



## WHAT'S THE DEAL?

## Registered Direct Offerings (“RDOs”)

### *Here's the deal:*

- RDOs are hybrid securities offerings, meaning that these offerings have some characteristics typically associated with private placements and some characteristics of public offerings.
- An RDO is a public offering usually made pursuant to an issuer's effective registration statement wherein a financial intermediary acts as a placement agent on a best efforts basis and identifies investors that purchase the registered securities from the issuer.
- RDOs are generally marketed and sold to a limited number of institutional investors, however, given that an RDO is a public offering, securities can also be sold to retail investors.

### What's the Deal?

A registered direct offering, or RDO, is a public offering of securities that is sold on a best efforts basis (rather than on a firm commitment basis) by a placement agent that is engaged by the issuer to introduce the issuer to potential purchasers. The purchasers buy the securities directly from the issuer.

An RDO is generally marketed on a wall-crossed or confidential basis, usually to a select number of accredited and institutional investors. Given that an RDO is a public offering, securities may be offered and sold to retail investors. An issuer may find an RDO an attractive financing option if the issuer would like to test the market or conduct an offering without attracting much market attention but would rather not incur the liquidity discount often associated with a private placement, or PIPE, transaction. Given that an RDO is marketed to a limited number of investors, it may be less disruptive to the trading market for the issuer's securities than a fully marketed follow-on offering. Also, from time to time, an RDO may be used to issue and sell securities to one or to a handful of investors, which may include existing securityholders that may not be able to acquire restricted securities.

### Structuring Alternatives

An RDO may be structured as (1) an “*any-or-all*” transaction, where the transaction will proceed to a closing regardless of the amount raised in the offering, (2) a “*minimum-maximum*” transaction, where a certain minimum amount of proceeds must be raised in order for the transaction to close and a maximum offering size also is indicated, or (3) an “*all-or-none*” transaction, where all of the securities offered must be sold in order for the transaction to close.

If an RDO is structured as a minimum-maximum offering or as an all-or-none offering (not an any-or-all offering), the placement agent must set up an escrow account at a national bank in order to collect and

hold the investor funds until the conditions for release are met pursuant to Rule 15c2-4 under the Securities Exchange Act of 1934 (the “Exchange Act”).

## Participants in an RDO

Companies that are reporting companies, and that have an effective shelf registration statement, may consider an RDO.

Generally, the issuer will retain a financial intermediary to act as the placement agent. The placement agent will act on a best efforts only basis. The placement agent will introduce the issuer to potential investors; however, the placement agent has no obligation to purchase any of the offered securities. Unlike a firm commitment underwritten offering, in which the underwriter purchases the securities and resells these to investors, in an RDO, the investors are purchasing directly from the issuer.

Generally, the placement agent will “wall cross” potential investors in order to gauge their interest in a transaction.

An issuer may conduct a registered direct offering without a placement agent; however, this is generally only the case when the investor or investors are existing securityholders or when the investors have approached the issuer directly (as a reverse inquiry) and expressed an interest in purchasing securities.

As noted above, to the extent that the RDO is subject to a contingency, and an escrow agent is required, the issuer and the placement agent will retain an escrow agent that is a national bank, which will establish an escrow account to hold investor funds.

## Documentation

Generally, the issuer and the placement agent will enter into an engagement letter pursuant to which the issuer will retain the placement agent to act on an exclusive basis as its agent in connection with the proposed RDO. The letter will specify the placement agent’s fee, which may include a percentage of the amount raised, as well as warrants. The engagement letter may also address expense reimbursements, tail provisions, and other matters. Finally, the issuer will agree to indemnify the placement agent for losses arising in connection with certain matters.

At pricing, the issuer and the placement agent will enter into a placement agency agreement. The placement agency agreement will supersede the engagement letter. The placement agency agreement will contain provisions that are very similar to those that would be contained in an underwriting agreement. The issuer will make representations and warranties about the issuer and its business, make certain covenants pertaining to the offering, and indemnify the placement agent and certain of its affiliates from liabilities under the Securities Act of 1933 that may arise in connection with the offering.

Despite the fact that a registered direct offering is conducted on a best efforts, and not a firm commitment, basis, the placement agent nonetheless would be considered a statutory underwriter. As a result, the placement agent and its counsel would conduct a diligence review in connection with the proposed offering. In addition, and in order to bolster the placement agent’s diligence defense, the placement agent would generally require as a condition to closing, and set out in the placement agency agreement, the delivery of a legal opinion by the issuer’s counsel, as well as the delivery of a 10b-5 negative assurance letter, and a comfort letter in customary form delivered to the placement agent by the issuer’s independent accountants. Of course, depending on the particular issuer and its industry, additional deliverables may be required. Often, in order for the issuer’s accountants to deliver a comfort

letter, given that the placement agent is acting only on a best efforts basis, the placement agent may be required to deliver a representation letter. The representation letter to the accountants would state that the placement agent will conduct diligence that is consistent with the diligence that would be undertaken in connection with a firm commitment registered offering.

From time to time, institutional investors that are participating in an RDO will express an interest in having a separate subscription or purchase agreement between the investor and the issuer pursuant to which the issuer makes representations and warranties directly to the investor. This should be considered carefully. A definitive commitment to purchase cannot be entered into until pricing information has been made available and time of sale materials have been made available.

