



FINRA Issues FAQs on Same Day Clearance for Offerings

Effective March 1, 2010, FINRA inaugurated a same day clearance option for filers submitting accelerated base, takedown, and concurrent (simultaneous filing of a base and takedown) shelf offerings for offerings required to be filed under Rule 5110, the Corporate Financing Rule.¹ The same day clearance option provides an immediate no objections opinion upon the successful filing of a shelf offering via COBRADesk, FINRA's online filing system, although the transaction will be subject to post-offering review and verification. In order to take advantage of the same day clearance process ("SDC"), the filer must make a number of representations, by means of checking the appropriate boxes in the filing, depending on the nature of the offering. Our earlier SDC alert details the required representations.²

FINRA recently appended a frequently asked questions ("FAQs") section to its COBRADesk Same Day Clearance Guide available on the COBRADesk website. Some of the more interesting answers to FAQs are:

- SDC is not available if FINRA members have received or will receive unregistered securities with the review period (180 days prior to filing through 90 days following effectiveness) that would be deemed underwriting compensation.
- SDC is available even if there is a potential for Rule 2720 conflict if the requirements of Rule 2720 are satisfied.
- Certain information may be provided after the SDC and receipt of the no objections letters, for example, disclosure of the maximum number of securities to be distributed.
- A reminder that the filing fee must be paid within 48 hours of filing the base prospectus through COBRADesk but not necessarily before the SDC.
- FINRA will conduct a post-offering review after the final offering documents have been filed. If the staff has relatively minor comments, filers will be contacted telephonically to allow the filers to modify the filings. The FAQ notes that if significant compliance issues are identified, a referral to the investigative unit may be made.

¹ FINRA is the Financial Industry Regulatory Authority and successor to the NASD. Rule 5110 (successor to NASD Rule 2710) can be found at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=11880&element_id=6831&highlight=5110#r11880.

² See "Whoosh! FINRA Inaugurates Same Day Clearance for Offerings," available at <http://www.mofo.com/files/Publication/0a1786a3-0155-46ef-b9bb-e0243ce7555f/Presentation/PublicationAttachment/4397e17f-dbac-401b-a639-4ca8545949b0/100224FINRASAMEDAY.pdf>.

Key Takeaways

As we have previously noted, in order to take best advantage of the same day clearance process, we suggest:

- File as soon as possible, preferably when the base prospectus and registration statement are filed with the SEC and not when an offering is looming; gather the information and documents as soon as possible.
- In light of the changes to NASD Rule 2720, underwriters should make sure they receive and maintain FINRA approval as “qualified independent underwriters.”³
- Filers should carefully review all required information and check all representations. While the filing process has been clarified and become more automated, filings can only be updated, not amended.

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³ An FAQ sets forth the process for pre-approval as a QIU.