

## SEC Limits its Non-Public Review Policy for Non-U.S. Issuers

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On December 8, 2011, the [Division of Corporation Finance](#) of the [U.S. Securities and Exchange Commission](#) significantly limited its policy of allowing non-U.S. issuers to submit initial drafts of registration statements (initial public offering or other first-time registration statements) on a “draft” confidential basis. The policy had previously allowed many non-U.S. issuers to avoid the public scrutiny of a public filing of their initial registration statement (including Staff comments) that comes along with filing through the EDGAR system. **Effective immediately**, however, initial review of non-U.S. issuer registration statements on a non-public basis will be available only where the issuer is:

- a foreign government registering its debt securities;
- a foreign private issuer that is listed or is 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.

The Staff also indicated that shell companies, blank check companies and issuers with no or substantially no business operations will not be eligible for non-public submission of their registration statements. It is important to note, as the Staff cautioned, that under certain circumstances, even those companies which otherwise fall into one of the four qualifying categories above may *not* receive non-public confidential treatment. The Staff did not provide any specific guidance, but does give the examples of a competing bid in an acquisition transaction or publicity about a proposed offering or listing.

Although the new policy is effective immediately, non-public submissions that do not fall within one of the qualifying categories and that were received by the Staff prior to December 8, 2011 will continue to be reviewed by the SEC without a public filing. However, those companies should be aware that any subsequent amendment to the registration statement will not enjoy the non-public treatment and must be filed on the EDGAR system.

The change of policy, notes the Staff, is due to the trend of a vast majority of foreign private issuers listing their securities exclusively on a U.S. securities exchange, as opposed to both a foreign and U.S. security exchange. As a result, the former rationale that these companies should not be subjected to public disclosure of their registration statement before completion of review, as required by the U.S., while their foreign market did not require such disclosure, no longer makes sense as the general policy.



These new registration limitations on foreign private issuers follow the Staff's approval last month of new restrictions on listing standards for companies that have effected reverse mergers. The Staff seems very focused on heightening disclosure standards for foreign private issuers and making their entry into the U.S. capital markets more rigorous and "safe" for investors. Non-U.S. issuers (even those that have already started the registration process) now have additional concerns and considerations prior to entering the U.S. capital markets, including their eligibility for the non-public review process, and the implications of filing if not so eligible, and should plan accordingly.

The SEC's statement on Non-Public Submissions from Foreign Issuers can be found at <http://www.sec.gov/divisions/corpfm/internatl/nonpublicsubmissions.htm>.

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