

## Securities Regulation Daily Wrap Up, CORPORATE FINANCE—CorpFin issues policy statement on granting disqualification waivers, (Mar. 13, 2015)

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By John M. Jascob, J.D.

The SEC's Division of Corporation Finance issued a policy statement today concerning the factors it will consider in granting waivers from regulatory disqualification under Regulation A and Rules 505 and 506 of Regulation D. The policy statement follows SEC Chair Mary Jo White's speech yesterday at Georgetown University, where she responded to criticism that the Commission has routinely granted such waivers without rigorous analysis.

**Factors considered in waiver requests.** The policy statement notes that the relevant disqualification provisions of Regulation A and Regulation D prevent bad actors from taking advantage of safe harbors that facilitate private or limited offerings of securities. As investors in these offerings do not receive the protections afforded by the Securities Act's registration requirements, the Division's analysis will focus on how the misconduct bears on the applicant's fitness to participate in these exempt offerings.

Parties seeking a waiver must submit a waiver request addressing the factors outlined in the policy statement and describing why a waiver should be granted. The party seeking a waiver bears the burden of establishing such justification. The Division will continue to ask, where appropriate, that the recipient of a waiver provide disclosure about the disqualifying event to investors before any future sales occur in offerings made under Regulation A or Rules 505 or 506 of Regulation D.

**Responsible persons.** Specifically, the Division will consider who was responsible for the identified misconduct and what role the bad actors had with respect to the party seeking the waiver. For example, the Division would consider it a negative factor if the party seeking the waiver from disqualification is the same person as the party responsible for the misconduct. Similarly, the Division would consider it a negative factor if the individual who committed the misconduct, such as an executive officer, director, or control person, continues to influence the operations of the entity seeking the waiver.

If the party seeking the waiver disregarded warning signs, condoned or did not address the misconduct, or obstructed the investigation, then those factors would also weigh against granting a waiver. Depending on the circumstances and the conduct at issue, however, the Division would generally view favorably actions by an applicant to remove the individuals responsible for the misconduct or terminate its association with them.

**Remedial steps.** The Division would also consider what remedial measures have been taken by the waiver applicant to address the misconduct, when those remedial measures began, and whether those measures are likely to prevent a recurrence of the misconduct. For example, the Division would examine whether there have been subsequent changes in control, whether the bad actors still remained employed by the applicant, and whether the applicant has taken steps to improve training or has made improvements to its policies, procedures, or practices. The Division's analysis of the importance of these remedial steps would focus on how they relate to the party's ability to prevent future misconduct and harm to investors, clients, or customers.

**Impact of denial.** In addition, the Division would consider the severity of the impact on the issuer or third parties, such as investors, clients, or customers, if the waiver request is not granted. The Division would weigh any such impact against the facts and circumstances relating to the misconduct to assess whether disqualification would be a disproportionate hardship in the light of the parties involved in, and the nature of, the misconduct. Applicants should submit information concerning whether or how often they have used the relevant exemption in the past, or how they plan to use the exemption in the future, and explain why a waiver is needed.

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