FREQUENTLY ASKED QUESTIONS ABOUT RULE 144A EQUITY OFFERINGS

These FAQs relate specifically to Rule 144A equity offerings. Please refer to our Frequently Asked Questions About Rule 144A generally, and our Frequently Asked Questions About Initial Public Offerings for additional information about equity offerings.

Understanding Rule 144A Equity Offerings

What is a Rule 144A equity offering?

A Rule 144A equity offering is an unregistered offer and sale of equity securities issued by a U.S. or foreign company, the equity securities of which are neither listed on a U.S. securities exchange nor quoted on a U.S. automated inter-dealer quotation system. See "Frequently Asked Questions About Rule 144A—What securities are eligible for exemption under Rule 144A?"

Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), provides a non-exclusive safe harbor from the registration requirements of Section 5 of the Securities Act for certain offers and sales of qualifying securities by certain persons other than the issuer of the securities. A Rule 144A equity offering is usually structured so that the issuer first sells newly issued securities to an "initial purchaser," typically a broker-dealer, in a private placement exempt from registration under the Securities Act. The initial purchaser can then take advantage of the Rule 144A safe harbor to reoffer and resell the restricted securities immediately to qualified institutional buyers ("QIBs").

Rule 144A provides that reoffers and resales in compliance with the rule are not "distributions" and, therefore, the reseller is not an "underwriter" within the meaning of Section 2(a)(11) of the Securities Act. A reseller that is not the issuer, an underwriter, or a dealer can rely on the exemption provided by Section 4(a)(1) of the Securities Act. Resellers that are dealers can rely on the exemption provided by Section 4(a)(3) of the Securities Act.

Which securities are eligible for exemption under Rule 144A?

Equity securities offered pursuant to Rule 144A, when issued, must not be "fungible" with or substantially identical to a class of securities listed on a national securities exchange or quoted in an automated inter-dealer quotation system ("Listed Securities"). Common stock is deemed to be of the "same class" if it is of substantially similar character and the holders enjoy substantially similar rights and privileges. American Depositary Receipts ("ADRs") are considered to be of

the same class as the underlying equity security. Preferred stock is deemed to be of the same class if the terms of the preferred stock relating to dividend rate, liquidation preference, voting rights, convertibility, call, redemption, and other similar material matters are substantially identical. A convertible or exchangeable security with an effective conversion premium upon issuance (at pricing) of less than 10%, and a warrant with a term of less than three years or an effective exercise premium on issuance (at pricing) of less than 10%, will be treated as the "same class" as the underlying security. See also "Frequently Asked Questions About Rule 144A—Eligible securities."

Source: Rule 144A(d)(3)(i) and SEC Release No. 33-6862 (April 23, 1990). Rule 144A(d)(3)(i) "invites a comparison of apparently different types of securities of the same issuer to determine whether in reality they should be considered the same class." J. William Hicks, *Resales of Restricted Securities* at 7-18 (West Group 2007). The Securities and Exchange Commission ("SEC") has stated that privately placed securities that, at the time of issuance, were fungible with securities trading on a U.S. exchange or quoted on NASDAQ would not be eligible for resale under Rule 144A. In Release No. 33-6862 (April 23, 1990), the SEC stated that the test under Rule 144A to determine whether common stock will be deemed to be of the same class is the same as the test used under Section 12(g)(5) of the Exchange Act of 1934, as amended (the "Exchange Act") (which section governs the requirement to register a class of securities under the Exchange Act) and will be interpreted by the SEC in the same manner.

In addition to the foregoing, Rule 144A does not cover resales of securities issued by open-end investment companies, unit investment trusts, and face-amount certificate companies that are required to be registered under Section 8 of the Investment Company Act of 1940.

Source: Rule 144A(d)(3)(ii).

Who may rely on Rule 144A?

Issuers are not eligible to rely on Rule 144A for the sale of securities. Rather, in a Rule 144A equity offering, issuers rely on any valid exemption for the offer and sale of unregistered securities when they sell securities to the initial purchaser(s). Often issuers rely on Section 4(a)(2) or Regulation D, or Regulation S under the Securities Act. The initial purchaser(s), or any person or entity other than the issuer, may rely on Rule 144A for the resale of the securities. Generally, the initial purchaser are broker-dealers. Affiliates of the issuer may rely on Rule 144A.

