

December 8, 2011

## SEC Further Limits Confidential Submissions by Foreign Private Issuers

On December 8, 2011, the staff (the "Staff") of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the "SEC") announced a new policy that limits the ability of foreign private issuers to submit registration statements (and amendments) to the SEC on a confidential basis. The new policy will have its most significant impact on issuers that go public via an initial public offering in the United States without listing concurrently on an exchange outside the United States.

**Prior policy.** In contrast to U.S. issuers, foreign private issuers registering for the first time (*i.e.*, on Form F-1 (for an initial public offering), on Form F-4 (for an exchange offer in connection with an acquisition or following an offering of debt securities under Rule 144A) or on Form 20-F (for a listing with no accompanying public offering)) could generally submit registration statements to the Staff on a confidential basis. This policy was itself a modification of an earlier approach that allowed all registration statements filed with the SEC by foreign private issuers to be filed on a confidential basis.

This confidential submission process allows the Staff to review the disclosure, and the issuer to respond to Staff comments and resolve any complicated issues, before a public filing is made. In effect, by submitting confidentially, foreign private issuers are able to prepare to access the U.S. public markets without publicly revealing their intentions until they are ready to launch the offering. Confidential submissions, however, do not constitute the filing of a registration statement under the U.S. Securities Act of 1933, and thus no offers of securities can be made in the United States until a registration statement is publicly filed with the SEC via the EDGAR system.

**New policy.** Beginning December 8, the Staff will review initial registration statements of foreign issuers that are submitted on a non-public basis 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.

To promote transparency, shell companies, blank check companies and issuers with no, or substantially no, business operations will not be able to make confidential submissions. In

addition, as noted above, foreign private issuers that choose to go public via a listing and offering only in the United States will not be able to make a confidential submission to the SEC of the initial registration statement or any amendments prepared in response to Staff comments or otherwise. The new policy will affect a number of Chinese companies, as well as companies in certain industries, such as shipping, that choose to go public only in the United States.

**Special circumstances.** The Staff has stated that in certain circumstances (including where there is a competing bid in an acquisition transaction or where there is publicity about a proposed offering or listing), the Staff may request a foreign issuer to publicly file its registration statement even though the issuer would be permitted to submit confidentially under the general parameters of the policy.

**Procedure.** The Staff urges foreign issuers to contact the Division's Office of International Corporate Finance prior to any confidential submission under the new policy.

**Confidential submissions made before December 8.** The new policy will not apply to confidential submissions made before December 8, but it will apply to subsequent amendments of those submissions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to the Paul, Weiss Securities Group.

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