Real Estate Financing from the Crowd

A Securities Law Primer of the JOBS Act's Panoply of Fundraising Exemptions

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Vol. 30 No. 6, November/December 2016 (American Bar Association)

Alternative sources of revenue for mezzanine financing remain a constant quest for savvy real estate developers looking to alleviate funding gaps in the capital stack. The availability of well-priced mezzanine financing determines whether a real estate project is viable and will advance. This article focuses on raising mezzanine financing from the "crowd" under the Jumpstart Our Business Startups Act ("JOBS Act") of 2012, Pub. L. No. 112-106, 126 Stat. 306 (codified as amended in scattered sections of 15 U.S.C.), and is intended to guide the practitioner through the key securities laws and strategic planning involved with the recent boom in "crowdfunding."

Though crowdfunding is still in its early stages, it has become a household word in real estate circles thanks to the JOBS Act. Titles II, III, and IV of the JOBS Act created three new opportunities for real estate developers to raise funds from the crowd. Real estate developers have been increasingly turning toward crowdfunding in recent years. Congress enacted the JOBS Act to democratize the raising of capital in order to give smaller companies access to capital and permit non-accredited investors to participate in the investment process. In certain circumstances, the result is that crowdfunding is transforming how investors locate and invest in real estate, which is benefiting investors, real estate developers, and the real estate market.

The JOBS Act bestowed the duty of rule-making on the Securities and Exchange Commission (SEC) to implement Titles II, III, and IV of the JOBS Act, which means that Congress required the SEC to adopt rules to expand the registration exemptions under the Securities Act of 1933, as amended (the "Securities Act"). Specifically, Title II of the JOBS Act directed the SEC to lift the ban on general solicitation only when all investors are accredited; Title III created equity crowdfunding and required the SEC to bring non-accredited investors into an investment regime; and Title IV, sometimes called Reg. A+ investing, required SEC rulemaking to update Regulation A of the Securities Act to increase the offering limit from $5 million to $50 million in a 12-month period, required certain filings be provided to investors, and required annual audited financial statements.

What Is Crowdfunding?

Crowdfunding is not a 21st century concept. Many older examples exist, including those that pre-date the Internet. One 130-year-old example of crowdfunding involves the Statue of Liberty, which was a gift of friendship funded by the citizens of France to the United States and is recognized as a universal symbol of freedom and democracy. Funding for the statue's pedestal was left to the state of New York. When funds came up short by

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two-thirds of the required amount, a few of the other states offered to help with the cash—but only if the statue were relocated to their state. Newspaper publisher Joseph Pulitzer came forward to keep the Statue of Liberty in New York. To raise the funds needed, he placed a full-page ad in his newspaper, the *New York World*, in 1885 to appeal to the public to contribute funds toward the pedestal. "We must raise the money!" the ad read.

The crowdfunding appeal was so popular that within five months, by August 11, 1885, the *New York World* collected more than $100,000 in donations from approximately 160,000 people, which amounted to less than $1 per person on average. What 1885 crowdfunding had in common with modern crowdfunding is that the appeal to a broad base of potential contributors requesting funds to be channeled to a sole collection point can yield positive results.

Following the "Great Recession" of 2008, entrepreneurs and real estate developers denied and rejected by lenders, investors, and private equity sources turned to crowdfunding web sites to raise funds. Initially, they used crowdfunding web sites to raise funds on a donative basis—that is, they appealed for small sums from the crowd with nothing offered in exchange or just a nominal or token thank-you gift. As raising funds became more competitive, some companies began to promise more than nominal consideration to entice the crowd, which means they offered a "security" under federal securities law—see *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

The following language from the U.S. Supreme Court's opinion in *SEC v. W.J. Howey Co.* became known as the "Howey Test"—a contract or transaction is an investment contract if "a person invests his money in a common enterprise and *is led to expect profits solely from the efforts of the promoter or a third-party*." 328 U.S. at 298–99 (emphasis added). In view of the Howey Test, when developers and entrepreneurs enticed the crowd by promising a return on their investment, doing so was no longer donative and was considered the offering of a security and thus governed by the Securities Act.

