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Regulation A+: New and Improved After the JOBS Act or a Failed Revival?

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REGULATION A+: NEW AND IMPROVED AFTER THE JOBS ACT OR A FAILED REVIVAL?

Neal Newman†

ABSTRACT

This piece is a follow-up to a previous article that I wrote on Regulation A. In April of 2012, then-President Barack Obama signed into law the Jumpstart our Business Start Ups (JOBS) Act. Under the JOBS Act’s Title IV, Congress made revisions to a private offering exemption referred to as Regulation A with the intention of reviving an exempt offering option that was close to dormant. The primary Regulation A criticism being that issuers were required to do too much in terms of providing business and financial disclosure where the most the issuer could raise through a Regulation A offering was $5 million.

In response, the JOBS Act made several changes to Regulation A; the most notable change involved raising the offering cap from $5 million to $50 million. In my previous piece, I roundly criticized the Regulation A changes promulgated through the JOBS Act. In that previous article I argued that Regulation A was flawed at inception and that the changes to Regulation A in sum did nothing to make the regulation more appealing. The previous piece was speculative, however as the Securities and Exchange Commission had not drafted its final rules until the summer of 2015. Thus the piece was published before having the benefit of assessing how issuers might respond to Regulation A as revised.

This current piece is the rare occasion where I double-back on the assertions made in a previous article and see if in fact I was correct or whether I missed the mark. In writing this follow up article, my findings were educational. The effort taught me to be ever vigilant about the

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intersection between the theoretical and the practical. My research revealed that Regulation A has grown exponentially in terms of issuer use and popularity which is contrary to what I was expecting. Therefore, I was wrong in that regard and I am fine with acknowledging that.

To be fair and dispassionate, in this article I have concluded that Regulation A, as revised, while still having some flaws, is an example of Congress using its legislative powers to take something that was structurally flawed and problematic and making it into something that now appears to be viable, usable, and more appealing to emerging growth and start-up companies.

A word of caution, however. My findings also surfaced a call for a healthy dose of vigilance as well. There are storm clouds gathering over the Regulation A offering exemption. The increased offering sizes allowed under Regulation A coupled with the lack of investor sophistication (dynamics exclusive to Regulation A) could leave many investors exposed to investing in companies that in hindsight they would have been better off taking a pass on. These issues and the corresponding discussions unfold in the pages that follow.

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INTRODUCTION**

In April of 2012, President Barack Obama signed into law the Jumpstart Our Business Startups Act (hereinafter the “JOBS Act”). Under the JOBS Act’s Title IV, Congress made revisions to a private offering exemption referred to as “Regulation A” with the intention of reviving an exempt offering option that was close to dormant. Before the passage of the JOBS Act, Regulation A was

** This piece is a follow-up to a previous article that I wrote on Regulation A. See Neil Newman, Let Sleeping Regs Lie: A Diatribe on Regulation A’s Futility Before and After the JOBS Act, 18 U. Pa. J. Bus. L. 65 (2016).


used sparingly as it was primarily criticized for requiring too much for an exemption that offered too little.  

For example, as will be discussed later in this article, the most an issuer could raise using Regulation A prior to Regulation A’s revisions under the JOBS Act was $5 million in any twelve month period. But the regulation required the issuer to prepare an offering circular referred to as Form 1-A which required a great deal in terms of time and expense for issuers to complete.  

In an effort to resuscitate Regulation A as a viable option for private offerings, Congress, through the JOBS ACT, made several changes to the exemption. The most notable of which involved raising the offering cap from $5 million to $50 million. Nonetheless, in a previous article I authored, I roundly criticized the proposed Regulation A changes promulgated through the JOBS Act. I argued that Regulation A was flawed at inception and that the prospective changes to Regulation A did nothing to make it more appealing. Those arguments were speculative, however, as the United States Securities and Exchange Commission (hereinafter the “SEC” or the “Commission”) did not draft its final rules until the summer of 2015. The article therefore was published without the benefit of assessing how issuers responded to the Regulation A revisions.

This piece provides an opportunity to revisit the assertions made in my previous article to see if Regulation A, as revised (“Regulation A+”), has become a more appealing offering exemption based on the number of companies choosing to use Regulation A+ in lieu of other popular options such as Exchange Commission qualifying only one of those offerings).

3 For example, as will be discussed later in this article, the most that an issuer could raise using Regulation A prior to the passing of the JOBS Act was $5 million in any 12-month period. 17 C.F.R. § 230.251(b) (2014), amended by 17 C.F.R. § 230 (2015).


7 Id. (In the prior article I roundly criticized Regulation A even in its revised form. My general premise being that Regulation A in its revised form would still be too cumbersome for issuers to comply with and the cost of doing a Regulation A offering would far outweigh the benefits. That coupled with the argument that there were far more appealing offering exemptions available such as Regulation D’s Rule 506.).

as Regulation D’s Rule 506.\textsuperscript{9} Theoretically, issuers will choose Regulation A+ if and only if Regulation A+ provides more desirable features or options than other offering exemptions (e.g., the inclusion of non-accredited and unsophisticated investors).

Writing this article has been educational and a reminder to be ever vigilant about the intersection between the theoretical and the practical: Not only has the use of Regulation A grown exponentially, but the exemption may now rival or even surpass its previously more popular predecessor, Regulation D’s Rule 506.\textsuperscript{10} Regulation A+ is an example of Congress using its legislative powers to take something that was structurally flawed and problematic and making it into a regulation that, while still having some flaws, now appears to be more appealing to emerging growth and start-up companies.

By the same token, Regulation A+ is not an unqualified success. The considerable increase in the use of Regulation A has surfaced potential problems such as the increased exposure of this option to “lay” investors; i.e. investors with modest income, modest net worth, and little to no financial sophistication. While, these are the investors that Regulation A actively seeks, there are concerns about how issuers, regulators, and the market as a whole will react if/when these investors suffer significant losses in this private equity startup company space. These potential problems will be discussed in Section VII.

But first this piece takes a step back. In order to give the reader context and an appreciation for the tension between theoretical and practical considerations this article is structured as follows. The first part contains an overall assessment of Regulation A based on my research and findings. In Part II, I provide some historical background on Regulation A and articulate commonly perceived problems with Regulation A prior to its revisions under the JOBS Act. Part III discusses the changes made by the JOBS Act; the biggest modification being an increase to its offering cap from $5 million to $50 million in any twelve-month period.\textsuperscript{11} Part IV contains a theoretical discussion about why an issuer would choose Regulation A+ (Regulation A as revised by the JOBS Act) over other offering exemption choices. In Part V, the piece transitions from theory to practice by analyzing a sample of post JOBS Act Regulation A filings to get a clear idea of the types of companies

\textsuperscript{9} See GAO–12–839, supra note 2, at 11 (showing that Regulation D filings far outnumbered Regulation A filings during the time period studied).

\textsuperscript{10} See discussion on this assertion in Section V infra.

\textsuperscript{11} 15 U.S.C. § 77c(b)(2)(A) (2012) (“The aggregate offering amount of all securities offered and sold within the prior 12-month period in reliance on the exemption added in accordance with this paragraph shall not exceed $50,000,000.”).
making use of the revised exemption. Ultimately, Part VI attempts to answer the main questions posed by this article: Why are issuers turning to Regulation A+ in volumes? Were the revisions to Regulation A successful?

Part VII invokes a word of caution. Regulation A was designed to attract “lay” investors (i.e., investors with modest income, modest net worth, and little or no financial sophistication). The increase in the use of Regulation A+ has given more of these investors exposure to the risks and rewards of emerging growth private equity. The story of Elio Motors (a company that used a Regulation A offering to raise nearly $16 million, but has yet to produce a single car)\(^\text{12}\) illustrates the concerns of this increased exposure: What will the fallout be from Regulation A+ if Elio Motors and other companies similarly situated ultimately fail? Finally, the paper concludes.

I. OVERALL ASSESSMENTS

Is Regulation A+ as revised under the JOBS Act new and improved or was the effort a failed attempt at revival? Although some may say that it is still too early to decide whether revised Regulation A is in fact a success, early signs are unequivocal that, at the very least, issuers have turned to Regulation A in volumes. Additionally, interviews conducted with issuers that have used the Regulation A+ exemption revealed that they were happy with their choice and did not perceive some of the issues raised in this article as problematic.\(^\text{13}\) The remainder of this article explores how this conclusion was formed.

II. BACKGROUND OF REGULATION A

A. Securities Offerings in General

As a general rule, when a company issues its securities the company must either register those securities or find an applicable exemption.\(^\text{14}\) The underlying premise of this rule is that investors need information, including financial information, to make an informed decision about whether or not to

\(^{12}\) For a detailed examination of the Elio Motors example, see Section VII infra.

\(^{13}\) See infra Section VI (discussing the results of our own in-depth interviews with Regulation A filers).

\(^{14}\) See Securities Act of 1933, ch. 38, §§ 4–5, 48 Stat. 74, 77–78 (1933) (codified as amended at 15 U.S.C. §§ 77d–e (2016)) (generally prohibiting persons from selling securities unless those securities have been registered and providing exemptions to this general rule).
invest in a particular company. This information needs to be disclosed through the registration process so that it does not remain within the issuing company.

