MEDICAL FUNDING PROFESSIONALS

Reg A+ Safe Advertising and Communication Guidelines

The Securities and Exchange Commission's ("SEC's") Regulation A+ has transformed the funding and growth prospects of countless companies that don't have access to venture capital funding or couldn't otherwise bear the costs of a normal SEC registration. While this new market provides a compelling opportunity for startups and early-stage companies, there are several important legacy SEC laws which still apply and should be considered before you file your offering. The purpose of this memo is to inform you of the key rules and common stumbling blocks involved in the Regulation A+ filing process to reduce the likelihood of your company encountering issues that delay your progress.

Communication with the Public and Potential Investors Prior to Qualification

The Regulation A+ offering process is initiated when a company files an offering statement known as Form 1-A with the SEC. At this stage of the process a company is said to be "in registration" and from this point forward must abide by certain SEC communications laws which determine what can and cannot be said about the company in its interactions with the public.

Companies at this stage should refrain from making any statements related to the company or offering which the SEC might interpret as an "offer of securities", and refrain from any such statements that could materially affect the content of the Form 1-A offering document. Standard product advertising is permitted, but any promotional claims about the company's profitability, growth, or financial prospects may trigger an objection and should be avoided. This goes for all forms of communication with the public and includes statements made on TV, radio, or the internet, as well as any statements made in newspaper articles or publications or even during industry conferences and roadshows. If the SEC considers any such statements to be an "offer of securities" you may be required to retract your statements and potentially even repurchase securities that you sell in the future. Companies should always consult an attorney before talking to the press and inform their marketing and PR teams of any upcoming media appearances.

At any time prior to qualification a company or person authorized to act on behalf of a company may communicate orally or in writing with potential investors to determine whether there is any interest in the securities potentially being offered. This is known as "testing the waters" (TTW). Communications of this nature, whether oral or in writing, may not involve solicitation or acceptance of payment or a commitment to future payment of securities and must include statements to this effect. TTW materials will need to be filed with the SEC if and when you decide to launch your offering and must be free of any inconsistencies with the official filing document. In addition, any statements which misrepresent the company will be subject to securities anti-fraud regulations.

Written offers include any form of communication outside of face-to-face or voice-to-voice interaction, so in addition to internet content this includes video broadcasts and recordings. Any written offers or

other TTW materials posted online or on social media may need to be modified to maintain consistency with the filing document. The law dictates that all TTW materials prior to qualification be accompanied by the most recent offering circular or contain information describing how investors can obtain the document, such as the name, phone number, and address of the person or entity responsible for distributing the offering circular, or a web link (URL) where the offering circular can be found.

The URL should direct investors to a webpage where the offering circular is easy to find. Ideally the document will be displayed prominently near the top of the landing page; not nestled below promotional messages and other material which could distract investors from accessing the file. Your company's "invest now" page can serve as the landing page during pre-qualification provided that your document is clearly visible, however, for post-qualification purposes, the SEC typically requires that URLs direct investors to a standalone offering circular, most commonly in the form of a downloadable PDF.

As a rule of thumb, any communications delivered prior to qualification should contain each of the following as it relates to your offering circular:

1. A message telling investors to read the offering circular before investing
2. A URL linking to a webpage where your offering circular can easily be found
3. A no-money disclaimer

This applies to all forms of broadcast and print communication – TV, radio, digital billboards, newspapers, and other print media. Regardless of the format, each of the elements outlined above should be communicated clearly and for long enough such that the average person can read, process, and jot down all relevant information.

Communication Post-Qualification

Once the SEC qualifies the offering statement you are free to sell securities. All subsequent written offers must be accompanied by the latest offering circular via a link directing investors to the document (not just a landing page containing the document as you may have linked to with your preliminary offering circular prior to qualification). Offers containing notice of a link without a clickable URL are not permitted under SEC rules.

Broadcast and print communications which do not have a clickable link (such as TV, radio, and print publications) must not make any statements in reference to the offering. Companies have far less leeway in terms of what they're allowed to say at this stage compared to during pre-qualification, and any advertising or promotional messages on these platforms must be limited to statements about the company and/or products.

As is the case prior to qualification, any oral or written offers may not include any information that is not consistent with the latest offering circular and must not contain any new, material information which has not yet been disclosed in your offering statement.

Keep in mind that all rules and regulations pertaining to offering communications post-qualification must be adhered to for the duration of your Reg A+ offering, which could potentially last for a period of 6 to 12 months.

