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OTC Markets Amends Listing Standards For OTCQB To Allow Non-Reporting Issuers

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

Effective May 18, 2017, the OTC Markets has amended its qualification rules for the OTCQB to allow quotation by companies that follow its alternative reporting standard (“Alternative Reporting Standard”). OTC Markets aligned the new requirements with the existing OTCQX Alternative Reporting Standard requirements. In addition, the OTC Markets made clarifying amendments to its rules, amended the rules related to the timing of removal for delinquent filers, and revised the rules for international reporting companies.

Highlights of Changes

To qualify for the OTCQB using the Alternative Reporting Standard, a company must file audited financial statements prepared in accordance with U.S. GAAP by a PCAOB qualified auditor, have a minimum bid price of \$0.01, not be subject to bankruptcy or reorganization proceedings, and maintain corporate governance including (i) have a board of directors that includes a minimum of two independent directors, and (ii) have an audit committee comprised of a majority of independent directors.

The cure period for delinquent filings has been extended to 45 days from the prior 30-day period. However, the cure period for a bid price deficiency has been reduced in half to 90 days from the prior 180 days. Moreover, if a company’s closing bid price falls below \$0.001 at any time for five consecutive days, the company will automatically be removed from the OTCQB.

The new rules clarify that a U.S. transfer agent is only required for U.S. and Canadian incorporated companies. However, international reporting companies must now file their reports with OTC Markets immediately after such filing with their primary international market.

The new rules clarify that the OTCQB annual fee is due 30 days prior to the beginning of each new annual service period. An OTCQB company must remain registered and in good standing in its state of incorporation.

The OTCQB has been recognized by most U.S. states as a “securities manual” for the purpose of the blue sky manual’s exemption. In order to qualify, companies must file reports with OTC Markets that meet the information requirements for the manual’s exemption in the state. The OTC Markets filings requirements are designed to ensure satisfaction of these requirements.

Finally, the new rules clarify that an OTCQB company is required to make timely disclosures of news releases and developments whether through an SEC form 8-K or press release with OTC Markets. A company must also act promptly to dispel unfounded rumors which result in unusual market activity or price variations.

Comprehensive Refresher on OTCQB, Including the New Amendments

The OTC Markets divide issuers into three (3) levels of quotation marketplaces: OTCQX, OTCQB and OTC Pink. The OTC Pink, which involves the highest-risk, highly speculative securities, is further divided into three tiers: Current Information, Limited Information and No Information. The OTCQB is considered the venture market tier designed for entrepreneurial and development-stage U.S. and international companies. To apply to the OTCQB, a company must submit a completed application and quotation agreement and pay the application fee.

Eligibility Requirements

To be eligible to be quoted on the OTCQB, all companies will be required to:

Meet a minimum closing bid price on OTC Markets of \$.01 for each of the last 30 calendar days and as of the day the OTCQB application is approved;

In the event that there is no prior public market and a 15c2-11 application has been submitted to FINRA by a market maker, OTC Markets can waive the bid requirement at its sole discretion;

In the event that a company is a seasoned public issuer that completed a reverse stock split within 6 months prior to applying to the OTCQB, the company must have a post-reverse-split minimum bid price of \$.01 at the close of business on each of the 5 consecutive trading days immediately before applying to the OTCQB;

In the event the company is moving to the OTCQB from the OTCQX, it must have a minimum closing bid price of \$.01 for at least one (1) of the 30 calendar days immediately preceding;

Companies may not be subject to bankruptcy or reorganization proceedings the company's application;

Either be subject to the reporting requirements of the Securities Exchange Act of 1934 and be current in such reporting obligations, be a Tier 2 Regulation A reporting company and be current in such reporting obligations, or, if an international issuer, be eligible to rely on the registration exemption found in Exchange Act Rule 12g-2(b) and be current and compliant in such requirements or be a bank current in its reporting obligations to its bank regulator, or be current in the OTC Markets Alternative Reporting Standards;

Have U.S. GAAP audited financials prepared by a PCAOB qualified auditor, including an audit opinion that is not adverse, disclaimed or qualified. International reporting companies may have audited financial statements prepared in accordance with IFRS;

Be duly organized, validly existing and in good standing under the laws of each jurisdiction in which it is organized and does business;

Submit an application and pay an application and annual fee;

Maintain a current and accurate company profile on the OTC Markets website;

Use an SEC registered transfer agent and authorize the transfer agent to provide information to OTC Markets about the company's securities, including but not limited to shares authorized, shares issued and outstanding, and share issuance history; and

Submit an OTCQB Annual Certification confirming the accuracy of the current company profile and providing information on officers, directors and controlling shareholders.