See Preliminary Note No. 7 to Rule 144A and SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 138.01 (Jan. 26, 2009), available at http://www.sec.gov/divisions/corpfin/guidance/securitiesactrulesinterps.htm.

Why conduct a Rule 144A equity offering?

Privately held companies may find a Rule 144A equity offering to be an attractive alternative to an IPO, especially if the IPO market is closed. The market often views an equity 144A offering as a stepping stone to an IPO. An issuer can complete a Rule 144A offering while waiting for the IPO window to open. The preparations for a Rule 144A equity offering are substantially similar to those for an IPO, though less involved. Also, an issuer that has commenced the IPO process can leverage all of that work, and quickly and efficiently use many of the disclosures prepared in connection with an IPO for a Rule 144A equity offering. If the IPO window opens

before or even after the closing of the Rule 144A offering, the work undertaken in connection with the Rule 144A equity offering can easily and effectively be leveraged for the IPO. Other, alternative offerings that an issuer may consider while the IPO window is closed are less favorable for the issuer.

The ability to resell securities in reliance on Rule 144A enables broker-dealers to structure offerings that closely resemble traditional firm commitment public offerings. Once the securities are in the hands of QIBs, a market for the securities may develop among QIBs. These markets do not provide the same liquidity as national securities exchanges but they provide some liquidity nonetheless. The issuer can enhance the liquidity of the securities by including its securities in one of the trading markets for restricted securities. In many Rule 144A equity offerings, the issuer agrees to commence an IPO or to register the offered securities for resale within a fixed period of time.

Foreign issuers that do not want to become subject to U.S. reporting requirements may also be interested in Rule 144A equity offerings.

In addition to providing yet another capital-raising alternative, a Rule 144A equity offering offers other benefits. Issuers in a Rule 144A offering have greater flexibility with respect to disclosure than do issuers in a public offering. Although issuers generally produce offering memoranda that include SEC-style disclosure, the contents of the offering memoranda are dictated by industry practice, not SEC regulation. Issuers are not required to comply with the regulations that prescribe the disclosure requirements for the registration statements used in public offerings. Further, there is no SEC review of the offering memorandum, thus eliminating the delay associated with SEC review. Until the issuer becomes an SEC reporting company, it is not subject to the corporate governance provisions of the federal securities laws and the national securities exchanges, nor is it exposed to the liabilities arising from these provisions, particularly those set forth in the Sarbanes-Oxley Act. See "What Are The Disclosure Requirements For Rule 144A Equity Offerings?"

Finally, many Rule 144A offerings are structured as global offerings, with a side-by-side offering targeted at foreign holders in reliance on Regulation S. This dual structure permits an issuer, especially a foreign issuer, to broaden its potential pool of investors. A foreign issuer may take advantage of this structure to attract investors from its home country that are already familiar with the issuer.

What are the advantages of undertaking a Rule 144A equity offering?

In addition to the potential efficiencies that may be realized by a private company that completes a Rule 144A equity offering prior to completing an IPO, the advantages of a Rule 144A offering, include: (1) no public disclosure of innovative structures or sensitive information; (2) limited (or no) FINRA filing requirements, and (3) reduced for liability under the Securities Act. See "Why Conduct a Rule 144 Equity Offering?"

What are the disadvantages of conducting a Rule 144A equity offering?

Rule 144A offerings are limited to QIBs, which limits the universe of potential purchasers. Following the completion of the offering, there will not be an immediate, liquid secondary market for the offered securities. See "Frequently Asked Questions About Rule 144A—Are securities resold under Rule 144A

freely tradable after such resale?" Investors may demand a liquidity discount for the offered securities.

A Rule 144A offering may allow a private company to raise capital from institutional investors and become better known; however, it is unlikely to result in any research analyst following. The company will defer becoming subject to SEC reporting requirements, but Rule 144A issuers are required to provide purchasers, at their request, with reasonably current information. See "What Are the Disclosure Requirements For Rule 144A Equity Offerings?"

