

ClientAlert

December 14, 2011

SEC Sets New Limits on Confidential Submissions of Registration Statements by Foreign Private Issuers

On December 8, 2011, the staff of the Securities and Exchange Commission (the “SEC”) revised its policy of allowing foreign private issuers to submit drafts of their initial registration statements under the Securities Act of 1933 or the Securities Exchange Act of 1934 for review on a confidential basis. The revised policy is intended to “promote transparency and investor protection” and takes effect immediately.

Prior to the revised policy, the SEC allowed all first-time foreign private issuer registrants to submit draft registration statements and amendments thereto on a confidential basis for review by the staff. This accommodation enabled foreign private issuers to respond to any SEC disclosure and accounting comments on their submissions without public scrutiny before making the registration statement publicly available through filing. This flexibility has been particularly beneficial for companies that are already reporting or becoming public in their home jurisdictions.

In response to a trend of foreign private issuers using the confidential review process without a listing of securities outside the United States, the SEC staff decided to limit the availability of the confidential review. Under the staff’s revised policy, confidential submissions will only be permitted to the extent the foreign private issuer:

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

All other foreign private issuers registering for the first time with the SEC must publicly file their registration statements and related amendments via the SEC’s EDGAR system.

Any non-public submission made prior to December 8, 2011, by a foreign private issuer not falling within one of the above categories will continue to be reviewed by the SEC without the need for a public filing. However, any subsequent amendment to the registration statement (whether in response to SEC comments or otherwise) must be filed publicly.

In its release, the SEC staff noted that circumstances, such as a competing bid in an acquisition transaction or publicity about a proposed offering or listing, may develop under which the staff will request a foreign private issuer to publicly file its registration statement even if it falls within the parameters of the revised policy. The SEC staff also indicated that it will continue to assess use of the procedure and may make additional changes in the future and reminded foreign private issuers that non-public registration statements must be complete when submitted to the staff for review. It also established a dedicated e-mail, oicf_fpi_submissions@sec.gov, for the receipt of all draft registration statements and other submitted materials under these procedures.

The revised policy should not affect the registration process for foreign private issuers that are already public or going public in their home jurisdictions. However, the revised policy will impact foreign private issuers that are not listed on any non-U.S. securities exchange and that wish to list exclusively in the United States, given that the initial registration statement must now be filed publicly with the SEC and all SEC comment letters and responses thereto will become publicly available.

A copy of the SEC's revised policy on confidential submissions by foreign private issuers may be found at www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

Corporate

New York

Carlos T. Albarracín
+1 (212) 408-1081
calbarracin@chadbourne.com

Charles E. Hord, III
+1 (212) 408-5353
chord@chadbourne.com

Edward P. Smith
+1 (212) 408-5371
esmith@chadbourne.com

Marc A. Alpert
+1 (212) 408-5491
malpert@chadbourne.com

Peter K. Ingerman
+1 (212) 408-5422
pingerman@chadbourne.com

Kevin C. Smith
+1 (212) 408-1092
ksmith@chadbourne.com

Nilo J. Barredo
+1 (212) 408-5285
nbarredo@chadbourne.com

Sey-Hyo Lee
+1 (212) 408-5122
shlee@chadbourne.com

London
Claude S. Serfilippi
+44 (20) 7337-8030
cserfilippi@chadbourne.com

A. Robert Colby
+1 (212) 408-5571
rcolby@chadbourne.com

Jonathan M.A. Melmed
+1 (212) 408-1002
jmelmed@chadbourne.com

Washington
Dana Frix
+1 (202) 974-5691
dfrix@chadbourne.com

William Greason
+1 (212) 408-5527
wgreason@chadbourne.com

J. Allen Miller
+1 (212) 408-5454
amiller@chadbourne.com

Sean P. McGuinness
+1 (202) 974-5680
smcguinness@chadbourne.com

Morton E. Grosz
+1 (212) 408-5592
mgrosz@chadbourne.com

Marc M. Rossell
+1 (212) 408-1057
mrossell@chadbourne.com

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