

# Reg A+: An Overview

John Fahy

Dan Zinn

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Dallas Bar Association  
Securities Section



OTC Markets



Whitaker Chalk  
Attorneys & Counselors

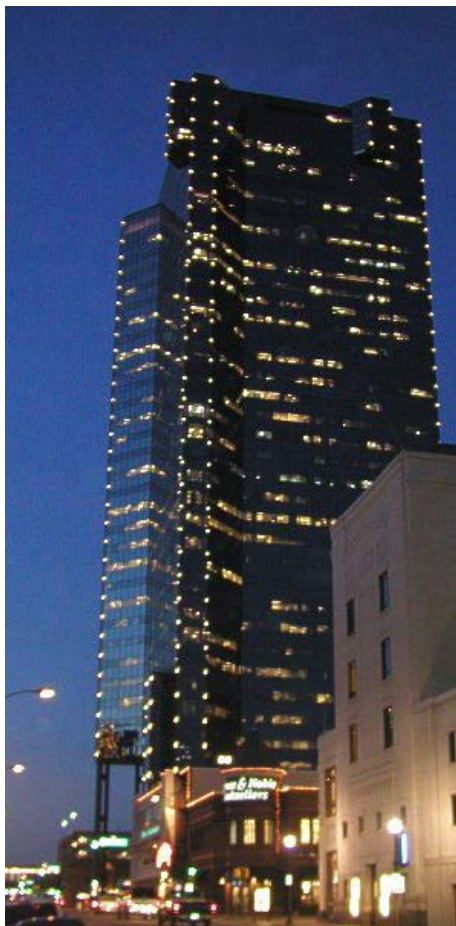
# Dan Zinn

Dan joined OTC Markets Group as General Counsel and Corporate Secretary in November of 2010. Prior to joining OTC Markets Group, he was a partner at The Nelson Law Firm, LLC, outside counsel to the Company. Dan also previously worked in the corporate office of the American International Group (AIG). He received a BS degree from the Pennsylvania State University and earned his JD at the Benjamin N. Cardozo School of Law in New York City. Dan is a member of the New York State and American Bar Associations.

# John R. Fahy

John R. Fahy is a member of Whitaker Chalk Swindle & Schwartz PLLC in Fort Worth where he has worked since 2006. He chairs the Securities Committee of the State Bar of Texas Business Law Section and is a Council Member for the Business Law Section. Previously, he worked for the U.S. Securities and Exchange Commission's Fort Worth Regional Office, managed the Texas State Securities Board's Houston office, and served as general counsel for two registered broker-dealers. He also previously held the Series 7, 24, and 66 licenses. Mr. Fahy earned his JD and master degrees from the University of Texas and his BA from Yale.

# Whitaker Chalk Swindle & Schwartz PLLC



- Founded in 1978
- Office in downtown Fort Worth
- 35 attorneys
- Transactions
  - Securities and Corporate
  - Real Estate
  - Oil & Gas
  - Wills, Probate, Trusts, Tax
  - Corporations, partnerships, entities, HOAs
    - Intellectual property (trademarks, copyrights, patents)
  - Employment law
- Disputes
  - Commercial Litigation
  - Arbitration / Mediation

301 Commerce St., Suite 3500  
Fort Worth, TX 76102  
(817) 878-0500  
[whitakerchalk.com](http://whitakerchalk.com)



# OTC Markets Group Inc.

- **Our Mission:** To create better informed and more efficient financial marketplaces

OTC Markets Group operates three financial marketplaces:

OTCQX® Best Marketplace, OTCQB® Venture Marketplace and OTC Pink® Open Marketplace

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## U.S. and Global Securities

**10,000**

Including 1,400+ dividend paying companies, 3,600+ ADRs and foreign ordinaries, 2,300+ current SEC-Reporting companies, 600+ Community Banks

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## Total Annual Dollar Volume

**\$238 billion**

*As of Q4 2014*

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## OTC Link ATS

**SEC Registered Alternative Trading System and FINRA Member Broker-Dealer**

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## Registered Broker-Dealers

**120+**

Directly linked through OTC Link® ATS to provide liquidity and execution services