The Offering Statement

The SEC has specific rules about what can be included in an offering document, as well as specific guidelines and antifraud considerations that impact the phrasing and language of the document. There are written and unwritten rules regarding how information can be stated, particularly as it relates to statements made about your company. The SEC only approves of verifiable, fact-based assertions, so a statement such as “the company is the market leader in product x” will be rejected by the SEC unless you can provide proof and have the statement verified by an independent party. The SEC will also take issue with statements such as, “the company has strong liquidity” (a subjective description), or “the company’s leadership is well-equipped to manage industry headwinds” (abstract and promotional).

Graphics and images can be a problem if they misrepresent the company or convey potentially misleading information. Graphics that help investors better understand the company’s products or services are usually permitted and can be useful, however a picture showing profits and stock prices increasing, which an investor might interpret as a guarantee of future performance, may get flagged by the SEC.

Forecasts and projections are permitted under SEC rules, but any “forward-looking information” must be accompanied by clear statements describing the assumptions underlying the projections, as well as relevant cautionary language. In addition, the SEC will object to any forecasts included in TTW materials which do not appear in the offering circular.

The exhibits section of the offering statement is comprised of a legal opinion, the company’s constitutional documents, and material contracts. A material contract is a contract made outside the ordinary course of business that is “material to the issuer” – essentially any contract that is not part of your normal business framework that is critical to the business and/or company operation. It doesn’t apply to something like a utilities service contract, but it does include options plans, software licenses, and other contracts for which cancellation or failure to renew could have a material adverse effect on the company’s success.

The SEC has revised its policy regarding the redaction of confidential information in material contracts. Previously, companies required special permission to redact sensitive information such as trade secrets or other propriety information of which disclosure might jeopardize performance or personal privacy, however the SEC is currently implementing measures that allow companies to redact this information so long as the essential terms of the contract (price, duration, etc.) are disclosed.

It's worth noting that relationships with other companies may require you to disclose additional information. If you plan to acquire another business or purchase the assets of another company, for example, you’ll likely be required to provide audited financial statements of the company in question.

Additionally, if your business operations are significantly linked with those of another company, the SEC may consider that company a co-issuer and demand that the filing include that company as well.

Financial Statements

The SEC requires companies to submit audited financial statements for the two most recent fiscal years, or since inception, whichever is shorter. Companies must also submit unaudited interim financial statements when filing in the second half of the fiscal year to the end of the first quarter of the subsequent fiscal year. Financial statements must be prepared in accordance with Generally Accepted Accounting Principles (GAAP), or, in the case of companies operating or domiciled in Canada, with International Financial Reporting Standards (IFRS).

Clean Audit Opinion

All audits, including audits of Canadian companies, must be conducted in accordance with US auditing standards. Companies should ascertain if the independent auditors evaluating their financial statements can provide a "clean" audit opinion prior to the audit. The SEC will not accept any qualification or disclaimer of opinion for a Tier 2 offering, limiting companies to a Tier 1 offering in a best-case scenario. If possible, companies should have this resolved prior to engaging in any TTW actions, as Tier 1 TTW processes are subject to greater restrictions than those of Tier 2.

Independent Auditors

It's also important to ensure that the independent auditors satisfy the independence criteria stipulated in Rule 2-01 of Regulation S-X. The SEC imposes different standards for independence depending on whether you undertake a Regulation Crowdfunding ("Reg CF") or Tier 2 Regulation A+ offering. Some issuers have discovered that the independent auditors who evaluated financials for A Reg CF offering failed to meet the stricter independence standards set forth under Reg A Tier 2. An accountant, for example, who assists the company in its preparation of financial statements and offers tax advice may not be considered independent under Regulation A+.

Stale Financial Statements

Ongoing reporting requires that companies provide up-to-date financial statements, so be sure you're aware of when your financial statements will be considered out-of-date ("stale") and implement measures to keep your financials current. Interim financial statements can be prepared in-house assuming your company is able to make the required adjustments and has access to the same data from the year before. Year-end financials will almost always require auditing.

The SEC Process

SEC Review

When your company and advisors are satisfied that the offering statement to be filed with the SEC is complete and that all relevant exhibits have been procured, it is converted into SEC's EDGAR electronic filing format and submitted to the SEC. The offering will subsequently be reviewed by the SEC who will subsequently provide various comment letters regarding the disclosure and financial statements. It typically takes around 90 days for the SEC to complete review procedures, however in some cases the process will take less than two months.

The SEC can comment on both text and financial data so your accounting team should be prepared to revise any financial statements if required by the SEC.

One word of caution on terminology: companies cannot claim that the SEC has approved an offering or use any language that suggests the offering is suitable for investors. You can only claim that you filed an offering with the SEC and that the offering has been qualified.

