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**SECURITIES & COMMODITIES
REGULATION**

**AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES**

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CROWDFUNDING UNDER THE SEC'S NEW RULES

As mandated by the JOBS act, the SEC has issued three new rules that permit general solicitation and advertising of securities offerings on crowdfunding platforms without registration under the Securities Act. The authors lay out the various advantages and disadvantages of the rules, and conclude with a chart that compares 10 significant provisions for securities offerings across the rules.

Stephen P. Wink and Brett M. Ackerman *

In the past three years, the Securities and Exchange Commission has adopted new rules that permit general solicitation and advertising of securities offerings that are not registered under the Securities Act of 1933:

- Rule 506(c) under Regulation D – adopted July 11, 2013;¹
- Regulation A as amended (sometimes called “Reg A+”) – amended March 25, 2015;² and

- Regulation Crowdfunding — adopted October 30, 2015.³

As context, all securities offerings in the United States must either be registered under the Securities Act or exempt from registration. Historically, the exemptions from registration (such as Securities Act Section 4(a)(2) and Rule 506(b) under Regulation D) require that exempt securities offerings do not involve any general solicitation or advertising. Of course, an offering on a crowdfunding website may be deemed to involve general solicitation and advertising.

The three new rules permit differing forms of general solicitation and advertising, but each allows for securities offerings on crowdfunding platforms. The three new rules differ significantly from one another and were tailored to serve different purposes. As such, they

¹ Eliminating the Prohibition against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44771 (July 2013) [hereafter, the “Rule 506(c) Release”].

² Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), 75 Fed. Reg. 21806 (April 2015) [hereafter, the “Reg A+ Release”].

³ Crowdfunding, 80 Fed. Reg. 71388 (Nov. 2015) [hereafter, “Regulation Crowdfunding Release”].

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each have their own unique characteristics, advantages, and disadvantages, which are summarized in the summary chart attached as Appendix A.

As described in further detail below, Rule 506(c) is highly flexible, but its main drawback is that while the securities offering may be advertised to the general public, all purchasers of securities must qualify as “accredited investors” within the meaning of Rule 501 under Regulation D. Regulation A and Regulation Crowdfunding allow all investors (including non-accredited investors) to purchase securities via crowdfunding offerings, but they restrict the dollar amount of securities that can be sold in any given 12-month period, and have other significant drawbacks as well. For example, Regulation A requires issuers to file a public offering circular and provide periodic financial reporting, similar to the requirements applicable to companies that “go public” in a registered offering. As for Regulation Crowdfunding, the exemption is only available to issuers that are operating companies, requires that the securities offering be conducted through a registered intermediary (either a broker-dealer or “funding portal”), and restricts the type of advertising that can be conducted in connection with the offering.

Given the costs and limitations associated with the three crowdfunding exemptions, as outlined below, it is uncertain whether the new options will have a dramatic impact on issuers’ capital-raising activities over the long-term. Nonetheless, these three different avenues represent new opportunities for issuers, intermediaries, and investors alike.

A. RULE 506(C) UNDER REGULATION D

The Jumpstart Our Business Startups Act (JOBS Act) mandated that the SEC remove the prohibitions on general solicitation and public advertising in connection with securities offerings under Rule 506.⁴ As a result,

on July 10, 2013, the SEC finalized amendments to Rule 506 to create a new Rule 506(c) under Regulation D.⁵

In contrast to Regulation A and Regulation Crowdfunding, Rule 506(c) does not limit the dollar amount of securities that may be sold, does not place any restrictions on advertising or require that any advertisements be filed with the SEC, and does not require audited financial reports in connection with the offering. The offering documents in a Rule 506(c) offering are also not required to be disclosed to the general public. Rule 506(c) offerings are also generally not subject to state law registration and disclosure requirements as a result of federal preemption.⁶

While Rule 506(c) is highly flexible and requires minimal filing requirements,⁷ all purchasers of securities must qualify as “accredited investors” within the meaning of Rule 501 under Regulation D. Additionally, the issuer of the securities must take reasonable steps to verify that all purchasers are accredited investors.⁸ This limitation is significant and, as such, the vast majority of private placements are still conducted in reliance on the longstanding private placement exemption that is now Rule 506(b). Nevertheless, Rule 506(c) has found application in the crowdfunding context, at least in part because it is available to issuers that operate as

⁵ Rule 506(c) Release, *supra* note 1.

