

**Report to the Commission**  
**Regulation A Lookback Study and Offering Limit Review Analysis**



**This is a report by the staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or conclusions contained herein.**

**March 4, 2020**

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## A. Executive Summary

Regulation A was originally adopted by the Commission in 1936 as an exemption for small issues under the authority of Section 3(b) of the Securities Act of 1933 (the “Securities Act”).<sup>1</sup> Section 401 of the Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”)<sup>2</sup> amended Section 3(b) of the Securities Act by designating Section 3(b), the Commission’s exemptive authority for offerings of up to \$5 million, as Section 3(b)(1), and adding new Sections 3(b)(2) through 3(b)(5) to the Securities Act.<sup>3</sup> Section 3(b)(2) directed the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to \$50 million of securities within a 12-month period. Sections 3(b)(2) through (5) specify certain terms and conditions for such exempt offerings and authorize the Commission to adopt other terms, conditions, or requirements as necessary in the public interest and for the protection of investors.

In 2015, the Commission adopted final rules to implement Section 401 of the JOBS Act by creating two tiers of Regulation A offerings: Tier 1, for offerings of up to \$20 million in a 12-month period; and Tier 2, for offerings of up to \$50 million in a 12-month period.<sup>4</sup> In 2018, the Commission adopted further amendments to the issuer eligibility and related provisions pursuant to the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (the “Economic Growth Act”) to allow issuers that are subject to the ongoing reporting requirements

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<sup>1</sup> See Release No. 33-632 (Jan. 21, 1936).

<sup>2</sup> See Sec. 401(a), Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012).

<sup>3</sup> See 15 U.S.C. 77c(b)(2) through (5).

<sup>4</sup> See Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), Release No. 33-9741 (March 25, 2015) [80 FR 21805 (April 20, 2015)] (“2015 Regulation A Release”).

of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) to use the exemption.<sup>5</sup>

The Commission is required by Section 3(b)(5) of the Securities Act to review the Tier 2 offering limit every two years. In the 2015 Regulation A Release, the Commission stated that the staff would undertake to review the Tier 1 offering limit at the same time.<sup>6</sup> Following completion of the staff reviews of the offering limits in 2016 and 2018, the Commission did not propose to increase the offering limit for either Tier at those times. At the time of adoption of the 2015 amendments, the Commission also stated that the staff would study and submit a report to the Commission no later than five years following the adoption of the amendments on the impact of both Tier 1 and Tier 2 offerings on capital formation and investor protection.<sup>7</sup> The Commission indicated in the 2015 Regulation A Release that, based on the information contained in the report, it may propose either to decrease or to increase the offering limit for Tier 1, as appropriate.<sup>8</sup>

Staff has conducted a lookback review of Regulation A as specified in the 2015 Regulation A Release and an offering limit review as required under the JOBS Act. While the joint findings of these analyses are discussed more in depth throughout this report, at a high level:

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<sup>5</sup> See Amendments to Regulation A, Release No. 33-10591 (Dec. 19, 2018) [84 FR 520 (Jan. 31, 2019)] (“2018 Regulation A Release”).

<sup>6</sup> See 2015 Regulation A Release, at Section II.A.

<sup>7</sup> See *id.* The 2015 Regulation A Release stated that “[t]he report will include, but not be limited to, a review of: (1) the amount of capital raised under the amendments; (2) the number of issuances and amount raised by both Tier 1 and Tier 2 offerings; (3) the number of placement agents and brokers facilitating the Regulation A offerings; (4) the number of Federal, State, or any other actions taken against issuers, placement agents, or brokers with respect to both Tier 1 and Tier 2 offerings; and (5) whether any additional investor protections are necessary for either Tier 1 or Tier 2.” *Id.*

<sup>8</sup> *Id.*

- Through the staff’s examination of capital formation in the Regulation A market since the effectiveness of the 2015 amendments, the amount of capital raised and the number of issuances and amounts sought in Tier 1 and Tier 2 offerings, as of December 31, 2019 were reported as follows:
  - \$2.446 billion reported raised by 183 issuers in ongoing and closed offerings (average of \$13.4 million), including \$230 million in Tier 1 and \$2.216 billion in Tier 2 offerings;
  - \$9.095 billion sought across 382 qualified offerings (average of \$23.8 million), including \$759 million sought across 105 qualified Tier 1 offerings and \$8.336 billion sought across 277 qualified Tier 2 offerings (excluding withdrawn offerings); and
  - \$11.170 billion sought across 487 filed offerings (average of \$22.9 million), some of which have not been qualified, including \$1.102 billion sought across 145 filed Tier 1 offerings and \$10.069 billion sought across 342 filed Tier 2 offerings (excluding withdrawn and abandoned offerings).
- Aggregate Regulation A financing levels between 2016 and 2019 were significantly higher than financing levels prior to the 2015 amendments, due to the increase in the offering limit and the number of offerings. However, aggregate Regulation A financing levels remain modest relative to registered offerings or Regulation D offerings. Financing levels are likely related to a combination of factors, including the pool of issuers and investors drawn to the market under existing conditions; the availability to issuers of attractive private placement alternatives without an offering limit; the availability to investors of attractive investment alternatives with a more diversified pool

of issuers; limited intermediary participation and a lack of traditional underwriting, which limits certification (*i.e.*, signaling of an issuer’s growth potential to the market through an underwriter’s reputation, which mitigates the information asymmetry about an issuer’s potential); and a lack of secondary market liquidity.

The staff’s analysis took into account evidence from Regulation A market activity since the 2015 amendments through December 31, 2019; public comment following the 2015 amendments and the 2019 harmonization concept release;<sup>9</sup> evidence from industry reports; recommendations from the SEC’s annual Government Business Forums on Small Business Capital Formation;<sup>10</sup> and other public sources.

## **B. Background**

In adopting the two-tiered structure for Regulation A in 2015, the Commission indicated that it expected the requirements for Tier 1 to result in securities offerings that would be more local in character, while Tier 2 offerings would likely be more national in character.<sup>11</sup> Certain basic requirements are applicable to both tiers. While an issuer of \$20 million or less of securities can elect to proceed under either Tier 1 or Tier 2, Tier 2 issuers are subject to significant additional requirements. For example, Tier 2 issuers are required to include audited financial statements in their offering circulars<sup>12</sup> and must provide ongoing reports on an annual and semiannual basis with additional requirements for interim current event updates, assuring a

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<sup>9</sup> See 2015 Regulation A Release; and Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)] (“Concept Release”). Unless otherwise indicated, comments cited in this report are to comment letters received in response to the Concept Release, which are available at <https://www.sec.gov/comments/s7-08-19/s70819.htm>.

<sup>10</sup> See <https://www.sec.gov/oasb/sbforum>.

<sup>11</sup> See 2015 Regulation A Release.

<sup>12</sup> See Part F/S of Form 1-A [17 CFR 239.90].

continuous flow of information to investors and the market.<sup>13</sup> In addition, Tier 2 offerings are not subject to state securities law registration and qualification requirements, while Tier 1 offerings remain subject to those state requirements.<sup>14</sup>

In addition to expanding the Regulation A offering limit, the 2015 amendments sought to modernize the Regulation A filing process, align practice in certain areas with prevailing practice for registered offerings, create additional flexibility for issuers in the offering process, and establish an ongoing reporting regime for certain Regulation A issuers.<sup>15</sup>

## **C. Capital Formation in the Regulation A market**

### **1. Capital Raising under the Amendments**

Below we discuss available information on the amount of capital raised under the exemption and the number of issuances and amount raised by both Tier 1 and Tier 2 offerings. Subject to the considerations detailed below, we analyze the available evidence on offering activity under Regulation A.<sup>16</sup> Except where specified otherwise, we consider evidence from the effectiveness of the 2015 amendments (June 19, 2015) through December 31, 2019. During the considered period, we estimate that 487 offerings by 442 issuers were filed, of which approximately 382 offerings by 346 issuers were qualified. The total amount sought was

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<sup>13</sup> See 17 CFR 230.257 (“Rule 257”).

<sup>14</sup> See 2015 Regulation A Release.

<sup>15</sup> See *id.*

<sup>16</sup> These data exclude offerings identified as withdrawn or abandoned. Some offerings included in our data may have been effectively halted and may be withdrawn or abandoned at a future date. Unless noted otherwise, the analysis relies on the information reported by issuers in the most recent amendment during the considered period, including post-qualification amendments. Offerings were identified based on CIK and file number; offerings identified as duplicates were consolidated; and amendments were consolidated with the original offering for purposes of the number of offerings. Rounding affects totals. After a prospective Regulation A issuer files an offering statement with the Commission, the offering statement is subject to review by Commission staff. The offering statement may then be declared qualified by a notice of qualification. After a Regulation A offering statement has been qualified, issuers may begin selling securities.

approximately \$11.2 billion across all filed offerings, including approximately \$9.1 billion across qualified offerings.

**Table 1. Capital Sought under Regulation A during June 19, 2015 - December 31, 2019<sup>17</sup>**

<b>All Filed Offerings</b> <i>(Dollar amounts in millions)</i>	<b>Tiers 1 &amp; 2</b>	<b>Tier 1</b>	<b>Tier 2</b>
Aggregate dollar amount sought	<b>\$11,170.2</b>	\$1,101.5	\$10,068.6
Number of offerings	<b>487</b>	145	342
Average dollar amount sought	<b>\$22.9</b>	\$7.6	\$29.4
<b>Offerings Qualified by Commission Staff</b> <i>(Dollar amounts in millions)</i>	<b>Tiers 1 &amp; 2</b>	<b>Tier 1</b>	<b>Tier 2</b>
Aggregate dollar amount sought	<b>\$9,094.8</b>	\$759.0	\$8,335.8
Number of offerings	<b>382</b>	105	277
Average dollar amount sought	<b>\$23.8</b>	\$7.2	\$30.1

Table 2 summarizes information about the proceeds reported in Regulation A offerings. Between June 2015 and December 2019, approximately \$2.4 billion in proceeds was reported by 183 issuers.

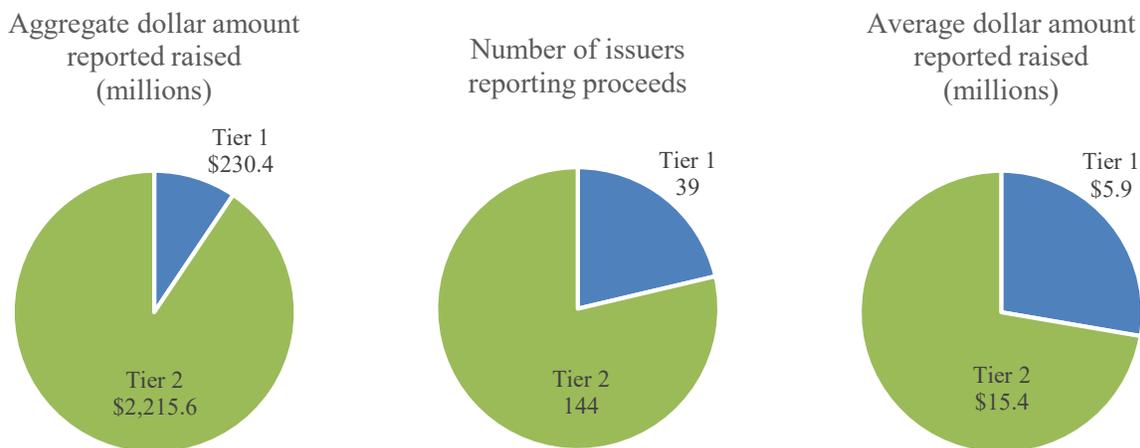
**Table 2. Capital Reported Raised under Regulation A during June 19, 2015 - December 31, 2019<sup>18</sup>**

<b>Capital Reported Raised</b> <i>(Dollar amounts in millions)</i>	<b>Tiers 1 &amp; 2</b>	<b>Tier 1</b>	<b>Tier 2</b>
Aggregate dollar amount reported raised	\$2,445.9	\$230.4	\$2,215.6
Number of issuers reporting proceeds	183	39	144
Average dollar amount reported raised	\$13.4	\$5.9	\$15.4

<sup>17</sup> See *supra* note 16.