Issuers are required to register offerings when the respective offering is public in nature. The registration mechanism requires issuing companies to file information publicly, via a "registration statement," so that potential investors have access to this information. In contrast, when an offering is not public in nature, the issuer can offer the securities under what are referred to as "private exemptions." An "exemption" allows the issuer to offer the securities without having to complete the cumbersome, expensive, time-consuming registration process. The private offering regime is complicated and it is beyond this article's scope to detail it completely. But, generally, eligibility for a private offering exemption is a function of (1) offering size, (2) investor wealth, and (3) investor sophistication. The smaller the offering size, the more likely it is that the offering will be deemed private in nature, thus obviating the requirement that the issuer register the securities. Likewise, if the potential investor pool is comprised of wealthy or financially savvy investors (the legal term of art for these individuals is "accredited investor"), the securities laws are less concerned with protecting this class of investors since the law sees the wealthy or financially savvy investors as able to fend for themselves.


See U.S. SEC. & EXCH. COMM'N, FORM S-1: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933 2 (2017) ("This form shall be used for the registration under the Securities Act of 1933 ("Securities Act"); of securities of all registrants for which no other form is authorized or prescribed . . . .").

See GAO-12-839, supra note 2, at 10-11 (reporting details of how issuers choose Regulation D's Rule 506, the historically most often used private offering exemption, with much more frequency than Regulation A).

For example, different rules within Regulation D include different offering caps, different disclosure requirements, and different investor qualification requirements. 17 C.F.R. § 230.504-06 (2017).

See Nonpublic Offering Exemption, Securities Act Release No. 33-4552 (Nov. 6, 1962) ("Whether a transaction is one not involving any public offering is essentially a question of fact and necessitates a consideration of all surrounding circumstances, including such factors as the relationship between the offerers and the issuer, the nature, scope, size, type and manner of the offering.").

See 17 C.F.R. § 230.501(a)(1)–(6) (2017) (detailing the various entities and persons who fall under the accredited investor definition).

See 17 C.F.R. § 230.502(b)(1) (2017) ("The issuer is not required to furnish the specified information to purchasers when it sells securities under [Rule 504], or to any accredited
B. Pre-JOBS Act Regulation A

Regulation A is a part of this exempt private offering regime. Prior to the JOBS Act, the most an issuer could raise in any twelve-month period under a Regulation A filing was five million dollars. Despite the relatively low offering limit, the requirements for Regulation A compliance were onerous and time consuming. First, the issuer had to complete an offering circular known as a Form 1-A: a twenty-nine page document that requires the issuer to provide financial and other information. Form 1-A is comprehensive and takes considerable time to complete. Many practitioners have compared the completing of a Form 1-A as being equivalent to completing a full-blown registration statement. Once completed, the issuer is required to file the Form 1-A with the Securities and Exchange Commission. In the SEC’s hands, the filing must go through a qualification process, which involves a review to make sure that the necessary disclosures have been provided.

In addition to filing Form 1-A, Regulation A required the issuer to register its securities in each state the issuer intended on offering its securities so that it was in compliance with state “Blue Sky” regulations. This was particularly difficult as, naturally, each state has different filing criteria and requires a filing

25 In drawing upon my own experiences as a practitioner spanning from 1998–2003, I never considered Regulation A as a viable option for my clients based in large part on the significant amount of time and expense that would be required to complete the Form 1-A Offering Statement.
27 See Investor Bulletin: Regulation A, U.S. SEC. & EXCH. COMM’N (July 8, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_regulationa.html (“For Tier 1 offerings, this offering circular must also be filed with, and is subject to review and qualification by, the staff at the SEC. . . . For Tier 2 offerings, the offering circular is subject to review and qualification by the staff at the SEC, but is not subject to review by state securities regulators.”).
28 Id.
29 See GAO–12–839, supra note 2, at 13.
fee. For example, New York charges a $300 fee if the offering is for less than $500,000 and $1,200 if the offering is for $500,000 or more.\footnote{Regulation\textit{ A} State Filing Requirements: New York, N. Am. Sec. Admins Ass'N, http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/regulation-a-offerings/state-filing-requirements/new-york/ (last visited Jan. 14, 2018).}

As such, the federal Form 1-A filing, coupled with the state Blue Sky registration requirements made for an offering regime that was tedious, cumbersome, time consuming, and costly. Historically, this qualification process for a Regulation A filing took an average of 228 days to complete,\footnote{See GAO-12-839, supra note 2, at 12.} the equivalent of a death sentence for any company that needed to raise money quickly.

C. Regulation A's Historic Disfavor

This long, onerous, and expensive registration process incentivized few issuers to use Regulation A in the past.\footnote{See id. at 10–11 (showing the number of Regulation A filings compared to other exemptions).} Appendix A, below, includes a chart that shows the declining use of Regulation A offerings filed in the period from 1992 to 2011.\footnote{See infra Appendix A.} In 1992, for example, 20 filings claimed exempt status under Regulation A, all of which were qualified by the SEC. Regulation A filings peaked in 1997 at 116, but of those filings, only 57 of them were qualified. Regulation A filings declined steadily from the 1997 high, dwindling down to eleven filings in 2011, of which only one was qualified. Issuers had spoken with their actions, clearly indicating that Regulation A was not the answer to their capital raising needs.

In addition to the difficulty of using Regulation A, securities laws attorneys speculated that Regulation A filings also may have declined due to issuers having far more appealing options such as Regulation D's Rule 506 which is exempt from state registration requirements. The exemption makes the rule less cumbersome with which to comply.\footnote{Regulation D's Rule 506 enabled small business issuers to do the same things that Regulation A does (i.e. offer securities without having to register them). But, generally, Regulation D's Rule 506 allowed issuers to raise far more money in much less time and at a fraction of the cost.\footnote{See infra p. 27 and note 157.}} Regulation D's Rule 506 enabled small business issuers to do the same things that Regulation A does (i.e. offer securities without having to register them). But, generally, Regulation D's Rule 506 allowed issuers to raise far more money in much less time and at a fraction of the cost.\footnote{17 C.F.R. § 230.506 (2017).} For example, as opposed to Regulation A, Regulation D's Rule
506 places no limits on the offering amount as long as the issuer satisfies the Rule's mandates.\textsuperscript{36} Rule 506 also does not have Regulation A's SEC filing requirement.\textsuperscript{37} Rule 506 issuers merely have to notify the SEC that they are doing a Rule 506 offering; there is no other filing or qualification process required.\textsuperscript{38} Finally, and perhaps most compelling, Rule 506 offerings are exempt from all state registration and filing requirements.\textsuperscript{39} Thus, many of the most onerous requirements of Regulation A offerings are entirely absent from Rule 506 offerings, making it a more efficient and less expensive capital raising process.

Regulation D's Rule 506, however, does have some noteworthy stipulations that Regulation A does not. First, Rule 506 places limits on the types of investors that can participate in an offering: they must either be accredited or financially savvy.\textsuperscript{40} An "accredited investor" is defined in Regulation D's Rule 501. Among other things, an accredited investor is one who either has a high net worth or one who earns a considerable amount of income on an annual basis.\textsuperscript{41} Additionally, Regulation D places limits on the number of investors who can invest. While Regulation D's Rule 506 places no limits on accredited investor participation, the rule limits the number of non-accredited investors to thirty five.\textsuperscript{42} This stipulation derives, as a policy matter, from the belief that accredited investors can fend for themselves due to their high net worth or high net income positions, and therefore do not need government oversight for protection.

D. Regulation A vs. Regulation D, By the Numbers

Comparing the number of Rule 506 offerings to the number of Regulation A offerings we see that, before the JOBS Act, issuers had a clear preference for

\textsuperscript{36} See generally 17 C.F.R. § 230.506 (2017) (Issuers using Regulation D's Rule 506 have no restrictions as to the offering amount).
\textsuperscript{37} Under Regulation D, issuers are merely required to provide notice to the SEC that they are offering securities in an exempt offering and are relying on a Regulation D exemption. See 17 C.F.R. § 230.503 (2017).
\textsuperscript{38} Id.
\textsuperscript{39} See generally 15 U.S.C. § 77r (2012) (amended 2015) (exempting under Section 18 of the Securities Act of 1933 certain securities and securities offerings from state registration, but not exempting offerings made under Regulation A (pre-JOBS Act)).
\textsuperscript{40} See 17 C.F.R. § 230.506(b)(2)(ii) (2017).
the Rule 506 offering exemption despite the fact that the 506 offerings are limited to either accredited investors or financially savvy investors.

The Government Accounting Office ("GAO") conducted a study comparing Rule 506 offerings to Regulation A filings. The study tracked offerings between 2008 and 2011. Unfortunately, the GAO was unable to find Rule 506 offering data for the periods covering 2008 and 2009. Nonetheless, the resulting analysis is compelling. In 2008 and 2009, the SEC qualified only eight and three Regulation A offerings, respectively. Similarly, in 2010 and 2011 the number of Regulation A offerings that were qualified totaled six and one, respectively. For comparison sake, the Office of the Comptroller tallied only those Rule 506 offerings for $5 million or less—the limit for Regulation A offerings at the time. In contrast to the low volume of Regulation A filings, the number of Rule 506 offerings in 2010 and 2011 totaled 7,517 and 8,194, respectively.

Based on this data, Rule 506 was clearly preferred through 2011. It is likely that aspects of Rule 506 such as state preemption and the lack of a qualification process were appealing to issuers. It is noteworthy that the limitations of Rule 506 offerings, such as the limit on types of issuers, did not deter the use of Rule 506 offerings—at least not prior to the JOBS Act's passing.