⁶ The National Securities Market Improvement Act, adopted in 1996, amended Section 18 of the Securities Act to provide that a security sold in an offering in compliance with Rule 506 is deemed a “covered security” and preempted from state blue sky regulation so long as a notice filing is made to perfect the exemption.

⁷ Under Rule 503 of Regulation D, an issuer offering or selling securities in reliance on Rule 504, 505, or 506 must file a notice of sales on Form D with the SEC for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering. A Form D filing includes basic identifying information and factual information about the offering.

⁸ 17 C.F.R. 23.506(c)(2) (enumerating non-exclusive methods by which an issuer shall be deemed to take reasonable steps to verify that each investor is an accredited investor).

⁴ Public Law 112–106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

investment funds. And, the managers of these investment funds can receive traditional investment advisor type compensation, such as a carried interest, without registering as a broker-dealer under the Securities Exchange Act of 1934, in reliance on a series of no-action letters issued by the staff of the SEC to the online investment platforms AngelList and FundersClub.⁹

In combination with the no-action letters referenced above, Rule 506(c) permits the formation of special purpose vehicles (investment funds) that in turn invest in securities of an underlying issuer. Most investment funds relying on Rule 506(c) are structured as private funds under either Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. Section 3(c)(1) is only available where the fund is not beneficially owned by more than 100 US persons, which effectively caps the number of US investors that may participate in an investment fund's 506(c) crowdfunding offering. Section 3(c)(7) does not have a limit on US participants, but each investor must qualify as a "qualified purchaser,"¹⁰ which is a higher standard than the accredited investor threshold that is needed to rely on 506(c) in the first instance.

Securities sold pursuant to Rule 506(c) are also "restricted" and cannot be freely resold in the secondary markets.¹¹ Issuers relying on Rule 506(c) should also be sure to undertake:

- reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;

⁹ SEC no-action letter to AngelList LLC (March 26, 2013); SEC no-action letter to FundersClub Inc. (March 26, 2013).

¹⁰ Person meeting the definition of qualified purchaser, in general, include natural persons who own not less than US\$5 million in investments; entities that own not less than US\$5 million in investments and are owned directly or indirectly by or for two or more related natural persons; certain trusts with not less than US\$5 million in investments; and persons acting for their own account or the account of other qualified purchasers who, in the aggregate, own and invest on a discretionary basis, not less than US\$25 million in investments. See Section 2(a)(51) of the Investment Company Act.

¹¹ "Restricted securities" are defined in Securities Act Rule 144(a)(3) to include, in part, "[s]ecurities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering."

- written disclosure to each purchaser prior to sale that the securities have not been registered under the Securities Act and, therefore, cannot be resold unless they are registered under the Securities Act, or unless an exemption from registration is available; and
- placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Securities Act, and setting forth or referring to the restrictions on transferability and sale of the securities.¹²

B. REGULATION A+

On March 25, 2015, the SEC adopted final amendments to Regulation A under the Securities Act to update and expand the prior exemption from registration under Regulation A, in response to the mandate under the JOBS Act.¹³ Historically, Regulation A offerings were rare and the amended Regulation A, referred to as "Reg A+," is intended to increase the utility of the Regulation A exemption. Reg A+ attempts to strike a balance between allowing an unregistered securities offering to be advertised and sold to the general public (including non-accredited investors) and providing the types of public disclosures and investor protections that would accompany a registered offering.

Issuer Limitations

The Reg A+ exemptions are only available to companies organized in and with their principal place of business in the United States or Canada; non-Canadian foreign private issuers may not take advantage of Reg A+.¹⁴ In addition, Reg A+ is not be available to:

- public companies subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act;
- companies that are registered or required to be registered under the Investment Company Act; are business development companies (also known as BDCs); or are blank check companies;
- companies that issue fractional undivided interests in oil, gas, or mineral rights;

¹² 17 CFR 230.502.