**OTC**Markets

# Global Leader in Exchange Graduations

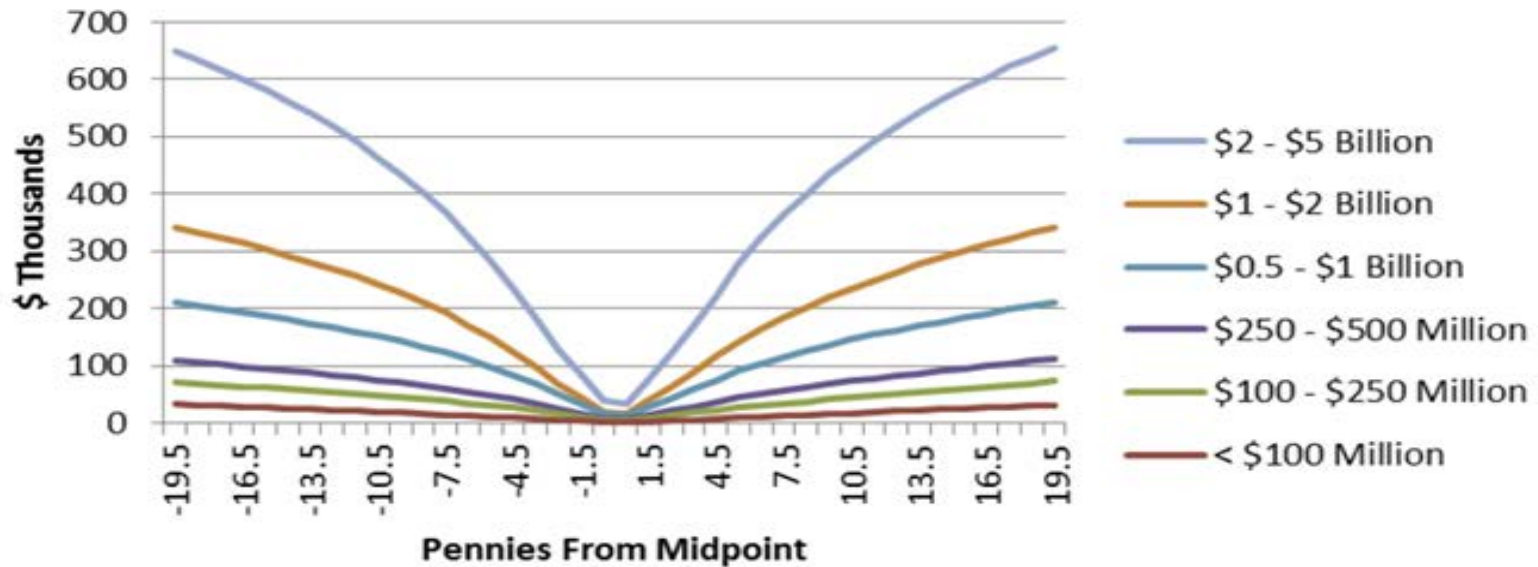


Market	2014 Graduates to Main Boards
OTCQX, OTCQB and OTC Pink - US	83
TSX Venture - Canada	22
LSE AIM Market - UK	5



# Small Companies Need Liquidity

## Cumulative Average Order Book by Market Capitalization



Source: SEC.gov

# Individuals Own Small Companies

Retail Investor  
Orders



Market Maker  
Trade Quality

Percentage Ownership of Exchange-Listed Companies		
Market Cap (millions)	Median Institutional Ownership	Median Individual Ownership
\$0-50	10.9%	89.1%
\$51-100	19.9%	80.1%
\$101-250	31.3%	68.7%
\$251-500	43.7%	56.3%
\$501-1000	62.4%	37.6%
\$1001+	83.5%	16.5%

Source: SEC.gov

# About Regulation A+

## JOBS ACT Title IV - “Small Company Capital Formation”

- Previous Regulation A provided an exemption for offerings up to \$5 million that were registered with state securities administrators
  - Regulation A offerings have not been widely used, with Regulation A offerings dropping from a peak of 57 in 1998 to only one in 2011.
- Title IV of the JOBS Act amends Section 3(b) of the Securities Act to raise the cap on offerings under Regulation A in any 12-month period from \$5 million to \$50 million.



