

FINRA Implements Same-Day Clearance Process of Shelf Registration Statements

March 4, 2010

Background

The Financial Industry Regulatory Authority's (**FINRA**) Corporate Financing Department is responsible for the pre-offering review of registered offerings of securities for compliance with FINRA's regulations governing, among other items, a FINRA member's (**Member**) compensation and other offering terms and arrangements. Traditionally, for issuers that are subject to FINRA review, in order for a shelf takedown^[1] offering to be completed in compliance with FINRA Rule 5110 (the **Corporate Financing Rule**), a participating Member must rely on FINRA's prior issuance of a "**conditional no objections**"^[2] opinion with respect to the base prospectus. Following the offering takedown, the Member is then also required to obtain a "**415 no objections**"^[3] opinion from FINRA regarding the offering terms and arrangements set forth in the final prospectus supplement.

Since September 2008, the financial markets have been extremely volatile causing many issuers' market capitalizations to fall and, therefore, subjecting such issuers to FINRA's Corporate Financing Rules and related review process (*i.e.*, due to the decrease in such issuer's market capitalization, it no longer satisfies the exemption available under the Corporate Financing Rule, which is based, in part, on an issuer's public float). Accordingly, since September 2008, FINRA has received a significantly greater number of shelf takedown offering submissions, placing a greater burden on FINRA and causing a delay in the review and approval process for a number of such offerings.

Therefore, in an effort to address this increased volume and the associated timing issues related to shelf takedown offerings, FINRA has announced that, effective March 1, 2010, a new "*Same-Day Clearance Option*" is available to issuers and Members. For transactions on tight timelines, this modification to FINRA's existing method of review will, of course, prove to be particularly helpful.

Same-Day Clearance Methods

There are three avenues available for issuers and Member offering participants to take advantage of the Same-Day Clearance Option, which are as follows:

(A) Base Filing Only

As with the traditional FINRA approval process, a "conditional no objections" opinion on the base prospectus will still be required prior to the submission of a takedown request or the completion of a shelf takedown itself.[\[4\]](#) Previously, issuer's counsel would typically file the registration statement with the base prospectus via FINRA's COBRADesk[\[5\]](#) website (**COBRADesk**) for review and approval by FINRA, which would typically take anywhere from a few days to a number of weeks to complete. Often, this delay would prevent Members from beginning their marketing process and the consummation of the offering itself.

Under the new Same-Day Clearance process, however, *either* the issuer, issuer's counsel or member's counsel may make the base prospectus submission via COBRADesk (together with the appropriate representations required with this filing). Following the successful submission to the Corporate Financing Department, an *immediate* conditional no objections opinion will be issued by FINRA.[\[6\]](#)

(B) Takedown Filing

Traditionally, the takedown request has been submitted by the Member's counsel following the receipt of the conditional no objections opinion (by the issuer) and within one (1) business-day following the filing of the final prospectus supplement with the Securities and Exchange Commission (the **SEC**). The assigned FINRA reviewer(s) would then review, among other items, the underwriter's/placement agent's compensation, terms and arrangements. Obtaining the 415 no objections opinion from FINRA could, again, typically take anywhere from a few days to a month or more.

Under the new the Same-Day Clearance Option, *either* the same counsel that submitted the original base prospectus or new counsel can submit the takedown request. Counsel making the takedown request will be required to make a few additional representations and provide the terms and name the Member(s) participating in the offering. Following the successful submission of the takedown request to the Corporate Financing Department via COBRADesk, an *immediate* 415 no objections opinion will be issued by FINRA.

(C) Concurrent Base and Takedown Filing

For an offering that is eligible for Same-Day Clearance, FINRA is also providing a Same-Day Clearance Option for “concurrent” filings. Under this filing method, counsel may now simultaneously make the representations and provide the information required for each of the base prospectus filing and the takedown request filing in one submission. Following the successful submission of a “concurrent” filing, FINRA will immediately issue both the conditional no objections and 415 no objections opinions.

Importantly and of *tremendous benefit* is the fact that this “concurrent” filing and approval process can be completed before the final offering terms are determined and prior to the filing of the final prospectus supplement with the SEC, further cutting down the timeframe in which FINRA approval may be obtained.[\[7\]](#)

As with the traditional approach, the Same-Day Clearance process will still require compliance with FINRA’s rules, including, without limitation, the restrictions relating to conflicts of interest (NASD Rule 2720) and underwriting terms and arrangements (FINRA Rule 5110(f)). In addition, the Same-Day Clearance Option is provided only if the aggregate Member’s compensation does not exceed eight percent (8%) of the gross proceeds to be raised.

It should also be noted that, in all of the above-referenced Same-Day Clearance methods, FINRA will conduct a post-clearance review of the representations made, to ensure that the compensation terms of the Member(s) are compliant with FINRA's rules and that the disclosure and other items are properly set forth in the offering documents and provided in the COBRADesk submission, as the case may be.

What Effect Will the Same-Day Clearance Option Have on Issuers and Members?

Issuers and Members involved in shelf takedown offerings that are subject to FINRA review, especially those transactions conducted under tight timelines, should consider taking advantage of this new, expedited approval process.

This constructive alteration by FINRA of its review and approval process should prove to be an invaluable tool for all offering participants, and will relieve the stress of not knowing if FINRA approval will come in time to market a transaction or announce an offering. Accordingly, with this change, issuers will be better able to take advantage of market conditions when they prove amenable to an offering, and will better position Members to market and consummate an offering without the time constraints presented by the traditional FINRA approval process.

Simply stated, this change is welcome and should be positively viewed by all parties involved in shelf takedown offerings.

[\[1\]](#) A shelf take-down is the sale or transfer of stock pursuant to Rule 415 of the Securities Act of 1933, as amended, which was registered on a registration statement and previously declared effective by the Securities and Exchange Commission.

[\[2\]](#) A "conditional no objections" opinion is the notice issued by FINRA following submission of the issuer's registration statement with base prospectus by or on behalf of such issuer and FINRA's subsequent review and approval of this document.

[3] A “415 no objections” opinion is the notice issued by FINRA following submission of the final prospectus supplement by either the issuer’s or Member’s counsel, which such 415 no objections opinion will approve of the final offering terms and arrangements and the Member’s offering related compensation.

[4] This does not apply to same-day clearance of “concurrent” base and takedown requests, which is discussed later in this article.

[5] COBRADesk – acronym for Corporate Offerings Business & Regulatory Analysis - is a web-based application that allows filers (issuers, members or their counsel) to electronically transmit public offering information (“filings”) for review to the Corporate Financing Department of FINRA.

[6] The filing fee required to be paid on the entire base prospectus is still required under either the traditional or same-day clearance method.

[7] Once each of the (i) underwriting/placement agent agreement is completed and (ii) the final prospectus supplement is filed with the SEC, counsel must submit each document to FINRA via COBRADesk within one business day thereafter.