

SEC Provides Guidance on Waivers of Ineligible Issuer Status for Well-Known Seasoned Issuers

On July 8, 2011, the Division of Corporation Finance of the Securities and Exchange Commission (the “SEC”) issued guidance for companies seeking a determination from the SEC that they should not be considered “ineligible issuers” under the SEC’s rules.¹ Ineligible issuer status has significant consequences to companies because it excludes them from taking advantage of streamlined procedures for accessing the capital markets under the SEC’s 2005 Securities Offering Reforms,² including the use of automatic shelf registration statements and use of free-writing prospectuses. The guidance sets forth factors the SEC Staff will consider in determining whether to grant a waiver from ineligible issuer status.

I. Ineligible Issuer Status

Issuers who, or whose subsidiaries, have violated the anti-fraud provisions of the federal securities laws, or are the subject of a judicial or administrative decree or order (including a settled claim or order) prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws, become “ineligible issuers” and therefore do not have well-known seasoned issuer (“WKSI”) status for three years. As a result, during that period, they will not be able to use automatic shelf registration statements or free-writing prospectuses. The SEC’s Division of Corporation Finance, pursuant to delegated authority, may grant waivers of ineligible issuer status under Securities Act Rule 405³ “upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”

II. Framework for Waiver Requests

The SEC Staff will review all of the facts and circumstances, with a focus on the reliability of an issuer’s current and future disclosures, to evaluate whether granting a waiver would be consistent with the public interest and the protection of investors. The Staff emphasizes two factors related to the nature of the anti-fraud violation: first, whether the anti-fraud violation involves the issuer’s own disclosures about itself; and second, whether the anti-fraud violation is scienter based (involving a mental state encompassing intent to deceive, manipulate or defraud, and including recklessness). There are three general situations.

Anti-fraud Violations Not Involving Issuer Disclosure

The Staff indicates that if the anti-fraud violation does not involve the issuer’s own disclosures, then a waiver request would likely be granted, even if the anti-fraud violation is scienter based. This could occur, for example, if the issuer is a broker-dealer and the anti-fraud violation stems from its broker-dealer activity, rather than material misstatements or omissions in its own filings.

¹ See SEC Division of Corporation Finance, Statement on Well-Known Seasoned Issuer Waivers (July 8, 2011), available at <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp.htm>.

² See Securities Offering Reform, SEC Release No. 33-8591, 70 Fed. Reg. 44722 (July 19, 2005), available at <http://www.sec.gov/rules/final/33-8591fr.pdf>.

³ 17 C.F.R. § 230.405.

Scienter Based Anti-fraud Violations Involving Issuer Disclosure

In contrast, absent exceptional circumstances, a waiver request would likely not be granted in the case of an anti-fraud violation that is scienter based and involves the issuer's own disclosures because this situation raises questions about the reliability of the issuer's current and future disclosures.

Non-Scienter Based Anti-fraud Violations Involving Issuer Disclosure

Finally, if an anti-fraud violation involves the issuer's own disclosures but is not scienter based, then the Staff will consider the following factors in deciding whether to grant a waiver. No single factor is determinative.

- **Remedial Measures.** The Staff will consider remedial measures the issuer has taken to prevent a recurrence of the misconduct, including changes in key personnel, undertakings specifically designed to prevent future fraudulent disclosures and improvements to internal controls and disclosure controls and procedures.
- **Pervasiveness and Timing of Misconduct.** The Staff will review the age of the misconduct and the seriousness and pervasiveness of the misconduct by the issuer and its officers, directors and employees. Older misconduct and fraudulent conduct and disclosures limited to the actions of a few individuals not in positions of authority could create fewer questions about the reliability of an issuer's future disclosures than a pattern of misconduct by senior management. Changes in personnel would also be relevant.
- **Impact on the Issuer if the Waiver Request Is Denied.** The Staff will also consider whether denial of a waiver request and loss of WKSI status would be a disproportionate hardship compared to the issuer's misconduct, and whether such a denial could have harmful effects for the markets as a whole, in light of the issuer's significance to the markets.

III. Conclusion

This SEC Staff guidance sets forth factors the Staff will consider in determining whether to grant a waiver from ineligible issuer status, which will assist companies in evaluating the ability to preserve their access to the capital markets in the event they are the subject of a judicial or administrative proceeding that could otherwise cause them to be ineligible issuers.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Dan Zimmerman at 212.701.3777 or dzimmerman@cahill.com.