III. REGULATION A MODIFICATIONS UNDER THE JOBS ACT

A. In General

With the discussion in Parts I and II serving as important background, we can appreciate the context that precipitated Congress' decision to revisit Regulation A through Title IV of the JOBS Act. It is important to note that the SEC's final Regulation A rules resulted after much wrangling, primarily with state regulators who opposed Regulation A because it preempted state Blue Sky filing requirements. The SEC compromised by bifurcating

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43 See GAO-12-839, supra note 2, at 11 (showing the number of Regulation A filings compared to other exemptions).
44 Id.
45 Id.
46 Id.
47 Id.
48 Some state officials filed suit in court to challenge the rule legally and went after specific aspects of the rule. See Newman, supra note 6, at 93. See also Linden v. SEC, 825 F.3d 646, 648 (D.C. Cir. 2016).
49 See Newman, supra note 6, at 93.
Regulation A into two tiers: Tier 1 and Tier 2.\textsuperscript{50} Tier 1 offerings are limited to offerings from $0 to $20 million.\textsuperscript{51} Tier 2 offerings are for offerings up to $50 million.\textsuperscript{52} Tier 1 offerings are subject to the same state registration requirements that were in effect prior to the JOBS Act’s passing,\textsuperscript{53} whereas the Tier 2 offerings are exempt from state registration requirements.\textsuperscript{54} Although not subject to state registration, the Tier 2 offerings require much more in the way of disclosure and compliance.\textsuperscript{55} Issuers can choose which tier they would like to use simply by noting their selection in their filing and then comporting their offering to comply with that tier’s mandates.

B. The Specifics

1. Tier 1 Offerings: $0–$20 million

Generally speaking, the Regulation A Tier 1 offering rules are exactly the same as they were pre JOBS Act revisions—the notable exception being the raising of the cap from $5 million to $20 million.\textsuperscript{56} Issuers are still required to prepare and file Form 1-A,\textsuperscript{57} as well as to register their offering in each state in which the issuer intends on offering its securities.\textsuperscript{58} As far as Tier 1 offerings are concerned, the pressing question is whether raising the cap from $5 million to $20 million is enough of an incentive to increase Regulation A filings. From an issuer perspective, under the Tier 1 regime two big issuer deterrents remain post JOBS Act: the SEC qualification requirement and the state registration requirement. These obstacles remain substantial. In our sample of Regulation

\textsuperscript{50} 17 C.F.R. § 230.251(a) (2017).
\textsuperscript{52} 17 C.F.R. § 230.251(a)(2) (2017).
\textsuperscript{53} 15 U.S.C. § 77r(b)(4) (2016) (comparing Section 15 to Section 18 to show that Section 18 of the Securities Act of 1933 generally does not exempt Regulation A offerings from state registration and filing requirements).
\textsuperscript{54} 15 U.S.C. § 77r(b)(3) (2016) (exempting sales of securities to “qualified purchasers,” as defined by SEC rules, from state regulation of securities offerings). Regulation A’s final rules broadly define “qualified purchaser” as “any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A.” 17 C.F.R. § 230.256 (2017).
\textsuperscript{55} See SEC FORM 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings).
\textsuperscript{56} Compare 17 C.F.R. § 230.251(a)(1) (2017) (limiting Tier 1 prices to a maximum of $20 million), with 17 C.F.R. § 230.251(b) (2014) (limiting exemption amount to a maximum of $5 million).
\textsuperscript{57} See 17 C.F.R. § 239.90 (2017) (requiring the use of Form 1-A for Regulation A offerings).
\textsuperscript{58} See GAO–12–839, supra note 2, at 13–15.
A+ filers, we found it took Tier 1 filers an average of 375 days to qualify, up from 228 days before the JOBS Act.\textsuperscript{59}

2. Tier 2 Offerings: $0--$50 million

The most significant Regulation A revisions, however, occurred in the Tier 2 offering requirements. The first major change involved the raising of the aggregate offering limit from $5 million to $50 million.\textsuperscript{60} This increased limit triggers a host of additional requirements on the issuer’s part, presumably to offset the additional exposure to investors. In connection with the Form 1-A filing, which must still be filed for Tier 2 offerings, the issuer must also include audited financial statements.\textsuperscript{61}

Additionally, Tier 2 filers must file these audited financial statements on an ongoing basis.\textsuperscript{62} The exception to this reporting requirement occurs only when the issuer has fewer than 300 shareholders.\textsuperscript{63} The filing of audited financial statements is not an insignificant requirement. Generally speaking, preparation of such statements can cost small business issuers anywhere from $10,000 to $50,000 depending on the size of the company and the amount of work required.\textsuperscript{64}

Finally, and perhaps most significantly, Tier 2 filings are exempt from all state Blue Sky laws and registration requirements.\textsuperscript{65} This exemption for Tier 2 filers came about due to the SEC, in its final rule making, refusing to acquiesce to state regulators who opposed state preemption for Regulation A offerings regardless of size.\textsuperscript{66} In their opposition, state regulators argued that they were in the best position to protect their residents from financial fraud or other

\textsuperscript{59} See infra Appendix B, Section II.
\textsuperscript{60} See supra note 11 and accompanying text.
\textsuperscript{61} See SEC Form 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings).
\textsuperscript{62} See 17 C.F.R. § 230.252(a) (2017) (noting the documents that must be included with an offering statement, including those contents required by Form 1-A); 17 C.F.R. § 230.252(r)(2) (noting post-qualification amendment requirements, including annual financial statements); SEC Form 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings).
\textsuperscript{63} 17 C.F.R. § 230.257(d)(2) (2017).
\textsuperscript{64} See, e.g., Fig Pub., Inc., Regulation A Offering Statement (Form 1-A) (Dec. 21, 2015) (noting fees for accounting or audits at $37,500); Medalist Diversified REIT, Inc., Regulation A Offering Statement (Form 1-A) (Oct. 5, 2015) (noting fees for accounting or audits at $65,500).
\textsuperscript{65} See supra note 54 and accompanying text.
\textsuperscript{66} See generally sources cited supra note 48.
potential misdeeds in the private offering space as opposed to the federal government.\textsuperscript{67} To bolster their argument, they pointed towards the number of fraud instances that appear to accompany Rule 506 D offerings.\textsuperscript{68}

Nonetheless, the SEC held firm to its position and exempted all Tier 2 filers from state filing or registration requirements.\textsuperscript{69} I applaud the SEC’s resolve. If the SEC had kept the state filing requirements in the final rule, the state regulators would have all but insured that Regulation A+ would have been as unappealing as its predecessor. In its current iteration, however, Regulation A+ may have a chance of gaining traction as a popular exemption choice for small businesses. In our sample of Regulation A+ filers, we found it took Tier 2 filers 120 days to qualify.\textsuperscript{70}

\textbf{IV. THEORETICAL JUSTIFICATION FOR CHOOSING REGULATION A}

A thoughtful issuer will choose the offering that provides the best combination of attributes corresponding to the issuer’s situation. The issuer’s choice will be a function of the issuer’s size, capital requirements, stage of development, type of business, and the issuer’s investor pool demographic.\textsuperscript{71} Individual circumstances, therefore, dictate the issuer’s choice. So, what would cause a thoughtful issuer to choose Regulation A+ over other options, such as Regulation D’s Rule 506? Regulation A+ will be selected when it provides something unique and important to the issuer that other exemptions do not. To that end, a side by side comparison of Regulation A+ and Regulation D’s Rule 506 follows to show which features are unique to each.

\textsuperscript{67} See, e.g., Letter from Andrea Seidt, President, N. Am. Sec. Adm’rs Ass’n, Inc., to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n 10, 14 (on file with author) (arguing that maintaining state registration of Regulation A offerings will promote investor protections by States as intended by Congress).
\textsuperscript{68} Id. at 14.
\textsuperscript{69} 15 U.S.C. § 77r(b)(3) (2016) (exempting sales of securities to “qualified purchasers,” as defined by SEC rules, from state regulation of securities offerings). Regulation A’s final rules broadly define “qualified purchaser” as “any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A.” 17 C.F.R. § 230.256 (2017).
\textsuperscript{70} See infra Appendix B, Section II.
\textsuperscript{71} Here I am drawing upon my prior experience as a practitioner. These are the variables we considered before deciding upon an appropriate exemption for the companies we assisted with exempt offerings.
A. Regulation A+ vs. Regulation D’s Rule 506

1. Offering Size

As discussed earlier, Regulation A+ as revised allows the issuer to offer up to $50 million of securities in any twelve-month period. 72 The offering size for Rule 506 is unlimited. 73

2. Filing Requirements

Regulation A+, even as revised, still requires the issuer to complete and file the formidable Form 1-A. 74 Once completed, however, the full offering circular can range anywhere from 50 to over 100 pages. 75 Rule 506, on the other hand, has no formal SEC filing requirement and no SEC qualification process. 76 Thus, while the Regulation A filer has to comply with the SEC's qualification process (which may take up to two to three months even under optimal circumstances), Rule 506 issuers can offer their shares immediately with no SEC review or qualification process. Rule 506 issuers do, however, have to notice the SEC whenever the issuer does a Regulation D offering. The issuer is required to file a Form D, which asks for basic information about the offering. The Form D is not subject to any review or qualification process, however. 77

3. Disclosure Requirements

As discussed earlier, Regulation A+ now has a two-tiered offering structure. Tier 1 does not require audited financial statements. Tier 2 filers, however, must include audited financial statements with its Form 1-A filing and file audited financial statements with the SEC on an annual basis. 78 Recall that

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72 See supra note 11 and accompanying text.
74 See supra note 11 and accompanying text.
75 See, e.g., Medalist Diversified REIT, Inc., Offering Circular (Form 1-A) (Oct. 5, 2015) (totaling 93 pages in length plus exhibits); AdvantaMeds Solutions USA Fund I, Inc., Offering Circular (Form 1-A) (Nov. 6, 2015) (totaling 78 pages in length plus exhibits).
76 See supra note 37 and accompanying text.
Tier 2 filers must file annual audited financial statements with the SEC indefinitely following their Tier 2 offering, unless the issuer has fewer than 300 shareholders. Tier 1 filers have no such ongoing filing obligations. The ongoing audited financial statement requirement is a fixed cost burden to which Tier 2 filers are subject regardless of size, profitability, or other issuer characteristics.

