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COBRADesk Same Day Clearance

FINRA Announces Optional Procedure for Same Day Clearance of Shelf Filings under Rule 5110

SUMMARY

The FINRA Corporate Financing Department has created a Same Day Clearance Option that allows issuers and member firms to obtain FINRA clearance on the day filings are made for shelf registration statement filings that are not exempt from FINRA review. The Same Day Clearance Option became available through FINRA's web-based filing system, called the COBRADesk system, on March 1, 2010 and will enable issuers and member firms to obtain clearance for these filings upon electronic confirmation that certain conditions have been met, without the need for FINRA personnel to review and approve the filings. For shelf filings that are not exempt from FINRA review, this new option should streamline and reduce the timing uncertainty sometimes associated with the review process.

The Same Day Clearance Option will be available for issuers filing base prospectuses and for member firms filing either base prospectuses or prospectus supplements, or both, for shelf registrations that are not exempt from filing. If the party making the filing elects the option, confirms electronically that all of the conditions of the option are met and makes the filing before 4 PM on a business day, the COBRADesk system will automatically generate a no-objections letter for the filing without review by a FINRA examiner. FINRA reserves the right to review the filing, and whether the conditions were in fact met, after the fact.

Filers are not required to use the Same Day Clearance Option and may elect to have the filing reviewed instead. Filers may still request expedited review in appropriate cases. The Same Day Clearance option is not available for non-shelf filings, such as IPO registration statements.

BACKGROUND

FINRA Rule 5110 requires member firms participating in a public offering to file relevant information and documents with the FINRA Corporate Financing Department so that the Department can determine whether the proposed underwriting compensation and other underwriting terms are fair and reasonable and not prohibited by Rule 5110. Some types of offerings (for example, offerings of investment grade non-convertible debt) are exempt from filing and other types of offerings (for example, private offerings exempt under Section 4(2) of the Securities Act of 1933 and Rule 506 of Regulation D) are exempt from all of the provisions of Rule 5110. Filings are made by means of the COBRADesk system, which permits filers to provide information in response to online questions and to attach documents, including offering documents and underwriting agreements. Following a COBRADesk filing, members may not participate in the offering until FINRA has reviewed the offering and issued a no-objections letter.

The COBRADesk filing process was primarily designed for initial public offerings and other offerings not registered pursuant to the Rule 415 shelf process. Some Rule 415 shelf offerings registered pursuant to Form S-3 or F-3 are exempt from COBRADesk filing if the issuer has been subject to reporting under Section 12 or 15(d) of the Securities Exchange Act of 1934 for 36 months and has a public float of \$150 million (for Form S-3 registrants) or \$300 million (for Form F-3 registrants).¹ The COBRADesk filing exemption is not available if the issuer does not satisfy those conditions or if the offering involves a conflict of interest under NASD Rule 2720 and there is no filing exemption under Rule 2720.² Shelf registration statements may be filed with FINRA by the issuer (in a so-called issuer managed offering) or by a participating member. Because Rule 5110 only applies to member firms, most issuers are not required to make a FINRA filing, although many do so in order to avoid delays caused by filing at the time of a takedown from a shelf. If an issuer has not made a filing with FINRA prior to effectiveness of the original registration statement, member firms participating in a takedown may find it necessary to make a filing and obtain a no-objections letter on an expedited basis.

¹ These standards are based on the requirements for Forms S-3 and F-3 as they existed prior to October 1992, when those forms were amended by the SEC.

² An offering may involve a Rule 2720 conflict of interest if, among other things, the issuer controls, is controlled by, or is under common control with, any member participating in the offering, or any participating member, together with its affiliates, will receive at least 5% of the net proceeds of the offering. "Control" is specially defined for purposes of Rule 2720, and includes ownership by one entity of 10% or more of the common stock, preferred stock or subordinated debt of another entity. An offering may be exempt from the Rule 2720 filing requirement (which may apply even if there is a filing exemption under Rule 5110) if (i) the offering is of securities rated investment grade or securities in the same series as investment grade securities and having equal rights and obligations, (ii) the offering is of securities having a bona fide public market, as defined in the Rule, or (iii) the lead managers of the offering do not have a conflict of interest, are not affiliated with a member having a conflict of interest and satisfy a condition relating to disciplinary history of supervisory persons responsible for organizing, structuring or performing due diligence with respect to corporate public offerings of securities.

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The Same Day Clearance Option was designed to enable filers to obtain no-objections letters on the day of filing without FINRA review, provided that the terms of the offering do not involve any special issues typically requiring comment and remediation.

SAME DAY CLEARANCE OPTION FILING PROCESS

On February 23 and 24, 2010, FINRA conducted web-access training sessions in the new optional filing process. As demonstrated by FINRA staff, the COBRADesk system will allow filers to select the Same Day Clearance Option, which will pre-populate certain fields in the filing and enable use of the Same Day Clearance representations described below. If the COBRADesk filing, including the Same Day Clearance representations, is completed and released prior to 4 PM on a business day, a no-objections letter will be generated immediately by the system.

