

Additional SEC Guidance on Well-Known Seasoned Issuer Waivers

On March 12, 2014, the Division of Corporation Finance (Division) of the US Securities Exchange Commission issued revised guidance on well-known seasoned issuer (WKSI) waivers.¹ The Division further updated this guidance on April 24, 2014 (the April 2014 guidance).²

In the April 2014 guidance, the Division clarified its framework for determining whether a showing of good cause has been established in a WKSI ineligibility waiver request, specifying that:

Where there is a criminal conviction or a scienter based violation involving disclosure for which the issuer or any of its subsidiaries was responsible, the issuer's burden to show good cause that a waiver is justified would be significantly greater.

This additional sentence emphasizes that it will be more difficult for an issuer to obtain a waiver of WKSI ineligibility in situations where a criminal conviction or a scienter-based disclosure violation is an underlying cause of the ineligibility.

The April 2014 guidance also modifies the Division's position with respect to its consideration of the impact if a waiver request is denied. The concluding sentence of this section of the guidance discussing this factor now reads:

We will also look at any effects that the issuer's loss of WKSI status could have for the markets as a whole and the investing public in considering whether a waiver would be consistent with

the public interest and the protection of investors.

Previously, this sentence expressly stated that such consideration was to be made "in light of the issuer's significance to the markets and its connectedness to other market participants." The revised guidance makes clear that the Division is not limited in the factors it may consider when assessing the impact of a denial of a waiver request.

Practical Considerations

Any issuer drafting a request for waiver of WKSI ineligibility should be sure its request is based on the April 2014 guidance (or any subsequent updates that the Division may issue in the future), rather than the March 2014 guidance.

Issuers with criminal convictions or scienter-based violations involving disclosure for which they have responsibility are likely to face close scrutiny from the Division in the context of a WKSI ineligibility waiver request. Since the burden of showing good cause is on the issuer, any such waiver request will need to emphasize appropriate reasons why there is good cause for the Division to grant the waiver. Obtaining a waiver in these circumstances will be more challenging than where only a civil or administrative non-scienter-based violation exists. Although greater scrutiny may be expected when a criminal conviction or scienter-based disclosure violation exists, in appropriate circumstances it nevertheless may be possible to obtain a waiver of WKSI ineligibility.³

While the Division ostensibly broadened the scope of its consideration of the impact of denial of a waiver request, the April 2014 guidance may signal discomfort with a suggestion that a larger, well-connected issuer would be more likely to receive a waiver than a smaller issuer would be. However, because the parameters for considerations in this area are not specified, an issuer making a waiver request has more flexibility to develop arguments regarding impact of denial in its waiver request, which could touch on significance or connectedness to the market, if appropriate, but which could also encompass other factors.

*If you have any questions about the Division's WKSI ineligibility waiver guidance, please contact the author of this Legal Update, **Laura D. Richman**, at +1 312 701 7304, or any of the lawyers listed below, or any other member of our Corporate & Securities practice.*

David S. Bakst

+1 212 506 2551

dbakst@mayerbrown.com

Harry Beaudry

+1 713 238 2635

hbeaudry@mayerbrown.com

John P. Berkery

+1 212 506 2552

jberkery@mayerbrown.com

Edward S. Best

+1 312 701 7100

ebest@mayerbrown.com

Bernd Bohr

+44 20 3130 3640

bbohr@mayerbrown.com

Robert E. Curley

+1 312 701 7306

rcurley@mayerbrown.com

Paul De Bernier

+1 213 229 9542

pdebernier@mayerbrown.com

Robert M. Flanigan

+44 20 3130 3488

rflanigan@mayerbrown.com

Marc H. Folladori

+1 713 238 2696

mfolladori@mayerbrown.com

Robert F. Gray

+1 713 238 2600

rgray@mayerbrown.com

Lawrence R. Hamilton

+1 312 701 7055

lhamilton@mayerbrown.com

Michael L. Hermsen

+1 312 701 7960

mhermsen@mayerbrown.com

Philip J. Niehoff

+1 312 701 7843

pniehoff@mayerbrown.com

Dallas Parker

+1 713 238 2700

dparker@mayerbrown.com

Elizabeth A. Raymond

+1 312 701 7322

eraymond@mayerbrown.com

Laura D. Richman

+1 312 701 7304

lrichman@mayerbrown.com

David A. Schuette

+1 312 701 7363

dschuette@mayerbrown.com

Jodi A. Simala

+1 312 701 7920

jsimala@mayerbrown.com

Frederick B. Thomas

+1 312 701 7035

fthomas@mayerbrown.com

J. Kirk Tucker

+1 713 238 2500

ktucker@mayerbrown.com

Endnotes

- ¹ For more information, see our April 1, 2014 Legal Update available at http://www.mayerbrown.com/files/Publication/71509cdf-a727-45e8-8af9-36ee52db67ce/Presentation/PublicationAttachment/7cb35255-e4a2-4c9f-93ea-39428c035729/UPDATE-SEC_Guidance_WKSI_Waivers_0414.pdf.
- ² Available at <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>.
- ³ See, for example, the order dated April 25, 2014 in which the Securities and Exchange Commission granted a waiver from being an ineligible issuer, available at <http://www.sec.gov/rules/other/2014/33-9578.pdf>. This order was issued the day after the Division issued the April 2014 guidance, although the incoming request was submitted, and the deliberations may have occurred, before the revised guidance was issued.

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