This rule assumes because the issuer has more than 300 shareholders it is of sufficient size and infrastructure to absorb these costs. I question in how many cases that holds true for Regulation A filers. Again, one of the unique Regulation A characteristics (which will be discussed in further detail momentarily), is that anyone can invest in a Regulation A offering regardless of net worth, net income, or investor sophistication. In that regard, under a Regulation A offering, it is conceivable that an issuer could have an investor base with a high number of shareholders, but with each shareholder investing nominal amounts. The end result would be a high number of shareholders but a modest—if not small—capital yield from the offering. Issuers in this predicament would nonetheless be required to provide audited financial statements on an annual basis but may not have the requisite size or infrastructure to be able to absorb such cost while still having sufficient capital to execute their business plans. The ongoing audited financial statement requirement for Regulation A Tier 2 filers is yet another area where the SEC may have overburdened issuers.

For a Rule 506 offering, the disclosure requirements are a bit more involved, but do not involve audited financial statements. When shares are issued to non-accredited investors under Rule 506, the disclosure regime is graduated based on the offering size. Generally speaking, larger offering sizes require more disclosures. These disclosure requirements include both non-financial and financial statement information. On the other hand, issuers are not required to provide financial and business disclosures to accredited investors. But as a practical matter, issuers will provide the same information...

81 See generally 17 C.F.R. §§ 230.251–230.263 (2017) (placing no stipulations on the investor’s qualifications and, by inference, allowing anyone to invest in a Regulation A offering regardless of net worth, income, or financial sophistication).
83 Id.
85 See supra note 21 and accompanying text.
to accredited investors that it provides to non-accredited investors because of Rule 10b-5’s anti-fraud provisions.\(^86\)

The Rule 506 issuer is required to provide the same non-financial information that would be required in a Form 1-A offering circular.\(^87\) If the issuer is not Regulation A eligible, on the other hand, then the issuer must provide “the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.”\(^88\) Unlike Regulation A+ Tier 2, Rule 506 does not require issuers to prepare ongoing disclosures.

The Rule 506 financial statement disclosure requirements are based on offering size: (1) offerings up to $2 million, (2) offerings up to $7.5 million, and (3) offerings over $7.5 million. The greater the offering size, the more the issuer is required to disclose to the non-accredited investor about the issuer’s financial condition.\(^89\) For offerings up to $2 million, the issuer is required to provide audited financial statements for the two previous years.\(^90\) For offerings up to $7.5 million, the issuer must provide “the financial statement information required in Form S-1 for smaller reporting companies.”\(^91\) And finally, for offerings greater than $7.5 million, the issuer must provide “the financial statements as would be required in a registration statement filed under the [1933] Act on the form that the issuer would be entitled to use.”\(^92\)

Which provision is more preferable in the area of financial reporting? This call is a close one, but I might give the edge to Regulation A. Tier 1 offerings have no audited financial statement requirement at filing, but Tier 2 offerings do.\(^93\) Rule 506 has the complicated graduated scale, which is a function of offering size, and investor demographic. Recall that issuers are not required to provide disclosures of any kind to accredited investors, but must provide this financial information to others.\(^94\) The argument for Regulation A being the

\(^{88}\) Id.
\(^{90}\) See 17 C.F.R. § 230.502(b)(2)(i)(B)(1) (2017) (noting that the issuer must include information required in Article 8 of Regulation S-X, which generally requires audited financial statements for the two previous years, but here, only the issuer’s balance sheet must be audited).
\(^{93}\) See SEC FORM 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings).
preferred choice here is that the requirement is simple; audited financial information is required for all Tier 2 filers—period. If one were being highly nuanced on the financial disclosure question, then the argument for Rule 506 would be: if all the issuer’s investors were accredited, then the need for any financial statement disclosures by law would not be required.

But as mentioned earlier, federal securities law is a complicated creature to grapple with; it is full of idiosyncrasies and hidden traps for the unwary. As a practical matter, it is good practice to provide financial and business information to all of your investors, regardless of demographic. This is so because under Rule 10b–5, an issuer can be held liable if the issuer, among other things, fails to disclose material information. By providing complete and accurate information to all of its investors, the issuer avoids this potential disclosure snag.

4. The Accredited Investor or “Financially Savvy Requirements”

As mentioned earlier, the fact that anyone can invest in a Regulation A offering regardless of net worth, net income, or financial sophistication, is a unique characteristic of Regulation A. The only limit placed on Regulation A investors is the amount they invest. Regulation A investors who are not accredited can invest no more than ten percent of their net worth or ten percent of their income, whichever is greater. Interviews conducted with selected companies reveal that issuers address Regulation A’s ten percent net income and net worth limits simply by having the investors attest to being within them.99

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95 See SEC FORM 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings).

96 17 C.F.R. § 240.10b–5 (2017). Rule 10b–5 is the general anti-fraud provision of the federal securities laws which can hold anyone liable for violating the federal securities laws if they are fraudulent in either the buying or selling of a security. The Rule 506 offerings would be subject to this general provision, which is why issuers may often choose to provide financial information even where all the investors are accredited. See 17 C.F.R. § 230.506 (2017). Now, the issuer could choose to provide unaudited financial information, which would substantially cut down on the cost of providing such information.


99 See 17 C.F.R. § 230.251(d)(2)(i)(D) (2017). Typically, the investors make this attestation in the subscription agreement that they sign as a precursor to taking ownership of the stock.
In contrast to Regulation A, Rule 506 investors must be accredited, or at the very least, financially savvy.\textsuperscript{100} In Sections V and VI we will drill down on this characteristic a bit more to determine whether having access to a limitless investor pool—regardless of net worth, net income, or financial sophistication—is a consistent and clear advantage that Regulation A has over Regulation D’s Rule 506.

5. Restricted Shares

When shares are “restricted,” the shareholder may not sell those shares unless the shares are registered or the shares are issued under another applicable exemption.\textsuperscript{101} Regulation A shares are “unrestricted”, which means that the holder of those shares can re-sell those shares freely, and does not have to worry about having the shares registered or finding an applicable exemption.

Rule 506 shares, on the other hand, are restricted shares, and therefore the shareholder cannot re-sell those shares unless they are registered or resold relying on an applicable exemption.\textsuperscript{102} Again, all things being equal, the edge appears to go toward the Regulation A+ filer. Having freely tradeable shares upon receipt gives the investor a flexibility option that Rule 506 does not provide. We will drill down on this in the following section to see if there are some caveats to this apparent advantage.

6. “Testing the Waters”

The Regulation A+ offering exemption also has what is referred to as a “Testing the Waters” provision.\textsuperscript{103} This provision allows issuers to gauge the interests of prospective investors before actually undergoing the SEC’s qualification process. So, the issuer can get indications of investor interest for

\textsuperscript{100} See 17 C.F.R. § 230.506(b)(2)(ii) (2017) (requiring investors who are not accredited to have “such knowledge and experience in financial and business matters that [they are] capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that purchaser comes within this description,” which has come to be referred to as the “financially savvy” requirement).

\textsuperscript{101} This Rule stems from the ‘33 Act’s general construction. The ‘33 Act’s Section 5 prohibits the sale of unregistered securities. But we are also aware of the numerous exceptions to this general rule where issuers can sell securities under an applicable exemption. Regulation A and Regulation D’s Rule 506 being among the possible exemptions.

\textsuperscript{102} See 17 C.F.R. § 230.506 (2017). Understand, these shares are restricted by virtue of the fact that they have not been registered, as the shares have been issued under the Regulation D Rule 506 exemption.

\textsuperscript{103} 17 C.F.R. § 230.255(a) (2017).
its company before deciding on whether or not the issuer wants to offer the
security for sale, and thus go through the SEC's qualification process and any
applicable state registration requirements. The "Testing the Waters" provision,
however, cannot be compared directly to Rule 506 because Rule 506 does not
have a filing requirement at all. Rule 506 issuers can commence selling their
shares right away, the only big compliance hurdles facing Rule 506 issuers
involve determining whether their investors are accredited, and then making
sure that those investors receive any financial and non-financial disclosures
accordingly.

