



WHOOSH! FINRA Inaugurates Same Day Clearance for Offerings

In these times of overnight and wall-crossed deals, counsel has often had the need to pull on the reins if the offering was subject to FINRA Rule 5110,¹ facing underwriter and issuer displeasure. Rule 5110, the Corporate Financing Rule, provides for review by FINRA of underwriting or other arrangements in connection with specified public offerings in order to enable FINRA to assess the fairness and reasonableness of proposed underwriting compensation and arrangements. An offering that is required to be filed with FINRA may not proceed until FINRA has delivered a no-objections opinion relating to the underwriting compensation. FINRA generally requires that all documents and information be filed with it fifteen business days prior to the expected commencement of the offering, a serious problem when deals can start and close in less than a week.

Effective March 1, 2010, FINRA is inaugurating a same day clearance option for filers submitting accelerated base, takedown and concurrent (simultaneous filing of a base and takedown) shelf offerings. The same day clearance option will provide 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, the filer must make the following representations, by means of checking the appropriate boxes in the filing:

- *Representations required for a filing of a base registration statement*
 - The appropriate sections of the registration statement will disclose that the aggregate value of all compensation to be received by participating FINRA members will not exceed 8% of the offering proceeds.
 - If the registration statement is already effective, such disclosure will be made in any post-effective amendments.
- *If the offering is subject to NASD Rule 2720² – the offering document will comply with the prominent disclosure provisions of the rule.*
- *Representations required for a takedown filing*
 - The terms and arrangements between participating FINRA members and the issuer do not include any prohibited arrangements under Rule 5110(f)(2).

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 NASD Rule 2720 addresses public offerings with conflicts of interest. It was amended, effective September 14, 2009. A significant element of NASD Rule 2720 is prominent disclosure in the offering document of the nature of the disclosure and, if relevant, the participation of a qualified independent underwriter. http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=11657&element_id=3676&highlight=2720#r11657.

- The aggregate value of all items of compensation to be received by participating members will not exceed 8% of the offering proceeds, and all underwriting compensation will be disclosed in the offering document.
- Participating members have not acquired unregistered securities that would be deemed to be underwriting compensation during the 180-day period preceding the filing.
- If NASD Rule 2720(a)(2) applies, the qualified independent underwriter has been approved by the Corporate Financing Department within the 12-month period preceding the filing.
- The final offering documents and all agreements entered into by any participating member and the issuer in the 180 days preceding the filing will be submitted to COBRADesk, and certain information will be completed.

The representations do not change essential FINRA requirements. Rather, they allow FINRA to issue opinions quickly in reliance on such representations. FINRA has announced that filings completed by 4:00 p.m. Eastern Time should receive the no objections opinion before the close of business on the same day. The same day clearance process should eliminate most of the timing concerns relating to a FINRA filing.

Key Takeaways

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.”
- 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.

FINRA expects to issue a question and answer sheet in the near future.

Contacts

Nilene R. Evans
(212) 468-8088
nevans@mof.com

About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, Fortune 100 companies, investment banks and technology and life science companies. Our clients count on us for innovative and business-minded solutions. Our commitment to serving client needs has resulted in enduring relationships and a record of high achievement. For the last six years, we've been included on *The American Lawyer's* A-List. *Fortune* named us one of the “100 Best Companies to Work For.” We are among the leaders in the profession for our longstanding commitment to pro bono work. Our lawyers share a commitment to achieving results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mof.com.

© 2010 Morrison & Foerster LLP. All rights reserved.

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.