

Client Alert

March 25, 2014



SEC Revises Guidance on Granting WKSI Waiver

Introduction

On March 12, 2014, the SEC's Division of Corporate Finance updated its guidance regarding requests for waivers by well-known seasoned issuers ("WKSIs") that would otherwise become ineligible issuers under Rule 405 of the Securities Act as a result of certain activities. Under Rule 405, an issuer can become an ineligible issuer as a result of activities such as violating the anti-fraud provisions of the securities laws.

This revised guidance is a refinement of its July 2011 "Statement on Well-Known Seasoned Issuer Waivers,"¹ based on the Division's experience with waiver requests. The July 2011 statement provided guidance on what constitutes "a showing of good cause" for purposes of an ineligible issuer waiver request. The revised statement outlines a more detailed framework that the SEC generally will follow in considering whether to grant a waiver of ineligible issuer status.

The new guidance may be found at the following link: <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>

WKSIs, Disqualification and Waivers

WKSIs, widely followed issuers representing a significant amount of capital raised and traded in the United States, are able to register their securities offerings on shelf registration statements that become effective automatically upon filing. A WKSI is not required to wait for the SEC to review and declare its registration statement effective before it is permitted to make sales.² In order to qualify as a WKSI, an issuer may not be an "ineligible issuer," defined by Rule 405 as, among other things, an issuer that has been convicted of certain crimes or that has violated the anti-fraud provisions of the federal securities laws. Because this definition includes activities of subsidiaries, financial holding companies are particularly susceptible to becoming ineligible issuers, as they from time to time are subject to regulatory proceedings that involve these types of decisions or orders.

Under Rule 405, the SEC may grant waivers of ineligible issuer status "upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer."

¹ The July 2011 guidance is available at <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp.htm>.

² For additional information about WKSIs, please see our "Frequently Asked Questions About Shelf Offerings": <http://www.mofo.com/files/Uploads/Images/FAQShelfOfferings.pdf>.

Standards for Granting Waivers

According to the recent guidance, the SEC will consider the nature of the violation or conviction, whether it involved disclosure for which the issuer or its subsidiaries was responsible or calls into question the ability of the issuer to produce reliable disclosures, and whether the conduct involved a criminal conviction or scienter-based violation. The SEC will also consider the following factors, with no single factor being dispositive: (1) who was responsible for the misconduct and the duration of the misconduct (including the level of the employees involved and whether there were any “red flags” that were disregarded); (2) what remedial steps were taken by the issuer (including improvements in internal controls); and (3) what the impact of a denial of the waiver request would be (including effects that the issuer’s loss of WKSJ status could have for the market as a whole). One difference between the 2011 guidance and the 2014 guidance is that the above factors were only applicable to non-scienter based violations involving an issuer’s disclosure in the 2011 guidance, while these factors appear to be more generally applicable in the 2014 guidance.

Conclusion

We anticipate that the SEC’s new guidance will play an important role when issuers need to shape their WKSJ waiver requests, and their responses to any events that would result in “ineligible issuer” status. Requesting issuers will want to be able to make arguments that address the SEC’s concerns in each of these areas.

Authors

Steven J. Bleiberg
New York
(212) 336-4228
sbleiberg@mofo.com

Lloyd S. Harmetz
New York
(212) 468-8061
lharmetz@mofo.com

About Morrison & Foerster

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life sciences companies. We’ve been included on *The American Lawyer’s* A-List for 10 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com. © 2014 Morrison & Foerster LLP. All rights reserved.

For more updates, follow Thinkingcapmarkets, our Twitter feed: www.twitter.com/Thinkingcapmktks.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.