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Regulation A+: A Middle Way?

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A nonpublic company seeking access to the capital markets faces a largely binary choice between conducting a private placement, with few if any reporting obligations afterwards, and conducting an SEC-registered offering and immediately becoming subject to ongoing public-company reporting requirements and other responsibilities under the Securities Exchange Act of 1934. Depending on factors such as the type and amount of capital being raised and the company's stage of development and future financing plans, one alternative or the other usually presents itself as the logical choice. The consequences are significant. Even with the reforms ushered in by the JOBS Act of 2012, becoming a public company involves significant upfront and ongoing management attention, overhead expense and legal liability. On the other hand, going public provides significantly more liquidity for stockholders, can result in an increased equity valuation, can afford a great deal more opportunity for capital raising, and can provide the company with an improved form of currency for acquisitions and employee compensation.

When it passed the JOBS Act, Congress instructed the SEC to develop a new exemption from the registration requirements of the Securities Act of 1933 that would permit nonpublic companies to conduct securities offerings of up to $50 million in any rolling 12-month period. In response, on December 18, 2013the SEC proposed amendments to Regulation A, a seldom-used Securities Act exemption, for offerings by nonpublic US and Canadian companies. The SEC is seeking comment on the proposals, colloquially called "Regulation A+," through early March 2014 (the deadline will be announced when the proposals are published in the Federal Register).

If adopted in its current form, Regulation A+ will offer some nonpublic companies a middle way between remaining private and going public. Eligible companies would include some that would not otherwise qualify as "emerging growth companies" under the JOBS Act or would not be able to take advantage of the SEC's scaled reporting requirements for smaller reporting companies.

Whether Regulation A+ proves popular remains to be seen. If companies begin to use it, for many it will be a transitional stage on the road to becoming a fully-fledged public company. Other companies, however, may find that Regulation A+ offers a longer-term solution that provides tangible public-company benefits with some but not all of the attendant costs—particularly if trading venues develop that offer secondary market liquidity and achieve market acceptance.

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