B. But are the Regulation A+ Advantages Really Advantages?

In sum, Regulation A+ has several distinct features: the ability to issue
shares to anyone regardless of their net worth, net income, or their financial
status; selling unrestricted shares; and the ability to "test the waters" before
undergoing the qualification process. Are these distinctive characteristics
attractive enough to cause an issuer to forego other options, including the
apparently superior features that Rule 506, for example, would provide?

In my previous article, I questioned whether being able to issue shares to
anyone regardless of net worth, net income, or investor sophistication was
really an advantage.104 I took the position that if your primary motivation for
choosing Regulation A+ was so that you could cast your investor net as wide
as possible so as to capture those who were neither accredited investors nor
financially savvy, that might not be a good thing.

The rationale in my previous article for taking this position was: if you are
not an accredited investor (i.e. someone who does not have a net worth
exceeding $1 million or a net income of at least $200,000), nor a person who is
"financially savvy," then presumably you are a person who may be operating
at a more modest disposable income level. Likewise, if you are not "financially
savvy," presumably you are the type of investor who may be treading in
unfamiliar territory.106 I argued that an investor pool consisting predominantly

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104 See Newman, supra note 6, at 87.
105 The rule, in relevant part, reads, "Each purchaser who is not an accredited investor either
alone or with his purchaser representative(s) has such knowledge and experience in financial
and business matters that he is capable of evaluating the merits and risks of the prospective
106 See Newman, supra note 6, at 87.
of low net income, or low net worth investors who have limited investment knowledge would be less than ideal for any issuer.\textsuperscript{107}

First, if an investor is neither a high net worth nor a high net income individual, then that person presumably is investing money that he or she can ill afford to lose.\textsuperscript{108} It is logical to conclude that investors of this nature could prove burdensome for the issuer.\textsuperscript{109} One can envision the issuer having to spend a great deal of time easing fears of nervous and unenlightened investors who may have invested money that will make an appreciable impact on their lives if lost.\textsuperscript{110}

Granted, if the investor is not an accredited investor, Regulation A+ limits the investment amount to the greater of 10\% of the investor’s net worth, or 10\% of the investor’s annual net income.\textsuperscript{111} But ten percent from someone making $50,000 a year ($5,000) will have a much more significant financial impact on that person than would a ten percent investment from someone making $150,000 ($15,000). The overall point here is that if relatively lower income individuals end up investing there is a much higher likelihood that these individuals could be investing money that they can ill afford to lose. Given their potential lack of financial sophistication, it is foreseeable, if not likely, that this will be happening with greater frequency under Regulation A+.

Second, Regulation A+ assumes that, because Regulation A+ offerings are open to anyone regardless of net worth or financial sophistication, there is a critical mass of modestly wealthy individuals who are not financially savvy but who are willing, able, and interested in investing in emerging growth companies. However, given the apparent success of a number of Regulation A filers (discussed in the following section), it appears that these investors do exist and are numerous enough to support a number of Regulation A filings. My initial reservations on this point seem to be unfounded.

Third, Regulation A+ shares are unrestricted. The ability of investors to freely resell the securities on the secondary market has obvious appeal, assuming the company continues to grow and thus there is secondary market appeal for the shares. However, the existence of secondary market appeal is a strong assumption to make in most cases. As will be discussed in Part V below, very few of these companies are likely to grow past their fledgling startup phase to a size where they would have broad secondary market appeal. Accordingly,
it is not entirely clear, as a theoretical matter, whether the unrestricted nature of Regulation A+ shares is an appealing characteristic or not.

Fourth, Regulation A's “Testing the Waters” provision provides significant advantages to the emerging growth company, as it allows these companies to see if this exemption will work best for them prior to expending the resources required to undertake it. How this works mechanically is the issuer submits its Regulation A filing to the SEC, but before the filing undergoes the qualification process, the issuer can solicit investors either orally or in writing to determine whether the investor has any interest in the proposed securities offering. This “Testing the Waters” provision is equivalent to taking a car for a test drive before buying it. Just as the potential car buyer is under no obligation to purchase the car, those investors who have given “indications of interest” are not obligated to purchase the shares.

Finally, Regulation A+’s disclosure requirements seem to be preferable to Rule 506’s because they are simpler. Regulation A+ merely requires that all Tier 2 filers provide audited financial information. One might argue that Rule 506’s financial disclosure provisions are preferable, since no financial disclosure is required at all if all the issuer’s investors are accredited. However, as mentioned earlier, federal securities law is full of idiosyncrasies and traps for the unwary. Regardless of the regulations, as a practical matter, an issuer should provide financial and business information to all investors so as to avoid liability under Rule 10b-5 for failure to disclose material information.

V. HOW HAVE ISSUERS RESPONDED?

Thus far, everything I have alleged about the implications of Regulation A+’s provisions is theoretical and speculative. The remainder of this article explores how issuers actually perceive and use Regulation A+ in practice. I do this by assessing (1) a sample of Regulation A filings and analyzing those filings to see what we can learn from them; and (2) interviewing a select group of

113 See SEC Form 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings).
114 17 C.F.R. § 240.10b-5 (2017). Rule 10b-5 is the general anti-fraud provision of the federal securities laws which can hold anyone liable for violating the federal securities laws if they are fraudulent in either the buying or selling of a security. The Rule 506 offerings would be subject to this general provision, which is why issuers may often choose to provide financial information even where all the investors are accredited. See 17 C.F.R. § 230.506 (2017). Now, the issuer could choose to provide unaudited financial information, which would substantially cut down on the cost of providing such information.
Regulation A filers to get first-hand accounts as to why Regulation A was their exempt offering choice and feedback about their experience with it.

A. The Numbers behind the Story

In contrast to my predictions and speculation that Regulation A+ would be no more appealing than Regulation A's initial version, since the JOBS Act's passage in 2012, there has been a significant increase in Regulation A filings.115 Specifically, 267 Regulation A+ filings were filed between August 13, 2012 and May 24, 2016, as compared to 2011 when there were only 11 Regulation A applications filed, of which only one was qualified.116 Thus my focus is: What is the story behind these numbers and what is the reason for this significant uptick in Regulation A filings? Is it a fad or is there some clear rationale for the significant increase in issuers now choosing the Regulation A exemption as opposed to the historically more popular Rule 506 Regulation D exemption? What is more, I am specifically concerned with whether Regulation A is providing some kind of advantage that other exemptions are not, for that would be the only logical reason for choosing Regulation A over other options.

Of the over 267 Regulation A+ filings that were filed between August 13, 2012 and May 24, 2016 I sampled a subset of 48 of these filings.117 I looked at a number of variables such as the maximum and minimum offering amounts, the size of the issuers in terms of assets, liabilities, revenues, and income. I also looked at the number of days between the issuer submitting its Regulation A filing and the SEC qualifying the offering.118 Ultimately, the sampled filings revealed some interesting trends.

Of the sampled filings, 19 were Tier 1 filings (39.6 percent) and the remaining 29 were Tier 2 filings (60.4 percent).119 The average minimum offering amount over the entire sample size was $829,861 and the average maximum offering size over the entire sample was $17,677,397.120 Average total assets over the entire sample were $6,215,061 with average total liabilities

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115 See supra Section I (discussing increase in Regulation A filings).
116 See infra Appendix A.
117 See infra Appendix B, Section I to view companies sampled.
118 The companies sampled are tabulated and summarized in Appendix B. Sample results are discussed in Section V.
119 See infra Appendix B, Section I - Summation for “Tier” column.
120 See infra Appendix B, Section I - Summations for “Min. Offering Amt.” and “Max. Offering Amt.” columns.
at $5,829,579, which leaves an average total net worth of $385,482.121 Additionally, average revenue over the sample was $391,377, which resulted in an average net loss of $314,238.122 Thus, one can readily conclude that the majority of the companies issuing securities under Regulation A are not very large, and that Tier 2 offering amounts are not approaching the statutory $50 million limit. Additionally, on average these companies are not yet profitable123

1. Analyzing the Tier 1 Data

The Tier 1 offerings reveal some interesting observations. The average maximum offering amount for the Tier 1 filer was $7,643,434, just $2.6 million over the previous limit of $5 million.124 The average total assets for the Tier 1 filer was $13,168,719.125 Average total revenue for the Tier 1 filer was $54,071, which resulted in an average net loss for all Tier 1 filers of $34,182 per company.126 These numbers suggest that most Tier 1 filers are unlikely to need $20 million of raised capital. This observation is corroborated by the fact that very few Tier 1 filers even came close to seeking the $20 million offering limit. In fact, in our sample, only three out of the 21 Tier 1 filers actually sought the maximum $20 million offering amount. Only two out of these three were actually qualified.127 The next two highest filers each sought maximum offering amounts of $14 million.128

Additionally, the average number of days that it took for the Tier 1 filers in our sample to get qualified was 375 days, 147 days longer than the pre-revision average.129 This suggests that the revisions have not improved the efficiency of the qualification process. In fairness, this sample size was taken right after the JOBS Act had just been passed. Thus, any improvements or efficiencies that may have been implemented under revised Regulation A may