Since the enactment of the Securities Act, the offering of a security has required advance registration with the SEC or a valid private offering exemption from registration. Securities Act § 4(a)(2). Until the JOBS Act and more specifically, the final rulemaking under Titles II, III, and IV by the SEC, there was no valid private offering exemption to permit securities offerings over the Internet. Accordingly, such offerings violated prohibitions on using general solicitation methods to market unregistered securities. These violations did not go unnoticed by the SEC, Congress, or state regulators. Congress also recognized that with the relatively small sums raised, often by non-accredited investors contributing small sums, many companies soon were hiring employees. Job creation on the heels of the Great Recession motivated Congress to continue the crowdfunding momentum but through a regulated regime that put investor protection measures in place. Through the JOBS Act, Congress democratized private offerings to allow smaller companies access to capital and permit non-accredited investors to participate in the investment process.

Title II—Rule 506(c) Offerings

Title II of the JOBS Act directed the SEC to lift the ban on general solicitation, provided that all investors in the offering are accredited. In September 2013, the SEC created a new private offering exemption under Regulation D of the Securities Act, which effectively split it into two distinct exemptions—section 506(b), which the JOBS Act did not amend, and the new section 506(c), which changed the world of private investing. Under new Rule 506(c), the SEC lifted the ban on general solicitation, allowing developers to promote their projects using general solicitation of the public provided that (1) all purchasers are "accredited investors," and (2) issuers take reasonable steps to verify that status.

Rule 506(c) offers several advantages to the private offering exemption under section 506(b), chief among them the ability to market the offering in any manner the real estate developer prefers, including the Internet, newspapers, magazines, billboards, direct mailings, or other methods to promote the offering to the world to raise funds faster. Further, Rule 506(c) offers advantages to the rules discussed below under Titles III and IV, and found elsewhere in the Securities Act, because of its lack of document disclosure requirements—all investors must be accredited and they are presumed to be sophisticated and thus equipped to decipher the risks involved or to ask the pertinent questions before investing. The result is that developers can raise funds from experienced investors under Rule 506(c) more expeditiously and inexpensively than ever before.

Accredited Investor Verification

The SEC did not specify how accredited investor verification should take place under a section 506(c) offering—just that the developer must take reasonable steps to verify the accreditation status of the investor. Accreditation is achieved by proving the investor has a net worth of $1 million, not including primary residence; has earned $200,000 per year over the past two years, with a reasonable prediction to make that again this year (or $300,000 combined with the investor's spouse); or, by a letter of accreditation from a CPA, attorney, or other professional. Verification of the foregoing by "reasonable methods" could include the following:

- verification based on income (by reviewing copies of any IRS form that reports income, such as Form W-2, Form 1099, Schedule K-1 of Form 1065, and a filed Form 1040);
- verification based on net worth (by reviewing specific types of documentation dated within the prior three months, such as bank statements, brokerage statements, certificates of

deposit, tax assessments, and a credit report from at least one of the nationwide consumer reporting agencies, and obtaining a written representation from the investor); or
- a written confirmation from a registered broker-dealer, an SEC-registered investment adviser, a licensed attorney, or a certified public accountant stating that such person or entity has taken reasonable steps to verify that the purchaser was an accredited investor within the last three months and that such purchaser is an accredited investor.

The non-document-based factors that a developer may weigh and rely on according to the SEC under Rule 506(c) include the following factors, as part of the "flexible, principles-based method":

- the nature of the investor and the type of accredited investor that the purchaser claims to be;
- the amount and type of information that the developer has about the investor;
- the nature of the offering, such as the manner in which the investor was solicited to participate in the offering; and
- the terms of the offering, such as the minimum investment amount.

The foregoing discussion makes clear that the disclosure requirements and investor verification provisions of Rule 506(c) can be complied with readily. Real estate developers soon realized that Rule 506(c) provided a superior opportunity to launch crowdfunding sites that sold securities to accredited investors alone, rather than continue to wait for the SEC's passage of rules under Title III, which according to industry buzz was the most anticipated of the reforms from the JOBS Act.