## **JOBS ACT Title IV - “Small Company Capital Formation”**

Title IV provides for a new exemption that provides the following:

- allow for offerings not exceeding \$50 million in any 12 month period (Reg A+), and allow for the SEC to increase this amount every two years;
- public solicitation, including through solicitations of interest before a written offering document is prepared or filed;
- securities issued will not be considered restricted securities;
- require issuers to file audited financial statements with the SEC annually;
- limit the coverage of the exemption to equity securities, debt securities, debt convertible into equity and guarantees of these securities; and
- offerings will not be subject to state securities registration requirements.

# SEC FINAL RULE

Effective June 19, 2015

- Tier 1 - Annual offering limit of \$20 million with no more than \$6 million or 30% annually sold by selling securities owners
- Tier 2 - Annual offering limit of \$50 million with no more than 30% or \$15 million sold by selling securities holders

# Regulation A– Blue Sky

- Tier 1 - Must Blue Sky to qualify
  - Approximately 38 states are involved in coordinated filing process
- Tier 2 - Pre-empt state Blue Sky registration requirements
  - SEC defined all Tier 2 investors as “qualified purchasers” under statute.
  - Petition for Review by Massachusetts and Montana filed in DC Circuit Court of Appeals.
  - Montana asked SEC to delay effectiveness – DENIED on June 16

# Regulation A Tier 2 – “Reg A Plus” Investor Limitations

- Non-accredited investors limited to investing no more than:
  - 10% of annual income; or
  - 10% of net worth;
- Limitation does not apply to securities to be listed on exchange upon qualification; and
- No reasonable steps to verify requirement such as in SEC Rule 506(c).

# Issuer Eligibility Disqualifications

- No oil and gas fractional undivided interests;
- No securities subject to Reg ABS;
- No issuers subject to a Section 12(j) order within 5 years before filing;
- No issuers required to file periodic reports under Section 12(g) or 13(b);
- No blank check companies;
- No foreign issuers (except Canadian issuers);
- No Reg A issuers who have failed to file required ongoing reports for two years preceding offering or such shorter time that issuer was required to file reports; and
- No Companies required to be registered under Investment Company Act of 1940 and BDCs.

## Testing the Waters

“Testing the waters” with the general public is OK so long as solicitation materials used after publicly filing an offering statement are preceded or accompanied by a preliminary offering circular or contain a notice directing potential investors as to where and how the most current offering circular can be obtained.

# Bad Actor Disqualifications

- Same Bad Actor Disqualifications Standards applied to SEC Rule 506(d) now apply to Regulation A offerings; and
- Bad Actor waivers should not be expected in the Regulation A Plus context due to eligibility to resell securities and state law pre-emption.

## **Section 12(g) Registration Requirements**

Reg A Tier 2 securities are exempted from 12(g) registration requirements, provided:

- SEC registered transfer agent employed;
- Public float of less than \$75 million as of completion of last semi-annual period;
- If no public float – annual revenues of less than \$50 million.



# Communications & Offering Practices

- 1) Offering Statements to be filed on EDGAR;
- 2) Non Public pre-filing as in JOBS Act just like JOBS Act Title I Emerging Growth Companies;
- 3) All must become public 21 days before qualification;
- 4) Eliminate Model A question & answer format under Part II of Form 1-A;
- 5) Update and clarify Model B narrative format;
  - Form S-1 Part I allowed as alternative;

# Communications & Offering Practices

- 6) Permit REITs and other eligible companies to use Part 1 of Form S-11;
- 7) Offering statements must be “qualified” by SEC before sales made;
- 8) Tier 1 and Tier 2 file 2 years financial statements;
- 9) Tier 2 financial statements must be audited under GAAs or PCAOB standards;
- 10) Financial statements must be dated no more than 9 months before the date of non-public submission, filing or qualification
  - Interim financial statements must cover at least 6 months.

# Secondary Sales in Regulation A Offering Statement

- Non affiliate selling security holders are limited to 30% of aggregate offering price for 12 months after date of offering qualification.
- Affiliates limited to \$6 million under Tier 1 and \$15 million for year after the one year anniversary of offering qualification in Tier 2.

# Ongoing Reporting Requirements

- **Tier 1**
- File a form 1-Z Exit Report with SEC within 30 days of termination or completion of offering.