¹³ Reg A+ Release, *supra* note 2.

¹⁴ 17 C.F.R. 230.251(b).

- companies that have not filed the ongoing reports required by Reg A+ during the two years immediately preceding the filing of a new offering statement (or for such shorter period that the issuer was required to file such reports);
- companies that have been subject to an order by the SEC under Section 12(j) of the Exchange Act that was entered within five years before the filing of the offering statement; or
- companies that are subject to “bad actor” disqualification under Securities Act Rule 2627.¹⁵

Limitations on Offerings and Secondary Transactions

Reg A+ provides for two tiers of offerings that are exempt from the ordinary registration requirements of the Securities Act, referred to as Tier 1 and Tier 2 offerings. Tier 1 offerings are limited to US\$20 million in any 12-month period while Tier 2 offerings are limited to US\$50 million in any 12-month period.¹⁶

Reg A+ permits sales by selling security-holders generally, but limits the total amount of such sales in the first 12 months following a Reg A+ offering to 30 percent of the aggregate offering price.¹⁷ After the expiration of the 12-month period following the offering, the limitations on secondary sales affect selling security-holders differently, depending on whether they are an affiliate of the issuer. Sales by affiliates of the issuer that are made pursuant to a qualified offering statement are always limited to either US\$6 million (for Tier 1) or US\$15 million (for Tier 2) over a 12-month period, even for sales that occur following the expiration of the first year after the issuer’s initial qualification of an offering statement.¹⁸ In contrast, non-affiliates’ sales that are made pursuant to a qualified offering statement following the expiration of the first year after an issuer’s initial qualification of an offering statement are limited to the maximum offering amount permitted (US\$20 million for Tier 1 or US\$50 million for Tier 2).

Investor Limitations

Under Reg A+, purchasers who do not qualify as accredited investors under Rule 501 of Regulation D

may not purchase securities in a Tier 2 offering in an amount that exceeds either of the following:

- 10 percent of the greater of annual income or net worth (for natural persons);
- 10 percent of the greater of annual revenue or net assets at fiscal year-end (for non-natural persons).¹⁹

These investment limitations do not apply if the securities will be listed on a national securities exchange. While the final rules do not contain investment limitations with respect to purchasers in a Tier 1 offering, applicable state blue sky securities laws may contain investment limitations based on the status of the purchaser.

Issuers are also required to notify investors of these investment limitations and may rely on an investor’s representation that it is in compliance with the investment limitations unless the issuer knew at the time of sale that such representation was inaccurate.²⁰

Offering Requirements

Issuers relying on Reg A+ are required to file an offering statement on Form 1-A with the SEC electronically using the EDGAR system, which consists of three parts: Part I (Notification); Part II (Offering Circular); and Part III (Exhibits). Offering statements must be “qualified” by the SEC before sales may be made pursuant to Reg A+, and offering statements may only be declared qualified by a “notice of qualification” issued by the Division of Corporation Finance.²¹ The notice of qualification is analogous to a notice of effectiveness in registered offerings.

The Offering Circular disclosure in Part II of Form 1-A is fairly substantial and “akin to what is required of smaller reporting companies in a prospectus for a registered offering,” such as basic information about the issuer, a summary of risk factors, plan of distribution, use of proceeds, business operations, and material terms of the securities being offered.²²

During the prequalification period, issuers and intermediaries generally are required to deliver a preliminary offering circular to prospective purchasers at

¹⁵ *Id.*

¹⁶ 17 C.F.R. 230.251.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 17 C.F.R. 230.251(d)(2).

²⁰ *Id.*

²¹ 17 C.F.R. 230.252(e).