For companies that are relying on the Alternative Reporting Standard (i.e., not reporting to the SEC), meet minimum corporate governance requirements, including (i) have a board of directors that includes at least two independent directors; and (ii) have an audit committee comprised of a majority of independent directors. A company may request the ability to phase in compliance with this requirement if: (a) at least one member of the board of directors and audit committee are independent at the time of the application; and (b) at least two members of the board and a majority of the audit committee are independent within the later of 90 days after the company begins trading on the OTCQB or by the time of the company's next annual meeting and in no event later than one year from joining the OTCQB.

All companies are required to post their initial disclosure on the OTC Markets website and make an initial certification. The initial disclosure includes:

Confirmation that the company is current in its SEC reporting obligations, whether subject to the Exchange Act reporting requirements or Regulation A+ reporting requirements, and has filed all reports with the SEC, that all financial statements have been prepared in accordance with U.S. GAAP, and that the auditor opinion is not adverse, disclaimed or qualified;

Bank Reporting Companies must have filed all financial reported required to be filed with their banking regulator for the prior two years, including audited financial statements;

International Companies – (i) Companies subject to the Exchange Act reporting requirements must be current in such reports; (ii) A company that is not an SEC Reporting company must be current and fully compliant in its obligations under Exchange Act Rule 12g3-2(b), if applicable, and shall have posted in English through the OTC Disclosure & News Service or an Integrated Newswire, the information required to be made publicly available pursuant to Exchange Act Rule 12g3-2(b) for the preceding 24 months (or from inception if less than 24 months); and all financial statements have been prepared in accordance with U.S. GAAP and that the auditor opinion is not adverse, disclaimed or qualified;

Alternative Reporting Companies must have filed, through the OTC Disclosure and News Services, an information and disclosure statement meeting the requirements of the OTCQX and OTCQB disclosure guidelines; and

Verification that the company profile is current, complete and accurate.

In addition, all companies will be required to file an initial and annual certification on the OTC Markets website, signed by the CEO and/or CFO, stating:

The company's reporting standing (i.e., whether SEC reporting, Regulation A+ reporting, Alternative Standards Reporting, bank reporting or international reporting) and briefly describing the registration status of the company;

If the company is an international company and relying on 12g3-2(b), that it is current in such obligations;

That the company is current in its reporting obligations to its regulator and that such information is available either on EDGAR or the OTC Markets website;

That the company profile on the OTC Markets website is current and complete and includes the total shares outstanding, authorized and in the public float as of that date;

That the company is duly organized, validly existing and in good standing under the laws of each state or jurisdiction in which the company is organized and conducts business;

States the law firm and/or attorneys that assist the company in preparing its annual report or 10-K;

Identifies any third-party providers engaged by the company, its officers, directors or controlling shareholders, during the prior fiscal year and up to the date of the certification, to provide investor relations services, public relations services, stock promotion services or related services;

Confirms the total shares authorized, outstanding and in the public float as of that date; and

Names and shareholdings of all officers and directors and shareholders that beneficially own 5% or more of the total outstanding shares, including beneficial ownership of entity shareholders.

An application to OTCQB can be delayed or denied at OTC Markets' sole discretion if they determine that admission would be likely to impair the reputation or integrity of OTC Markets group or be detrimental to the interests of investors.

Requirements for Bank Reporting Companies

Bank reporting companies must meet all the same requirements as all other OTCQB companies except for the SEC reporting requirements. Instead, bank reporting companies are required to post their previous two years' and ongoing yearly disclosures that were and are filed with the company's bank regulator, on the OTC Markets website.

International Companies

In addition to the same requirements for all issuers as set forth above, foreign issuers must be listed on a Qualified Foreign Exchange and be compliant with SEC Rule 12g3-2(b). Moreover, a foreign entity must submit a letter of introduction from a qualified OTCQB Sponsor which states that the OTCQB Sponsor has a reasonable belief that the company is in compliance with SEC Rule 12g3-2(b), is listed on a Qualified Foreign Exchange, and has posted required disclosure on the OTC Markets website. A foreign entity must post two years' historical and ongoing quarterly and annual reports, in English, on the OTC Markets website which comply with SEC Rule 12g3-2(b). I am a qualified OTCQB Sponsor and assist multiple international companies with this process.

Application Review Process

OTC Markets will review all applications and may request additional information on any of the information submitted. In addition, OTC Markets can require that a company provide a further undertaking, such as submission of personal information forms for any executive officer, director or 5% or greater beneficial owner. OTC Markets can request that third parties provide confirmations or information as well. OTC Markets can, and likely will, conduct independent due diligence including through the review of publicly available information.

OTC Markets can deny an application if it determines, upon its sole and absolute discretion, that the admission of the company would be likely to impair the reputation or integrity of OTC Markets or be detrimental to the interests of investors.

Upon approval of an application, the company's securities will be designated as OTCQB on the OTC Markets websites, market data products and broker-dealer platforms.

