Regulation A and shareholder liquidity

As the earliest Regulation A offerings close, we find that companies and their existing shareholders now have questions about how shareholders can resell their securities and get some liquidity. We've seen a lot of misinformation out there so we're setting out some simple guidelines regarding resales. How you can resell securities depends to a great extent on who you bought them from and in what sort of offering. In order to know how you can resell your securities, first establish the following:

- What sort of offering did you buy the shares in? Was it a Regulation A offering that was filed with the SEC, or was it a private placement, maybe made under Rule 506 of Regulation D?
- Do you have "control" securities? If you are an officer, director or hold more than 10% of the company's securities, you might be an "affiliate" and your shares will be subject to additional restrictions on resale. You'll likely need a lawyer to advise you whether these restrictions apply.
- Are there any contractual restrictions on transfer, like having to get permission from the company to sell? These restrictions might appear in the terms of the securities themselves, or in a purchase or subscription agreement, or in an investor rights agreement.

People who bought the shares from the company in a Reg A offering

Assuming you didn't buy so many of the shares offered that you have become an affiliate, if you bought your shares in a Reg A offering, they can be sold freely. The company may have arranged for the shares to be traded on the OTC Market, in which case you may be able to find offer and sale prices listed on the OTC.

If you are an affiliate of the company, you can't resell freely, even if you did buy the securities in the Reg A offering. You'll need to resell in reliance on Rule 144 if you want to sell publicly. There's no holding period imposed but there are limitations on the number of shares you can sell at any one time, you'll need to sell through a broker or market maker, you'll have to file a Form 144 with the SEC and "adequate current public information" must be available about the company, which means it must be compliant with Regulation A's ongoing reporting requirements.

People who bought shares in a Reg D offering

If you bought your shares from the company in a Regulation D offering (for example, an offering to accredited investors under Rule 506 of Reg D), your shares are "restricted" and you can't resell them freely even if the company has done a Reg A offering. Your shares are treated differently from the ones sold under Regulation A, even if they are of the same class.

If you're not an affiliate, you can hold your securities for a year from the date you received them from the company and then resell them freely. Where you sell them will depend on whether there is a market for the specific class of the company's shares that you hold. If, for example, the company has applied to have that class of securities listed on the OTCQX after the Reg A offering, you can resell your shares on the OTCQX. (You could also in theory sell them on Craigslist, but that rarely works out well.) If your share certificate bears a legend that says the shares are restricted (or a similar notation is made on any digital ledger if the shares aren't held in paper form), you may need to prove to the OTC that the shares are no longer restricted, possibly by providing a legal opinion.

If you want to resell within the one-year holding period, you'll need to resell them in another private offering, probably limited to accredited (i.e, rich) or institutional investors.

If you are an affiliate, the securities are both "restricted" and "control" and you'll need to hold them a year from the date on which you got them from the company before you can resell them publicly. The ways in which you can sell publicly are the same as discussed above for non-affiliates. Again, for affiliates there are limitations on the number of shares you can sell at any one time, you'll need to sell through a broker or market maker, you'll have to file a Form 144 with the SEC and "adequate current public information" must be available about the company, which means it must be compliant with Regulation A's ongoing reporting requirements. If you want to resell within that year, you'll need to resell them in another private offering, probably limited to accredited or institutional investors.

Make sure you also comply with any restrictions or requirements the company may additionally have imposed on you through contract. For example, some companies do not want an extensive trading market in their securities, or may want veto power over the identity of any new shareholder, so there may be requirements to notify or get permission from the company before transfer, even if you are allowed to transfer legally. The company may request an opinion of counsel before any transfer is made.

For further information contact:

Sara Hanks	sara@crowdcheck.com
Andrew Stephenson	andrewstephenson@crowdcheck.com
Huiwen Leo	huiwen@crowdcheck.com
Jamie Ostrow	jamie@crowdcheck.com

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