²² Reg A+ Release at 21830.

least 48 hours in advance of sale.²³ However, when an issuer is subject to (and current with respect to) ongoing Tier 2 reporting obligations, such delivery is not required, and issuers and intermediaries are only subject to the general delivery requirements for offers.²⁴

With respect to the final offering circular, the rules reflect an “access equals delivery” model, provided that sales are made on the basis of offers conducted during the prequalification period and the final offering circular is available on EDGAR. Within two business days after completing a sale, issuers and intermediaries must provide purchasers either with a copy of the final offering circular or a notice identifying where the final offering circular may be obtained on EDGAR, along with information on how to contact the issuer or intermediary to request a copy of the final offering circular.

Financial Statements and Ongoing Requirements

Both Tier 1 and Tier 2 issuers are required to file balance sheets and other financial statements as of the two most recently completed fiscal year-end dates. Tier 2 issuers are required to file audited financial statements, while Tier 1 issuers may file unaudited financial statements (provided that they have not already obtained audited financial statements for other purposes).²⁵

Tier 1 issuers are not subject to any ongoing reporting obligations other than the obligation to provide certain information on Form 1-Z within 30 days after the completion or termination of the offering (such as the date that the offering commenced, the total amount of securities sold, the price of the securities sold, net proceeds to the issuer, etc.).²⁶ Tier 2 issuers provide similar information on either Form 1-K or Form 1-Z, depending on when the offering is terminated or completed. Tier 2 issuers are also required to file periodic reports on an annual and semi-annual basis, as

well as current event reports if they experience certain material events.²⁷

State Law Preemption

Reg A+ allows for the preemption of registration and qualification requirements of state blue sky securities laws for securities offered or sold to “qualified purchasers,” which are defined as any person to whom securities are offered or sold in a Tier 2 offering. Preemption of state blue sky securities laws is not available for Tier 1 offerings.

The net result of the requirements discussed above is that Reg A+ has yet to find any significant level of adoption by issuers seeking to raise capital, and most issuers are better served either by relying on the much less onerous Rule 506(b) or Rule 506(c) exemptions, or by registering a public offering that would not be subject to the \$50 million selling limit.

C. TITLE III CROWDFUNDING

Section 4(a)(6) of the Securities Act provides an issuer an exemption from the registration requirements of the Securities Act for crowdfunding transactions that satisfy the following requirements:

- the amount raised does not exceed US\$1 million in a 12-month period;
- individual investments in all crowdfunding issuers in a 12-month period are limited to either of the following: (i) the greater of US\$2,000 or 5% of annual income or net worth, if the investor’s annual income or net worth of the investor is less than US\$100,000 or (ii) 10% of annual income or net worth (not to exceed an amount sold of US\$100,000), if the investor’s annual income or net worth is US\$100,000 or more; and
- transactions must be conducted through an intermediary that is registered as either a broker-dealer or a new regulated entity called a “funding portal,” and each offering must be conducted exclusively through one intermediary.

Often referred to as “Title III Crowdfunding” due to the fact that it was mandated under Title III of the JOBS Act, Section 4(a)(6) includes no limitations with respect to particular types of investors. Accordingly, all retail, institutional, and accredited investors are eligible to

²³ 17 C.F.R. 230.251(d)(2).

²⁴ *Id.*

²⁵ Issuers domiciled in the US must prepare their financial statements in accordance with US generally accepted accounting procedures (GAAP), while Canadian issuers may prepare their financial statements in accordance with either US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (IASB IFRS).

²⁶ 17 C.F.R. 230.257(a).

²⁷ 17 C.F.R. 230.257(b).

participate in such crowdfunding transactions. That said, Section 4(a)(6) is narrowly tailored to facilitate online capital-raising in only small amounts and the investment limits under the exemption apply equally to all investor types.

