Certain United States Offering Considerations

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Overview of United States Securities Laws

- Registration under U.S. Securities Act (registered or exempt offering)
- Registered offerings – common registration statements:
  - Long Form registration statements (Forms S-1 and F-1)
  - Short Form registration statements (Forms S-3 and F-3)
  - Multi-Jurisdictional Disclosure System (MJDS) (Form F-10)
- Exempt offerings – common exemptions referenced:
  - Section 4(a)(2) and Section 4(a)(1)(1/2)
  - Regulation D – Rules 504, 505, 506(b) and 506(c)
  - Rule 144A
  - Regulation S (offshore transactions)
- Must comply with applicable state securities laws

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Exempt Offerings – Regulation D

- Section 4(a)(2) – “not a public offering”
- Section 4(a)(1)(1/2) – resale exemption
- Regulation D
  - Rule 504 – Not Exchange Act reporting, $1 million (12 month period) and state registration
  - Rule 505 – Up to $5 million, unlimited “accredited investors (“AIs”),” up to 35 non-AIs
  - Rule 506 – No $ limit, unlimited AIs, up to 35 non-AIs
    - Rule 506(b) – No “general solicitation or general advertising”
    - Rule 506(c) – “General solicitation and general advertising” permitted; verification of AI status required
- Rule 144A – resale exemption, “qualified institutional buyers” (QIBs), not a U.S. listed or quoted security
- Regulation S – offshore transactions (outside U.S. and “U.S. persons” (in some cases))
  - Equity: Category 1 (FPI, No SUSMI), Category 2 (not Category 1 eligible and equity of reporting issuer), Category 3 (not Category 2 eligible)
- Regulate the whole offering

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Rule 506(d) – Bad Actor Disqualification

- Adopted under the JOBS Act
- Only applies to Rule 506 offerings
- Potential loss of Rule 506 exemption if any of the following "covered persons" are subject to a disqualifying event:
  - the issuer and any predecessor of the issuer or affiliated issuer;
  - any director, executive officer, officer participating in the offering, general partner or managing member of the issuer;
  - any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power;
  - any promoter connected with the issuer in any capacity at the time of the sale;
  - any investment manager to an issuer that is a pooled investment fund and any director, executive officer, other officer participating in the offering, general partner or managing member of any such investment manager, as well as any director, executive officer or officer participating in the offering of any such general partner or managing member;
  - any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with sales of securities in the offering (a "compensated solicitor"); and
  - any director, executive officer, other officer participating in the offering, general partner, or managing member of any such compensated solicitor.

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Disqualifying Events

- Disqualification will apply if a covered person is subject to the following “disqualifying events”:
  - criminal convictions within ten years before the sale of securities (or five years, in the case of issuers, their predecessors and affiliated issuers);
  - court orders entered within five years before the sale of securities, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in such conduct or practice;
  - in each case (A) in connection with the purchase or sale of any security; (B) involving the making of any false filing with the SEC; or (C) arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;
  - certain final orders of certain state regulators (such as state securities, banking and insurance regulators) and certain federal regulators, if the order is based on fraudulent, manipulative or deceptive conduct within ten years before the sale of the securities for so long as such orders are in effect;
  - certain SEC disciplinary orders relating to brokers, dealers, municipal securities dealers, investment advisers and investment companies and their associated persons for so long as such orders are in effect;

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Disqualifying Events (continued)

- SEC cease and desist orders within five years before the sale of securities for scienter-based anti-fraud violations and Section 5 registration violations;
- suspension or expulsion from membership in, or suspension or bar from associating with a member of, a securities self-regulatory organization for the duration of the suspension or expulsion;
- SEC stop orders and orders suspending a Regulation A exemption issued within five years before such sale, or investigations in respect of such orders ongoing at the time of the sale; and
- U.S. Postal Service false representation orders entered within five years before such sale, or a temporary restraining order or preliminary injunction with respect to conduct alleged to have violated the false representation statute that applies to U.S. mail

- SEC guidance – generally only concerned with events related U.S. courts and regulatory activities

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Disqualifying Events (continued)

- "Reasonable care" exception – factual inquiry with covered persons
- Rule 506(e) – disclosure for disqualify events before September 23, 2013 provided a reasonable time prior to sale
- Form D certification
- Practical Implications –
  - Reciprocal representations and warranties
  - Issuer – due diligence questionnaires
  - Dealers – due diligence within organization and syndicate/selling group
    - Compartmentalization of Regulation D commissions
    - Use of Section 4(a)(2) and other Regulation D exemptions

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New Cross Border Transaction Structures

- Canadian bought deal or underwritten deal – Rule 144A/Regulation D (bifurcated deals)
- Canadian agency deal – Rule 506(b) of Regulation D
- Typical U.S. transaction mechanics –
  - Rule 144A –
    - Certificated securities/restricted CUSIPs
    - Deemed representations and warranties in U.S. wrap
  - Rule 506(b) of Regulation D
    - Certificated securities
    - Subscription agreement
  - Common share offerings v. unit offerings
- New variations on transaction structures
  - Rule 144A (no or limited U.S. market)
    - Contractual only restrictions on transfer (Regulation S)
    - QIB representation letter in U.S. wrap
    - 4(a)(1)(1/2)
  - Rule 506(b) of Regulation D
    - Bad actor disqualification issues – 4(a)(2)
    - QIB level purchasers – contractual only restrictions on transfer (no or limited U.S. market)
    - Common share offerings v. unit offerings

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Section 12(j) of the Exchange Act