The SEC's enactment of Rule 506(c) in September 2013 opened the door to a bounty of crowdfunding web sites. Since then, more than 70 real estate crowdfunding web sites have launched to accommodate the massive demand. On May 23, 2016, RealtyMogul.com reported that its crowdfunding site alone topped more than $200 million in debt and equity in funded real estate transactions, making it the first platform to surpass this million-dollar milestone for U.S.-based real estate finance. See www.crowdfundinsider.com/tag/real-estate. The research and advisory firm, MASSolutions, Inc., estimates that the global market for real estate investments through crowdfunding was $2.5 billion in 2015 and is conservatively expected to reach $3.5 billion in 2016. See 2015CF-RE Crowdfunding for Real Estate. All signs indicate that real estate crowdfunding under Rule 506(c) will continue to be popular for the foreseeable future.

Title III—Regulation Crowdfunding

Title III of the JOBS Act required the SEC to bring non-accredited investors into the process for equity crowdfunding. In response, the SEC enacted proposed crowdfunding rules under Title III in October 2013 and final rules in October 2015. The final rules became effective on May 16, 2016, concluding the SEC's statutory requirements imposed by Congress from the JOBS Act to promote capital raising. Title III of the JOBS Act creates an exemption from registration under a new section 4(6) of the Securities Act for crowdfunding offerings. The rules set forth limitations on the amount of funds that companies can raise in a crowdfunding offering and the type of companies eligible to commence an offering. The rules also prescribe the manner in which such an offering must be conducted and the reporting and disclosure obligations with which a company must comply during and following an offering, all as described below.

Annual per Issuer Limitations

The final rules under Title III permit developers to raise up to $1 million in crowdfunding offerings during any 12-month period from all investors, including non-accredited investors, subject to compliance with the prescribed offering requirements. For the first time since 1933, non-accredited investors can participate in the real estate crowdfunding arena on a widespread scale.

Per-Investor Limitations

Title III imposes limitations on the amount of funds that an individual may invest in a crowdfunding offering. An individual investor, over the course of a 12-month period, may invest in the aggregate across all crowdfunding offerings up to:

- if either his annual income or his net worth is less than $100,000, then the greater of:
  —$2,000; or
  —5% of the lesser of his annual income or net worth; and
- if both his annual income and his net worth are at least $100,000, then 10% of the lesser of his annual income or his net worth.

In both cases, the aggregate amount of securities sold to an investor through all crowdfunding offerings during any 12-month period may not exceed $100,000. It is incumbent on the portals to monitor their sites and on the investors participating to make sure these per-investor limits are not violated.

Eligibility to Crowdfund Under Title III

Certain developers and issuers are not eligible to crowdfund under the new rules. For example, crowdfunding under Title III is not available to non-U.S. entities, public companies, blind-pool entities, investment companies, and companies affiliated with any person who is subject to certain federal and state "bad-boy" disqualifiers. In addition, if a developer conducts a crowdfunding offering after an initial crowdfunding offering, then the developer must have complied with all of the SEC-mandated annual reporting requirements during the prior two-year period.

Restrictions on Transfer

Securities purchased in a private

offering using crowdfunding cannot be resold for a period of one year, subject to a handful of exemptions such as sales back to the company or transfers within the investor's family. Investors can expect difficulty liquidating their investment after the mandatory hold period because there is no active secondary market for the securities. Unless and until a secondary market for these securities develops or the company is acquired, investors may hold their securities indefinitely, which means greater risk and heightens the portals' education burden for the investors. In the case of real estate investing, there is usually a greater likelihood of refinancing or sale to provide liquidity than in corporate investing.

Disclosure and Reporting Obligations

The SEC imposed disclosure and reporting obligations both before and following the commencement of an offering. The developer is required to disclose detailed information to prospective investors and to make that information available on the SEC web site at least 21 days before sale of a security occurs. The following summarizes the required contents of the detailed information.