A non-reporting issuer that conducts a Rule 144A equity offering also must monitor the number of its equity holders to ensure that it does not inadvertently become subject to SEC reporting requirements by crossing the holder of record threshold. It does not matter how the equity holder acquired its interests in the issuer. Accordingly, an issuer may limit an offering to a small number of initial purchasers for purposes of avoiding the reporting rules but eventually become subject to the reporting requirements if ownership of its securities becomes more dispersed. The number of holders can be monitored relatively easily by a transfer agent or through the facilities of a private secondary trading market.

As discussed above, equity securities offered under Rule 144A must not be fungible with, or substantially identical to, listed securities. Accordingly, it is not likely that an issuer will be able to complete multiple Rule 144A equity offerings.

What are the principal steps for a Rule 144A equity offering?

An issuer first sells restricted securities to one or more initial purchasers in a private placement exempt from registration, generally under Section 4(a)(2), and/or Regulation D, or Regulation S of the Securities Act. The initial purchasers will be broker-dealers. The broker-dealers reoffer and resell the securities to QIBs in reliance on the Rule 144A resale safe harbor.

What are the disclosure requirements for Rule 144A equity offerings?

There are no regulations prescribing the disclosure requirements for a Rule 144A offering. Most practitioners advise their clients to prepare an offering memorandum that contains substantially the same issuer type of information that an issuer would be required to include in a registration statement. Moreover, if the issuer is preparing for a future IPO, it will need to prepare audited financial statements. However, it is important to note that, market practice aside, the issuer will have significant flexibility regarding the presentation of information in the offering memorandum. For example, the issuer may choose to present summary or selected information for fewer years or may include limited executive compensation information in the offering memorandum.

Once an issuer has commenced the Rule 144A offering process, Rule 144A requires that issuers provide purchasers, at their request, with "reasonably current" information about the issuer unless the issuer is (i) not a reporting company under the Exchange Act, (ii) a foreign issuer exempt from reporting pursuant to Rule 12g3-2(b) of the Exchange Act, or (iii) a foreign government.

Such information includes the following:

- A brief description of the issuer's business, products, and services;

- The issuer's most recent balance sheet, profit and loss statement, and retained earnings statement; and
- Any similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements must be audited if audited statements are "reasonably available").

With respect to a foreign private issuer (as defined under the U.S. federal securities laws), information will be presumed reasonably current if the information meets the timing requirements of the issuer's home country or principal trading market.

The obligation to provide information to purchasers continues so long as the issuer is neither a reporting company nor a foreign issuer providing home country information.

Rule 144A Equity Offering Team

Who is involved in a Rule 144A equity offering?

The participants in a Rule 144A equity offering include many of the same players as would be involved in an IPO. Retaining the proper external advisers is important for a successful offering. The offering team will include one or more initial purchasers. The initial purchasers may be the same broker-dealers that would serve as underwriters in an IPO by the same issuer. If there are multiple initial purchasers, one may serve as the lead and the others may play the same role as co-managers of an IPO. Also involved (although technically not required), is an independent auditing firm with significant public company experience and outside legal counsel. Financial printers are not required but should be considered, depending on the size of the offering. A transfer agent is not required, assuming the issuer is not yet public, but the issuer should be ready to engage a transfer agent by the time any registration statement is filed, if contemplated. An issuer may also want to hire an investor relations firm.

An issuer should also have an internal offering team in place. Key members of the internal team should include the issuer's president, CEO, CFO, general counsel, controller, and an investor relations or public relations manager. Depending on the issuer's industry, other team members may be essential. For example, a life sciences company may want its chief research officer or chief medical officer on the internal team.

How does a reseller establish a reasonable belief that a person is a QIB?

