



Implications of SEC's Revised "WKSI-Waiver" Guidance

Apr 17, 2014

Reading Time : 4 min

WKSI Waivers

Well-known seasoned issuers, or WKSIs, are a category of issuers consisting of the largest, most actively traded and widely followed public companies. WKSIs are afforded maximum flexibility under U.S. securities laws, including, most notably, the ability to file automatically effective shelf registration statements. As a result, a WKSI is able to conduct registered offerings of debt and equity securities without the delay associated with SEC review. A company that would otherwise qualify as a WKSI can lose this preferred status, however, if it or one of its subsidiaries violates the anti-fraud provisions of the federal securities laws, thereby becoming an "ineligible issuer." Rule 405 under the Securities Act permits such an issuer to request a waiver of its 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."

Revised Guidance

The SEC's primary focus in considering a WKSI waiver request is whether the conduct giving rise to the ineligibility indicates that the issuer's current and future disclosure may be unreliable, in which case permitting the issuer to file automatically effective registration statements (without SEC review) would be inappropriate. The SEC will examine whether the misconduct (i) related to the disclosures of the issuer or its subsidiaries or otherwise calls into question the ability of the issuer to produce reliable disclosures going forward and (ii) was criminal or scienter-based. The SEC will also consider the additional factors set forth below, none of which will be individually dispositive in its review:

- *Responsibility for, and Duration of, the Misconduct.* The SEC will focus on whether the misconduct was perpetrated by officers, directors or employees of the WKSI

parent itself or by personnel of a subsidiary. Greater isolation between the misconduct and the persons responsible for the accuracy of the WKSI parent's disclosures weighs in favor of granting the waiver. However, even if personnel of the WKSI parent are not directly implicated in the misconduct, the SEC will consider whether the WKSI's officers or directors (i.e., those responsible for the reliability of the WKSI's disclosures) knew or should have known of the misconduct, or created a corporate culture (a "tone at the top") that condoned or ignored such behavior. Misconduct persisting over a period of time may indicate a lack of effective oversight at the WKSI parent level, which could be a predictor of unreliable future disclosures.

- *Remedial Action.* The SEC will consider whether the issuer has taken appropriate measures to address the violative conduct, and whether such measures would prevent a recurrence of the misconduct. Effective remedial action, which may include terminating personnel, training and improvements in internal controls and disclosure controls and procedures, may give the SEC comfort that, despite prior infractions, the issuer's future disclosures will be reliable.
- *Impact of Denial.* The SEC will consider whether the loss of WKSI status would be a disproportionate hardship in light of the nature of the issuer's misconduct. The SEC will consider whether denial of the waiver would impact the markets as a whole and the investing public, in light of the issuer's significance and its connections to other market participants.

Comparison to Prior Guidance

The SEC's prior guidance, issued in July 2011, considered many of the same factors, but in a more regimented fashion. Under the prior guidance, the SEC initially considered two threshold factors: first, whether the applicable violation stemmed from the issuer's own disclosures about itself; and second, whether the violation was scienter-based. If the violation did not involve the issuer's own disclosures, the SEC indicated a waiver would likely be granted, even if the offense was scienter-based. If the violation involved the issuer's disclosures and was scienter-based, the SEC indicated the requested waiver would likely be denied. Finally, if the violation stemmed from the issuer's own disclosures but was not scienter-based, the SEC would consider additional factors, namely (i) the remedial steps taken by the issuer, (ii) the pervasiveness and timing of the conduct and (iii) the impact that denial of the waiver would have on the issuer and the markets as a whole. Clearly the components of the SEC's evaluation are similar under both the updated and prior guidance. Under the new approach, however, the SEC no longer considers, as threshold matters, whether the violation

stemmed from the issuer's disclosures or was scienter-based and, as a result, the additional considerations (e.g., remedial actions taken) will be analyzed in all cases.

Implications for the Preparation of WKSI Waiver Requests

Under the SEC's prior guidance, a WKSI holding company could take relative comfort that it would be granted a WKSI waiver following misconduct by a subsidiary that did not impact the disclosures of the WKSI parent, even if the misconduct were scienter-based. In such cases, the issuer's waiver request would often, in relatively perfunctory fashion, merely assert that the relevant misconduct did not affect the WKSI parent's disclosures and cite the severe and disproportionate impact that would result from denial of the waiver (see, for example, [here](#), [here](#) and [here](#)). Under the prior guidance, issuers would commonly only address the additional considerations (i.e., remedial steps, pervasiveness and timing) in cases involving non-scienter-based misconduct that affected the issuer's own disclosures (see, for example, [here](#), [here](#) and [here](#)). Through its revised guidance, the SEC appears to have rejected the former approach under which certain aspects of the underlying violation were analyzed as threshold issues, with the result of such analysis impacting the extent to which additional factors were considered. Therefore, issuers will need to be certain to craft comprehensive waiver requests that address all of the considerations raised by the SEC, regardless of the nature of the underlying misconduct.

Categories

Capital Markets

© 2025 Akin Gump Strauss Hauer & Feld LLP. All rights reserved. Attorney advertising. This document is distributed for informational use only; it does not constitute legal advice and should not be used as such. Prior results do not guarantee a similar outcome. Akin is the practicing name of Akin Gump LLP, a New York limited liability partnership authorized and regulated by the Solicitors Regulation Authority under number 267321. A list of the partners is available for inspection at Eighth Floor, Ten Bishops Square, London E1 6EG. For more information about Akin Gump LLP, Akin Gump Strauss Hauer & Feld LLP and

other associated entities under which the Akin Gump network operates worldwide, please see our Legal Notices page.