

FINRA Provides FAQs on Same Day Clearance Option for Shelf Offerings

by David S. Baxter, Jonathan J. Russo and K. Brian Joe

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 FINRA filings if specific representations are made regarding their accelerated shelf offerings. Earlier this week, FINRA released a list of Frequently Asked Questions (FAQs) on using the Same Day Clearance option. This 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 implemented, 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 on the same day as any filing successfully submitted between 9:00 am and 4:00 pm (New York time).

The representations required for a base registration statement are 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 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.

FINRA released a list of FAQs earlier this week, which is available in the COBRADesk Same Day Clearance Guide and can be accessed by logging into COBRADesk. The FAQs include the following guidance:

- FINRA members who have received or will receive unregistered securities (such as warrants) within the review period (i.e., 180 days prior to filing through 90 days following effectiveness) that would be deemed underwriting compensation cannot use the Same Day Clearance option.
- Even if there is a potential for a NASD Rule 2720 conflict of interest and/or QIU requirement, the Same Day Clearance option is still available so long as the prominent disclosure provisions of NASD Rule 2720 are satisfied and, if a QIU is required, the FINRA member acting as a QIU has been approved during the 12-month period prior to the filing.
- The name of a registered principal of the FINRA member on whose behalf the filing is being made must also be provided.
- Any filing fees must be paid within 48 hours of filing the base prospectus through FINRA’s COBRADesk service.

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

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