The reseller (and any person acting on the reseller's behalf) may rely on the following non-exclusive methods to establish a prospective purchaser's ownership and discretionary investments in securities:

- The purchaser's most recent publicly available annual financial statements; provided that such statements present the information as of a date within 16 months preceding the date of the sale of securities under Rule 144A to a U.S. purchaser, or within 18 months for a foreign purchaser;
- The most recent publicly available information filed by the prospective purchaser with (a) the SEC; another U.S. federal, state; or local governmental agency; or a self-regulatory organization, or (b) a foreign governmental agency or foreign self-regulatory organization; provided that such statements present the

information as of a date within 16 months preceding the date of the sale of securities under Rule 144A to a U.S. purchaser, or within 18 months for a foreign purchaser;

- The most recent publicly available information appearing in a recognized securities manual, such as Moody's or Standard & Poor's; provided that such statements present the information as of a date within 16 months preceding the date of the sale of securities under Rule 144A to a U.S. purchaser, or within 18 months for a foreign purchaser; or
- A certification by the purchaser's chief financial officer, a person fulfilling an equivalent function or other executive officer specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the end of the purchaser's most recent fiscal year or, in the case of a purchaser that is a member of a family of investment companies, a certification by an executive officer of the investment adviser specifying the amount of securities owned by the family of investment companies as of a specific date on or since the end of the purchaser's most recent fiscal year.

The bases for reliance enumerated in Rule 144A are non-exclusive; resellers may be able to establish a reasonable belief of eligibility based on factors other than those cited.

A reseller cannot rely on certifications that it knows, or is reckless in not knowing, are false. However, a seller has no duty of verification. In other words, unless the circumstances give a reseller reason to question the veracity of the information, the reseller does not have a duty to verify the information.

Source: Rule 144A(d)(1)(i)-(iv) and SEC Release 33-6862 (April 23, 1990).

How does a reseller typically satisfy the requirement of making a purchaser aware that the reseller may rely on Rule 144A in connection with the resale?

Typically, the warning is given by placing a legend on the security itself. For example, the stock certificate representing securities resold under Rule 144A will include a legend (or a notation for electronic records) stating that the securities have not been registered under the Securities Act and, therefore, may not be resold or otherwise disposed of in the absence of such registration or unless such transaction is exempt from, or not subject to, registration.

In addition, the offering memorandum or other offering document used in connection with the Rule 144A offering typically will include an appropriate notice to investors, such as the following:

> "Each purchaser of the securities will be deemed to have represented and agreed that it is acquiring the securities for its own account or for an account with respect to which it exercises sole investment discretion, and that it or such account is a QIB and is aware that the sale is being made to it in reliance on Rule 144A."

The offering memorandum or other offering document will also include a notice to purchasers that the securities to be acquired may only be reoffered and resold pursuant to an exemption from, or registration under, the Securities Act.

Finally, the securities will have a restricted CUSIP number.

What do the initial purchasers do?

The issuer will want to carefully identify one or more initial purchasers that will be responsible for the offering process. If the issuer wants to be in a position to complete an IPO soon after completion of the Rule 144A equity offering, the initial purchasers should be, or should include, registered broker-dealers that are qualified to serve as the underwriters of the proposed IPO. An initial purchaser may be chosen based on its industry expertise, including the knowledge and following of its research analysts, the breadth of its distribution capacity, and its overall reputation. As is the case with the underwriters of an IPO, the issuer should at a minimum consider the following questions:

- Does the investment bank have strong research in the issuer's industry?
- Is the investment bank's distribution network mainly institutional or retail?
- Is the investment bank's strength domestic, or does it have foreign distribution capacity?

Depending on the offering size, an issuer may want to include a number of additional initial purchasers to complement the lead initial purchaser's strengths and weaknesses.

As with an IPO, an issuer should keep in mind that the initial purchasers have at least two conflicting responsibilities—to resell the securities they purchase from the issuer and to recommend to potential purchasers that the purchase of the securities in a Rule 144A equity offering is a suitable and worthy investment. In order to learn about the issuer's business—and to support a diligence defense for the initial purchasers in connection with the offering—the initial purchasers and their counsel should spend a substantial amount of time performing business, financial, and legal "due diligence" in connection with the Rule 144A equity offering, and making sure that the offering memorandum and any other offering materials are consistent with the information provided.

What do the auditors/accountants do?

