



## SEC's Division of Corporation Finance Issues Revised Statement on Well-Known Seasoned Issuer Waivers

March 21, 2014

On March 12, 2014, the Division of Corporation Finance (the "Division") of the Securities and Exchange Commission ("SEC") issued a revised statement, outlining the factors the Division considers in determining whether to grant an issuer's request for a waiver of "ineligible issuer" status so that the issuer may continue to qualify as a well-known seasoned issuer ("WKSI").<sup>1</sup>

### BACKGROUND

Under Securities Act Rule 405, in order to qualify as a WKSI, an issuer may not be an "ineligible issuer," which is defined by the rule to be, "among other things, an issuer that has (or whose subsidiary has) been convicted of a felony or misdemeanor specified in four enumerated provisions under Section 15 of the [Securities] Exchange Act or an issuer that has violated (or whose subsidiary has violated) the anti-fraud provisions of the federal securities laws (or that are the subject of a judicial or administrative decree or order prohibiting certain conduct or activities involving the anti-fraud provisions of the federal securities laws)."<sup>2</sup> Rule 405 permits the SEC to grant a waiver of ineligible issuer status if it determines, "upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer."<sup>3</sup> The SEC delegated the responsibility of acting on waiver applications to the Division.

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<sup>1</sup> See U.S. Securities and Exchange Commission, Division of Corporation Finance, "Revised Statement on Well-Known Seasoned Issuer Waivers" (Mar. 12, 2014). A WKSI is an issuer that meets all the registrant requirements of Form S-3 or Form F-3 and either: (1) "[a]s of a date within 60 days of the determination date, has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of \$700 million or more"; or (2) "[a]s of a date within 60 days of the determination date, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the [Securities] Act." Securities Act Rule 405, 17 C.F.R. § 230.405. WSIs can avail themselves of certain communications and registration privileges, most notably the ability file shelf registration statements that become effective automatically upon filing.

<sup>2</sup> "Revised Statement on Well-Known Seasoned Issuer Waivers"; see also Securities Act Rule 405, 17 C.F.R. § 230.405.

<sup>3</sup> Securities Act Rule 405, 17 C.F.R. § 230.405.

## THE DIVISION'S FRAMEWORK FOR ASSESSING WAIVER REQUESTS

In its recently released statement, which updates the guidance it provided on the subject in 2011, the Division clarified that its assessment for determining whether the issuer has demonstrated “good cause” for a waiver “focuses on how the conduct that gave rise to the ineligibility relates to the reliability of the issuer’s current and future disclosure and, if it does, what steps the issuer has taken to remediate any deficiencies.”<sup>4</sup> In particular, the Division will consider the following factors:

1. **Nature of the Violation:** The Division will consider:
  - whether the violation or conviction that gave rise to the registrant’s “ineligible issuer” status was disclosure-related or implicates “the ability of the issuer to produce reliable disclosure currently and in the future”<sup>5</sup>; and
  - whether the conduct involved a criminal conviction or scienter-based violation, or a civil or administrative non-scienter based violation.
  
2. **Who Was Responsible for the Violation:** The Division will consider:
  - the rank of the individuals responsible for the violation (*i.e.*, whether those responsible were officers or directors of the WKSI parent or were lower level employees of a subsidiary); and
  - whether the WKSI parent was aware of the misconduct or whether senior officers at the WKSI parent ignored any red flags regarding the misconduct.

The Division will assign more weight to this factor “if individuals involved with, or with influence over, the issuer’s disclosure were participants in or knew or should have known about the misconduct resulting in ineligibility, as this may call into question the reliability of the issuer’s current and future disclosure.”<sup>6</sup>
  
3. **The Duration of the Misconduct:** The Division will look at whether the violation occurred over the course of years or was an isolated incident.
  
4. **Remedial Measures Taken:** The Division will consider:
  - what remedial measures the issuer has instituted as a result of the misconduct, and in particular, whether the issuer has made key changes in the personnel involved in the misconduct, improved training, and/or enhanced internal controls and disclosure controls and procedures; and

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<sup>4</sup> “Revised Statement on Well-Known Seasoned Issuer Waivers.” Since the Division issued its original statement on WKSI waivers on July 8, 2011, the Division granted 17 out of 17 waiver requests.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

- whether the remedial measures taken by the issuer are likely to “prevent a recurrence of the misconduct and mitigate the possibility of future unreliable disclosure.”<sup>7</sup>

In its analysis of this factor, the Division will focus on the relationship between the issuer’s remedial measures and its ability to produce reliable disclosure.

5. **Impact of Waiver Request Denial:** The Division will examine whether the issuer’s loss of WKSI status:

- would result in a disproportionate hardship to the issuer, in light of the nature of the issuer’s violation or conviction; or
- would negatively impact “the markets as a whole and the investing public, in light of the issuer’s significance to the markets and its connectedness to other market participants.”<sup>8</sup>

The Division stressed that its determination regarding whether a waiver would be consistent with the public interest and the protection of investors requires a review of all the relevant facts and circumstances; no single factor is determinative. The burden is on the issuer to demonstrate, based on the framework applied by the Division, that “the conduct that gave rise to the violation, and the facts and circumstances as they currently exist, do not affect its ability to produce reliable disclosure and that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”<sup>9</sup>

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If you have any questions or would like additional information, please do not hesitate to contact [Yafit Cohn](#) at (212) 455-3815 or [yafit.cohn@stblaw.com](mailto:yafit.cohn@stblaw.com), or any other member of the Firm’s Public Company Advisory Practice.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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