FINRA Review

For companies who partner with a registered broker-dealer to execute their offering, the broker-dealer must submit the offering to FINRA for evaluation of the terms of renumeration that will be paid to the broker-dealer. This review coincides with the review conducted by the SEC, and no offering statement will be qualified without confirmation from FINRA that the terms of compensation are acceptable. The SEC will evaluate any FINRA comments related to content in the offering circular outlining the method of distribution and the description of broker-dealer pay. Companies should engage their broker-dealer before submitting the offering statement to the SEC to ensure that all necessary disclosures are provided and to avoid a situation where a FINRA review compromises the timing of an SEC review.

SEC, Jury Waivers, and Exclusive Forum Provisions

Your company's constitutional documents may carry provisions demanding that investors relinquish their right to a jury trial and/or that any lawsuits be filed in court at a specified destination. The SEC frequently raises concerns related to jury trial waivers and will often request additional information as well as risk factors outlining the conditions under which these waivers would apply. Furthermore, such waivers may be prohibited under certain state laws.

In addition, the SEC maintains the opinion that exclusive jurisdiction clauses are not permissible as it pertains to various claims under securities laws. In some instances the SEC has ordered companies to revise and re-submit their constitutional documents to modify exclusive jurisdiction clauses and investor rights agreements.

If your constitutional documents or investor rights agreements contain jury waiver or exclusive forum clauses you should address any necessary revisions with your lawyers before filing with the SEC.

State Filing Fees

While there are no fees for filing with the SEC, the states impose fees for Tier 1 and Tier 2 notice filings. This is a domain very much in flux as states continue to adjust policy, so companies should make sure they stay current on any information pertaining to fees that will need to be paid. Tier 2 notice filing requirements have been implemented by at least 39 states and territories, and some states mandate that registrations be made prior to any offer, including TTW offers.

Treatment of Company Responses to Investor Questions

Certain discussions and conversations with potential investors (including communications taking place on investment platforms or during roadshow presentations) may be considered TTW communications or securities offers. Your lawyer should be aware of any of these communications so that the appropriate disclosures and links to your offering circular are supplied.

Conditional Exemption from Becoming a Publicly Reporting Company (Section 12(g) of the Securities Exchange Act)

Keep an eye out for situations where you may be obligated to become "fully-reporting" with the SEC, which necessitates far more rigorous and costly reporting procedures. Outside the Regulation A+ framework, a corporation must become fully-reporting when it amasses more than 2,000 shareholders of record (or more than 500 in the case of non-accredited investors) and has $10 million in assets.

This would have made Reg A+ unfeasible for many startups and early-stage companies, so the SEC granted a conditional exemption from full reporting for Tier 2 offerings such that a company is not required to become fully reporting even when they attain a substantial number of shareholders. The conditional exemption requires that a company meet each of the following criteria:

- The company's public float (market value of common stock held by non-affiliates) is less than $75 million. If there is no public float, the company's revenue must not exceed $50 million per year.
- The company is currently in compliance with its ongoing reporting obligations under Tier 2 of Regulation A.
- The company keeps track of its shareholders and any associated records through a registered stock transfer agent.

You may reach one of these milestones earlier than you expect, so it's advisable that you seek legal counsel on how to become a fully reporting company or how to enlist brokers or custodians to hold your shares through DTC or in "street name" whereby each broker qualifies as one shareholder of record. Companies that allow investments through self-directed IRAs should keep in mind that the IRA custodian is the sole shareholder of record for the account.

Issuer-Dealer and Agent Registration Requirements

Companies who do not engage a licensed broker-dealer to execute their offering may be required to register as an issuer-dealer in certain jurisdictions or have management personnel register as issuer

agents. Florida, North Dakota, and Texas are among the states requiring issuer-dealer registration, while states requiring agent registration but not issuer-dealer registration include Alabama, Maryland, Nevada, New Jersey, and Washington.

Any issuer failing to register as a dealer or agent when required may face severe penalties including, but not limited to, cease and desist orders as well as civil and criminal penalties which could result in "Bad Actor" disqualification, making it more difficult to raise money in the future. In addition, individual investors may hold issuers liable if they exercise their right to demand rescission of their investment.

Marketing the Offering

It's common for Reg A offerings to be conducted exclusively online, with neither the issuer or broker engaging in any marketing or selling operations. Companies who intend to contact potential investors through their own personnel should notify a lawyer so they can receive advice on how to structure communications and ensure that these individuals aren't acting as broker-dealers themselves. It's crucial that any compensation paid to employees or other personnel not be tied to the level of investment brought in. This goes for celebrity endorsers as well. The SEC is strict about what promoters are allowed to say and how they can be compensated.