The SEC's Regulation Crowdfunding implements Section 4(a)(6) of the Securities Act and there are several notable aspects in the rule that may limit its utility.²⁸

Issuer Limitations

As noted above, issuers may only sell \$1 million of securities under Section 4(a)(6) in any 12-month period. In addition, the amount of securities sold in reliance on Section 4(a)(6) by entities controlled by or under common control with the issuer must be aggregated with the amount to be sold by the issuer in the offering to determine the aggregate amount sold in reliance on Section 4(a)(6) during the preceding 12-month period.²⁹ Regulation Crowdfunding also mandates that the aggregate amount of securities sold in reliance on Section 4(a)(6) include securities sold by any predecessor of the issuer in reliance on Section 4(a)(6) during the preceding 12-month period.³⁰ However, the SEC has clarified that only the capital raised in reliance on the exemption provided by Section 4(a)(6) should be counted toward the US\$1 million limit; capital raised through other means, such as other exempt securities offerings, is not required to be counted in determining the aggregate amount sold in reliance on the Section 4(a)(6) exemption.³¹

The types of issuers that are eligible to rely on Section 4(a)(6) are essentially limited to small, domestic operating companies. Issuers not eligible to rely on the Section 4(a)(6) exemption include:

- foreign issuers, issuers that are not organized under the laws of a state or territory of the United States;
- public companies, i. e., issuers that are subject to reporting requirements under the Exchange Act;
- mutual funds or private funds, investment companies as defined in the Investment Company Act, or companies that are excluded from the

definition of investment company under Section 3(b) or 3(c) of the Investment Company Act;

- issuers that are not eligible to rely on Section 4(a)(6) as a result of a disqualification;
- issuers that have failed to comply with the annual reporting requirements under Regulation Crowdfunding (discussed below) during the two years immediately preceding the filing of an offering statement; and
- shell companies, i.e., companies that have no specific business plan or have indicated that their business plan is to engage in a merger or acquisition with an unidentified company or companies.³²

Although Section 4(a)(6) and Regulation Crowdfunding do provide an exemption from the registration requirements under the Securities Act, issuers relying on Section 4(a)(6) are required to file a "Form C" with the SEC prior to the commencement of the offering, which is a disclosure document that, although public, is relatively simple when compared to the requirements of Form 1-A and Regulation A.³³ It requires basic information, such as the name of intermediary through which the security will be sold, compensation of the intermediary, type and target number of securities offered, price (or method of determining price), and basic information about the issuer.

Issuers relying on Section 4(a)(6) must also comply with a number of financial disclosure requirements (which vary depending on the amount offered and sold in reliance on Section 4(a)(6) within the preceding 12-month period) as well as certain ongoing reporting requirements. For issuers that are offering more than \$100,000, the issuer must provide financial statements reviewed by a public accountant that is independent of the issuer, except if financial statements of the issuer are available that have been audited by a public accountant that is independent of the issuer, the issuer must provide those financial statements instead and need not include the reviewed financial statements.³⁴ For issuers offering more than \$500,000 of securities in reliance on Regulation Crowdfunding for the first time, they must provide financial statements reviewed by a public accountant that is independent of the issuer, but if

²⁸ Regulation Crowdfunding Release, *supra* note 3.

²⁹ 17 C.F.R. 227.100(c).

³⁰ *Id.*

³¹ Regulation Crowdfunding Release at 71392.

³² 17 C.F.R. 227.100(a)(4).

³³ 17 C.F.R. 227.201(a).

³⁴ 17 C.F.R. 227.201(t).

financial statements of the issuer are available that have been audited by a public accountant that is independent of the issuer, the issuer must provide those financial statements instead. For issuers offering more than \$500,000 that have previously sold securities in reliance on Regulation Crowdfunding, they must provide financial statements audited by a public accountant that is independent of the issuer.³⁵ All financial statements prepared for purposes of Regulation Crowdfunding must be prepared in accordance with US generally accepted accounting procedures (GAAP).³⁶

Issuers must also provide a narrative discussion of their financial condition, which must include (if material), a discussion of liquidity, capital resources, and historical results of operations. Issuers selling securities pursuant to Regulation Crowdfunding are required to file an annual report with the SEC and post the report on its website, no later than 120 days after the end of the fiscal year covered by the report.³⁷ The report must contain, at least, the issuer's financial statements — certified by the issuer's principal executive officer to be true and complete in all material respects — as well as the information required in the offering statement.³⁸ Regulation Crowdfunding also requires issuers to provide progress updates about the issuer's progress toward meeting the target offering amount, as well as amendments to the issuer's previous disclosures for any material change in the offer terms or disclosures previously provided to investors.³⁹