If audited financial statements are provided by an issuer in connection with a Rule 144A equity offering, whether as part of an offering memorandum or to purchasers, the accountants will prepare and audit the financial statements. Even if the issuer determines not to include audited financial statements, the issuer will need to work closely with the auditors, and the auditors should review the financial statements and all other financial information to ensure that the issuer is applying appropriate accounting standards so that once the financial statements are audited there won't be material changes from the reviewed financial information.

Other services that may be provided by accountants during the offering process include assisting the issuer in preparing the financial information to be included in the offering memorandum, such as the summary financial information, selected financial information, capitalization and dilution tables, and any pro forma financial statements; the accountants may also be asked to provide a "comfort letter" or an agreed-upon procedures letter to the initial purchasers. See "What are the disclosure requirements for Rule 144A equity offerings?" and more Frequently Asked Questions About Rule 144A—"What is a comfort letter?"

What does legal counsel do?

An issuer's in-house and outside legal counsel play an important role in the Rule 144A equity offering process. Issuer's counsel:

- Has principal responsibility for preparing any required offering documentation, including any post-offering registration statements covering the resale of the offered securities, if contemplated in the offering;
- Negotiates a purchase agreement with the initial purchasers and their counsel; and
- Prepares various other documents, including stock option plans, charter documents, committee charters, board minutes relating to the offering and any required consents, waivers, and legal opinions.

Counsel to the initial purchasers undertakes legal due diligence during the offering process and reviews and comments on the offering memorandum and other offering materials with the issuer, its counsel, and the initial purchasers. Counsel to the initial purchasers also:

- Negotiates the purchase agreement with the issuer and its counsel;
- Negotiates the "comfort letter," if applicable; and
- Submits any required materials to the Financial Industry Regulatory Authority, Inc. ("FINRA").

The issuer's counsel and counsel to the initial purchasers will also coordinate the closing of the transaction.

Pre-offering Matters

What steps should be taken to prepare for a Rule 144A equity offering?

Issuers contemplating a Rule 144A equity offering should consider making many of the same legal and operational changes that issuers should make before proceeding with an IPO. Those issuers that are considering a Rule 144A equity offering at the same time they are considering an IPO will need to consider the changes. The changes should be effected well before any organizational meeting held to launch the offering. See "Frequently Asked Questions About Initial Public Offerings—What corporate steps should be taken to prepare for an IPO?"

What is the "due diligence" process?

The Rule 144A due diligence process is similar to that followed in connection with a registered public offering. Generally, the due diligence process is divided into two parts: (a) business and management due diligence, and (b) documentary, or legal, due diligence. In order to help establish their due diligence, the initial purchasers in a Rule 144A equity offering will request documents at closing similar to those delivered in an underwritten offering, including a comfort letter, legal opinions, and officer certificates.

A due diligence investigation is a critical component in an initial purchaser's decision whether to undertake an offering, enabling the prospective purchaser to evaluate the relevant legal, business, and reputational risks. Rule 144A offerings do not subject the issuer and the initial purchasers to liability under Section 11 of the Securities Act. Nonetheless, a thorough due diligence investigation by lawyers, accountants, the issuer, and the initial purchasers necessarily produces better disclosure and mitigates liability or potential liability for material misstatements or omissions.

If the issuer is contemplating an IPO, either as an alternative to a Rule 144A equity offering or shortly after completion of the Rule 144A equity offering, the

underwriters of the proposed IPO may also serve as the initial purchasers in the equity 144A offering. In such case, switching between these formats will not necessarily involve a change in offering participants.

Offering Process

How are Rule 144A equity offerings structured?

The Rule 144A offering process is similar to the public offering process. The features of this process typically include:

- Solicitation of orders using a preliminary offering memorandum;
- Preparation and delivery of a final term sheet to investors to indicate the final pricing terms;
- Confirmation of orders using a final offering memorandum;
- Execution of the purchase agreement at pricing;
- Delivery of the comfort letter at pricing;
- Delivery of legal opinions and other closing documents at closing; and
- Closing three to five days after pricing.

What are the conditions that a reseller of the restricted securities must satisfy to rely on Rule 144A?