## Offering Materials

Investors may receive offering materials, such as a free writing prospectus, preliminary prospectus or preliminary prospectus supplement. Often, an issuer and placement agent may use a preliminary prospectus or preliminary prospectus supplement but may defer filing it until closer to the filing deadline while the issuer and placement agent are discussing the potential offering with wall-crossed investors.

Certain issuers, such as master limited partnerships, may not use a free writing prospectus in connection with an agency public offering.

## Securities Offered in an RDO

An RDO may be used to offer and sell any security—common stock, preferred stock, or debt securities. An issuer may sell its own newly issued shares. A selling stockholder also may use an RDO to sell its shares, either alone or with primary (issuer) shares.

## The Registration Statement

For purposes of conducting an RDO, an issuer may file a “bullet” registration statement or rely on a shelf takedown.

- *Bullet registration statement.* An issuer that does not have an effective shelf registration statement must file either (1) a single purpose registration statement for the express purpose of conducting an RDO (a “bullet”) or (2) a shelf registration statement. Once the Securities and Exchange Commission clears the registration statement, the issuer and the placement agent agree to conduct a registered direct offering and enter into a placement agency agreement. The issuer prepares and files a prospectus (or prospectus supplement) that describes the offering, and investors purchase the securities directly from the issuer.
- *Shelf takedown.* If the issuer has an already existing and effective shelf registration statement, it may choose to conduct a takedown pursuant to its shelf registration statement (a “shelf takedown”). Depending how the offering is marketed and sold, the issuer will prepare a preliminary prospectus supplement or a final prospectus supplement that describes the offering. The issuer and the placement agent also will enter into a placement agency agreement.

## Is an RDO a distribution?

A placement agent will sell the securities on a best efforts basis, and in doing so, can only engage in passive market making activities and cannot engage in market stabilizing transactions. Since an RDO is a

best efforts agency deal, RDOs do not include an over-allotment option which relates principally to stabilizing in connection with a firm commitment offering. Nonetheless, an issuer may increase the offering size to meet any additional demand.

An RDO will usually constitute a “distribution” for purposes of Regulation M, given that the placement agent will use special selling efforts, and the amount of securities offered will often be significant.

As a result, the placement agent is subject to the trading restrictions of Regulation M, and should be aware of the applicable restricted period for the issuer’s securities and submit the required Regulation M filings with the Financial Industry Regulatory Authority.

For investors, it is important to note that Rule 105 of Regulation M would not apply since the offering is conducted on an agency basis.

### Securities exchange rules and RDOs

An issuer considering an RDO should take into account the applicability of the rules of the securities exchange. Although an RDO is a public offering, it likely would not be considered a broadly distributed or “public offering” for purposes of the applicable securities exchange. To the extent that the RDO will result in an issuance of voting stock in excess of 20% of the issuer’s pre-transaction total shares outstanding, and the offering is being completed at a discount to the market price, the transaction may require shareholder approval. In evaluating whether an RDO is a public offering for purposes of these rules, the securities exchanges will consider several factors, including, but not limited to, whether the offering is an underwritten (a firm commitment) offering, the nature of the marketing process, the number of offerees, and the degree of investor control of the terms. In addressing this concern, an issuer may choose to limit the offering size and decide to offer shares of common stock and warrants in an “at market” offering (not at a discount).

### Comparing an RDO with a PIPE transaction

An RDO is a public offering but some of its features are akin to those of a private investment in public equity (“PIPE”) transaction. Since the placement agent may market a potential RDO as it would market a PIPE transaction (that is, by obtaining confidentiality undertakings until such time as an actual transaction is announced), RDOs are often (though mistakenly) referred to as “registered PIPEs.”

The following table provides some comparisons.

Differences	Registered Direct Offering	PIPE Transaction
Type of securities offering	Hybrid. Offering methodology has certain characteristics associated with a public offering and a private placement.	Private.
Typical investors	Any targeted investors, but commonly the institutional accredited investors and qualified institutional buyers (“QIBs”).	Institutional accredited investors and QIBs.

Differences	Registered Direct Offering	PIPE Transaction
Usual marketing material	Investors receive a preliminary prospectus (or preliminary prospectus supplement) during the marketing phase and a final prospectus or prospectus supplement prior to closing.	Investors may receive a private placement memorandum or rely on the issuer's public filings.
Purchase agreement between the issuer and each investor	Generally not needed.	Yes. Investors enter into a purchase agreement that irrevocably commits them to purchase a fixed number of securities at a fixed price.
Offering price affected by liquidity discount	No.	Yes.
Mode of settlement	Through the Depository Trust Company ("DTC") system. Usually closes on a T+2 or T+3 basis.	Outside of the DTC system. Investors receive physical certificates.
When offered, securities may be transferred	Freely transferable.	Restricted securities, which may be resold in other exempt transactions, or pursuant to an effective resale registration statement when available.

### *Checklist of Key Questions*

- Are the issuer's Exchange Act filings current? What materials will be used to market the potential offering?
- Does the issuer's board of directors and pricing committee understand the RDO structure?
- Does the placement agent use a wall-crossing script or a non-disclosure agreement in order to approach potential investors?
- Is an escrow account needed based on the structure of the RDO?
- Have the parties considered the applicability of the securities exchange rules in the context of certain offerings in which more than 20% of the pre-transaction total shares outstanding will be sold at a discount?
- If there is no placement agent, has the issuer made arrangements for DTC settlement through the issuer's transfer agent?