

# INSIGHTS

## THE CORPORATE & SECURITIES LAW ADVISOR

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### A New Blueprint for Controlling Shareholder Litigation?

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**CHRISTOPHER G. GREEN, JASON S. FREEDMAN, and LARISSA R. SMITH** of Ropes & Gray LLP explore the Delaware Supreme Court's *MFW* decision that establishes the conditions required to obtain business judgment review in controlling shareholder transactions.

### Using the Courts to Resolve Shareholder Proposal Disputes

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**KEIR GUMBS** and **DAN ALTERBAUM** of Covington & Burling LLP discuss recent cases in which companies sought relief in federal court to exclude shareholder proposals and whether this is a new course for companies seeking expeditious resolution of such disputes under SEC Rule 14a-8.

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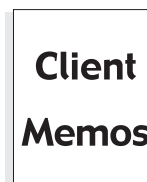
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**ROBERT B. LITTLE** and **CHRIS BABCOCK** of Gibson, Dunn & Crutcher LLP examine a recent Delaware Chancery Court decision that provides valuable guidance for M&A practitioners drafting or complying with contractual provisions governing indemnification for third party claims.

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# INSIDE THE SEC

## SEC Guidance on Well-Known Seasoned Issuer Waivers

By **Laura D. Richman** and **Michael L. Hermsen**

On March 12, 2014, the Division of Corporation Finance (Division) of the U.S. Securities and Exchange Commission (SEC) issued its “Revised Statement on Well-Known Seasoned Issuer Waivers.”<sup>1</sup> This guidance updates and refines the Division’s 2011 policy for granting waivers of “ineligible issuer” status in order to allow an issuer to qualify as a “well-known seasoned issuer” (WKSI).

When an issuer qualifies as a WKSI, it can register its securities under the Securities Act of 1933 (Securities Act) on a shelf registration that becomes effective automatically upon filing. This streamlined process provides flexibility for a WKSI to time securities sales to meet market conditions, without waiting for the Division to review and comment upon a registration statement and declare it effective.

Unless a waiver is granted, an issuer may not qualify as a WKSI if it is an ineligible issuer. Pursuant to Rule 405 under the Securities Act, an issuer will be an ineligible issuer if it (or its subsidiary) has been convicted of specified felonies or misdemeanors under Section 15 of the Securities Exchange Act of 1934, or has violated the anti-fraud provisions of the federal securities laws. Rule 405 authorizes the SEC to grant waivers of ineligible issuer status “upon a showing of good cause, that

it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”

### The Guidance

In the guidance, the Division indicated that when making a determination that a waiver would be consistent with the public interest and the protection of investors, it will consider whether the conduct involved a criminal conviction or scienter-based violation. It also will assess whether the violation involved disclosure for which the issuer was responsible or calls into question the issuer’s ability to produce reliable disclosure. While no single factor is determinative, the Division will consider:

- Who was responsible for the misconduct?
- What was the duration of the misconduct?
- What remedial steps were taken by the issuer?
- What impact would denial of the waiver request have?

The issuer carries the burden of justifying the appropriateness of any waiver request, based on the framework set forth in the Division’s guidance.

In a key change from its previous guidance on WKSI waivers, the Division’s new guidance no longer designates anti-fraud violations stemming from the issuer’s own disclosures about itself and the scienter-based nature of an anti-fraud violation as threshold considerations. Also, while the Division continues to take into account whether a violation was scienter-based, its revised guidance does not limit application of factors being considered with respect to non-scienter-based violations.

### Practical Considerations

Any issuer seeking a waiver of ineligible issuer status should review the updated guidance

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carefully and frame a waiver request letter to respond to the specific points that the Division has stated are important to its consideration. An express purpose of the Division's guidance is to provide transparency for its decision-making process. An issuer should provide specific, factual details demonstrating how factors that the guidance highlights as potential justifications are applicable to its situation.

The guidance specifically emphasizes "tone at the top." It is important that senior management does not condone or ignore violative behavior or "red flags" hinting at violative conduct. WKSI eligibility, and the related process for waiver of ineligible issuer status, provides another compliance incentive for promptly addressing and correcting securities law problems.

Remediation efforts designed to prevent future violations can be important to the justification for a waiver of ineligible issuer status. For example, the Division's guidance mentions improved training and improved internal controls as efforts it will take into consideration. The Division also reviews whether key changes have been made in the personnel involved in the violative or criminal conduct. Because the Division is focused on an issuer's ability to produce reliable disclosure, demonstrating improvements to disclosure controls and procedures may be helpful to a waiver request.

### **Note**

1. Available at <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>.