<sup>18</sup> Capital raised is based on information reported by companies in Forms 1-Z, 1-K, 1-SA, 1-U, and offering circular supplements pertaining to completed and ongoing Regulation A offerings and post-qualification amendments, and for issuers whose shares have become exchange-listed, information from other public sources. Estimates represent a lower bound on the amounts raised given the time frames for reporting proceeds following completed or terminated offerings and that offerings qualified during the report period may be ongoing. In particular, proceeds in ongoing offerings disclosed in periodic reports of Tier 2 issuers are likely to be amended at a future date. Issuers that report proceeds of zero are excluded from the count. Some of the issuers that have not yet made reports of proceeds may have ongoing offerings. Other issuers may have halted attempts to raise capital under Regulation A but have not made subsequent EDGAR filings. If an issuer reported proceeds both from a Tier 1 and a Tier 2 offering, that issuer is counted twice (once under Tier 1 and once under Tier 2).

**Figure 1. Capital Reported Raised under Regulation A**



Turning to a comparison of different offering tiers, as illustrated in Figure 1, Tier 2 accounted for the majority of Regulation A offerings (70% of filed and 73% of qualified offerings), amounts sought (90% of amounts sought in filed offerings and 92% of amounts sought in qualified offerings), and reported proceeds (91%) during this period. The larger Tier 2 offering limit does not appear to be the sole factor for issuers' decision between tiers, given that approximately 43% of filed Tier 2 offerings and 41% of qualified Tier 2 offerings sought amounts not exceeding the Tier 1 offering limit of \$20 million. We estimate that 112 Tier 2 issuers reported raising up to \$20 million in financing under Regulation A even though that amount would have made them eligible to use Tier 1 as well. Blue sky law preemption, facilitating nationwide solicitation and solicitation over the Internet, may have contributed to the popularity of Tier 2 offerings among issuers seeking the lower amount.<sup>19</sup>

<sup>19</sup> See, e.g., Commentary at the 38<sup>th</sup> Annual SEC Government-Business Forum on Small Business Capital Formation (Aug. 14, 2019), available at <https://www.sec.gov/files/2019-sec-government-business-forum-small-business-capital-formation-transcript.pdf>, transcript at 132–135.

Aggregate Regulation A financing levels were significantly higher relative to Regulation A prior to the 2015 amendments, as a combination of the increase in the offering limit and in the number of offerings.<sup>20</sup> As can be seen in Table 3 and Figure 2, issuer interest in Regulation A has grown over the considered period.

**Table 3. Trends in Financing under Regulation A since 2015<sup>21</sup>**

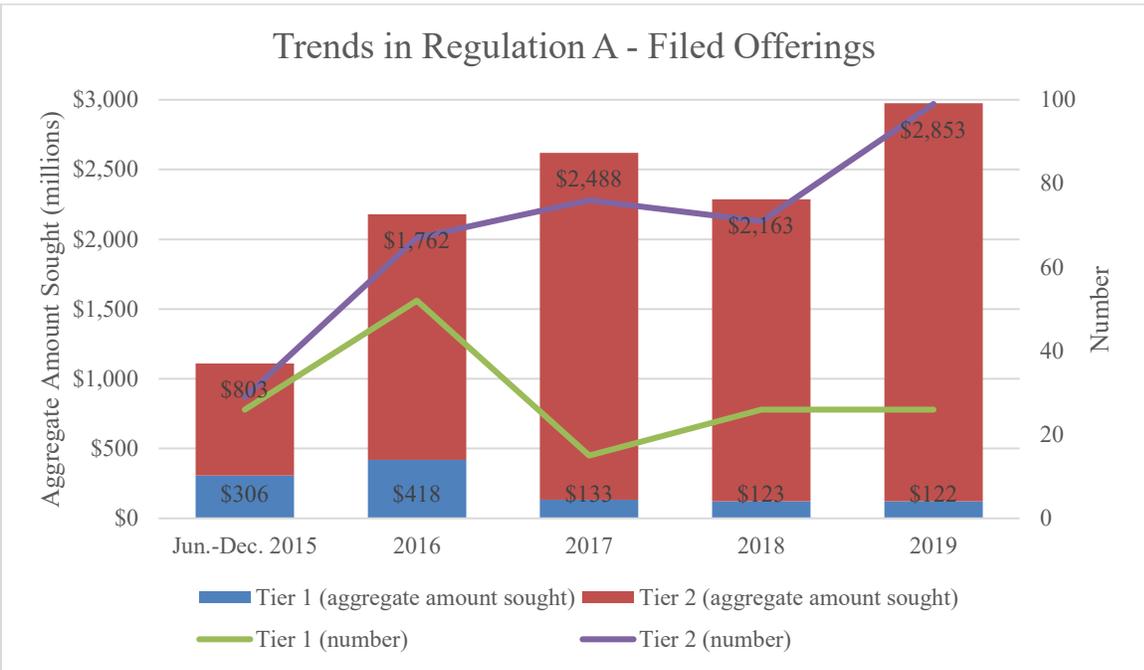
	<b>All</b>		<b>Tier 1</b>		<b>Tier 2</b>	
<b>Filed</b> Jun. 2015 to	Aggregate amount sought <i>(Dollar amounts in millions)</i>	Number of offerings	Aggregate amount sought <i>(Dollar amounts in millions)</i>	Number of offerings	Aggregate amount sought <i>(Dollar amounts in millions)</i>	Number of offerings
Dec. 2015	1,109.1	55	306.0	26	803.1	29
Dec. 2016	3,289.3	174	724.1	78	2,565.2	96
<i>Change in 2016</i>	<i>2,180.2</i>	<i>119</i>	<i>418.1</i>	<i>52</i>	<i>1,762.1</i>	<i>67</i>
Dec. 2017	5,909.7	265	856.8	93	5,053.0	172
<i>Change in 2017</i>	<i>2,620.4</i>	<i>91</i>	<i>132.7</i>	<i>15</i>	<i>2,487.7</i>	<i>76</i>
Dec. 2018	8,195.9	362	979.8	119	7,216.1	243
<i>Change in 2018</i>	<i>2,286.2</i>	<i>97</i>	<i>123.0</i>	<i>26</i>	<i>2,163.1</i>	<i>71</i>
Dec. 2019	11,170.2	487	1,101.5	145	10,068.6	342
<i>Change in 2019</i>	<i>2,974.3</i>	<i>125</i>	<i>121.7</i>	<i>26</i>	<i>2,852.5</i>	<i>99</i>
	<b>All</b>		<b>Tier 1</b>		<b>Tier 2</b>	
<b>Qualified</b> Jun. 2015 to	Aggregate amount sought <i>(Dollar amounts in millions)</i>	Number of offerings	Aggregate amount sought <i>(Dollar amounts in millions)</i>	Number of offerings	Aggregate amount sought <i>(Dollar amounts in millions)</i>	Number of offerings
Dec. 2015	181.9	15	68.8	10	113.1	5
Dec. 2016	1,892.1	100	305.7	42	1,586.4	58
<i>Change in 2016</i>	<i>1,710.2</i>	<i>85</i>	<i>236.9</i>	<i>32</i>	<i>1,473.4</i>	<i>53</i>
Dec. 2017	4,153.1	185	488.1	57	3,665.1	128
<i>Change in 2017</i>	<i>2,261.0</i>	<i>85</i>	<i>182.4</i>	<i>15</i>	<i>2,078.6</i>	<i>70</i>
Dec. 2018	6,332.1	280	724.5	86	5,607.6	194
<i>Change in 2018</i>	<i>2,179.0</i>	<i>95</i>	<i>236.4</i>	<i>29</i>	<i>1,942.5</i>	<i>66</i>
Dec. 2019	9,094.8	382	759.0	105	8,335.8	277
<i>Change in 2019</i>	<i>2,762.7</i>	<i>102</i>	<i>34.5</i>	<i>19</i>	<i>2,728.2</i>	<i>83</i>

<sup>20</sup> Prior to June 19, 2015, Regulation A issuers could raise up to \$5 million in a 12-month period. *See supra* note 3 and accompanying text. *See also* 2015 Regulation A Release, at text accompanying note 893 (noting that 26 offerings, excluding amendments, were qualified by the Commission in calendar years 2012 to 2014, which amounts to an average of 8–9 qualified offerings per year).

<sup>21</sup> *See supra* notes 17 and 18. Totals as of the end of the respective period reflect exclusion of abandoned or withdrawn offerings. Changes over time in cumulative amounts reported raised may reflect the timing of reporting by the company rather than the time at which the capital was raised, and therefore should not be used to gauge trends in capital raising activity.

Reported Proceeds Jun. 2015 to:	All		Tier 1		Tier 2	
	Aggregate proceeds (Dollar amounts in millions)	Number of issuers	Aggregate proceeds (Dollar amounts in millions)	Number of issuers	Aggregate proceeds (Dollar amounts in millions)	Number of issuers
Dec. 2015	9.6	2	2.0	1	7.6	1
Dec. 2016	238.7	27	55.6	7	183.1	20
Change in 2016	229.2	25	53.7	6	175.5	19
Dec. 2017	668.7	78	126.0	17	542.7	61
Change in 2017	430.0	51	70.3	10	359.6	41
Dec. 2018	1,404.4	132	186.5	27	1,218.0	105
Change in 2018	735.7	54	60.5	10	675.3	44
Dec. 2019	2,445.9	183	230.4	39	2,215.6	144
Change in 2019	1,041.5	51	43.9	12	997.6	39