121 See infra Appendix B, Section I – Summations for “Total Assets”, “Total Liabilities”, and “Net Worth” columns.
122 See infra Appendix B, Section I – Summations for “Revenue” and “Net Income” columns.
123 See infra Appendix B, Section I – Summation for “Net Income” column.
124 See infra Appendix B, Section II.
125 See infra Appendix B, Section II.
126 See infra Appendix B, Section II.
127 See infra Appendix B, Section I – AdvantaMeds (filed Nov. 6, 2015), San Carlos Resort, LLC (filed Jan. 7, 2016), and 360 Sports, Inc. (filed Jan. 22, 2016) (all seeking the maximum of $20 million allowed under Tier 1 Regulation A filings).
128 See infra Appendix B, Section I – Mountain Top 81, LLC (filed Mar. 25, 2016) and Pine Ridge Apartments, LLC (filed Apr. 1, 2016).
129 See infra Appendix B, Section II. Recall that before implementation of the JOBS Act, it took an average of 228 days for Regulation A filers to get qualified. See infra Section II.B.
not have manifested during the time period in which the Regulation A+ filings were reviewed. Only 57.1 percent (12 of the 21 Tier 1 filers in our sample) received SEC qualification.\footnote{See infra Appendix B, Section II.} The remaining nine, for various reasons, never got their Regulation A offering qualified with the Securities and Exchange Commission.\footnote{An issuer may not get qualified for a number of reasons. The issuer may go out of business during the course of trying to obtain funding, or the issuer may simply lose interest in the Reg. A filing while trying to comport with the SEC’s qualification process.}

1.1. Takeaway Points

a. Even though the JOBS Act revisions allow for Tier 1 issuers a maximum raise of $20 million in any 12-month period, the Tier 1 filers in our sample still tended to be closer to the $5 million offering size which was the maximum amount allowed under the old regime.\footnote{17 C.F.R. § 230.251(b) (2017).}

b. Even under the revised Regulation A, the time period for an issuer submitting a Tier 1 filing and getting qualified was just as long, if not longer, than the average time for qualification under the old regime.\footnote{See infra Appendix B. Recall that before implementation of the JOBS Act, it took an average of 228 days for Regulation A filers to get qualified. See infra Section II B.} This is of course with the caveat that improvements or efficiencies under the new Regulation A may not have manifested during the time period covering our sample.

c. With average total assets for Tier 1 filers at approximately $13.2 million and average revenue at $54,071, it is most likely the case that most Tier 1 filers are not sizeable enough to need $20 million of raised capital. In fact, very few Tier 1 filers even came close to seeking the new offering maximum. In our sample, only three out of the 21 Tier 1 filers actually sought the maximum and only two were actually qualified, requiring 59 and 73 days respectively to reach the qualification point.\footnote{See infra Appendix B, Section I – AdvantaMeds (filed Nov. 6, 2015), San Carlos Resort, LLC (filed Jan. 7, 2016), and 360 Sports, Inc. (filed Jan. 22, 2016) (all seeking the maximum of $20 million allowed under Tier 1 Regulation A filings).} The next two highest filers each sought maximum offering amounts of $14 million.\footnote{See infra Appendix B, Section I – Mountain Top 81, LLC (filed Mar. 25, 2016) and Pine Ridge Apartments, LLC (filed Apr. 1, 2016).}
2. Analyzing the Tier 2 Data

The average maximum Tier 2 offering price was just over $23 million.\textsuperscript{136} The SEC qualified 17 of the 29 Tier 2 filers (58.6 percent) comprising our sample.\textsuperscript{137} It took the SEC an average of 120 days to qualify those Tier 2 filings.\textsuperscript{138} Average total assets for Tier 2 filers was $751,028, with a similar level of total liabilities at $795,102.\textsuperscript{139} Average revenue for Tier 2 filers was $612,371 with an average net loss of $481,334.\textsuperscript{140}

Although a Tier 2 offering allows an issuer to raise up to $50 million in any twelve month period, the average maximum offering size was just over $23 million—close to the Tier 1 offering maximum.\textsuperscript{141} Only eight of the 29 Tier 2 filers in the sample sought the maximum $50 million offering size.\textsuperscript{142} One additional company listed its maximum offering size at $49 million.\textsuperscript{143} The SEC qualified six out of the eight Tier 2 filers that were seeking the $50 million maximum offering amount. On average, the SEC qualified Tier 2 offerings much more quickly than the Tier 1 offerings. The shorter qualification times are likely attributed to the SEC streamlining its qualification process as it gets used to operating under the revised Regulation A rules.

VI. WHY ARE ISSUERS CHOOSING REGULATION A?

A. Post-JOBS Act Analysis

The analysis of Regulation A’s provisions before and after the JOBS Act reveals that several of the issues that made Regulation A so unappealing—namely the state registration requirements for all Tier 1 filers and the long lead times between filing and qualification—survived the revisions. Tier 2 filers

\textsuperscript{136} See infra Appendix B, Section II.
\textsuperscript{137} See infra Appendix B, Section II.
\textsuperscript{138} See infra Appendix B, Section II.
\textsuperscript{139} See infra Appendix B, Section II.
\textsuperscript{140} See infra Appendix B, Section II.
\textsuperscript{141} See infra Appendix B, Section II.
\textsuperscript{142} See supra note 11 and accompanying text.
\textsuperscript{143} See infra Appendix B, Section I. The eight filers seeking the maximum offering size were: Medalist Diversified REIT, Inc.; Punch TV Studios, Inc.; Hamilton National Income Trust, Inc.; GK Investment Holdings, LLC; Cottonwood Multifamily REIT, Inc.; Brewdog USA, Inc.; ThrillCorp, Inc.; and American Homeowner Preservation, LLC.
\textsuperscript{144} See infra Appendix B, Section I (Teraphysics Corp.).
have it worse since they must provide audited financial statements in the filing and adhere to ongoing periodic reporting requirements.\footnote{145} What can explain, then, the dramatic increase in the volume of Regulation A+ filings? The answer perhaps lies in the technology that has evolved with respect to equity offerings. In private equity offerings, as in so many other venues, the internet has fundamentally changed the way business is conducted. Private equity offerings are now being offered through crowdfunding platforms such as SeedInvest, that connect startups with investors online.\footnote{146} SeedInvest was founded in 2012 and launched in 2013.\footnote{147} A visit to their website shows a menu of companies, each offering their securities through the SeedInvest online portal.\footnote{148} These companies are using their portal to offer their securities through Regulation A, as well as other exempt transaction rules.\footnote{149}

The ability to offer equity through these portals may help explain the rise in demand for Regulation A offerings. These portals give the Regulation A filer access to an unlimited pool of potential investors. Since Regulation A, unlike Rule 506(b) or 506(c), does not have any investor qualification stipulations,\footnote{150} Regulation A filers can offer securities to all investors without doing any screening or due diligence.

Despite the initial appeal of this option, managing a large shareholder class—particularly one composed primarily of unsophisticated investors—could pose long-term challenges for young companies. Foreseeable is a situation where an issuer has offered shares under the Regulation A exemption but four or five years after the offering, the company still has yet to achieve profitability. Unsophisticated investors, those not steeped in the speculative nature of investing in startup companies, may require a lot of hand-holding on the issuer’s part. Frequent inquiries to the company as to when profitability is expected or when the investor may see returns on his investment are all plausible fallouts. Granted, this is all speculative at this point. But early signs are already pointing in this direction.\footnote{151}

\footnote{145} See supra note 55 and accompanying text. See also 17 C.F.R. § 230.252(f)(2)(i) (discussing annual filing requirements).
\footnote{148} See Live Startups, SEEDINVEST, supra note 146.
\footnote{149} See id.
\footnote{150} See supra note 81 and accompanying text.
\footnote{151} See the discussion of the Elio Motors example in Section VII infra.
The burdens of a large investor class are particularly pronounced for Tier 2 filers. They are required to provide audited financial statements on an annual basis, unless their shareholder class declines below 300 members. Given the investment limitations placed on investors in Regulation A offerings, we can infer that the typical Regulation A Tier 2 investor will be investing in relatively low amounts and therefore the number of investors is likely to be high enough that the 300 shareholder threshold would easily be exceeded.

Additionally, a thoughtful issuer should choose an offering exemption that is both cost and time efficient. Neither Regulation A’s Tier 1 or Tier 2 offering regimes fall into this category. Tier 1 involves state registration requirements, and Tier 2 has its audited financial statement and ongoing periodic reporting requirements.

The ongoing periodic reporting requirement, which includes audited financial statements, is costly, particularly for the smaller companies that are choosing the Regulation A offering exemption. As the sample of Regulation A+ filers illustrates, many of these companies are not generating revenue of any significant size, and are, on average, operating at a net loss. So, few of these companies have the ability to readily absorb the compliance costs of a Tier 2 filer. The annual audit costs alone could equal 10 or 20 percent of the company’s operating revenue. The logic in going the Regulation A Tier 2 route is just not there, at least not in theory.

Furthermore, the time lag between the Regulation A filing and SEC qualification, although improving, still involves a considerable amount of time. This waiting period could get shorter over time as both the SEC and its issuers become more familiar with the process, but the mere existence of a qualification process gives Regulation A+ a greater burden than other exempt offering regulations.

Based on the above analysis, it would seem that the only rationale for choosing the Regulation A exemption—as opposed to Regulation D’s Rule

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152 See SEC FORM 1-A, supra note 24, at Part F/S(c) (requiring audited financial statements for Tier 2 Regulation A offerings). See also 17 C.F.R. § 230.252(f)(2)(i) (discussing annual filing requirements).


154 For example, a modest $5 million offering with a minimum investment of $500 per shareholder would then result in a maximum of 10,000 shareholders.