Ongoing Requirements

All companies are required to remain in compliance with the OTCQB standards, including the ongoing disclosure obligations;

OTCQB companies will be required to remain current and timely in their SEC reporting obligations, including either Exchange Act reports, Regulation A+ reports or Alternative Reporting Standard and including all audited financial statement requirements;

A foreign company that is not an SEC Reporting Company must remain current and fully compliant in its obligations under Exchange Act Rule 12g3-2(b), if applicable, and in any event shall, on an ongoing basis, post in English through the OTC Disclosure & News Service or an Integrated Newswire the information required to be made publicly available pursuant to Exchange Act Rule 12g3-2(b);

Banks must remain current in their banking reporting requirements and file copies of their reports on the OTC Markets website no later than 45 days following the end of a quarter or 90 days following the end of the fiscal year;

All OTC Markets postings and reports must be filed within 45 days following the end of a quarter or 90 days following the end of the fiscal year for US Exchange Act issuers and Alternative Reporting Standard filers, as required by Regulation A+ for Regulation A+ reporting issuers, and immediately after their submission to their primary regulator for international companies; where applicable, file a notice of late filing allowing for 5 extra days on a quarterly report and 15 extra days on an annual or semiannual report;

All OTCQB companies will be required to post annual certifications on the OTC Markets website signed by either the CEO or CFO no later than 30 days following the company's annual report due date;

All companies are required to comply with all federal, state, and international securities laws and must cooperate with all securities regulatory agencies;

Must pay the annual fee within 30 days of prior to the beginning of each new annual service period;

All companies must respond to OTC Markets inquiries and requests;

All companies must maintain an updated verified company profile on the OTC Markets website and must submit a Company Update Form at least once every six months;

OTCQB is a recognized securities manual for purposes of blue sky secondary market exceptions. A precondition to relying upon the manuals exemption is the maintenance of current updated disclosure information as required by OTC Markets;

All companies must make a press release and possibly other public disclosure (such as a Form 8-K) to inform the public of any news or information which might be reasonably expected to materially affect the market of its securities;

All companies must file interim disclosures in the event the company undergoes a reverse merger or change of control and make new updated certifications and disclosure related to the new business and control persons;

In the event that OTC Markets determines, upon its sole discretion, that a company is the subject of promotional activities that encourage trading, OTC Markets may require the company to provide additional public information related to shareholdings of officers, directors and control persons and confirmation of shares outstanding, and any share issuance in the prior two years. OTC Markets may also require submission of a Personal Information Form for any executive officer, director or 5%-or-greater shareholder.

Not be subject to bankruptcy or reorganization proceedings;

Be duly organized and in good standing under the laws of each jurisdiction in which the company is organized or does business;

Companies relying on the Alternative Reporting Standard must comply with the ongoing corporate governance requirements subject to a notice and one-year grace period if the company falls into noncompliance;

All OTCQB companies must meet the minimum bid price of \$.01 per share at the close of business of at least one of the previous thirty (30) consecutive calendar days; in the event that the price falls below \$.01, the company will begin a grace period of 90 calendar days to maintain a closing bid price of \$.01 for ten consecutive trading days; and

Use an SEC registered transfer agent and authorize the transfer agent to provide information to OTC Markets about the company's securities, including but not limited to shares authorized, shares issued and outstanding, and share issuance history.

Officers and directors of the company are responsible for compliance with the ongoing requirements and the content of all information. Entities that do not meet the requirements of either OTCQX or OTCQB will be quoted on the OTC Pink.

Fees

Newly applying entities must pay an initial application fee of \$2,500, which fee is waived for existing OTCQB entities. All OTCQB companies will be required to pay an annual fee of \$10,000. Fees are nonrefundable.

Removal/Suspension from OTCQB

A company may be removed from the OTCQB if, at any time, it fails to meet the eligibility and continued quotation requirements subject to a notice and opportunity to cure. Companies that are delinquent in filing and reporting requirements are subject to a 45-day cure period. Companies with a bid price deficiency shall have a 90-day cure period. However, in the event the company's bid price falls below \$0.001 at any time for five consecutive trading days, the company will be immediately removed from the OTCQB. All other deficiencies are subject to a 30-day cure period. OTC Markets may provide additional cure periods, but in no event may audited financial statements be older than 18 months.

In addition, OTC Markets Group may remove the company's securities from trading on OTCQB immediately and at any time, without notice, if OTC Markets Group, upon its sole and absolute discretion, believes the continued inclusion of the company's securities would impair the reputation or integrity of OTC Markets Group or be detrimental to the interests of investors.

In addition, OTC Markets can temporarily suspend trading on the OTCQB pending investigation or further due diligence review.

A company may voluntarily withdraw from the OTCQB with 24 hours' notice.

The Author

Attorney Laura Anthony
Founding Partner
Legal & Compliance, LLC
Corporate, Securities and Going Public Attorneys
LAnthony@LegalAndCompliance.com

Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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