**Figure 2. Trends in Regulation A**



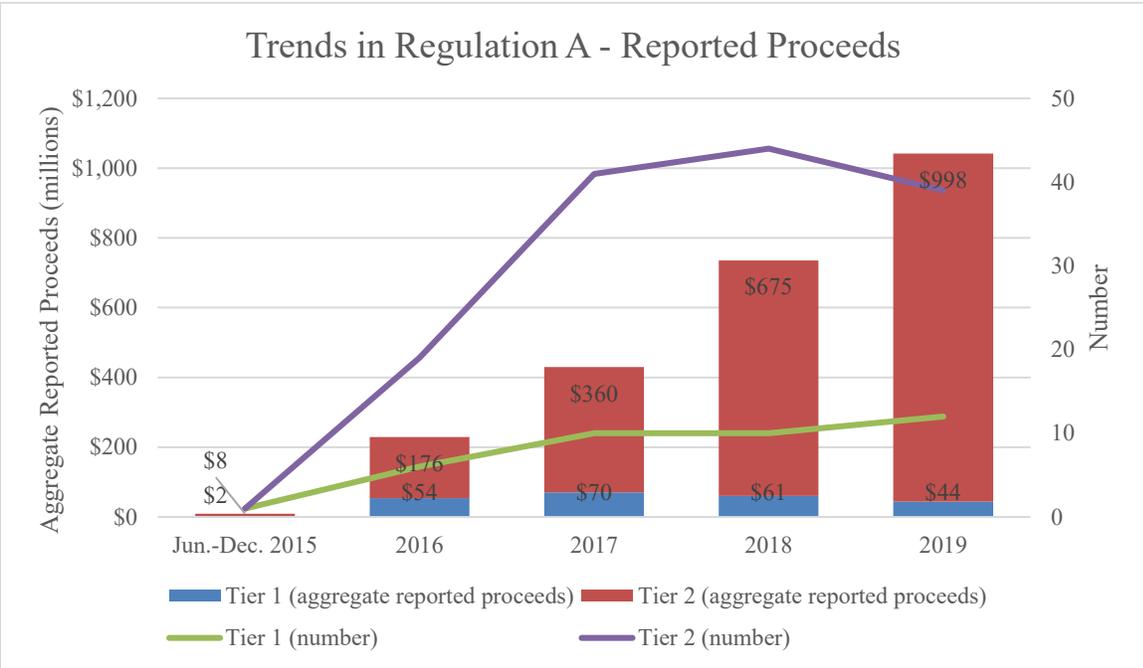
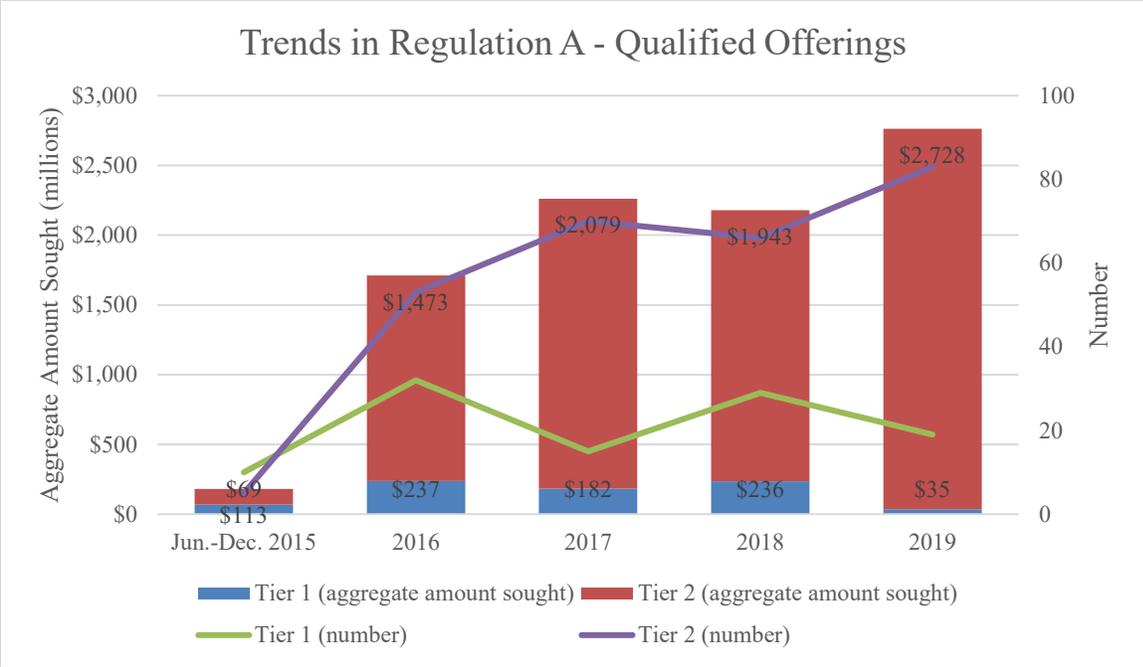


Table 4 reports amounts of capital sought and reported raised per issuer (across all offerings during the June 2015–December 2019 period). A typical Regulation A issuer sought to offer amounts that were substantially below existing offering limits. Reported proceeds were significantly smaller than the amounts sought and the existing offering limits, and only 10% of

issuers reported proceeds that in the aggregate (across the entire June 2015–December 2019 period) reached the respective 12-month offering limit. Potential reasons are difficult to pinpoint with certainty, but the findings are generally in line with the expectation that proceeds would be lower than amounts sought due to many of these issuances being best-efforts, self-underwritten offerings with limited institutional participation.

**Table 4. Capital Sought and Raised under Regulation A during June 2015–December 2019 vs. Existing Offering Limits<sup>22</sup>**

	Median per issuer (Dollar amounts in millions)	Average per issuer (Dollar amounts in millions)	% of issuers with proceeds reaching the existing limit
<i>Amount sought per issuer across filed offerings</i>			
All issuers	\$15.0	\$25.2	33%
Tier 1	\$5.0	\$8.5	15%
Tier 2	\$26.0	\$32.0	41%
<i>Amount sought per issuer across qualified offerings</i>			
All issuers	\$16.3	\$26.1	34%
Tier 1	\$5.0	\$8.2	13%
Tier 2	\$26.0	\$32.3	41%
<i>Reported proceeds per issuer</i>			
All issuers	\$5.0	\$13.4	9%
Tier 1	\$4.1	\$5.9	3%
Tier 2	\$5.5	\$15.4	10%

## 2. Characteristics of Regulation A Issuers and Offerings

Below we summarize information on issuer and offering characteristics in qualified Regulation A offerings during the considered period.

<sup>22</sup> See *supra* notes 16, 17, and 18. However, all amounts shown in this table reflect totals of reported proceeds for each issuer, across all offerings during the considered period. Thus, amounts of proceeds per issuer may exceed the 12-month offering limits. For an issuer that reported proceeds on both Tier 1 and Tier 2 offerings, the offerings are allocated between the two categories as reported. The threshold for an issuer reaching the limit is set at 99.9% of the maximum to allow for rounding.

**Table 5. Regulation A Issuer and Offering Characteristics<sup>23</sup>**

Variable	Mean	Median
Total assets	\$32,582,700	\$311,500
Employees	38.9	2.5
Age (years since incorporation)	6.6	3.0
Revenue	\$2,642,800	\$0
% revenue >0	47%	
Net income	-\$490,100	-\$14,000
% net income >0	21%	
Cash and cash equivalents	\$1,842,700	\$31,200
Property, plants, and equipment	\$4,677,200	\$0
Long-term debt	\$5,758,900	\$0
% continuous offerings	80%	
% testing the waters	27%	
% offerings with affiliate selling security holders	6%	
States of solicitation	38	51
% equity offerings <sup>24</sup>	93%	

Although there was considerable heterogeneity among issuers, Table 5 shows that the pool of issuers in qualified Regulation A offerings has so far has been dominated by small relatively young issuers. Among issuers for which revenue information was available, just under half of the issuers have generated revenue.<sup>25</sup> Turning to offering characteristics, most offerings (93%) involved equity securities, were conducted on a continuous basis (80%), and did not report sales by affiliated security holders (94%). Offerings were generally conducted on a best-efforts basis.<sup>26</sup> Over a quarter of qualified offerings used testing the waters, almost all of which

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<sup>23</sup> Statistics are based on qualified offering statements. The information is based on Part I of Form 1-A of Regulation A offering statements or latest amendment qualified during the considered period. *See supra* note 17.

<sup>24</sup> Certain security types characterized as “other” were reclassified as equity or debt based on description.

<sup>25</sup> Revenue information was not available for approximately 5.5% of issuers.

<sup>26</sup> Information in Part I of Form 1-A across qualified offerings (or latest amendment qualified during the considered period) indicates that 93% of the offerings reported being best-efforts offerings. Some of the remaining offerings were associated with mergers and dividend reinvestment plans, while some others may reflect inaccuracies in tagging. We are not aware of firm commitment underwriting in this market segment.

were Tier 2 offerings. The median offering involved national solicitation by the issuer or intermediary, but solicitation was generally limited to a handful of states in Tier 1 offerings (median of three among qualified Tier 1 offerings).

During the considered period, the majority of Regulation A issuers lacked a liquid secondary trading market for their securities. Table 6 and Figure 3 summarize data on secondary trading markets for Regulation A issuers. Some commenters have noted that state registration requirements for secondary market transactions in Regulation A securities limit liquidity in the Regulation A market.<sup>27</sup>

**Table 6. Secondary Trading Market of Regulation A Issuers<sup>28</sup>**

<i>Market</i>	<i>Issuers</i>	<i>%</i>
Exchange listing <sup>29</sup>	11	3.2%
OTC quotation <sup>30</sup>	75	21.7%
<i>OTCQX/OTCQB</i>	14	4.0%
<i>OTC Pink</i>	61	17.6%
No market identified	260	75.1%

<sup>27</sup> See, e.g., Advisory Committee on Small and Emerging Companies: Recommendations Regarding Secondary Market Liquidity for Regulation A, Tier 2 Securities (May 15, 2017), available at <https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-secondary-liquidityrecommendation.pdf>.

The 2019 Small Business Forum also recommended that the Commission provide for blue sky preemption for secondary trading of securities issued in Tier 2 offerings. See 2019 Forum Report, at 10.

State registration requirements for secondary market transactions are not applicable to Regulation A securities listed on a national securities exchange. See Concept Release, at Section V.B.2.

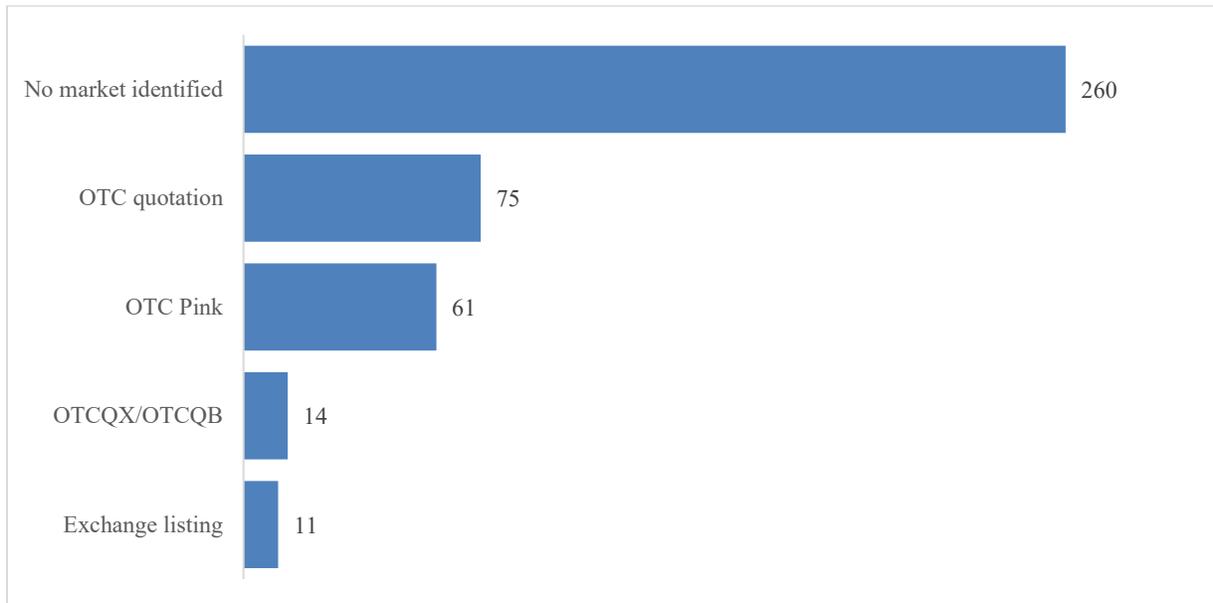
<sup>28</sup> There were 346 issuers in offerings qualified during the considered period.

