

SEC Staff Limits Ability of Foreign Issuers to Submit Draft Filings on Confidential Basis

December 13, 2011

The staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission announced it is limiting the ability of foreign issuers to submit draft initial registration statements and amendments for review by the staff on a confidential basis.

On December 8, 2011, the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC) announced that, effectively immediately, it was limiting the ability of foreign issuers to confidentially submit draft initial registration statements and amendments for review by the staff.

Under the revised policy, foreign issuers will have to fall under one of four enumerated categories described below in order to submit an initial registration statement for review on a confidential basis. This represents a further curtailment of the staff's confidential review policy for foreign private issuers. In March 2001, the staff revised its former policy of permitting foreign private issuers to submit all registration statements for staff review in draft form on a confidential basis and began only accepting for review on a confidential basis draft registration statements in connection with a registrant's initial registration with the SEC.

The confidential review procedure allows the staff to review and comment on disclosure and the issuer to respond to staff comments before a filing is made with the SEC electronically via EDGAR and made available on the SEC's website. However, during the confidential review process, because the registration statement is not "filed" under the Securities Act of 1933, as amended, no offers of securities can be made in the United States. The ability to submit draft registration statements on a confidential basis has historically been viewed by foreign issuers considering accessing U.S. capital markets as a significant advantage because they are able to keep their intentions, as well as their financial and other information, out of public view until they are ready to take their offering on the road and meet potential investors, at which time they file via EDGAR.

The staff said the revised policy was needed in order to "promote transparency and investor protection." The new policy comes on the heels of the recent announcement by the staff that its goal will be to publicly release staff comment letters and response letters relating to disclosure filings reviewed by the Divisions of Corporation Finance and Investment Management no earlier than 20 business days following the completion of a filing review, instead of the current 45 days.

Under the new confidential review policy, the staff will review initial registration statements of foreign issuers that are submitted on a confidential basis only where the registrant is a:

- Foreign government registering its debt securities
- Foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange
- Foreign private issuer that is being privatized by a foreign government
- Foreign private issuer that can demonstrate the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction

The staff has indicated that even if a submission falls within one of the above four categories, circumstances may develop in which the staff will request a foreign issuer to publicly file its registration statement. Examples of these circumstances include a competing bid in an acquisition transaction or publicity about a proposed offering or listing. Further, shell companies, blank check companies and issuers with no, or substantially no, business operations (such as special purpose acquisition companies, or SPACs) will not be permitted to use the confidential submission procedure.

Confidential submissions that were received by the staff before December 8, 2011, but do not come within one of the above categories, will continue to be reviewed by the staff without a public filing. However, the subsequent draft of the registration statement, whether in response to comments issued by the staff or otherwise, must be filed on the EDGAR system.

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