Limitations on Resales

Regulation Crowdfunding generally restricts resales of securities purchased under Regulation Crowdfunding for a period of one year, unless such securities are transferred in any of the following ways;

- to the issuer of the securities;
- to an accredited investor;
- as part of an offering registered with the Commission; or

- to a member of the family of the purchaser or the equivalent, to a trust controlled by the purchaser, to a trust created for the benefit of a member of the family of the purchaser or the equivalent, or in connection with the death or divorce of the purchaser, or other similar circumstance.⁴⁰

At the end of the one-year period, securities purchased under Regulation Crowdfunding are no longer restricted and may be resold under an applicable registration exemption.

Advertising Restrictions

Pursuant to Securities Act Section 4A(b)(2), advertising in connection with any crowdfunding offering is prohibited, except that Regulation Crowdfunding allows an issuer to publish a notice advertising the terms of an offering, which are similar to so-called "tombstone ads" under Securities Act Rule 134.⁴¹ Regulation Crowdfunding also allows an issuer to communicate with investors about the terms of the offering through communication channels which the intermediary provides on the intermediary's platform, so long as the issuer identifies itself as the issuer in all communications.⁴² Unlike Regulation A+, issuers are not permitted to "test the waters" to determine if there is any interest in the offering before having filed anything with the SEC. Further, to the extent that an issuer engages anyone to promote the issuer's offering through communication channels provided by the intermediary, the issuer must take reasonable steps to ensure that the person clearly discloses the receipt of compensation each time the person makes a promotional communication.⁴³

Intermediary Requirements

As noted above, Section 4(a)(6) of the Securities Act and Regulation Crowdfunding require crowdfunding transactions to be conducted through an intermediary that is registered with the SEC as either a broker-dealer or a "funding portal," and that is also a member of a national securities association (i.e., the Financial Industry Regulatory Authority (FINRA)).

³⁵ *Id.*

³⁶ Regulation Crowdfunding Release at 71414.

³⁷ 17 C.F.R. 227.202(a).

³⁸ *Id.*

³⁹ 17 C.F.R. 227.203(a).

⁴⁰ 17 C.F.R. 227.501(a).

⁴¹ 17 C.F.R. 227.204(a)-(b).

⁴² 17 C.F.R. 227.204(c).

⁴³ 17 C.F.R. 227.205.

A “funding portal” is defined as any person that acts as an intermediary for the offer and sale of securities for the account of others, but solely with respect to offerings pursuant to Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.⁴⁴ Thus, unlike a registered broker-dealer, a funding portal’s activity would be limited to offerings under Regulation Crowdfunding. While Regulation Crowdfunding provides a safe harbor under which funding portals may engage in certain activities, an intermediary that is a registered broker-dealer is not subject to these same restrictions and could engage in each of these activities, to the extent otherwise permitted under Regulation Crowdfunding, without monitoring its compliance under the more prescriptive safe harbor provisions for funding portals. As a result, potential crowdfunding intermediaries may question the advantages of registering as funding portals given the extensive compliance requirements that would apply and the limited business scope as compared to their registered broker-dealer counterparts.

D. CONCLUSION

Rule 506(c), Reg A+, and Regulation Crowdfunding each represent exciting new avenues under which issuers may raise capital through crowdfunding, and each has potential advantages and disadvantages. While Rule 506(c) is seemingly more flexible than both Reg A+ and Regulation Crowdfunding, its utility is limited by restricting the universe of eligible investors to “accredited investors.” Reg A+ and Regulation Crowdfunding can be used more broadly in offerings to any investor, but Reg A+ imposes onerous reporting requirements and Regulation Crowdfunding offering limitations (US\$1 million in a 12-month period) may cause the costs of utilizing that exemption to outweigh the benefits. Accordingly, Rule 506(c) remains the most widely used equity crowdfunding exemption. Whether and how each of these new exemptions will be used by issuers over time, remains to be seen. ■

⁴⁴ 17 C.F.R. 227.300(b).