The Same Day Clearance Option is available only for Rule 415 shelf registration statements filed on Form S-3 or F-3. It is not available for initial public offerings and other non-shelf registration statements. The Same Day Clearance Option is also not available for shelf registration statements of well-known seasoned issuers (“WKSIs”) filed with FINRA because of a Rule 2720 conflict of interest. The COBRADesk system requires persons filing shelf registration statements to indicate whether the issuer is a WKSI. WKSI shelf registrations are automatically handled by the COBRADesk system using an interface with reduced information requirements and generally resulting in a no-objections letter in one day or less. A WKSI filing does not require the special representations required for the Same Day Clearance Option. FINRA staff have indicated informally that persons filing WKSI registration statements may not attempt to use the Same Day Clearance Option by omitting to identify the issuer as a WKSI, and that the staff intends to compare the information in a filing with the filed registration statement to determine, among other things, whether the issuer was correctly identified as a WKSI.

Representations. The Same Day Clearance representations are in addition to the representations and information otherwise required to be provided by filers in shelf offerings. The following representations, to be made by the filing member or issuer, are required in connection with the filing of a shelf registration statement or post-effective amendment containing a base prospectus for same day clearance:

- The “Plan of Distribution”, “Underwriting” or other similar section of the base prospectus 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 statement is already effective, this disclosure will be included in any post-effective amendment.
- In the event that the offering is subject to Rule 2720, the base prospectus will comply with the prominent disclosure provisions of that rule.

The following representations, to be made by the filing member, are required for same day clearance of a takedown filing, such as a prospectus supplement relating to a particular offering:

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- Terms and arrangements between participating FINRA members and the issuer do not include any prohibited arrangements as described in FINRA Rule 5110(f)(2).
- 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”, “Underwriting” or other section of the prospectus supplement or base prospectus that describes the terms and arrangements entered into by participating members related to the distribution of the offering.
- Participating FINRA members have not acquired unregistered securities that would be deemed underwriting compensation during the 180-day period preceding the filing.
- In the event Rule 2720(a)(2), requiring a qualified independent underwriter, applies to the offering, the qualified independent underwriter is one whose qualification has been approved by the Department within the 12-month period prior to the submission of the filing.³
- The final offering documents, including the prospectus supplement, signed underwriting agreement, letter of intent, engagement letter or other documents entered into by any participating FINRA member and the issuer in the 180-day period preceding the filing for the takedown offering, will be submitted in COBRADesk, and the “Takedown/Issuer Managed/Selling Securityholders” screen will be completed.⁴

Principal Confirmation. When the COBRADesk filing is made on behalf of one or more member firms, rather than by the issuer, the form containing the Same Day Clearance representations requires confirmation by a named principal of the member firm responsible for the filing. FINRA has stated that by “principal” they mean a supervisory principal qualified by having taken a Series 24 or similar examination for supervisory principals. The confirmation states as follows:

We confirm the accuracy of the above representations and we understand that the information, representations and documents filed will be subject to a post-offering review and verification process by the Department following its issuance of a no-objections opinion.

The representations to be confirmed by the filing firm and its principal apply not only to arrangements and items of compensation applicable to that member but to all participating members. Therefore, the filing firm should have procedures in place to help ensure that it has all necessary information about

³ Member firms wishing to be pre-qualified as qualified independent underwriters may submit a letter to the Department providing information demonstrating qualification as required by Rule 2720. The Department issues a confirmation of qualification which is good for a period of one year. The pre-qualification process is not new, although there have been changes as a result of the amendments to Rule 2720, including changes to the conditions for being a qualified independent underwriter, that went into effect on September 14, 2009. A member wishing to be pre-qualified must submit a new qualification letter every 12 months.

⁴ FINRA recognizes that some of the documents or information described in this representation may not be available by the time of the filing for Same Day Clearance. The documents and information must be filed within one business day after filing with the SEC or, if not filed with the SEC, after becoming available to the filer.

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underwriting compensation and other relevant arrangements relating to all the participating members in order to permit the filing firm and its principal to make the representations confidently.

Post-Offering Review. In discussions with practitioners about the Same Day Clearance Option, FINRA staff members have indicated that post-offering review is not intended to be like the pre-offering review process in connection with other types of offerings, and is not expected to generate the same kinds of comments about disclosure, underwriting terms and related arrangements as are given in pre-offering reviews. Rather, FINRA staff have indicated that they expect post-offering reviews resulting in comments to be the exception rather than the rule. Nevertheless, it is possible that post-offering reviews could lead to after-the-fact disagreements with FINRA staff about the application of Rules 5110 and 2720 to particular offerings, and members may wish to rely on the pre-offering clearance process for filings that raise significant interpretive questions.

Effective Date. The Same Day Clearance Option is available for shelf offerings filed on or after March 1, 2010. FINRA does not believe that the option requires an amendment to the FINRA rules, filing with the SEC or SEC approval.

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