New Liquidity Opportunities — and New Burdens — for your Over-the-Counter Stock

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The Bankers' Statement – Spring 2015

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Maybe at one time your company was reporting to the Securities and Exchange Commission (SEC) and your company's stock was listed on The NASDAQ Stock Market (NASDAQ). You were relieved when the Jumpstart Our Business Startups Act allowed you to terminate your SEC registration, even though it meant that your stock could no longer be listed on NASDAQ. The stock of a bank or thrift holding company remained, however, eligible for inclusion on the OTC Bulletin Board (OTCBB®). While the OTCBB® did not provide the liquidity of NASDAQ, it required nothing of your company other than continuing to file the reports required by your banking regulators. Odds are good that, in the last couple of years, your stock was moved from the OTCBB® to one of the OTC Markets Group Inc.® (OTC Markets) tiers, probably the OTCQB®. Still, nothing was required of you other than continuing to file required reports with your banking regulators. In fact, you may have been surprised to find that it was done without your knowledge.

Or maybe your company is one of the many de novo banks of the last 20 years that has never conducted a public offering and has few shareholders. Although you are glad to have never had the burden of SEC reporting and stock exchange listing, you realize how difficult it is for shareholders to sell the stock they may now have held for a number of years.

If your company has already had its stock quoted on the OTCQB®, the OTC Markets® has imposed new costs and burdens for you to remain in that marketplace. On the other hand, if your privately held bank is looking for a way to create some stock liquidity, the OTC Markets® has provided a new opportunity for you.

Beginning May 1, 2014, OTC Markets® began imposing a number of requirements for initial or continued inclusion on the OTCQB®. While some are generally easy (e.g., having a minimum bid price of $0.01 and not being subject to bankruptcy), others could be burdensome for compliance by a small company.

The new requirements include:

- submission of an application;
- an annual certification that all eligibility requirements continue to be met;
- posting on the OTC Markets® website the previous two years' disclosure filed with your banking regulators and the initial certification from the OTC Markets®;
- maintenance of an SEC registered transfer agent, which is authorized to provide certain information related to the company's securities to the OTC Markets®; and
- an annual fee of $10,000 (and an application fee of $2,500 if the company is not already quoted on the OTCQB®).

The initial application must report:

- names, addresses, birth dates and share ownership of all officers, directors and control persons; and
- names and addresses of accountants, legal counsel, investor relations or public relations advisors and transfer agent.

The company must also sign an agreement containing representations and warranties from the company and agreeing to indemnify OTC Markets® for certain losses, claims, damages and liabilities.

The OTC Markets® may also require the submission of additional information regarding any executive officer, director, or beneficial owner of 5% or more of a class of the company's securities or require the fulfillment of some other condition to admission.

The OTC Markets® warns those companies already included on the OTCQB® that if they do not meet the standards, file the required paperwork and pay the annual fee prior to the deadline (April 30, 2015, for December 31 fiscal year end companies), the company's shares will be moved to the OTC Pink® tier. The OTC Markets'® website states that companies on the OTC Pink® tier could be there by "default, distress or design" and then provides investment warnings based on the category in which the company has been placed based on the amount of information the company has disclosed.

As an alternative to the OTCQB® tier, OTC Markets® is providing a new marketplace, OTCQX® for Banks, for banks, savings and loans, and their holding companies that have few shareholders. Marketed as a very selective marketplace, it has all of the requirements for the OTCQB®, plus the company must have:

- at least $100 million in assets and $4 million in shareholder equity;
- (1) a bid price of at least $5.00 or (2) net tangible assets of $2 million if the company has been in continuous operation for 3 years or $5 million if it has been in operation for less than 3 years, or (3) average revenue of at least $6 million for the last 3 years;
- at least 50 beneficial shareholders, each owning at least 100 shares;
- proprietary priced quotations published by a market maker; and

- a broker-dealer appointed by the company and pre-approved by OTC Markets® that specializes in banks.

To be quoted on the OTCQX®, the company must post through the OTC Markets'® disclosure service its annual audited financial statements, interim financial statements, any information required to have been made publicly available by the banking regulators and any material information distributed to its shareholders. The company is also required promptly to release publicly any information reasonably expected to be material to the market for its securities.

Inclusion on the new tier for banks comes with higher fees than those for the OTCQB® tier: an application fee of $5,000 and an annual fee of $15,000. The more extensive application requires information about all litigation pending or threatened against the company in the last 10 years.

Non-SEC reporting issuers will need to weigh the benefits and burdens of the new quotation regime to determine whether or not to pursue these liquidity opportunities.

Notes:

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