Description of Issuer. The offering documents should contain the following information about the developer:

- the issuer's full name, form of entity, state, date of organization, address, and web site URL;
- the names of officers, directors, and shareholders owning 20% or more of equity;
- how long each officer and director has served in that position;
- the business experience of each officer and director over the preceding three years;
- whether any officer, director, or shareholder owning more than 20% of equity is identified by the SEC as a "bad actor" (if so, the issuer will be disqualified); and
- disclosure of the reasonable opportunity for investors to rescind investment commitments.

Description of the Issuer's Business. The offering documents should contain a description of the developer's project and business.

Description of the Capital Structure. The developer's offering documents should contain a description of the project's capital structure, including:

- current sources of financing before the crowdfunding;
- current debt;
- equity offerings conducted in the previous three years;
- target amount of capital and deadline to raise the amount;
- intended use of the proceeds from the present offering;
- whether the issuer previously failed to comply with the ongoing reporting requirements of Title III crowdfunding;
- inclusion of legends tailored to the issuer's business and the offering;
- a summary of the material risks involved with the offering, including capital-related risk such as from the issuance of additional shares, sales of assets, or transactions with related parties; and
- the ownership and capital structure including:
  - —terms of other securities offered;
  - —a description of how the exercise of rights held by principal shareholders could negatively affect crowdfunding investors;
  - —how securities offered were valued and how they may be valued in the future;
  - —risks related to minority ownership;
  - —a description of the restrictions on the transfer of the securities; and
  - —management's discussion and analysis on the issuer's financial condition, including, to the extent material, a discussion of liquidity, capital resources, and historical results of operations.

Offering Terms. The offering documents should contain a description of the project's capital structure, including:

- that its campaigns are all-or-nothing and investors will receive refunds if they fail to receive the target amount;
- the price of the securities being offered via Title III crowdfunding or the method used to determine the price;
- if there is no fixed price at the start of the crowdfunding campaign, it must provide a final price before closing the offering; and
- a description of the intermediary's financial interest in the transaction, including:
  - —the amount of compensation to the portal for the offering;
  - —whether that compensation consists of cash or equity; and
  - —that equity is permitted if issued at the same share price and on the same terms as in the crowdfunding offering.

Ongoing Disclosure. The offering documents must state where and when on the developer's web site investors can read the annual reports in the future. In addition, the developer must:

- file progress updates regarding the target offering amount (Form C-U); and
- file annual reporting within 120 days of each fiscal year end (Form C-AR)—the reporting requirement continues until the issuer:
  - —becomes a reporting company;
  - —has filed at least one annual report and has fewer than 300 holders of record;
  - —has filed at least three annual reports and has total assets of no more than $10 million;
  - —has, under Title III, repurchased or sold all of its securities to a third party; or

—has been liquidated or dissolved.

The progress updates due from the developers must be filed on Form C-U within five business days of (1) the receipt of commitments for 50% of the offering; (2) receipt of commitments for the full offering; (3) the developer agrees to accept subscriptions in excess of the initial offering amount; or (4) the developer closes the offering. Further, Title III permits developers to satisfy the foregoing 50% and 100% progress update requirements by relying on the crowdfunding portal to make the progress of the developer's offering publicly available on its platform updates. Nevertheless, the developer is required to file Form C-U with the SEC to disclose the total amount of securities sold in the offering.

Limited Ongoing Annual Reporting Requirement

Once the offering is completed, the developer is subject to limited ongoing reporting requirements. Title III requires the developers to file with the SEC, within 120 days following the end of its fiscal year, and to post on its web site, annual reports on Form C containing disclosures substantially similar to those provided in the offering statement (see above), excepting any information pertaining to the offering no longer applicable. The annual reporting obligation expires on the first to occur of the developer (1) becoming an SEC reporting company; (2) redeeming or repurchasing all of the securities issued under the crowdfunding exemption; (3) liquidating or dissolving; (4) filing at least one Form C and having fewer than 300 holders of record; or (5) filing at least three Form Cs and having less than $10 million in assets. On termination of the annual reporting obligation, within five business days from the date on which it becomes eligible to do so, the developer must file with the SEC Form C notice of the termination of its obligations under Title III.