<sup>29</sup> Information on exchange listing was based on searches of CERT submissions and news searches and excludes issuers delisted as of December 31, 2019.

<sup>30</sup> Information on OTC quotation was based on data from OTC Markets as of the end of December 2019. For issuers with multiple classes of securities we cannot determine whether the class issued in a Regulation A offering is quoted on the OTC market. Grey market issuers are excluded. Among securities quoted on the OTC market, liquidity can vary significantly from issuer to issuer and is on average lower than the liquidity of securities listed on major exchanges. Many filers mention a lack of a public market for their securities in their disclosures.

<i>Market</i>	<i>Issuers</i>	<i>%</i>
Total:	346	100%

**Figure 3. Secondary Trading Market of Regulation A Issuers**



There have been relatively few Exchange Act reporting company issuers relying on Regulation A to date.<sup>31</sup> It remains unclear what impact such issuers' reliance on Regulation A will have on capital formation and investor protection. The potential economic effects of reliance of reporting company issuers on Regulation A were discussed in the adopting release for the 2018 amendments.<sup>32</sup>

The industry distribution reflects a heavy concentration of offerings in the finance sector.<sup>33</sup> Figure 4a summarizes the industry distribution of the amounts sought in qualified

<sup>31</sup> The change to permit Exchange Act registrants to use Regulation A was adopted in December 2018 and approximately 17 Exchange Act registrants sought to use Regulation A to conduct an offering in 2019, of which 11 of those offerings were qualified.

<sup>32</sup> See 2018 Regulation A Release, at Section IV.

<sup>33</sup> Issuers with primary SIC codes between 6000 and 6999 are classified as being in the finance sector.

Regulation A offerings. Finance, insurance, and real estate accounted for 53% of financing sought in qualified Regulation A offerings. Examining more granular SIC code data suggests that financial issuers were frequently REITs and other real estate companies, other holding companies, non-depository credit institutions, and commercial banks. The most common industry among nonfinancial issuers in qualified offerings was business services (which includes software), followed by chemicals.

**Figure 4a. Capital Sought in Qualified Regulation A Offerings, by Issuer Industry<sup>34</sup>**

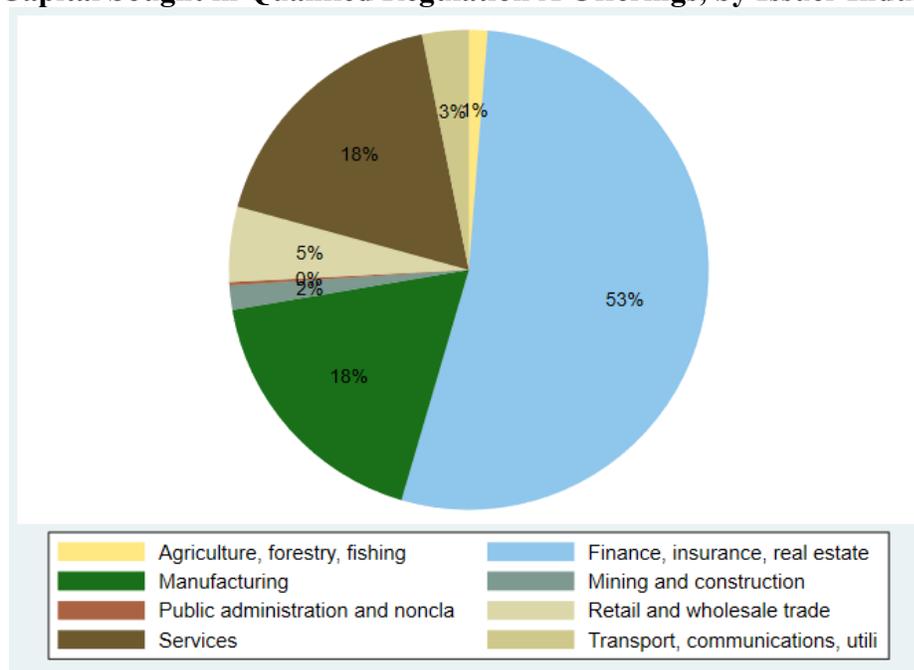
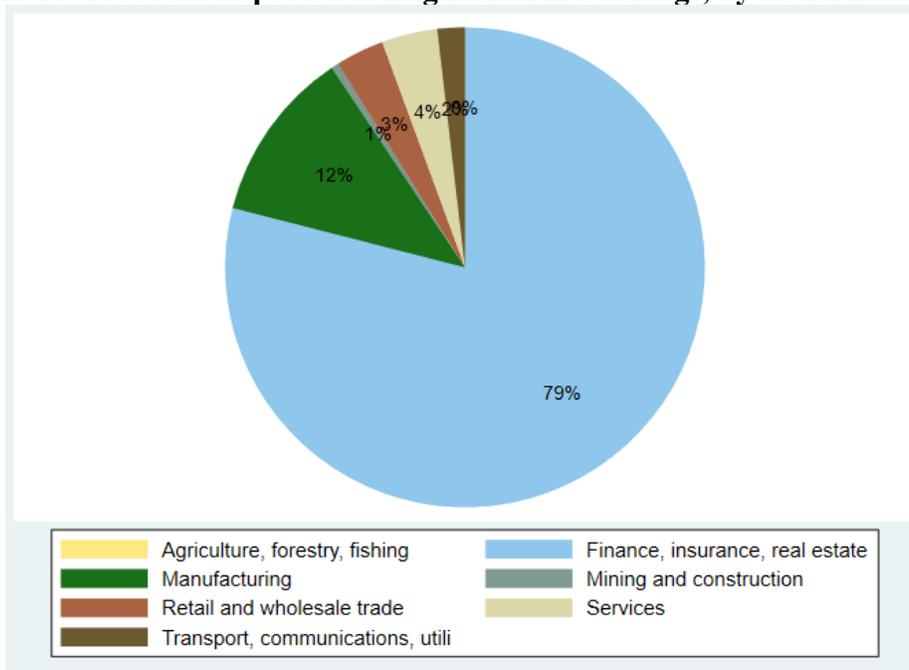


Figure 4b summarizes the industry distribution of the proceeds reported in Regulation A offerings. The finance sector accounted for 79% of reported proceeds (with real estate issuers accounting for 69% of all reported proceeds). The most common industry among nonfinancial issuers was transportation equipment, followed by business services.

<sup>34</sup> See *supra* notes 17 and 18. The industry is based on the primary SIC code as reported in Part I of Form 1-A or the latest amendment to it.

**Figure 4b. Proceeds Reported in Regulation A Offerings, by Issuer Industry<sup>35</sup>**

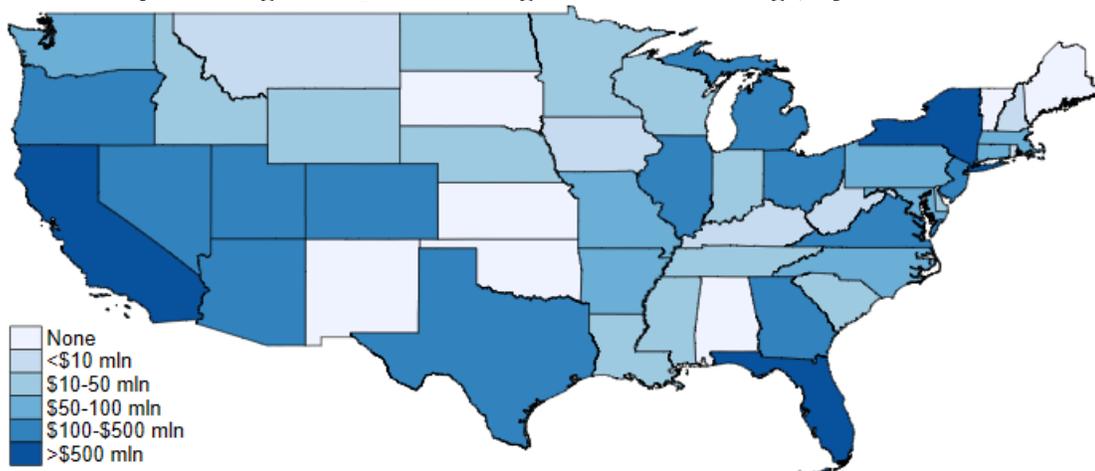


Close to 50% of qualified offerings were by issuers incorporated in Delaware, with an additional 13% by issuers incorporated in Nevada. As with reporting companies, headquarters location often differs from the state of incorporation.

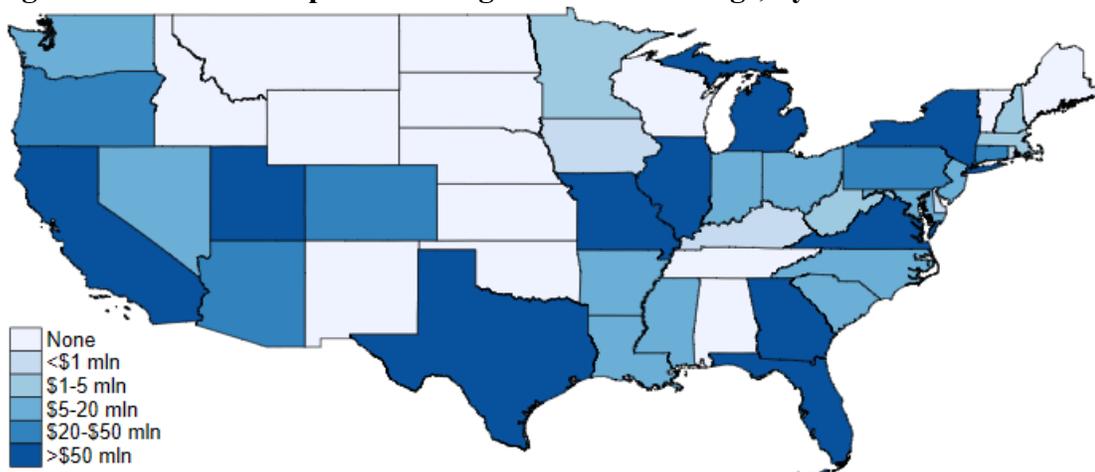
Figure 5a summarizes the geographic distribution of financing sought in qualified Regulation A offerings, by state of issuers' headquarters location. Issuers headquartered in California accounted for 24% of the aggregate amounts sought, followed by Washington, DC (16%) and Florida (9%). Figure 5b summarizes the geographic distribution of the proceeds reported in Regulation A offerings, by state of issuer headquarters location. Issuers headquartered in Washington, D.C. accounted for 36% of reported proceeds (due to one large REIT sponsor headquartered in that area), followed by California (13%), and Utah (7%).

<sup>35</sup> See *supra* note 18. The industry is based on the primary SIC code as reported in Part I of Form 1-A or the latest amendment to it.