There are four conditions to reliance on Rule 144A:

- Actual sales are made only to QIBs or to an offeree or purchaser that the reseller (and any person acting on its behalf) reasonably believes is a QIB (see "Frequently Asked Questions About Rule 144A—How does a reseller establish a reasonable belief that a person is a QIB?");
- The reseller (or any person acting on its behalf) must take reasonable steps to ensure that the buyer is aware that the reseller may rely on Rule 144A in connection with the resale (see "Frequently Asked Questions About Rule 144A—How does a reseller typically satisfy the requirement of making a buyer aware that the reseller may rely on Rule 144A in connection with the resale?");
- The securities reoffered or resold are eligible securities under Rule 144A (see "Frequently Asked Questions About Rule 144A—What securities are eligible for exemption under Rule 144A?"); and
- In the case of securities of an issuer that is neither an Exchange Act reporting company, nor a foreign issuer exempt from reporting pursuant to Rule 12g3-2(b) of the Exchange Act or a foreign government, the holder and a prospective buyer designated by the holder must have the right to obtain from the issuer and must receive, upon request, certain "reasonably current" information about the issuer.

Source: Rule 144A(d).

What are road shows?

Road shows or "dog and pony shows" are presentations where the issuer's representatives (usually the CEO, CFO, and possibly an investor relations professional) and the initial purchasers meet with potential significant investors to discuss the issuer's business and the offering. Attendance at a road show for a Rule 144A equity offering generally is limited to QIBs (or non-U.S. persons if the offering will be conducted in compliance

with Regulation S) although general solicitation is permitted in the context of the offering. If the issuer is a reporting company, the issuer will need to closely consider the content of a road show in light of Regulation FD. See "Frequently Asked Questions About Initial Public Offerings—What are road shows and what materials are permitted?"

Can an issuer hold an electronic road show?

Yes. Participation in electronic road shows, either through the Internet or otherwise, is usually limited to QIBs although general solicitation is permitted in the context of the offering. See "Frequently Asked Questions About Rule 144A—Can the Internet be used to make Rule 144A reoffers and resales?"

May an issuer publicly announce its intention to complete a Rule 144A equity offering?

Yes. Effective September 23, 2013, pursuant to Section 201 of the Jumpstart Our Business Startups (JOBS) Act, the SEC revised Rule 144A to permit general solicitation and general advertising of these offerings, provided actual sales are made only to persons that are reasonably believed to be QIBs. As a result, issuers and initial purchasers will have enhanced flexibility with respect to communications about Rule 144A offerings.

Are the securities resold under Rule 144A freely tradable?

No. Securities acquired in a Rule 144A transaction are deemed "restricted securities" within the meaning of Rule 144(a)(3) of the Securities Act. As a result, these securities remain restricted until the applicable holding period under Rule 144 expires and may only be publicly resold under Rule 144, pursuant to an effective registration statement, or in reliance on any other available exemption under the Securities Act. Exempt resales of restricted securities may be made in compliance with Rule 144A, the so-called Section 4(1½) exemption, or Regulation S. See "Frequently Asked Questions About Rule 144A—Why do Rule 144A purchasers often insist that the issuer register the securities issued in the Rule 144A transaction?"

Source: Preliminary Note No. 6 of Rule 144A.

What are the holding periods applicable to the sale of Rule 144A securities?

In December 2007, the SEC amended Rule 144 to, among other things, shorten the holding period for restricted securities (subject to certain public information requirements). For non-affiliate holders of restricted securities, Rule 144 provides a safe harbor for the resale of such securities without limitation after six months in the case of issuers that are reporting companies that comply with the current information requirements of Rule 144(c), and after one year in the case of non-reporting issuers. In each case, after a one-year holding period, resales of these securities by non-affiliates will no longer be subject to any other conditions under Rule 144.

For a reporting issuer, compliance with the adequate current public information condition requires the issuer to have filed all reports under Section 13 or Section 15(d) of the Exchange Act. For a non-reporting issuer, compliance with the adequate current public information condition requires making publicly available basic information about the issuer, including certain financial statements.