Financial Statements

Before a developer may commence

with a crowdfunding offering under Title III, it should prepare financial statements comprising balance sheets, income statements, cash flow statements, statements of changes in owners' equity, and notes to the financial statements. The associated costs and efforts of preparing the financial statements may deter many companies from using crowdfunding, but it would be useful for many issuers willing to comply with the requirements that are relaxed in certain situations. The financial statement requirements under Title III are summarized here:

- For offerings of $100,000 or less:
  —the developer must include U.S. GAAP financial statements for the two most recently completed fiscal years; and
  —the financial statements must include an amount of total income, taxable income, and total tax as reflected in the company's federal income tax returns for the most recently completed fiscal year, certified by the principal executive officer; because many principal executive officers may not have the accounting or financial background to complete a competent and comprehensive review, developers and issuers should consider adopting internal protocols for competent review of the financial statements before the principal executive officer's certification.
- For issuers raising more than $100,000 and less than $500,000:
  —U.S. GAAP financial statements reviewed by an independent public accountant.
  Exception: For issuers who have never before sold securities via Title III crowdfunding, in offerings greater than $500,000 U.S. GAAP financial statements audited by an independent public accountant are required; except that first-time issuers seeking to raise up to $1 million under Title III crowdfunding can provide reviewed financial statements. Another exception to the more relaxed provisions of the foregoing is that if audited or reviewed financial statements are available, the developer must provide those instead of the more relaxed financial statements otherwise called for under Title III.

Use of Funding Portals

All crowdfunding offerings under Title III must take place exclusively through a broker-dealer or a funding portal registered with the SEC. The developer may use only one portal per offering. Further, all of the required information must be easily accessible on the portal itself, not linked to or from other web sites, though the issuer may refer to additional information beyond that required on the portal appearing on other web sites. Under both federal and state law, issuers (including officers, directors, sellers, and promoters of the offering) will be liable for fraudulent or intentionally misleading statements or material omissions made in connection with their offerings. If the issuer fails to "exercise reasonable care" and knowingly makes untrue or misleading statements, it must reimburse investors for their purchase of securities, plus interest. The issuer and its officers and directors bear the burden of proof in a dispute with investors for this liability.

Crowdfunding portals facilitate the offer and sale of crowdfunded securities and are required to take measures to reduce the risk of fraud. Under the final rules, portals are prohibited from offering investment

advice or soliciting sales of securities displayed on their platforms. Portals cannot compensate promoters for solicitations or based on the sale of securities. Further, portals cannot hold or handle any investor's funds or securities.

Advertising Restrictions

Title III governs how the developer can promote its crowdfunding campaign. The restrictions on advertising the terms of the offering are extensive, comparable to "tombstone ads" permitted under Securities Act Rule 134 that direct investors to the intermediary's platform. For example, the developer can publicize the name of the portal on which it is conducting the offering and a link to its web site, as well as the amount and price of the securities, plus limited factual information such as the name, address, phone number, and web site of the developer; the e-mail address of a representative of the developer; and a brief description of the developer's business. There are no limits on how the developer distributes the advertising notices, such as through social media. Indeed, they must do so vigorously to make sure the offering is a success!

In view of the foregoing, the crowdfunding rules furnish eligible small companies, including real estate developers and emerging nonpublic growth companies, access to capital at a critical stage when many cannot attract seed financing from private equity, high-wealth investors, or angel or venture capital investors or cannot do so at competitive terms. On the other hand, Title III crowdfunding has some drawbacks, including the annual $1 million offering limit, financial statement requirements, offering documentation compliance costs, compensation to the crowdfunding portal, and expenses of ongoing reporting requirements. The drawbacks underscore why it is essential, on a case-by-case basis, to analyze thoroughly whether Title III crowdfunding is the most effective fundraising method, as the Securities Act contains other private offering exemptions with lower compliance costs and greater fundraising maximums or no maximums.