**Figure 5a. Capital Sought in Qualified Regulation A Offerings, by Issuer Location<sup>36</sup>**



**Figure 5b. Proceeds Reported in Regulation A Offerings, by Issuer Location<sup>37</sup>**



#### **D. Intermediaries in the Regulation A market**

Below we discuss available information on the number of placement agents and brokers facilitating Regulation A offerings. Intermediary involvement in Regulation A offerings has been limited so far. This can pose hurdles for capital raising by small and first-time issuers,

<sup>36</sup> See *supra* notes 16 and 17. The state of location is based on the state of headquarters location as reported in Part I of Form 1-A or the latest amendment. The maps exclude Alaska, Hawaii, and U.S. territories. Those areas did not have issuers with qualified Regulation A offerings during the considered period.

<sup>37</sup> See *supra* notes 18 and 36.

which tend to have potentially high information asymmetries and lower levels of investor recognition. For approximately 32% of qualified offerings, Part I of Form 1-A reported the use of an intermediary or fees to intermediaries, including approximately 26% of offerings in which a registered intermediary was identified by name or CRD number.<sup>38</sup> Based on Form 1-A data for those offering statements that identified a registered intermediary involved in the offering, close to 40 registered intermediaries have participated in Regulation A offerings.

## **E. Investor Protection Considerations in the Regulation A Market**

### **1. Federal, State, and Other Actions**

Below we discuss available information on the number of Federal, State, or any other actions taken against issuers, placement agents, or brokers with respect to both Tier 1 and Tier 2 offerings.

At the outset we note that our ability to quantify the severity of investor protection risks in the Regulation A offering market is limited by several factors, including: a relatively small sample size; latency of fraud (not all incidences may be detected or result in observable legal actions); high business risk and failure rates of small and startup businesses under normal conditions; and a lack of data on investor composition (*e.g.*, we cannot observe the percentage of investor money invested by accredited investors). Further, information gathered under the existing offering limit and exemption structure may not be representative of investor risks and magnitude of losses under a different regulatory structure (such as a different offering limit or different investor protections for investors in Tier 1 versus Tier 2 offerings).

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<sup>38</sup> As a caveat, we observe variance in the completeness of information about intermediaries reported in Part I of Form 1-A.

During the considered period, there have been relatively few instances of legal proceedings involving issuers or intermediaries relying on Regulation A, some of which remain ongoing as of this writing. We have identified nine enforcement actions and administrative proceedings undertaken by the Commission involving issuers or intermediaries involving or relying on Regulation A,<sup>39</sup> and one group of actions by a state securities regulator against an issuer and its intermediaries.<sup>40</sup> We have not identified any other state court actions or any FINRA actions in the considered period, other than two FINRA actions resulting from the same offerings that led to the above-referenced state court action.<sup>41</sup> Due to the small sample size and differences in the circumstances associated with individual legal proceedings, some of which

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<sup>39</sup> See *SEC v. Hologram USA Networks, Inc. and Alkiviades David*, Civil Action No. 1:19-cv-09013 (S.D.N.Y. filed Sep. 27, 2019) (“*SEC V. Hologram*”); *BrixInvest, LLC (f/k/a Rich Uncles, LLC and Nexregen, LLC)*, Release No. 33-10702 (Sep. 26, 2019); *SEC v. Longfin Corp. and Venkata S. Meenavalli*, No. 19-CV-5296 (S.D.N.Y. filed June 5, 2019); *SEC v. Blockvest, LLC*, 2019 U.S. Dist. LEXIS 24446 (Feb. 14, 2019); *Punch TV Studios, Inc.*, Release No. 33-10452 (Jan. 9, 2018); *Strategic Global Investments, Inc.*, 34-81314 (Aug. 3, 2017); *Web Debt Solutions, LLC*, Release No. 33-10316 (Feb. 28, 2017); and *Steven J. Muehler, Alternative Securities Markets Group Corp., and Blue Coast Securities Corp., dba GlobalCrowdTV, Inc. and Blue Coast Banc*, Release No. 34-78118 (Jun. 21, 2016). See also *Med-X, Inc.*, Release No. 33-10216 (Sept. 16, 2016), which temporarily suspended the exemption pursuant to Rule 258(a) and was subsequently vacated by *In the Matter of Med-X, Inc.*, Initial Decision Release No. 1130 (May 8, 2017).

Actions during the covered period involving issuer conduct that preceded the effectiveness of the 2015 amendments to Regulation A are excluded.

<sup>40</sup> See Press Release, Colorado Division of Securities, Injunction granted and Receiver appointed in Division of Securities case against Joseph David Ryan, Madyson Investments (Nov. 16, 2017), available at <https://www.colorado.gov/pacific/dora/securities-joseph-david-ryan-madyson-investments> (“Colorado Division of Securities Action”); Press Release, Colorado Division of Securities, David Joseph Ryan and Dennis Farrah of Colorado Springs Arrested on Charges of Securities Fraud, available at <https://www.colorado.gov/pacific/dora/joseph-david-ryan-dennis-farrah-indicted-securities-fraud>; and Press Release, Colorado Division of Securities, Licenses Sanctioned for Two Representatives Who Sold Securities for Madyson Capital Management, available at <https://www.colorado.gov/pacific/dora/dennis-farrah-mark-raezer-license-sanctions>.

<sup>41</sup> See Letter of Acceptance, Waiver and Consent from Mark Gregory Raezer to FINRA, FINRA Case ID 201805707500 (Jun. 25, 2018), available at [https://www.finra.org/sites/default/files/fda\\_documents/2018057075001%20Mark%20Gregory%20Raezer%20CRD%206439772%20AWC%20jm%20%282019-1564186791168%29.pdf](https://www.finra.org/sites/default/files/fda_documents/2018057075001%20Mark%20Gregory%20Raezer%20CRD%206439772%20AWC%20jm%20%282019-1564186791168%29.pdf); and Letter of Acceptance, Waiver and Consent from Dennis Mitchell Farrah to FINRA, FINRA Case ID 2018057111801 (Jun. 18, 2018), available at [https://www.finra.org/sites/default/files/fda\\_documents/2018057111801%20Dennis%20Mitchell%20Farrah%20CRD%202703960%20AWC%20jm%20%282019-1563414570771%29.pdf](https://www.finra.org/sites/default/files/fda_documents/2018057111801%20Dennis%20Mitchell%20Farrah%20CRD%202703960%20AWC%20jm%20%282019-1563414570771%29.pdf).

remain ongoing, we cannot infer a systematic relation between offer size and the incidence of legal actions.<sup>42</sup>

## **2. Issuer and Intermediary Characteristics**

### **a. Regulation A issuer characteristics that may be correlated with risks to investors**

The staff continues to monitor the use of Regulation A and the potential investor risks in connection with such offerings. For example, Regulation A offerings during the considered period exhibited certain characteristics that have been discussed in the context of investor risks in other markets, but we lack data to assess whether these characteristics will affect investor risks and potential losses in the Regulation A market differently than in other markets.

Some of the characteristics associated with the typical Regulation A issuer to date may be associated with higher risks to investors. Many of the issuers during the considered period were development-stage or penny-stock companies without institutional ownership or research coverage, characteristics that may be correlated with a higher level of risk.<sup>43</sup> Some of these issuers do not provide ongoing reports, which can contribute to information asymmetries.<sup>44</sup> Most issuers do not have a liquid secondary market for their securities, which can make it difficult for investors to sell their investment quickly without a loss of value.

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<sup>42</sup> Further, we recognize that larger offerings may result in larger potential aggregate losses in dollar terms. However, very small offerings may draw issuers with a different risk profile and potentially result in higher percentage losses of the invested capital.

<sup>43</sup> See United States Securities and Exchange Commission Office of Investor Education and Advocacy, Investor Bulletin: Microcap Stock Basics (Part 3 of 3: Risk) (Oct. 21, 2016), *available at* <https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-microcap-stock-basics-part-3-3>. Offering limits may discourage larger issuers from using Regulation A. Further, larger issuers that seek a public market and are able to meet listing requirements may prefer a traditional registered offering with an exchange listing that may achieve better recognition among analysts and institutional investors.

<sup>44</sup> This consideration is applicable to Tier 1 issuers that are not required to provide periodic reports; Tier 2 issuers that are eligible to terminate periodic reporting; and Tier 2 issuers that are not eligible to terminate periodic reporting but that are not compliant with periodic reporting obligations.

Recently, some concerns have emerged regarding Regulation A issuers that obtained an exchange listing.<sup>45</sup> Nasdaq has amended listing eligibility requirements for Regulation A companies seeking a Nasdaq listing to require issuers to have a minimum operating history of two years at the time of approval of its initial listing application.<sup>46</sup> Nasdaq stated in its proposal that “it has observed problems with certain companies listing on the Exchange in connection with an offering under Regulation A” and also noted, among other things, that “Regulation A offering statements have lighter disclosure requirements as compared to a traditional initial public offering on Form S-1.”<sup>47</sup>

Some Regulation A issuers have restated their financial statements.<sup>48</sup> Some issuers in Tier 2 offerings appear to not have filed, or to not have timely filed, their periodic reports. We lack the data to systematically assess the potential effects of these factors on Regulation A investors.

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<sup>45</sup> See Tom Zanki, Reg A+ ‘Mini-IPOs’ Face Market Resistance, Law360 (Feb. 23, 2018), *available at* <https://www.law360.com/articles/1015536/reg-a-mini-ipo-face-market-resistance>; and Tom Zanki, SEC Approves Nasdaq Plan to Raise Reg A+ Standards, Law360 (Jul. 1, 2019), *available at* <https://www.law360.com/articles/1174572/sec-approves-nasdaq-plan-to-raise-reg-a-standards>.

<sup>46</sup> See Order Granting Approval of a Proposed Rule Change to Adopt Additional Requirements for Listings in Connection with an Offering under Regulation A of the Securities Act, Release No. 34-86246 (Jun. 28, 2019) [84 FR 32245 (Jul. 5, 2019)].

<sup>47</sup> *Id.*

<sup>48</sup> Based on a search of filings by issuers with Regulation A offering statements qualified and not withdrawn as of December 2019, checked against Ives Group’s Audit Analytics restatements dataset (with disclosure dates ending December 31, 2019), excluding restatements referencing fiscal periods ending prior to 2014, we identified 21 issuers that restated their financials on or after the first Regulation A offering statement filing date, of which 15 restated their financials after the initial qualification (i.e., after investment commitments could be accepted). This amounts to 6% of issuers (21 / 346) issuing restatements or 4% (15 / 346) of issuers issuing restatements after qualification. Of the issuers with restatements, the majority had a negative effect. By comparison, during the considered period approximately 1,078 out of 14,325 (7.5%) unique issuers with registration statements declared effective (identified from EDGAR filings) issued restatements. As a caveat for interpreting these estimates, we cannot observe if the likelihood of issuing a restatement, conditional on having irregularities in financial statements, is comparable for Regulation A issuers and for issuers in registered offerings.

Further, some Regulation A offerings have involved lines of business that may be associated with higher risk. For example, a large share of proceeds reported raised in Regulation A offerings during the considered period involved real estate issuers (69% of proceeds reported in ongoing and completed offerings).<sup>49</sup>

As an important caveat, if the issuers with the described risk profile did not rely on Regulation A, it is plausible that they might have instead relied on other exemptions from registration or a registered offering.