International Investors

While many issuers don't actively solicit international investors, interest in Reg A offerings continues to grow overseas through expanded media coverage and internet search. A company's ability to accept foreign investment will primarily be determined by two factors: i) whether the company's intermediaries, including online platform, escrow partner, etc., are capable of processing overseas investments in a practical and cost-effective manner; and ii) whether international investments are authorized under the investor's home jurisdiction. Some jurisdictions treat the acceptance of an investment from their territories as an offering into that jurisdiction, requiring registration of both the offering and the individuals responsible for it. If you plan to raise capital from foreign investors, be sure to seek counsel on these matters before launching your offering.

Looking Forward

Companies should be aware of the future filings they'll be required to submit to the SEC after completing an offering. With Tier 1 offerings, companies must provide an "exit report" detailing the number of securities sold, the names of underwriters and other service providers involved and the fees they received, and the net proceeds to the issuer. With Tier 2 offerings, companies must provide semi-annual and annual filings (much of the content contained within the annual filing on Form 1-K will be the same or similar to what was provided in the initial filling). You'll need to provide audited financial statements for annual filings, while interim financial statements and comparable data from the previous year will be required for semi-annual Form 1-SA filings. In addition, major corporate events such as acquisitions and asset sales will require you to submit current reports on a Form 1-U.

It's wise to contemplate the exit strategy and/or liquidity options you might make available to investors prior to undertaking a Regulation A+ offering. Companies who plan to list their securities on an Alternative Trading System ("ATS") should be aware of the extra regulatory measures which might be involved. If you believe your company may be acquired in the future, think about whether the acquisition may be hindered by having a large number of non-accredited investors.

Considerations Prior to Starting Your Reg A+ Offering

How quickly are you able to obtain an audit of your financial statements?

For Tier 2 offerings, issuers must provide the SEC with audited financial statements from the last two fiscal years, as well as an unqualified opinion from the auditor including a statement that the issuer's financials were prepared in accordance with GAAP. Companies may not provide, distribute, or make use of any financial statements during an offering that have not been approved by the auditor.

The audit can be a lengthy procedure requiring a significant amount of information that you may not have fully prepared and ready for submission. Furthermore, you may discover that certain factors preclude your company from securing an audit at all.

Will you be required to disclose confidential information?

Regulation A+ exempts issuers from many of the disclosures required of a traditional IPO, however companies must still provide a considerable amount of information to investors which the general public and competitors will be able to access as well.

As it relates to contractual agreements and partnerships, in addition to disclosing "material contracts" as mentioned above, companies may be required to disclose the actual agreement itself, in which case the issuer should inform the counterparty of any potential disclosure. While the SEC maintains provisions for withholding the disclosure of certain proprietary and personal information contained in such agreements, be prepared for some pushback from counterparties who may wish to keep certain information confidential.

What type of security will you offer to investors?

Regulation A+ does not impose limitations on the type of security that may be sold to investors, however issuers may be limited by certain state rules and regulations depending on an issuer's state of incorporation and/or business structure (corporation, LLC, etc.). Corporations engaged in a Regulation A+ typically offer one of the following types of securities:

- Common stock with voting rights
- Non-voting common stock
- Preferred stock
- Non-voting preferred stock

The decision of what to issue will hinge on several factors, including your capital and ownership structures at the time of offering as well as the level of control you are willing to cede to outside investors. The SEC does not mandate voting rights, however some investors may demand such rights in any securities they potentially acquire. Whatever you decide, the SEC's primary concern is that you clearly delineate the rights investors will have, as well as any conventional rights investors may not have in the class of securities being offered. A similar system exists for LLCs, with issuers offering membership units carrying differing rights pertaining to voting and control.

Companies should decide what type of security they'll be offering before they undertake a Regulation A+. Keep in mind that Special Purpose Vehicles are not permitted under Regulation A+.

Will you be using a registered intermediary?

Only a small number of broker-dealers are presently engaged in Regulation A+ offerings, and even these operators are stretched in terms of their ability to make a market and attract investors to an offering. If you decide to conduct your offering without a licensed broker-dealer you'll be required to make additional registrations with certain states.

Do you have existing operations or is the company a new company?

The SEC is not concerned with the type of business you run provided that you give investors enough information about your past operations and future plans to allow them to make a "fully informed investment decision". Such disclosures are relatively straightforward for a company with extensive operating history, however new companies with little or no history will be required to provide considerable detail regarding current operations and future plans in order to meet the requirements demanded under federal securities laws. For instance, these entities must prove that they operate a legitimate and viable business model and are not simply shell companies, which necessitates an in-depth description of operational strategy for the next 12 months, as well as specifics related to any assumptions embedded in the plan. Companies should have this information prepared before launching their offering.

Note that Medical Funding Professionals ("MFP") is not a law firm, none of the foregoing is legal advice and no attorney-client relationship is created by contacting any MFP personnel. Events subsequent to the date of this memo may affect the information presented.

Source: CrowdCheck, Inc.