Title VI—Regulation A+

Title IV of the JOBS Act directed the SEC to liberalize existing Regulation A of the Securities Act, which contained rules providing exemptions from the registration requirements to permit some issuers to use general solicitation to sell their securities without having to register the securities with the SEC. Regulation A offerings are intended to make access to capital possible for small- and medium-sized companies that could not otherwise bear the costs of a normal SEC registration and to allow non-accredited investors to participate in the offering.

In 2015, under the JOBS Act's Title IV rulemaking authority, the SEC updated Regulation A, which has since been nicknamed "Regulation A+." Henceforth, developers may raise annually either up to $20 million or $50 million through the sale of securities to the general public without incurring the cost of a full registration statement or undertaking unlimited reporting obligations. Before the amendment, the Regulation A exemption was limited to those offerings of up to $5 million annually but still subject to the SEC registration and qualification requirements, as well as the annual compliance with securities laws to receive the benefit of general solicitation to raise the $5 million. This low offering amount, coupled with more costly securities compliance because of the lack of state law preemption, led to a low number of Regulation A offerings.

New Regulation A+ offers a choice of two tiers: Tier 1, for offerings of up to $20 million annually, and Tier 2, for offerings of up to $50 million annually, which can include securities offered by selling security holders, including affiliates, subject to limitations. Eligible securities include debt and equity securities, but not asset-backed securities. There are no per-investor amount limits applied to investors in Tier 1 offerings. With Tier 2 offerings, Regulation A+ imposes per-investor amount limitations only on non-accredited investors unless the securities are registered on a national securities exchange. The exemption available for the sale of securities by existing stockholders is subject to limitations on the amount.

The developer is permitted to "test the waters" to determine interest in a proposed offering before it files its qualification statement with the SEC and undertakes the full legal expense of preparing a complete offering package and qualification statement to be filed with the SEC. Further, the SEC permits an issuer to submit its qualification statement for nonpublic review by the SEC, and the statement need not be publicly filed until 21 days before its qualification.

Eligible Issuers. Regulation A+ preserves the issuer eligibility requirements of Regulation A, with the addition of two categories of ineligible issuers. Accordingly, eligibility to benefit from this exemption continues to be limited to non-publicly-reporting developers organized and with a principal place of business in the United States or Canada. Also excluded are blank check companies; issuers of fractional undivided interests in oil or gas or other mineral rights; issuers subject to "bad actor" disqualification; issuers that have not complied with their obligation to file ongoing reports under Regulation A during the two years (or shorter) before filing a new offering statement; and issuers that are, or have been, subject to an SEC order denying, suspending, or revoking the registration of a class of securities within the past five years.

Eligible Securities. The final rules under Title IV limit the types of securities eligible for sale under Regulation A+ to equity securities, debt securities, and debt securities convertible or exchangeable into equity interests, including any guarantees of such securities. Developers should note that asset-backed securities were excluded from the definition of eligible securities by the SEC.

Offering Limits and Rules. Eligibility for the Tier 1 exemption requires that the proceeds from the offering under Regulation A+ not exceed $20 million within any 12-month period, including not more than $6 million from offers by selling

security holders that are affiliates of the developer. Eligibility for the Tier 2 exemption requires that the proceeds from offerings not exceed $50 million within any 12-month period, including not more than $15 million from offers by selling security holders that are affiliates of the developer. Security holders, not affiliated with the developer, who sell under a qualified offering statement after one year are not subject to a specific limit other than the maximum offer amount under the respective tier.

For the calculation of the offering limit, Regulation A+ prescribes that developers aggregate the price of all securities offered under the exemption. Thus, any securities that include conversion rights to acquire shares within the first year at the election of the investor or at the election of the developer must be aggregated into the total offering amount by using the maximum estimated price for which such securities may be converted, exercised, or exchanged.