**b. Regulation A intermediary characteristics that may be correlated with risks to investors**

Some of the intermediaries involved in Regulation A offerings are associated with potential risks to individual investors. Regulation A offerings are not required to be conducted via registered intermediaries, and various Regulation A issuers have solicited prospective investors via unregistered entities, such as finders, promoters, marketing platforms, and other third parties that are not registered with the Commission or FINRA.<sup>50</sup> The use of unregistered intermediaries poses potential investor protection concerns because of the absence of regulatory framework for such intermediaries' practices and involvement in offerings. We lack data to

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<sup>49</sup> We cannot rule out the possibility that real estate issuers, most of which relied on Tier 2, provided timelier updates of proceeds raised, relative to other issuers.

*See also* FINRA, Investor Alert: Public Non-Traded REITs—Perform a Careful Review Before Investing (last updated Nov. 30, 2016), available at <http://www.finra.org/investors/alerts/public-non-traded-reits-careful-review>. However, Regulation A real estate offerings, on a per-offering and aggregate basis, were significantly smaller than nontraded registered real estate offerings. *See infra* note 74. Almost all Regulation A real estate offerings relied on Tier 2, which subjects issuers to semi-annual (rather than quarterly) reporting and nonaccredited investor investment limits (the higher of 10% of annual income or net worth per offering). However, Tier 2 offerings are exempt from state registration requirements — including investor suitability standards — that typically apply to nontraded registered offerings.

<sup>50</sup> This observation relies on the advertising of Regulation A offerings, including offerings that are in the testing-the-waters stage, on online platforms and such platforms' disclosure that Regulation A offerings advertised on them do not involve a registered broker-dealer or investment adviser. Because of variance in the completeness of information on the participation of unregistered intermediaries and other third parties involved in advertising the offering, we are unable to form a reliable estimate of their prevalence in the Regulation A market.

evaluate whether the involvement of unregistered intermediaries has resulted in additional risks to investors in Regulation A offerings during the considered period, compared to other offerings, such as private placements in reliance on Section 4(a)(2) or Regulation D, that also may involve unregistered intermediaries.

Some registered intermediaries engaged in Regulation A offerings make disclosures of prior actions, including, in some instances, violations of FINRA or other rules. With the caveat about data availability,<sup>51</sup> among offerings where the use of a registered intermediary was disclosed, the intermediary had at least one disclosure<sup>52</sup> on FINRA’s BrokerCheck website in approximately 36% of cases.

### **3. Consideration of Additional Investor Protections**

Based on the few legal proceedings during the considered period, the staff’s experience with reviews of offering materials, and feedback from market participants, it is not clear that additional investor protections are necessary at this time. The staff has identified one inconsistency in the treatment of Regulation A issuers that are Exchange Act reporting companies compared to other Regulation A issuers. Specifically, Regulation A includes an eligibility requirement that an issuer conducting a Regulation A offering must have filed with the Commission all reports required to be filed, if any, pursuant to Rule 257 during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports).<sup>53</sup> Because Exchange Act registrants are not required to file reports pursuant

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<sup>51</sup> See *supra* note 38 and accompanying text.

<sup>52</sup> Disclosures are broadly defined to include “customer complaints or arbitrations, regulatory actions, employment terminations, bankruptcy filings and any civil or criminal proceedings that they were a part of.” Larger broker-dealers or broker-dealers that have been registered for a longer period of time may have more disclosures.

<sup>53</sup> 17 CFR 230.251(b)(7). Rule 257 requires issuers conducting Tier 2 offerings to comply with certain ongoing and periodic reporting requirements.

to Rule 257, the existing eligibility provision does not expressly require those registrants to have filed their Exchange Act reports in order to rely on Regulation A.

The Commission could amend the eligibility restrictions of Regulation A with respect to Exchange Act filers such that a delinquent Exchange Act filer would be ineligible to rely on the exemption. Such a change would hold Exchange Act reporting company issuers to the same standard as repeat Regulation A issuers. This requirement would benefit investors by ensuring that they have access to historical financial and non-financial statement disclosure about Exchange Act reporting companies that are conducting Regulation A offerings and may facilitate the development of an efficient secondary market for the securities they purchase in Regulation A offerings. Furthermore, because they are already required to file such reports, such a requirement would not increase the burden of making a Regulation A offering for Exchange Act reporting companies or companies that were Exchange Act reporting companies within the two years prior to making a Regulation A offering.

## **F. Offering Limit Review Analysis**

We believe that the general economic tradeoffs associated with setting an offering limit for Tier 1 and/or Tier 2 offerings discussed in the economic analysis of the 2015 amendments continue to apply.<sup>54</sup> Below we present information from public comment; updated data on the use of Regulation A, inflation adjustment analysis, and an analysis of offerings relying on other offering methods without an offering limit during this period.

### **1. Evidence from Public Comment**

In the 2015 Regulation A Release, the Commission noted that some commenters suggested that the Commission raise the proposed \$50 million Tier 2 offering limit to an amount

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<sup>54</sup> See 2015 Regulation A Release.

above the statutory limit set forth in Section 3(b)(2); however, the Commission did not believe an increase was warranted at the time.<sup>55</sup> The Commission explained that, while Regulation A had existed as an exemption from registration for some time, the 2015 amendments were significant. Accordingly, the Commission believed that the 2015 amendments would provide for a meaningful addition to the existing capital formation options of smaller issuers while maintaining important investor protections.

Since adoption of the 2015 amendments, the 2017 and 2018 Small Business Forums have recommended that the Commission increase the maximum offering amount under Tier 2 of Regulation A from \$50 million to \$75 million.<sup>56</sup> A 2017 report by the Department of the Treasury also recommended that the Tier 2 offering limit be increased to \$75 million.<sup>57</sup>

In the Concept Release, the Commission requested comment on whether to increase the Regulation A offering limit. Comments were mixed, with some commenters supporting an increase in the offering limit and others opposing an increase. Several commenters expressed support for raising the Tier 2 offering limit to either \$75 million or \$100 million.<sup>58</sup> Others were

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<sup>55</sup> See 2015 Regulation A Release, at text accompanying note 93.

<sup>56</sup> See Final Report of the 2018 SEC Government-Business Forum on Small Business Capital Formation (June 2019) (“2018 Forum Report”), available at <https://www.sec.gov/info/smallbus/gbfor37.pdf>; and Final Report of the 2017 SEC Government-Business Forum on Small Business Capital Formation (March 2018) (“2017 Forum Report”), available at <https://www.sec.gov/files/gbfor36.pdf>.

<sup>57</sup> See A Financial System That Creates Economic Opportunities - Capital Markets (October 2017) (“2017 Treasury Report”), available at <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.

<sup>58</sup> See, e.g., letter from Committee on Securities Regulation of the Business Law Section of the New York State Bar Association dated October 16, 2019 (“NYSBA Letter”) (supporting raising the threshold to \$75 million and noting “[t]he Regulation A market would benefit from the participation of additional institutional investors and many institutional investors do not want to participate in smaller offerings where their holdings will constitute a disproportionately large percentage of the outstanding securities.”); letter from CrowdCheck, Inc. dated October 30, 2019 (“CrowdCheck Letter”) (supporting raising the threshold to \$100 million); letter from Goodwin Procter LLP dated September 24, 2019 (“Goodwin Letter”) (supporting raising the threshold to \$100 million); letter from OTC Markets dated September 24, 2019 (supporting raising the threshold and noting the 2017 and 2018 Small Business Forum and 2017 Treasury Report recommendations to raise the threshold to \$75 million);

opposed to any change in the offering limits, noting that the current thresholds are already high and expressing the view that the Commission needs to gather more data on how the exemption affects investors before making any changes.<sup>59</sup>

## 2. Evidence from Regulation A Market

Data on Regulation A issuers that have made offerings under Regulation A provide the most relevant point of reference in our analysis of offering limits. This data is presented in Tables 1 through 4 above. For most issuers, proceeds reported in Regulation A offerings were significantly below the amounts sought and the twelve-month offering limits.<sup>60</sup> As shown in Table 4, approximately 9% of issuers have reached the limit based on proceeds reported across completed and ongoing offerings during the considered period. By comparison, approximately 34% of issuers reached the limit based on the maximum amount sought across all qualified offerings. As an important caveat, this inference is based on the pool of issuers attracted to

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and letter from Institute for Portfolio Alternatives dated September 24, 2019 (supporting raising the threshold to \$100 million).

<sup>59</sup> See, e.g., letter from Xavier Becerra, California Attorney General, et al., dated September 24, 2019; letter from Davis Polk & Wardwell LLP dated September 24, 2019 (indicating that “since the current thresholds are high and larger offerings should benefit from full SEC protection.”); letter from the Council of Institutional Investors dated October 3, 2019 (expressing its belief that “the Commission should not take any action to broaden or expand the Regulation A+ exemption without compelling evidence that such a change would benefit long term investors and the capital markets”); letter from Consumer Federation of America dated October 1, 2019 (suggesting that expansion of Regulation A has been bad for investors and markets); letter from Healthy Markets Association dated September 30, 2019 (suggesting Regulation A is a “disaster for investors” that should be curtailed or eliminated); and letter from North American Securities Administrators Association dated October 11, 2019 (“NASAA Letter”) (generally rejecting expansion of the availability of private offerings and recommending more oversight by state regulators).

<sup>60</sup> We do not observe how issuers choose offer amounts sought. Offer amounts could reflect a combination of financing needs and market demand. Some issuers may set offer amounts equal to the amount they need to raise, while others may select the highest amount they may require over time, treating it as a shelf offering (e.g., to preserve the flexibility to raise more capital in the future if their financing needs expand). Others may set offer amounts below their financing needs to avoid an undersubscribed offering, with a plan to raise additional capital in a follow-on offering. In the absence of a public market or an underwriter for the majority of offerings, issuers may misjudge market demand or investor valuations of their company, causing proceeds to be significantly below amounts sought. Since the majority of offerings are conducted on a continuous basis, adverse changes in market conditions subsequent to offering qualification may also cause proceeds to be below amounts sought.

Regulation A with the provisions that are in place today. It is likely that issuers would forgo Regulation A as a pathway to raising capital if the current offering limit is too low for their financing needs.

An increase in the Tier 1 offering limit could draw more issuers to Tier 1, some of which might be switching from Tier 2. However, they also might not choose to switch to Tier 1 if they find Tier 2 to be more attractive (*e.g.*, due to preemption of state review or greater confidence and easier path to quotation on the upper tiers of the OTC market in the presence of periodic reports required by Tier 2). For example, from June 2015 through December 2019, we estimate that 112 Tier 2 issuers reported raising up to \$20 million in financing under Regulation A even though that amount would have made them eligible to use Tier 1 as well. Further, if the Tier 2 offering limit remains higher than the Tier 1 offering limit, some issuers might prefer Tier 2 because the higher maximum offering amount provides issuers with the flexibility to raise more capital without having to undergo a re-qualification (*e.g.*, if market conditions improve) even if the typical issuer's proceeds do not reach the amount sought.

Certain features of the data and the market limit our ability to draw definitive conclusions. First, the number of Regulation A issuers during the considered period was relatively small in absolute terms,<sup>61</sup> which can make statistics less reliable. As discussed above, we estimate that during the considered period 442 issuers filed offering statements, of which 346 issuers had at least one offering qualified.

