

Same Day Clearance Option from FINRA for Shelf Offerings Begins Today

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Beginning today, underwriters of accelerated shelf offerings that are not otherwise exempt from filing under Financial Industry Regulatory Authority, Inc. (FINRA) Rule 5110 may obtain Same Day Clearance of their filings with FINRA if specific representations are made regarding their accelerated shelf offerings. This Same Day Clearance option should help to alleviate delays associated with FINRA clearance for accelerated offerings such as overnight deals.

FINRA, which regulates broker-dealers in the United States, reviews underwriting terms to determine their fairness and reasonableness, principally through FINRA Rule 5110 (known as the Corporate Financing Rule). Sales of securities pursuant to an offering that is required to be filed with FINRA under Rule 5110 may proceed only after FINRA has issued a “no-objections” opinion relating to the underwriting terms and other arrangements. Because FINRA generally requires offering documents and related information to be filed 15 business days prior to the anticipated commencement of an offering, accelerated offerings not otherwise exempt from Rule 5110 have faced the risk of delay.

In an effort to address timing concerns related to accelerated offerings, FINRA is implementing, effective March 1, 2010, a Same Day Clearance option for accelerated base and/or takedown shelf offerings, provided that certain representations are made. While a filing using the Same Day Clearance option remains subject to FINRA’s review and verification following the offering, FINRA’s COBRADesk service will generate a “no-objections” opinion immediately following successful submission of the filing.

The representations required for a base registration statement are expected to be as follows:

- the “Plan of Distribution” or “Underwriting” section of the registration statement will disclose that the aggregate value of all compensation received or to be received by participating FINRA members does not exceed 8% of the offering proceeds or, if the registration is already effective, this disclosure will be included in any post-effective amendment; and

- if the offering is subject to NASD Rule 2720 (which relates to conflicts of interests of FINRA members and requires a qualified independent underwriter (QIU) under certain circumstances), the registration statement or offering document will comply with the prominent disclosure provisions of NASD Rule 2720.

The representations required for a takedown filing are expected to be as follows:

- the terms and arrangements between participating FINRA members and the issuer do not include any arrangements prohibited by FINRA Rule 5110(f)(2) (which enumerates certain underwriting terms that are unfair and unreasonable);
- the aggregate value of all items of compensation received or to be received by participating FINRA members in connection with the takedown offering does not exceed 8% of the offering proceeds and all underwriting compensation will be disclosed in the “Plan of Distribution” or “Underwriting” section of the registration statement or offering document;
- participating FINRA members have not acquired unregistered securities that would be deemed underwriting compensation during the 180-day period preceding the filing;
- if NASD Rule 2720(a)(2) (which would require a QIU) applies, the qualification of the QIU has been approved by FINRA’s Corporate Financing Department within 12 months prior to the filing; and
- the final offering documents and related materials will be submitted in COBRADesk and certain basic information about the underwriters will be completed.

According to sources at FINRA, a Frequently Asked Questions (FAQ) Guide is expected to be released shortly. We expect to provide more detailed guidance once the FAQ Guide is released by FINRA.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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