Integration. Regulation A+ preserved the integration safe harbor in Regulation A that set forth the offering exemptions that would not be integrated with the Regulation A offering to be considered as one offering. Among them are prior private securities offerings of the developer, subsequent offers and sales that the developer registered with the SEC, private securities offerings that take place more than six months after completion of the Regulation A offering, and offerings under Regulation S (offshore to foreign persons), among others. The new rules add to the safe harbor subsequent crowdfunding offers or sales made under section 4(a)(6) of the Securities Act.

Investment Limits. Regulation A+ imposes certain investor limits in Regulation A offerings except for accredited investors who can purchase freely without limitation in Tier 1 and Tier 2 offerings. Further, unaccredited investors also can purchase without limitation in Tier 1 offerings. In contrast, non-accredited investors in Tier 2 offerings are subject to an annual investment limitation of 10% of the greater of his annual income or net worth (if a person), or 10% of the greater of its annual revenue or net assets (if an entity), unless the securities are listed on a national securities exchange. It is incumbent on the developer, as on the issuer, to notify investors of the investor limitations. Nevertheless, a developer is permitted to rely on a representation that the investor has complied with the investment limitation—unless it is unreasonable to do so because the developer had actual knowledge at the time of investment in the offering that the investor gave a false representation.

Offering Statements Filing Requirements. All securities offerings under Regulation A+ will require an offering statement on Form 1-A to be filed with the SEC and are subject to SEC review and comment. The new rules require that an offering statement be declared qualified by a "notice of qualification" issued by the Division of Corporation Finance (analogous to a notice of effectiveness in registered offerings).

For real estate developers, it is clear that the Regulation A+ would be a promising alternative for those seeking to raise up to $20 million or $50 million for a real estate fund or to finance the mezzanine capital of a large commercial or mixed-use project. Certain disadvantages of Regulation A+ to consider before proceeding include the preparation of audited financial statements and a "mini-registration statement" to be filed with and reviewed by the SEC before the developer can accept any subscriptions, and the ongoing reporting to the SEC following the offering, which is less arduous than found under the Securities Act of 1934, as amended for publicly reporting entities, but significantly more than is typically found with a nonregistered offering. Further, Regulation A+ could be counterbalanced with other private offering exemptions available to raise funds that permit general solicitation, including under Title II and Title III above.

Neither Title II crowdfunding nor Title III crowdfunding requires the degree of disclosure amounting to a registration statement. Title II is free of most reporting requirements because all investors must be accredited. On the other hand, securities offered under Title IV offer immediate liquidity and thus are freely transferable, unlike Title II and Title III offerings. Plus, under Title IV, developers can raise large sums from the "crowd," just as they can under Title II's Rule 506(c), though not unlimited sums. Title IV, however, affords greater transparency because of the requirements for audited financial statements and SEC filing and review, which may in the long run lead to more funds raised because of significantly more investor confidence in the securities offered and in the developer. Title II has revolutionized real estate financing in recent years; however, as Regulation A+ receives more attention, it may well become more widely used. Title II's Rule 506(c) has certain inferior features such as no mandatory disclosure and no offering cap, plus a required transfer restriction of one year.

Also weighing in favor of Regulation A+ is the dramatic decrease in the number of IPOs and the decrease in proceeds raised by IPOs in the past 10 years. Apparently, 2015 was the best year for IPOs in more than a decade, with more than $85.2 billion raised, compared to $54.9 billion total in 2013. See Madeleine Johnson, *Will Uber Be the Hottest IPO of 2016?* (Aug. 1, 2016), zacks.com/stock/news/214631/will-uber-be-the-hottest-ipo-of-2016. The first quarter of 2016 was the slowest quarter for IPOs in the United States since 2009. In a potentially unpromising IPO market, a Tier 2 Regulation A+ offering offers a solid alternative. This offering also could be coupled with a NASDAQ listing as an alternative to an IPO.

Conclusion

Crowdfunding may be an attractive financing alternative for some real estate developers. Jumping into this market, however, requires careful planning and compliance with a complex regime of federal regulations. ■