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<sup>61</sup> It is difficult to attribute this pattern to a single cause. Some possibilities include, but are not limited to, lack of market familiarity with this offering method, adverse selection in the issuer pool, lack of underwriter interest, difficulty in attracting investors in the presence of limited secondary market liquidity, costs to initiate an offering in proportion to offering limits, eligibility requirements, and favorable conditions in the private placement market.

Second, information about offering proceeds, which indicates whether the offering limit constrains existing issuers' ability to raise financing, is incomplete, particularly for more recently qualified offerings.<sup>62</sup> Among 346 issuers with qualified offering statements, we identified 183 (53%) that reported non-zero proceeds in completed or ongoing offerings as of December 2019. We cannot conclusively determine from a review of filings whether the remaining offerings have effectively ended or remain in progress.<sup>63</sup> Further, among the filers reporting positive proceeds, for approximately 52% the proceeds information is partial because offerings remained ongoing as of the time of the filing, thus proceeds for such issuers are likely to be revised upward in the future.

Third, the considered period was characterized by a specific set of aggregate conditions (including a favorable interest rate environment, strong equity market performance, a high rate of private placement activity, and a comparatively low rate of registered initial public offerings),

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<sup>62</sup> Most offerings are conducted on a continuous basis, thus a period of time is likely to elapse between offering initiation and initial or final closing or termination. Issuers are afforded a period of time for reporting offering proceeds. Tier 1 issuers must provide information about sales and update certain issuer information by electronically filing a Form 1-Z exit report with the Commission not later than 30 calendar days after termination or completion of an offering. Tier 2 issuers must include in their first annual report after termination or completion of a qualified Regulation A offering, or in their Form 1-Z exit report, information about sales in the terminated or completed offering. Therefore, some issuers that have completed offerings during the considered period might not have reported offering proceeds. For many filers of qualified Tier 1 offering statements, a report of proceeds is not available. For many filers of qualified Tier 2 offering statements, information about proceeds is not discussed in periodic reports. Information collection is also affected by variance across filers in disclosure and tagging practices with respect to proceeds reporting. For Tier 2 filers that report proceeds in ongoing offerings, the amounts underestimate total proceeds likely to be raised upon offering completion.

<sup>63</sup> Some of these issuers may have ongoing offerings but not provide information on offering status in disclosures. Tier 1 issuers are not required to file periodic reports or provide interim information on proceeds in an ongoing offering. Tier 2 issuers are required to file periodic reports but interim offering progress updates are not required. Reporting of proceeds in the XML portion of Form 1-K is generally incomplete. While some Tier 2 issuers describe Regulation A offering proceeds in the Management's Discussion and Analysis (*e.g.*, if it is material for describing the issuer's liquidity and capital resources), others may aggregate Regulation A offering proceeds with proceeds from other sales of the issuer's securities or may not file periodic reports.

Other issuers with no offering status information may have effectively ended the offering with no proceeds but have not made a subsequent filing with that disclosure (*e.g.*, a report of zero proceeds on Form 1-Z or a request to terminate / withdraw the previously qualified offering).

thus, inference from this time period may not be representative of future Regulation A activity under different aggregate conditions.

Finally, inference from historical Regulation A market activity does not account for changes to the pool of market participants that may occur under an alternative offering limit. While we find in Table 4 above that existing Regulation A issuers, with the exception of certain real estate issuers, have largely not been constrained by the existing aggregate offering limits based on proceeds raised, an increase in the limits may change the pool of prospective issuers drawn to the Regulation A market. We lack data that would allow us to assess how a specific offering limit increase would affect the size and composition of the pool of prospective issuers, intermediaries, and investors in the Regulation A market.

### **3. Inflation-Related Considerations**

Inflation may be a relevant consideration as far as whether and to what extent to amend the offering limits. Inflation increases the cost of production inputs as well as wages in nominal terms, which may increase the amount of external financing required in nominal terms by issuers engaged in the same real activities. In 2017 the Commission adjusted for inflation Regulation Crowdfunding offering limits, pursuant to Title III of the JOBS Act.<sup>64</sup>

The Regulation A offering limit has not been adjusted for inflation since the enactment of the JOBS Act. Between April 2012, when the JOBS Act was enacted, and December 2019, the rate of Consumer Price Index (CPI) inflation was 11.69% according to Bureau of Labor Statistics

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<sup>64</sup> See Inflation Adjustments and Other Technical Amendments under Titles I and III of the JOBS Act, Release No. 33-10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)].

(BLS) data.<sup>65</sup> Table 7 sets forth the potential effects of these two inflation rates on the offering limits in Regulation A.

**Table 7. Potential Effects of Inflation-Adjustment of Regulation A Offering Limits**

<i>Tier</i>	<i>Current</i>	<i>Inflation-adjusted (11.69%)</i>
<b>Tier 1</b>		
Aggregate 12-month offering limit	\$20,000,000	\$22,338,000
Affiliate selling security holders <sup>66</sup>	\$6,000,000	\$6,701,400
<b>Tier 2</b>		
Aggregate 12-month offering limit	\$50,000,000	\$55,845,000
Affiliate selling security holders	\$15,000,000	\$16,753,500

#### **4. Evidence from Other Offering Methods**

##### **a. Use of Rule 506 by Regulation A issuers**

Some Regulation A issuers have conducted Rule 506 offerings, which are not subject to offering limits. Information about such issuers' offering sizes in Rule 506 can provide additional insights for the review of the offering limits for Regulation A.<sup>67</sup> We estimate that 34 issuers in Regulation A offerings qualified as of December 2019 conducted Rule 506 offerings during

<sup>65</sup> See Bureau of Labor Statistics, CPI Calculator, available at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (accessed January, 2020).

<sup>66</sup> Additionally, sales by all selling security holders in both Tier 1 and Tier 2 offerings are limited to no more than 30% of the aggregate offering price in an issuer's first Regulation A offering and any subsequent Regulation A offerings in the following 12-month period.

<sup>67</sup> We focus on Rule 506 offerings due to data limitations. Some issuers rely on Section 4(a)(2) without using the Regulation D safe harbor and filing a Form D. Data on such issuers is not available. Very few Regulation A issuers have undertaken a registered offering during this period, resulting in a lack of reliable data on such issuers' registered offering proceeds. From June 19, 2015 through December 31, 2019, we have identified 14 issuers in qualified Regulation A offerings that had a registration statement declared effective, based on the analysis of EDGAR filings. Not all of these offerings have been priced. Amounts raised may be below amounts registered.

2019, with the average (median) issuer reporting proceeds of \$5.8 million (\$0.2 million).<sup>68</sup>

While these amounts of Rule 506 financing are relatively modest, various sources report relatively modest sizes of typical angel and venture capital deals involving startups not limited to Regulation A issuers.<sup>69</sup>

Overall, Regulation A issuers that raise financing under Rule 506 tend to raise amounts of financing that are below the existing Regulation A offering limits. As an important caveat, this inference is based on the pool of issuers attracted to these offering exemptions with the provisions that are in place today. Generally, however, we do not know whether those issuers used Rule 506 because the Regulation A offering limit was too low for their needs or because Rule 506 was optimal for their capital raising strategy for other reasons.<sup>70</sup> Further, issuers with large financing needs might forgo Regulation A today and thus not be included in this analysis.

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<sup>68</sup> Data on Rule 506 financing is based on total proceeds reported raised per issuer in new and amended Form D filings from 2019. Pooled investment funds, which are ineligible under Regulation A, are excluded. Information on Regulation D offerings is based on staff analysis of data from Form D filings on EDGAR. The amount raised is based on the amounts reported as “Total amount sold” in all Form D filings (new filings and amendments) on EDGAR. Subsequent amendments to a new filing were treated as incremental fundraising and recorded in the calendar year in which the amendment was filed. It is likely that the reported data on Regulation D offerings underestimates the actual amount raised through these offerings. First, Rule 503 of Regulation D requires issuers to file a Form D no later than 15 days after the first sale of securities, but a failure to file the notice does not invalidate the exemption. Accordingly, it is possible that some issuers do not file Form D for offerings relying on Regulation D. Second, underreporting could also occur because a Form D may be filed prior to completion of the offering, and our rules do not require issuers to amend a Form D to report the total amount sold on completion of the offering or to reflect additional amounts offered if the aggregate offering amount does not exceed the original offering size by more than 10%.

<sup>69</sup> See, e.g., Jeffrey Sohl, Center for Venture Research, *The Angel Market in 2018: More Angels Investing in More Deals At Lower Valuations* (May 9, 2019) (stating that “[t]he average angel deal size in 2018 was \$349,620.”) See also Press Release, National Venture Capital Association, *US Venture Capital Investment Surpasses \$130 Billion in 2019 for Second Consecutive Year* (Jan. 14, 2020), available at <https://nvca.org/pressreleases/us-venture-capital-investment-surpasses-130-billion-in-2019-for-second-consecutive-year/> (stating that venture capital activity totaled “\$136.5 billion across 10,777 deals in 2019,” which amounts to approximately \$12.7 million per deal).

<sup>70</sup> For some issuers, private placements, including financing under Rule 506, may be the preferred financing method, regardless of the amount sought, and an offering under Regulation A may be largely supplemental (e.g., an attempt to give customers an opportunity to hold a share of the company), thus the Regulation A offering limit may not be a binding constraint on overall financing obtained by such issuers. Overall, because the choice to use both Rule 506 and Regulation A is not random and may be driven by a variety of unobservable

## b. Evidence from other offering methods that do not have an offering limit

It is difficult to predict how many new issuers would be drawn to Regulation A under a different offering limit. Table 8 below examines the use of other securities offering methods by issuers that raised amounts above the existing limit but below several alternative offering limit thresholds, some of which might consider Regulation A if it had a higher offering limit. We consider two types of offerings on which data is available: Rule 506 and registered offerings, which do not have offering limits.

**Table 8. Evaluation of Alternative Regulation A Offering Limits Using Evidence from Capital Raising in 2019 through Select Other Securities Offering Methods**

Number of issuers that raised above \$50 million and up to:	Number of issuers in offerings under	
	Rule 506 <sup>71</sup>	Registered offerings <sup>72</sup>
\$55.845 million (inflation adjustment)	51	17
\$60 million	85	29
\$70 million	144	46
\$75 million	171	57
\$80 million	198	72
\$90 million	231	90
\$100 million	270	122
\$110 million	298	143
\$120 million	315	151
\$125 million	325	162

Evidence from Table 8 indicates that although there are relatively few Rule 506 or registered offerings in the considered ranges, those numbers were comparable with the relatively

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factors, inference from this subset of issuers may not generalize to other current and prospective Regulation A issuers.

<sup>71</sup> Regulation A eligibility criteria exclude investment companies and blank check issuers and limit the exemption to U.S. and Canadian issuers, so for comparability pooled investment funds and issuers outside the U.S. and Canada are excluded from the Rule 506 proceeds used in this estimate. Reporting companies are eligible to rely on Regulation A under the 2018 amendments.