For affiliate holders of restricted securities, Rule 144 provides a safe harbor permitting resales of restricted securities, subject to the same six-month and one-year

holding periods for non-affiliates and to other resale conditions of amended Rule 144. These other resale conditions include, to the extent applicable: (a) adequate current public information about the issuer, (b) volume limitations, (c) manner of sale requirements for equity securities, and (d) notice filings on Form 144.

Source: Preliminary Note No. 2 of Rule 144. With respect to the resale of restricted securities pursuant to Rule 144, see J. William Hicks, *Resales of Restricted Securities*, at 5-1 (West Group 2007).

How are Rule 144A securities registered under the Securities Act?

The two principal methods to register the resale of Rule 144A eligible securities under the Securities Act are:

- "Exxon Capital" exchange offers; and
- Shelf registrations under Rule 415 of the Securities Act.

See also "Frequently Asked Questions About Rule 144A—What is an Exxon Capital exchange offering?"

Can an issuer that is not an Exchange Act reporting company be required to register under the Exchange Act in connection with a Rule 144A equity offering?

Yes. Section 12(g) of the Exchange Act requires any issuer (other than a bank or bank holding company) having 2,000 or more holders of record (or 500 non-accredited holders of record) of a class of equity securities and more than $10 million in assets at the end of its most recent fiscal year, anywhere in the world, to register the class of equity securities under the Exchange Act.

As a result, a non-reporting company that has sold equity securities in connection with a Rule 144A transaction may be required to register that class of equity securities. This may occur as a result of resales of the Rule 144A securities in the secondary market, other transactions that increase the number of holders, or, in the case of a foreign private issuer, a listing on NASDAQ. Issuers that effect "backdoor IPOs" under Rule 144A must be careful to monitor the number of their equity holders.

Source: Rule 12g3-2(a). Preliminary Note No. 4 of Rule 144A and SEC Release No. 33-6862 (April 23, 1990) state that Rule 144A does not affect the securities registration requirements of Section 12 of the Exchange act.

Other

Is a Rule 144A security a "covered security" for purposes of Section 18 of the Securities Act?

It depends. Section 18 of the Securities Act exempts certain securities and securities offerings from state regulation relating to registration and qualification of securities or securities transactions. However, states may continue to require notice filings to be made in connection with exempt securities or offerings.

Pursuant to Section 18, Rule 144A transactions are not subject to state regulation if (i) the issuer of the securities being resold in the Rule 144A transaction has a class of securities listed, or authorized for listing, on the New York Stock Exchange, NYSE MKT, or the NASDAQ, (ii) listed, or authorized for listing, on a national securities exchange that has listing standards that the SEC has determined by rule are substantially similar to the listing standards applicable to the securities described in clause (i), and (iii) the securities being resold in the Rule 144A transaction are equal or

senior to the issuer's securities that are listed on one of the above-referenced markets. For example, if an issuer has senior debt securities traded on the New York Stock Exchange, and it offers common stock in a Rule 144A offering, the common stock will be "covered securities" under Section 18.

In addition, under Section 18, Rule 144A resales to "qualified purchasers" are exempt from state regulation. In December 2001, the SEC issued a proposed rule to define the term "qualified purchaser" for purposes of Section 18, but the proposed rule was never adopted. The proposed definition mirrors the definition of "accredited investor" under the Securities Act, but since the SEC never formally adopted the definition, most legal practitioners are reluctant to advise their clients that they may rely on it or, consequently, on this provision of Section 18.

If Section 18 does not exempt the Rule 144A transaction from state regulation, then the transaction will be required to be registered with each state in which the Rule 144A resales occur, or must otherwise be exempt from such state registration. Most state securities laws contain an exemption from registration for reoffers and resales made to QIBs within the meaning of Rule 144A. In states that do not have the specific exemption, Rule 144A sales are often exempt because Rule 144A purchasers would likely be deemed to be "institutional investors" for purposes of such states' analogous institutional investor exemption.

Source: Preliminary Note No. 5 of Rule 144A and SEC Release No. 33-6862 (April 23, 1990) state that nothing in Rule 144A removes the need to comply with any applicable state law relating to the offer and sale of securities. See Section 18(b)(1)(C) with respect to the covered security exemption, and Section 18(b)(3) with respect to the "qualified purchaser" exemption.

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