APPENDIX A

Comparison Chart of “Crowdfunding” Exemptions

	Rule 506(c)	Regulation A	Regulation Crowdfunding
Eligible Issuers	Available to a wide variety of issuers, including fund structures and public companies	Available to most issuers, but not to public companies	Only available to issuers that are operating companies; no fund structures
Eligible Purchasers	Accredited investors only, and issuer must take reasonable steps to verify accreditation	All investors, including non-accredited investors	All investors, including non-accredited investors
Restrictions on Resale/Secondary Market Trading	Restricted securities; subject to certain restrictions on resale	Unrestricted	Restricted securities; purchasers are generally restricted from selling for one year, but may sell to the issuer, to accredited investors, or as part of a registered offering (such as 144A)
Intermediary Considerations	Issuer can sell directly or use any number of intermediaries/placement agents	Issuer can sell directly or use any number of intermediaries/underwriters	Only one intermediary may be used; offering must be conducted by a registered broker-dealer or a registered crowdfunding portal
Fundraising Limits	Unlimited	Tier 1 limited to \$20 million in any 12-month period Tier 2 limited to \$50 million in any 12-month period	Limited to \$1 million in any 12-month period
Advertising Considerations	Wide range of advertising permitted; no requirement to file advertisements with SEC	Wide range of advertising permitted, but must file all advertisements with SEC as part of Form 1-A	Strict restrictions on advertising; essentially limited to directing potential investors to the website of the broker-dealer or registered crowdfunding portal; advertisements must be filed with SEC
Offering Documents	No offering document is mandated, but a private placement memorandum is typically provided to investors	Must file Form 1-A with the SEC, which is a public offering document with a wide range of disclosure requirements	Must file Form C with the SEC, which is a relatively limited public disclosure document

COMPARISON CHART continued

	Rule 506(c)	Regulation A	Regulation Crowdfunding
Audited Financials	Not required	Tier 1 – not required Tier 2 – required	Offerings of greater than \$100,000 but no more than \$500,000 must have financials reviewed (but not audited) by an independent accountant. Offerings greater than \$500,000 where the issuer has never utilized Regulation Crowdfunding must have financials reviewed (but not audited) by an independent accountant. Offerings greater than \$500,000 where the issuer has utilized Regulation Crowdfunding require audited financials
Ongoing Financial Reporting	Not required, although investors typically receive issuer updates	Required semi-annually	Required annually
State Blue Sky Law Preemption	Exemptions are generally available under state law with a Form D notice filing	Tier 1 – no Tier 2 – yes	No. A unified and streamlined State registration process is under development

CLE QUESTIONS on Wink & Ackerman, *Crowdfunding under the SEC's New Rules*. Please circle the correct answer to each of the questions below. If at least four questions are answered correctly, there is one ethics credit for New York lawyers (nontransitional) for this article. Complete the affirmation and evaluation and return it by e-mail attachment to rscrubs@yahoo.com. The cost is \$40, which will be billed to your firm. To request financial aid, contact us by e-mail or fax, as provided above.

1. Offerings exempt under Rule 506(c) may be advertised to the general public but all purchasers of securities must be "accredited investors." **True** **False**
2. Rule 506(c) is not available to issuers that operate as investment funds. **True** **False**
3. A security sold in an offering in compliance with Rule 506 is preempted from state blue sky regulation so long as a notice filing is made to perfect the exemption. **True** **False**
4. Foreign private issuers may take advantage of Reg A+. **True** **False**
5. Crowdfunding transactions under Section 4(a)(6) of the Securities Act are limited to \$2 million in any 12-month period. **True** **False**

AFFIRMATION

_____, Esq., an attorney at law, affirms pursuant to CPLR

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2106 and under penalty of perjury that I have read the above article and have answered the above questions without the assistance of any person.

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