155 See infra Appendix B, Section II (noting the average net loss of $34,188 and $481,334 for Tier 1 and Tier 2 filers respectively).

156 See, e.g., Fig Pub., Inc., Regulation A Offering Statement (Form 1-A) (Dec. 21, 2015) (noting accounting fees of $37,500 while recording no revenue for the period covering Oct. 27, 2014 (inception) to Sep. 30, 2015).
506—would be if the issuer were specifically targeting non-accredited investors and expected that these non-accredited investors would comprise the bulk of the issuer’s investor base.157

B. Actual Companies and Their Experience with Regulation A+

In order to supplement these theoretical considerations, I interviewed a select group of companies to get their perspective on their choice to offer securities using Regulation A+. Their responses, below, are insightful, and lead to a different conclusion than the purely theoretical analysis.

KEEN HOME: One of the first companies I talked to was Keen Home, Inc.158 Keen Home appeared on the ABC syndicated show Shark Tank back in February, 2015.159 The two co-founders, Ryan Fant and Nayeem Hussain made their pitch to the Sharks.160 The Sharks found the Keen Home product and concept intriguing, and several of them engaged in a bidding war for the opportunity to invest.161 The two founders ultimately ended up accepting Robert Herjavec’s offer, which was $750,000 in exchange for a 13 percent equity stake in the company.162 Keen Home’s product is “the world’s first smart venting product for homes with central HVAC. The Keen Home Smart Vent regulates a home’s heating/cooling airflow on a room-by-room level, which the company believes results in improved comfort and efficiency.”163

157 See 17 C.F.R. § 230.506 (2017) (providing exemption for limited offers and sales without regard to the dollar amount of the offering as long as certain conditions are met).
159 Shark Tank is a business themed reality show where the Sharks, a group of self-made tycoons, look for new business ventures in which to invest. Entrepreneurs make their pitches and attempt to convince the Sharks to invest money into their companies. About Shark Tank, ABC, http://abc.go.com/shows/shark-tank/about-the-show (last visited Jan. 20, 2018).
161 See id. (video clip available as of Nov. 15, 2017 at http://abc.go.com/shows/shark-tank/video/p155379712/VDKA0_te811k).
163 Keen Home, Inc., Preliminary Offering Circular (Form 1-A), 4 (Nov. 10, 2016).
Keen Home’s appearance on Shark Tank served as the backdrop for my interview in March of 2017 with one of the two co-founders, Ryan Fant. Regarding Keen Home’s decision to use Regulation A, Mr. Fant explained that Keen Home was a consumer product and that right now the company was trying to build brand awareness and grow their business.\(^{164}\) When Keen Home explored private offering exemptions, they did not know much about Regulation A, but saw Regulation A as an opportunity to capitalize on buzz about the company created by their appearance on the show.\(^{165}\) Mr. Fant saw the Regulation A offering as an opportunity to capitalize on that awareness by helping them build both their capital and brand awareness through their investors. As Mr. Fant explained, their thinking was that their investors would be their “evangelists”—that they would get the word out about the product and would use it as well.

Keen Home, Inc. filed their Regulation A offering on November 10, 2016 and the SEC qualified them on February 1, 2017. As of March 2, 2017, Keen Home had raised $1,871,427 through its Regulation A offering.\(^{166}\) Keen Home was seeking to raise $7,400,000 total from this offering.\(^{167}\) Mr. Fant stated that they were happy with their capital raising results up to that point. He noted that the Company was past their halfway point and the offering had only been open for one month. He was confident that they would meet their $7.4 million target.

Mr. Fant acknowledged that he was not thrilled about the costs associated with complying with the ongoing financial reporting requirements, but he also did not think that they were extreme. He explained that he thought it was good to get “financial integrity” in place. He felt the reporting requirements helped institute “financial integrity”; he thought that it was a “best practice” to engage in the practice of compiling and preparing audited financial statements.

Finally, Mr. Fant noted that the anticipated capital infusion was creating excitement within the company, as they would now have much needed capital for research and development. He noted that Keen Home would be working

\(^{164}\) Telephone Interview with Ryan Fant, supra note 158.

\(^{165}\) Id.

\(^{166}\) Keen Home conducted its offering through SeedInvest.com. Their capital raising efforts to date were gathered by referencing the seedinvest.com website and looking up Keen Home’s offering. See Invest in Keen Home, SeedInvest, https://www.seedinvest.com/keenhome/series.a (last visited Jan. 20, 2018).

\(^{167}\) As of March 2, 2017, Keen Home had 883 shareholders. The minimum investment amount was $999. See id.
with companies such as Echo, Amazon, and Electra so that they could integrate their product with those applications.

Keen Home was incorporated in March of 2013.\textsuperscript{168} Total assets for the years ending 2016 and 2015 were $863,916 and $1,762,309, respectively.\textsuperscript{169} Total liabilities for those same periods were $3,943,174 and $3,133,686, which resulted in negative net worth amounts of $3,079,258 and $1,371,377, respectively.\textsuperscript{170} For the twelve-month period ending December 31, 2016, the company showed a net loss of $2,069,131, but only reported revenue of $915,051.\textsuperscript{171} Similarly, for the twelve-month period ending December 31, 2015, the company showed a net loss of $2,198,965, after net revenue of $1,005,267.\textsuperscript{172}

**KNIGHTSCOPE, INC.** On February 21, 2017, I spoke with William Santana Li, Knightscope Inc.’s Chairman and CEO about their Regulation A offering\textsuperscript{173} through SeedInvest.\textsuperscript{174} Knightscope sells security robots called Autonomous Data Machines (“ADMs”) that can be deployed either inside a place of business or around the building’s perimeter to monitor the area for suspicious activity and report any intrusion.\textsuperscript{175} The company claims that these robots monitor better, are less expensive, and are more reliable than human security.\textsuperscript{176}

Knightscope submitted its initial Regulation A filing on November 7, 2016.\textsuperscript{177} The company received its qualification on December 23, 2016.\textsuperscript{178} As of October 4, 2017, Knightscope had raised $17,689,348.\textsuperscript{179} When asked about his company’s choice in choosing Regulation A versus other available exemptions, Mr. Li noted that Regulation A was the best possible option given his company’s situation and what investor niche he could tap into. He claimed that 98 percent of the general population is not able to invest in most private offerings. Mr. Li explained further that the 700+ venture capital firms across

\begin{itemize}
  \item \textsuperscript{168} See Keen Home, Offering Circular 18 (Jan. 31, 2017).
  \item \textsuperscript{169} See Keen Home, Annual Report (Form 1-K), 3 (June 1, 2017).
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id. at 4.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} See Knightscope, Inc., Preliminary Offering Circular (Form 1-A), 20 (Nov. 7, 2016) [hereinafter Knightscope Form 1-A].
  \item \textsuperscript{174} See Invest in Knightscope, SEEDINVEST, https://www.seedinvest.com/knightscope/series.m (last visited Jan. 20, 2018).
  \item \textsuperscript{175} See Knightscope Form 1-A, supra note 173, at 3.
  \item \textsuperscript{176} See id.
  \item \textsuperscript{177} See Knightscope Form 1-A, supra note 173.
  \item \textsuperscript{178} See Knightscope, Inc., Notice of Qualification (Dec. 23, 2016).
  \item \textsuperscript{179} See Invest in Knightscope, SEEDINVEST, supra note 174.
\end{itemize}
the U.S. tend to invest in information technology, but that what their company
did (law enforcement physical security involving hardware and robotics) was a
complete outlier. So, Knightscope is not a “fit with traditional venture
capitalists.”180

As Mr. Li touted the merits in using the Regulation A exemption, he also
commented about the flexibility Regulation A afforded their company as they
were able to set the offering price, the terms, and other conditions.181 When
asked about the ongoing filing requirements, and whether they were a burden
from both a cost and compliance standpoint, Mr. Li felt that the ongoing
financial reporting requirements would force the company to “invoke a level
of accounting discipline and fiscal responsibility into the process.”182 Mr. Li
viewed the cost of meeting these reporting requirements as merely a cost of
doing business. Mr. Li saw the requirements as a “semi-benign way to put a
level of discipline into the company.”183

As of December 31, 2016 and December 31, 2015, Knightscope had total
assets of $6,329,770 and $7,405,024, respectively.184 For those same periods
the company had total liabilities of $2,252,163 and $1,285,863, respectively.185
The company had net losses of $5,472,547 (2016) and $3,392,277 (2015).186
These net losses were against net revenue of $420,425 (2016) and $29,770
(2015).187

MEDALIST DIVERSIFIED REIT, INC.: The final company I
interviewed, Medalist Diversified REIT, Inc. is a Real Estate Investment Trust
(“REIT”). To qualify as a REIT the company must follow certain compliance
guidelines. For example, one of the key compliance requirements for REITS
is that 95 percent of their gross income is derived from dividends.188

I spoke with Mr. Thomas Messier, one of the Company’s directors and its
Co-President.189 When asked about his company’s decision to choose
Regulation A, he explained that he “didn’t want to go the Regulation D route

180 Telephone Interview with William Santana Li, Chairman and CEO, Knightscope, Inc. (Feb.
181 Id.
182 Id.
183 Id.
185 Id. at F-5.
186 Id. at F-6.
187 Id.
189 Telephone Interview with Thomas Messier, Director and Co-President, Medalist
Diversified REIT, Inc. (July 31, 2017) (on file with author).
because [he] didn’t want to deal with the whole accredited investor issue.”  Mr. Messier thought Regulation A would be much easier, and in retrospect, thought the Regulation A offering worked well. Mr. Messier did not see the ongoing financial reporting requirements as a large burden, but merely a cost of doing business.

