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A cross-border legal update from Dechert's Corporate and Securities Group

New SEC Policy Limits Non-Public Submissions from Foreign Private Issuers

Background

The staff of the Division of Corporate Finance (the "Staff") at the Securities and Exchange Commission (the "SEC") on December 8, 2011 changed its policy concerning the review of registration statements filed by foreign private issuers.¹ The Staff announced that, effective immediately, it was limiting the ability of foreign private issuers to make confidential submissions of registration statements in connection with their initial public offerings and initial listings.²

As part of a long standing policy, the Staff allowed foreign private issuers and foreign governments to submit registration statements (and amendments) for initial public offerings and initial registrations on a confidential basis. Under the previous policy, the Staff would review and comment on the registration statement on a confidential basis and seek to resolve significant issues before such registration statement became publicly-available on the SEC's EDGAR Internet site.

¹ Under SEC rules, a "foreign private issuer" is an issuer incorporated or organized under the laws of a foreign country, unless (x) more than 50% of its outstanding voting securities are directly or indirectly held of record by U.S. residents; and (y) any of the following applies: (i) the majority of its executive officers or directors are U.S. citizens or residents, (ii) more than 50% of its assets are located in the U.S. or (iii) its business is administered principally in the U.S.

² The new SEC policy is available at <http://www.sec.gov/divisions/corpfin/internet/nonpublicsubmissions.htm>.

Revised Policy

Under the new policy, the Staff will now review initial registration statements of foreign issuers on a confidential basis only in the following limited circumstances:

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

In addition, under the new policy, shell companies, blank check companies and issuers with no or substantially no business operations (including, for example, special purpose acquisition companies) will not be permitted to take advantage of the non-public submission procedure.

In its announcement, the Staff also noted that it may require a foreign issuer to publicly file its registration statement even if it is generally eligible for confidential review under the new policy. The Staff provided the following two examples of such circumstances: a competing bid in an acquisition transaction or publicity about a proposed offering or listing.

Reasons for New Policy

The Staff stated that the change in policy is intended to “promote transparency and investor protection.” The Staff noted that historically a majority of foreign private issuers registering securities with the SEC had or were having their securities traded on a foreign securities exchange, and the foreign market generally did not require public disclosure of the registration statement before its review was completed. In recent years, however, the vast majority of foreign issuers using the SEC’s non-public review process did not have securities trading outside the U.S. and were not contemplating a non-U.S. listing.

Impacts of New Policy

The Staff will continue to review a foreign issuer’s registration statement on a non-public basis if it was submitted prior to December 8. However, the foreign issuer will be required to publicly file the next draft of the registration statement on EDGAR, unless it falls within one of the exceptions listed above.

A foreign issuer contemplating initial registration with the SEC should consider whether it will be eligible for the non-public submission process under the new

policy. If it will not be eligible, the foreign issuer should review and discuss with its advisors the requirements and implications of the public filing process.

A foreign issuer that appears to be eligible for the confidential review process under the new policy should remember that, as discussed above, the Staff may require a registration statement to be publicly filed even though it is eligible for confidential review. Although two examples of such circumstances were included in the Staff’s announcement, it is otherwise unclear whether and when the Staff will invoke this aspect of the new policy. Foreign issuers should also keep in mind that the Staff has indicated that it will continue to assess the foreign issuer submission process and may make changes to its policy in the future.

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