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SEC MODIFIES POSITION WITH RESPECT TO
CONFIDENTIAL REVIEW OF SEC FILINGS

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In a statement released at the end of April, the SEC's Division of Corporation Finance announced that the Division's Staff was modifying its position with respect to the confidential review of certain SEC filings made by foreign issuers.

Traditionally, the Staff has accepted for confidential review any registration statements filed by foreign issuers in connection with capital raising activities (on Forms F-1, F-2 and F-3), registration statements used in connection with public company acquisitions using stock (on Form F4) and registration statements used to list securities in the United States (on Form 20-F). This procedure enables foreign issuers to have their registration statements reviewed, and responses to comments addressed, by the SEC without the markets knowing a filing has been made. Such issuer's US counterparts generally must file their registration statements publicly. Public filings may be accessed by any interested party, and those that have access to subscription services or other notifications will be aware of a filing promptly after it has been made and will be able to retrieve copies of the filing. This will be the case even though the SEC has not yet commented on the registration statement.

Under its new policy, the Staff will continue to review on a confidential basis any registration statements filed in connection with a foreign issuer's initial registration with the SEC. However, in a departure from past practice, once the foreign issuer has registered a transaction under the Securities Act (in connection with a public offering or a public company acquisition), or has registered a class of securities in connection with a stock exchange listing, the Staff will no longer review subsequent registration statements on a confidential basis. The Staff has indicated that this new policy will apply "except in unusual circumstances." Such circumstances were not specified by the Staff.

The Staff has indicated in prior statements that it was considering whether filings made by foreign issuers would have to be in electronic format (as is the case for US issuers). The announcement regarding confidential review does not alter the current position that foreign issuers may continue to make paper filings.

As under past practice, registration statements submitted for confidential review should be complete (including a signed audit report). In addition, the SEC's Office of International Corporate Finance should be contacted in advance of any confidential submission.

Non-US issuers accessing the public US markets for the first time will not be impacted by the change. Those issuers that might be considering a listing to be followed by an acquisition or a public offering will not be able to take advantage of the confidential review system for the registration of their subsequent transactions, and to the extent confidential review is important may wish to consider the sequencing of their filings. Similarly, non-US issuers undertaking follow-on offerings will not be able to use the confidential review system.

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This memorandum provides only a general overview of the SEC's modified position with respect to confidential review of SEC filings. It is not intended to provide legal advice, and no legal or business decision should be based on its contents.

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