## Ongoing Reporting Requirements – Tier 2

- File annual and semi-annual reports as well as current reports;
- Current information qualification under Rule 144 only if last report is no more than 3 months plus 45 days old (except for annual report);
- Required to file a special financial report covering financial periods between the most recent period included in qualified offering document and the first required periodic report;
- Reg A Tier 2 ongoing reports satisfy informational requirements of SEC Rule 15c2-11;

## Ongoing Reporting Requirements – Tier 2

- Terminate Reg A reporting requirements
  - when issuers become subject to public co-reporting regulations under Section 13 of Exchange Act; or
  - by filing a form 1-Z exit report after completing reporting for the fiscal year in which the offering statement was qualified – so long as issuer has no class of securities held of record by no more than 300 persons (or 1,200 for bank holding companies).
- Tier 2 issuers required to include first annual report after offering qualification information about terminated or completed offering (or in 1-Z exit report).

# Sales by Regulation A Offering Purchasers

- Regulation A securities are eligible for resale.
- OTC Markets is only realistic venue offering liquidity.
- Blue Sky Requirements – e.g. see Section 5.0 of Texas Securities Act

# OTCQX The Best Marketplace

OTCQX streamlines the reporting process for global companies that are already listed and well-regulated in their home market, providing their U.S. investors with easy access to their company information

- ✓ Current disclosure & streamlined reporting
- ✓ High financial requirements
- ✓ Sponsorship by a professional advisor
- ✓ Well-regulated market
- ✓ Corporate services included: OTC Disclosure & News Service, Real-Time Level 2 Quote Display, Blue Sky Solutions

## ▫Reg A+ Requirements

- ✓ Adoption of Reg. A Reporting Standard
- ✓ Reg. A Initial, Annual and Semi-Annual Disclosure
- ✓ Quarterly Disclosure Required on Form 1-U
- ✓ PCAOB Audit Required for Ongoing Annual Reporting



# OTC Markets Proposed OTCQX Rules

- Definitions for “Regulation A” and “Regulation A Reporting Company” were added to the Definitions section.
- Initial Disclosure Obligations - A Regulation A Reporting Company must have filed all reports required to be filed on EDGAR. The most recent financial statements required to be audited under Regulation A must be audited by an independent public accountant registered with the PCAOB.

# OTC Markets Proposed OTCQX Rules

- Ongoing Disclosure Obligations - A Regulation A Reporting Company must file, on an ongoing basis, all annual, semi-annual and other interim reports required to be filed on EDGAR under Regulation A, and within 45 days of the end of each fiscal quarter must publish on EDGAR through Form 1-U quarterly disclosure including all information required in the Company's semiannual report. Each annual report must include financial statements audited by an independent public accountant registered with the PCAOB.
- For U.S. Premier Companies Only - A Regulation A Reporting Company must publish, on EDGAR through SEC Form 1-U, copies of all proxies, proxy statements and all other material mailed by the Company to its shareholders with respect thereto, within 15 days of the mailing of such material.

# OTCQB The Venture Marketplace

OTCQB® offers transparent trading for entrepreneurial and development stage companies not yet able to qualify for OTCQX or an exchange listing

- ✓ Minimum bid price test of \$0.01
- ✓ May not be distressed or in bankruptcy
- ✓ Current in disclosure
- ✓ Annual Certification confirming company information
- ✓ Well-regulated market
- ✓ Corporate services included: Real-Time Level 2 Quote Display Service, OTC Disclosure & News Service

## ▫ Reg A+ Requirements

- ✓ Adoption of Reg. A Reporting Standard
- ✓ Form 1-A Initial Disclosure
- ✓ OTCQB Application and Verification Standards Apply
- ✓ Annual and Semi-Annual Reporting under Reg. A
- ✓ Audited Financials under U.S. GAAS or GAAP

# OTC Markets Proposed OTCQB Rules

- Definitions for “Regulation A” and “Regulation A Reporting Company” were added to the Definitions section.
- Initial Disclosure Obligations - A Regulation A Reporting Company, must have filed all reports required to be filed on EDGAR. Audited annual financial statements must be prepared in accordance with Regulation A.
- OTCQB Certification - A new section will be added to part (a) of the OTCQB Certification indicating that a Regulation A Reporting Company is required to file periodic reports with the SEC under Tier 2 of Regulation A.
- Ongoing Disclosure Obligations - A Regulation A Reporting Company must file, on an ongoing basis, all annual, semi-annual and other interim reports required to be filed on EDGAR. Audited annual financial statements must be prepared in accordance with Regulation A.

**END**