<sup>72</sup> Registered offering proceeds are based on gross proceeds reported in SDC Platinum for U.S. public offerings of equity, debt, and convertible securities with issue dates in 2019, excluding withdrawn, postponed, and rumored offerings, asset-backed securities offerings, blank check issuers, investment fund issuers, and issuers outside the U.S. and Canada.

modest absolute numbers of Regulation A offerings and thus might suggest potential for a significant percentage jump in Regulation A activity under a higher offering limit. As a crucial caveat, issuers choosing to rely on Rule 506 or registered offerings today might be inherently different from the types of issuers that might find Regulation A attractive under a different offering limit.<sup>73</sup> Importantly, we recognize that historical use of other offering methods may not fully represent potential future use of Regulation A, particularly if the amended rules facilitate offerings by issuers that might not currently rely on securities offerings as a source of capital. We lack data or a methodology that would allow us to predict how many new issuers that would not have otherwise undertaken any securities offering would be drawn to Regulation A under a higher offering limit.

As discussed above, during the considered period, offerings of real estate issuers accounted for the largest share of proceeds reported raised in Regulation A offerings. As a point of comparison, with the caveats noted above about the difficulty in drawing inference from other offering methods about the Regulation A offering limit, registered REITs typically seek

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<sup>73</sup> Traditional exchange-listed registered equity offerings differ from Regulation A offerings, most of which are not exchange-listed, along several important dimensions. Exchange-listed issuers tend to be significantly larger because they have to meet listing criteria. Further, exchange-listed IPO deals tend to be larger because of high fixed costs that make small deals less cost-effective for issuers and underwriters. Underwriters are much more likely to participate in exchange-listed offerings, often on a firm-commitment basis. Underwriters perform due diligence, help set the valuation, signal issuer potential, market the offering to investors, and provide price stabilization after the offering. Exchange-listed companies are more likely to have a secondary market, research coverage and institutional following, which may result in additional information production.

Similarly, the Rule 506 market also differs from the Regulation A market along several dimensions, including investor base, disclosure environment, and offering process. Limits on participation by non-accredited investors in Rule 506 offerings may result in differences in the amounts raised and investor protection considerations associated with issuers that are broadly similar to Regulation A issuers along some observable dimension (*e.g.*, reported revenues). Limited information about the characteristics of Rule 506 issuers largely precludes identification of comparable Rule 506 issuers.

Even after accounting for differences in observable issuer characteristics, we are not able to rule out differences in issuer growth outlook and information risk, which would affect both the offering type and the offering proceeds.

significantly more financing than the Regulation A offering limit.<sup>74</sup> This would suggest that REITs that continue to rely on Regulation A would be likely to raise more Regulation A financing if the offering limit were increased. However, it is unclear if such issuers' overall capital formation would increase, particularly because the 2018 amendments provide Regulation A issuers with flexibility to switch between Regulation A and registered offerings. Nevertheless, non-exchange-listed REITs might increase their use of Tier 2 of Regulation A in the event of an offering limit increase to take advantage of testing-the-waters with individual investors and preemption of state registration requirements, which is not available in non-exchange-listed registered offerings.

#### **G. Other Considerations Related to Regulation A**

Since the adoption of the 2015 amendments, we have received comments and recommendations from a variety of sources on aspects of Regulation A other than the offering limits discussed above. Public comment on Regulation A, including Advisory Committee on Small and Emerging Companies (ACSEC) and Small Business Forum recommendations and rulemaking petitions prior to the 2019 Concept Release, were discussed in the 2019 Concept Release. Below we discuss public comment on certain Regulation A provisions, focusing on public comment received in response to the 2019 Concept Release and Small Business Forum recommendations since adoption of the 2015 amendments.

A number of commenters on the Concept Release supported extending the eligibility of Regulation A to issuers organized and with a principal place of business outside of the United

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<sup>74</sup> Based on the information from Intelligize on real estate offerings pursuant to effective registration statements on Form S-11 with the last filing during the considered period, including listed and nontraded offerings, the median (average) amount registered per issuer was approximately \$0.8 billion (\$1.0 billion).

States or Canada,<sup>75</sup> to business development companies (BDCs),<sup>76</sup> or to investment companies advised by registered investment advisers.<sup>77</sup> Prior Small Business Forums also recommended that BDCs<sup>78</sup> and SBICs<sup>79</sup> be eligible to use the exemption. In addition, the 2019 Small Business Forum also recommended that the Commission provide exemptions under the Investment Company Act of 1940 for diversified funds selling securities under Regulation A.<sup>80</sup> Some commenters requested that the Commission ensure that Regulation A remains available for evolving financial products, such as certain digital securities that are not strictly equity, debt or convertible debt.<sup>81</sup>

Consistent with the recommendations of the 2017 and 2018 Small Business Forums, three commenters on the Concept Release supported permitting at-the-market offerings under Regulation A.<sup>82</sup> After adoption of the 2015 amendments, the 2016 Small Business Forum recommended that the Commission provide a clearer definition of what constitutes “testing the waters materials” and permissible media activities.<sup>83</sup>

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<sup>75</sup> See, e.g., NYSBA Letter; Goodwin Letter; and letter from Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association dated October 16, 2019 (“ABA Letter”). *But see* CrowdCheck Letter (opposing the extension of Regulation A eligibility to non-U.S. or Canadian issuers).

<sup>76</sup> See, e.g., NYSBA Letter; and ABA Letter . *But see* CrowdCheck Letter (opposing the extension of Regulation A eligibility to BDCs); and NASAA Letter (stating that BDCs “warrant more specialized disclosure than Regulation A requires”).

<sup>77</sup> See CrowdCheck Letter. *But see* Goodwin Letter (opposing the extension of Regulation A eligibility to investment companies and blank check companies).

<sup>78</sup> See 2014 Forum Report; 2015 Forum Report; and 2016 Forum Report.

<sup>79</sup> See 2015 Forum Report.

<sup>80</sup> See 2019 SEC Government-Business Forum on Small Business Capital Formation (December 2019), available at <https://www.sec.gov/files/small-business-forum-report-2019.pdf> (“2019 Forum Report”), at 11.

<sup>81</sup> See NYSBA Letter; ABA Letter; and CrowdCheck Letter.

<sup>82</sup> See 2017 Forum Report; 2018 Forum Report; NYSBA Letter; ABA Letter; and CrowdCheck Letter.

<sup>83</sup> See 2016 Forum Report.

In addition, the 2017 and 2018 Small Business Forums requested guidance for broker-dealers, transfer agents, and clearing firms, regarding Regulation A securities and OTC securities.<sup>84</sup> Both those Forums recommended that the Commission require any portal that is conducting Regulation A offerings to be registered and subject to appropriate disclosure requirements.

A number of commenters on the Concept Release provided feedback on the current Regulation A reporting requirements. Two commenters opposed ongoing reporting requirements for Regulation A offerings,<sup>85</sup> while other commenters supported the current ongoing reporting requirements.<sup>86</sup> Several commenters on the Concept Release supported allowing incorporation by reference of the issuer's previously-filed financial statements into the Form 1-A.<sup>87</sup> Commenters also recommended allowing QR codes and different means of communications, in lieu of hyperlinks, to facilitate access to an issuer's most recent offering circular.<sup>88</sup> In addition, one commenter to the 2018 Regulation A Release suggested "certain amendments to alleviate the paperwork and regulatory burdens of certain filing requirements and offering amount limitations on Tier 2 issuers filing under Regulation A."<sup>89</sup>

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<sup>84</sup> See 2017 Forum Report; and 2018 Forum Report.

<sup>85</sup> See letter from CoinList dated September 26, 2019 ("CoinList Letter"); and letter from Rutheford B. Campbell, Jr., dated September 30, 2019 ("Campbell Letter").

<sup>86</sup> See, e.g., CrowdCheck Letter; and Goodwin Letter.

<sup>87</sup> See CoinList Letter; CrowdCheck Letter; and Goodwin Letter.

<sup>88</sup> See, e.g., CrowdCheck Letter; and CoinList Letter.

<sup>89</sup> See letter from Mark Schonberger dated Mar. 4, 2019, available at <https://www.sec.gov/comments/s7-29-18/s72918-5007949-182974.pdf>. For example, this commenter recommended that Regulation A be amended to permit issuers to: include in an annual amendment the ability to qualify an additional \$50 million for the following 12-month period, provided such issuers may not sell more than \$50 million in any 12-month period; permit a 180-day selling extension to apply after a post-qualification amendment is filed and prior to the qualification of that amendment; and forward incorporate periodic and current reports, including updated financial statements.

Commenters on the Concept Release also suggested changes to the Section 12(g) exemption for Tier 2 securities, with some commenters supporting tying the exemption to the revenue limits for smaller reporting companies,<sup>90</sup> and one commenter supporting making the Section 12(g) exemption permanent.<sup>91</sup> The 2019 Small Business Forum also recommended that all Tier 2 issuers be exempt from Section 12(g) of the Exchange Act, provided that the issuer is current in its Tier 2 reporting.<sup>92</sup>

Since the adoption of the 2015 amendments, we have received comments and recommendations from the Commission's Advisory Committee on Small and Emerging Companies,<sup>93</sup> a number of the annual Small Business Forums, and the 2017 Treasury Report on the preemption of state requirements for Regulation A offerings. The 2016 Small Business Forum recommended that Commission adopt rules that preempt state registration requirements for all primary and secondary trading of securities sold in offerings registered with the Commission.<sup>94</sup> Similarly, the 2017, 2018, and 2019 Small Business Forums recommended that the Commission provide for blue sky preemption for secondary trading of securities issued in Tier 2 offerings.<sup>95</sup> The 2017 Treasury Report also recommended that state securities regulators update their regulations to exempt from state registration and qualification requirements secondary trading of securities issued under Tier 2 or, alternatively, that the Commission use its

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<sup>90</sup> See Goodwin Letter; and letter from Wefunder dated September 13, 2019.

<sup>91</sup> See CrowdCheck Letter.

<sup>92</sup> See 2019 Forum Report, at 10.

<sup>93</sup> See Advisory Committee on Small and Emerging Companies: Recommendations Regarding Secondary Market Liquidity for Regulation A, Tier 2 Securities (May 15, 2017), available at <https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-secondary-liquidity-recommendation.pdf> ("ACSEC Secondary Market Liquidity Recommendation").

<sup>94</sup> See 2016 Forum Report.

<sup>95</sup> See 2017 Forum Report; 2018 Forum Report; and 2019 Forum Report.

authority to preempt state registration requirements for such transactions.<sup>96</sup> The 2017 and 2018 Small Business Forums also recommended that the Commission consider overriding advance notice requirements of state regulators in Regulation A offerings and limiting state filing fees for these offerings.<sup>97</sup> More recently, some commenters on the Concept Release suggested that the Commission provide for preemption of all Regulation A offerings,<sup>98</sup> and some commenters supported the preemption of state law authority over secondary sales of Regulation A securities.<sup>99</sup>

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<sup>96</sup> See 2017 Treasury Report.

<sup>97</sup> See 2017 Forum Report; and 2018 Forum Report.

<sup>98</sup> See, e.g., Campbell Letter; letter from NorthCapital Investment Technology dated September 24, 2019; and letter from Lex Markets dated October 10, 2019 (“Lex Markets Letter”). *But see* letter from William F. Galvin, Secretary of the Commonwealth of Massachusetts dated September 24, 2019 (“MA Secretary Letter”) (generally opposing the Commission expanding preemption of state authority).

<sup>99</sup> See, e.g., CoinList Letter; Goodwin Letter; and Lex Markets Letter. *But see* MA Secretary Letter (generally opposing the Commission expanding preemption of state authority).