 1 offerings are subject to pre-offering review – in a single coordinated-review process – by the securities departments in states where the securities will be offered and sold. After completing Reg A+ offerings, Tier 2 issuers must file scaled-down versions of annual, semiannual (instead of quarterly), and current reports. Tier 1 issuers are not subject to ongoing SEC-reporting requirements, but must simply file exit reports at the conclusion of their offerings.

Are Reg A+ offerings right for all companies? No. Companies wanting to raise more than $50 million should consider going public in a registered IPO or a private offering under Rule 506(b) or 506(c). Companies with access to enough accredited investors for their needs may want to stick with tried-and-true Rule 506(b) private placements or, if they want to generally solicit investors (but sell only to verified accredited investors), Rule 506(c) offerings. Companies that don't need to raise more than $5 million in a 12-month period should consider new-and-improved Rule 504, which was not discussed here but may make more sense for smaller offerings than Reg CF.

Reg A+ is relatively user-friendly and has some appealing features, as discussed. After two and a half years, new Reg A+ is successful as a financing alternative worthy of consideration by various companies. The Reg A+ deal space is active. In closing, here are some recent developments.

- On December 21, 2017, the Ontario Securities Commission declared that securities offered in Reg+ A offerings are immediately tradeable in Canada.
- Groundfloor, a P2P real estate lending platform, announced on January 8, 2018, that it received SEC qualification for a $50 million Reg A+ offering in all 50 states.
- On January 9, 2018, the SEC temporarily suspended Punch TV's Reg A+ offering, which had been qualified and had raised over $3 million from more than 6,600 investors, because its offering statement contained financial statements that falsely purported to be audited.
- Music star Drake and his business partner Brent Hocking founded Virginia Black, a bourbon whiskey maker which in January 2018 announced plans to raise $30 million in a Reg A+ offering.