Medalist had total assets of $82 (December 31, 2016) and $126 (December 31, 2015) and total liabilities of $290,795 (December 31, 2016) and $166,712 (December 31, 2015). The company reported net losses of $46,247 for the twelve month period ending December 31, 2016 and $141,836 for the twelve month period ending December 31, 2015. In both years the company reported no revenue.

C. Summary and Assessment of Findings

After speaking with the founders of each of these companies, it is evident that the issues cited earlier in this paper as deterrents—namely the ongoing reporting requirements, the state registration requirements for Tier 1 filers, and the undesirability of non-accredited investors—did not seem to be deterrents to these companies. They saw the ongoing reporting requirements merely as a cost of doing business and, overall, beneficial to their operations. None of them seemed to have issues with their lengthy qualification process. Additionally, they all felt the ability to raise money from non-accredited investors was a significant advantage rather than a burden; it was a big factor in their decision to use Regulation A in the first place.

Though I acknowledge that my actual findings seem to run contrary to what I was anticipating, I do make the following observations. The first is that all of these companies are start-up companies with very little, if any, operating history. They are all subsisting on seed money or early round capital investment. None of them are self-sustaining by generating sustainable operational profits, and some have not even started generating revenue yet. It remains to be seen how these companies will fare going forward. Though I am wishing the best for all of them, statistically speaking, at least three quarters of these companies are likely to fail by year five. And though the early stage compliance may not seem like a burden at this juncture, time will tell whether

190 Id.
192 Id. at 31.
193 Id.
it is something that will factor prominently in their cost structure going forward.

Presently, all of them seem to be operating in the early stage euphoria that comes with having a promising idea or concept that is still in the start-up honeymoon stage where the focus is still on the concept’s promise or potential and hasn’t yet shifted to whether the concept is actually making money. Only time will tell whether these companies’ feelings regarding Regulation A and its requirements may change once their focus shifts to profitability rather than product development. I want to conclude this article with a discussion of this very concern.

VII. ELIO MOTORS: A CAUTIONARY TALE? A HARBINGER OF THINGS TO COME?

Elio Motors was the first high profile company to successfully complete a Regulation A+ offering. The company raised approximately $15.82 million. Their success was highly publicized in private offering circles. The offering’s aftermath, however, reveals concerns inherent in the Regulation A+ offering. Specifically, the combination of (1) offerings for large amounts of capital, and (2) a pool of investors consisting primarily of non-accredited investors.

Elio Motors has yet to generate a single dollar of revenue. Their income statement for the 12-month periods ending December 31, 2015 and December 31, 2016 showed net losses of $22,594,195 and $52,719,773, respectively. Unsurprisingly, the company is also burning through cash. Its 2015 balance sheet showed cash of $6,870,044 while twelve months later, that number dwindled to just $120,206. Additionally, the company is incurring a significant amount of debt. As of December 31, 2016, the company’s total liabilities (both current and long term) totaled $93,806,238, $26,035,436 of which represents “[n]onrefundable customer deposits” (i.e., customers who have already paid for cars that will not be available until 2019, if at all).

194 See Elio Motors, Inc., Registration Statement (Form S-1), 37 (Aug. 3, 2017) [hereinafter Elio Motors Form S-1]. Companies use the Form S-1 in connection with an Initial Public Offering. In addition to Elio’s Regulation A+ filing, which occurred in 2015–2016, Elio is now seeking public investment through this IPO offering.
196 See Elio Motors Form S-1, supra note 194, at 7.
197 Id. at 36.
198 Id. at F-3.
Nonetheless, Elio’s executive team is being very well compensated:

- Paul Elio, the Company’s Chief Executive Officer received a salary of $250,000 for both 2015 and 2016.199

- Hari Iyer, the Company’s Chief Operating Officer received a salary of $104,167 in 2016, and $250,000 in 2015.200

- Connie Grennan, the Company’s Chief Financial Officer received a salary of $175,000 in 2016 and $150,000 in 2015.201

A critic has noted the importance of hiring the “best and the brightest” to give the company the best chance of success.202 But “in the case of Elio Motors, a company that has not generated any revenues, it is hard to swallow $250,000 salaries for officers [who] also hold 87.1% of the outstanding stock. Paul Elio, CEO and Chairman, holds 65.8% of the outstanding stock, meaning he sets his own salary.”203

In short, those who invested in Elio Motors’ Regulation A+ offering are likely to lose all or a good portion of their investment if Elio Motors does not resolve its production issues and start actually making cars. The company’s earliest projections for rolling its three-wheeled prototype, the “Elio,” off the production line is 2019.204 And the company says it will need another $376 million to begin production.205

Regulation A+ critics have found the situation with Elio Motors troubling.206 At least one has noted that less savvy investors can be unduly influenced by all the hoopla and fanfare that surrounds Regulation A+ offerings.207 Although Elio Motors fully disclosed its financial position, a critic

199 Id. at 70.
200 Id.
201 Id.
203 Id.
204 See Elio Motors Form S-1, supra note 194, at 8.
205 Id. at 40.
206 See generally Sidoti, supra note 202.
207 See generally id.
worried whether these less sophisticated investors had the appropriate filter to properly assess the investment risk associated with Elio Motors’ stock.\textsuperscript{208}

The situation with Elio Motors highlights what some feel is an inherent problem with Regulation A+: the problem of the “lay” investor, their relative vulnerability, and how best to protect them from speculation and uninformed investments. No doubt investors will lose money in some future Regulation A+ offerings due to the nature of investing in start-up and growth companies. But the question here is whether the “lay” investor has the stomach to endure the high risk/high reward nature of private equity investing. Or is this a situation where the concern for the “lay” investor’s vulnerability and exposure will lead to such scrutiny that the risk involved may ultimately price Regulation A+ offering out of the market? Only time will tell, but the vulnerabilities of these less sophisticated investors, coupled with the high potential for losses from investing in these startup companies, may be a combination that ultimately causes issuers to pivot away from the Regulation A+ offering toward Regulation D and other more traditional exempt offering regimes.

\section*{CONCLUSION}

To some extent, I stand corrected: when I started this foray into Regulation A I had already drawn conclusions about the effect of the JOBS Act revisions. But, I found that my assumptions about the relative strength of Regulation A’s deterrents were not shared by all issuers. I chose to write this article and its predecessor in order to examine the path of a once dormant exempt offering option and an attempt at its resurrection. Without question issuers have turned to Regulation A in considerable numbers. Although issues such as state registration requirements and ongoing reporting requirements do not appear to turn all issuers away.

I do make this concession with caution, however. Regulation A+ is still in a stage of relative infancy. Most of the companies that are part of our sample are early stage companies and have not yet dealt with the long-term effects of choosing Regulation A+. To be clear, I submit that most of the issuers we considered have not been forced to consider the long-term consequences of their exemption choice and thus we should proceed with some hesitancy when evaluating their decision to utilize Regulation A+.

Additionally, Elio Motors may serve as a harbinger for the Regulation A+ offering exemption. With large numbers of non-accredited (“lay”) investors now investing actively in emerging growth (i.e. “start-up”) companies in large

\textsuperscript{208} See id.
numbers, the question looms, what will be the potential fallout if companies like Elio Motors and other start-ups similarly situated end up failing? Will these lay investors be able to take these losses in stride as the more indoctrinated accredited investor has done for years?

In the end, I applaud Congress for making the effort to revise Regulation A to improve it, make it more appealing and more accessible. But like most things, every action has a reaction, a by-product, or an unintended consequence. Things are in motion now with the new and improved Regulation A+ now fully engaged. And yes, there is no question that issuers have responded to the improvements by making use of the Regulation A+ offering exemption in unprecedented numbers. In this second writing, the effort was made to reveal both the good and the potential bad with Regulation A+. To some extent, I stand corrected. But with this now more open investing model, the question remains, whether Regulation A+ as improved, will be a success or will the revival ultimately fail under the weight of the new investors that the Regulation ultimately is seeking to reach. Only time will tell. I look forward to someone else picking up the baton from this point and carrying it forward.
APPENDIX A

Historical Regulation A Use


Preemption of state securities laws

Beginning of financial crisis

Filed with SEC

Qualified

11 Regulation A Filings in 2011. The SEC qualified 1 of those 11 filings

20 Regulation A Filings in 1992
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<td>Team 2</td>
<td>Team 3</td>
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<td>Team 7</td>
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<td>Applegate Inc.</td>
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<td><strong>TOTAL AVERAGES:</strong></td>
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<td>$829,861</td>
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<td>No: 39.2% (20/51)</td>
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Tier 1: 39.6% (19/48)
Tier 2: 60.4% (29/48)
## Section II

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<th>TIER 1 AVG. MIN. OFFERING</th>
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<td>TIER 1 AVG MAX. OFFERING</td>
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<td>TIER 1 FILERS GETTING QUALIFIED</td>
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<td>TIER 2 FILERS GETTING QUALIFIED</td>
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<td>TIER 2 FILERS -AVG. TIME TO QUALIFICATION</td>
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