- Section 12(j) – The Commission is authorized by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, or the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations hereunder. No member of a national securities exchange, broker or dealer shall make use of the mails or any means or instrumentally of interstate commerce to effect any transaction in, or to induce the purchase and sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.
- SEC Enforcement Division administers Section 12(j) process and such Division's views on Section 12(j)
- Typical fact pattern – Exchange Act registration statement/ automatically effective after 60 days/delinquent reporting status
- Consequences – no brokered secondary trading permitted in U.S. and no brokered offering into the U.S.
- Obtain representation in underwriting or agency agreement that no Section 12(j) issues exist

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United States Regulation M and FINRA Private Placement Filing Obligations

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Overview

All Canadian broker-dealers with U.S. registered broker-dealer affiliates should be aware of their filing and other obligations under Regulation M and FINRA rules when offering or selling securities in the United States.

I. **Reg. M filings**
II. **FINRA Private Placement filing**

- What are the filings?
- Why are the filings required?
- Who has a filing obligation?
- When are the filings triggered and when are they due?
- How are the filings submitted?

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Reg. M Filings – Why?

- Reg. M is designed to prevent manipulation by individuals with an interest in the outcome of an offering, and prohibits activities and conduct that could artificially influence the market for an offered security.
- FINRA monitors broker-dealers for compliance with Reg. M.
  - Looking for certain prohibited purchases and bids (or attempts to induce the foregoing) and certain prohibited short sales

Reg. M Filings – Who has a filing obligation?

- If Reg. M filings are triggered, then the **lead** broker-dealer generally makes the Reg. M filings on behalf of each participating FINRA member.
- However, each FINRA member participating in the offering has an **individual filing obligation**.
  - If the lead fails to make the filings, then the individual FINRA members would not be in compliance.
  - As such, you should confirm that the lead has made any required filings and has properly identified each participating member in the filings.

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Reg. M Filings – When are they triggered?

1. Will offers and sales be made in the United States **AND** are the issuer's securities listed on an exchange, or quoted on an OTC market, in the United States?
   a. If no, then Reg. M filings are not required.
   b. If yes, then Reg. M filings may be triggered.

Reg. M Filings – When are they triggered? (cont.)

2. Is this offering a type of offering for which Reg. M filings are generally triggered?
   a. "Excepted activity" under Rule 101 of Reg. M:
      i. Offerings solely to "qualified institutional buyers" (QIBs) in the U.S. (including Rule 144A, Section 4(a)(2) and Reg. D offerings) are exempt.
      ii. If an offshore offering under Reg. S and in the U.S. to QIBs, then "U.S. person" concept must be included in the offering documents for the exemption to apply.
   b. For offerings of **units** under **Reg. S** and **Rule 144A**, Reg. M filings are not triggered ("U.S. person" concept).
   c. For offerings of other securities (e.g., common shares, subscription receipts, convertible debentures, etc.) under **Reg. S** and **Rule 144A**, we suggest that Reg. M filings generally be made.
   d. For other offerings (e.g., Reg. D, Section 4(a)(2)), Reg. M filings are generally triggered.
      i. Offerings solely to QIBs in the U.S. are exempt.
      ii. Offerings of units under Reg. S and to QIBs are exempt ("U.S. person" concept).

Reg. M Filings – If triggered, which forms are required?

1. **Restricted Period Notification** form would be required **if** a restricted period must be imposed.
   - **Exemption for "actively traded" securities** -- "Actively traded" means the securities have an average daily trading volume (ADTV) of at least US$1 million and the issuer has a public float of at least US$150 million.
2. **Trading Notification** form is required.
3. **Deal Status** form is required.

Reg. M Filings – When are they due?

1. **Restricted Period Notification** form
   a. If not an "actively traded" security, then either a "1 day" or "5 day" restricted period applies, depending on ADTV and public float.
   b. Restricted period generally begins 1 or 5 trading days prior to pricing, as applicable.
   c. The filing is generally due 1 trading day before the restricted period begins.
2. **Trading Notification** form is due the trading day after pricing.
3. **Deal Status** form is due upon completion of the member's participation in the offering (e.g., the closing date).

Note: The timing of the Reg. M filings may vary in certain circumstances (e.g., bought deal in Canada with a private placement in the U.S.)

Reg. M Filings – How are they submitted?

- Submit online through the FINRA Firm Gateway using the FINRA member's login

FINRA Private Placement Filing – Who has a filing obligation?

- If triggered, the **lead** broker-dealer generally makes the filing on behalf of each participating FINRA member.
- However, each participating FINRA member has an **individual filing obligation**.
  - Again, confirm that the lead has made the filing and has properly identified each participating FINRA member in the filing.

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FINRA Private Placement Filing – When is it triggered?

- Required for all **non-exempt** private placements in which a FINRA member participates.
  - Exempt offerings:
    - **Rule 144A** offerings to **QIBS** and offshore **Reg. S** offerings.
    - Offers and sales solely to **institutional "accredited investors"** under Rule 501(a)(1), (2), (3) or (7) of Reg. D in the United States.
- Offerings involving **individual "accredited investors"** pursuant to Reg. D in the U.S. are not exempt.

Note: If triggered, the filing is required **even if** the issuer's securities are not listed on any exchange, or traded on any OTC market, in the United States.

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FINRA Private Placement Filing – When is it due?

- Due within 15 calendar days after the date of first sale in the offering (i.e., the closing date)

FINRA Private Placement Filing – How is it submitted?

- Submit online through the FINRA Firm Gateway using the FINRA member's login.