

June 6, 2012

SEC Staff Issues Updated Guidance on Confidential Submissions by Foreign Private Issuers

On May 30, 2012, the staff (the "Staff") of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the "SEC") revised its policy relating to confidential submissions to the SEC by foreign private issuers in connection with their initial registration of securities (the "FPI Procedure"). Under the revised policy, eligible foreign private issuers that take advantage of the FPI Procedure will be required at the time they publicly file their registration statements to publicly file their previously submitted draft registration statements (and any amendments) and resubmit issuer response letters to Staff comments.

This revised policy applies to draft submissions first made after May 30, 2012.

Prior policies. In contrast to U.S. issuers, foreign private issuers registering securities 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)) have been able to submit their registration statements to the Staff for review on a confidential basis. This policy has allowed the Staff to review the disclosure, and the issuer to respond to Staff comments and resolve any issues, before a public filing is made. In effect, by submitting confidentially, foreign private issuers have been able to prepare to access the U.S. public markets without publicly revealing their intentions until they are ready to launch the offering.

Years ago this policy covered all SEC registration statements of foreign private issuers. In December 2011, the Staff reduced the scope of the policy by in effect allowing only those foreign private issuers with an existing offshore listing or those that are obtaining an offshore listing concurrently to avail themselves of the confidential submission option.

New policy. Beginning May 30, 2012, the Staff will continue to review initial registration statements of eligible foreign private issuers that are submitted on a non-public basis. However, these confidential submissions will be made public at the time the foreign private issuers publicly file their registration statements. (As before, Staff comment letters and issuer responses generally will be made publicly available no earlier than 20 business days following the effective date of the registration statement.)

The Staff changed its policy to align it with the confidential registration statement review procedure that became available to all issuers, including foreign private issuers, that qualify as emerging growth companies under the Jumpstart Our Business Startups Act (the "JOBS Act").

Procedures. Confidential submissions under both the JOBS Act and under the FPI Procedure must be made in the same manner through a secure e-mail system of the SEC. Issuer's counsel intending to rely on the FPI Procedure should contact the Office of International Corporate Finance in advance.

Foreign private issuers that qualify as emerging growth companies and who are also eligible to use the FPI Procedure will need to choose which route to use.

The confidential registration statement review procedure under the JOBS Act is not available for filings under the U.S. Securities Exchange Act of 1934 (the "Exchange Act"). In contrast, the Staff will review confidentially the initial registration statements on Form 20-F (an Exchange Act form) of eligible foreign private issuers under the FPI Procedure.

If foreign private issuers choose to use the FPI Procedure, they will not be able to avail themselves of any of the benefits available to emerging growth companies. If foreign private issuers choose to be treated as emerging growth companies, they will be able to take advantage of all the benefits afforded to emerging growth companies, but they must file their confidential submissions publicly at least 21 days before the roadshow for their offering.

Key benefits available to emerging growth companies include:

- the ability to engage in pre-IPO marketing communications to determine potential interest in the IPO;
- the ability to include only two (instead of three) years of audited financial information (with only two years of MD&A comparisons) and only two (instead of five) years of selected financial data in the registration statement (under a separate SEC accommodation, first time foreign registrants that elect to prepare financial statements under U.S. GAAP may also provide two years of audited financial information and MD&A comparisons, but still need to present five years of selected financial data under home-country GAAP);
- the ability for underwriters to engage in pre-deal and expanded post-deal research on the company; and
- a delay for up to five years in complying with the requirement to provide an auditor's attestation under Section 404(b) of the Sarbanes-Oxley Act.

Other considerations. Draft registration statements submitted confidentially must be complete. Issuers should expect to receive comments as they would on any other initial registration statement (i.e., typically within 30 days).

Confidential submissions, whether under the JOBS Act or under the FPI Procedure, 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.

The Staff reminded issuers that circumstances may develop in which the Staff will request that a registration statement confidentially submitted under the FPI Procedure be publicly filed before the issuer would otherwise be prepared to publicly file it. The Staff cited the launch of a competing public bid or publicity about a proposed public offering or listing as warranting termination of confidential treatment of a registration statement filed under the FPI Procedure.

Finally, we note that the Staff has reserved the right to continue to assess the FPI Procedure and make changes in the future. We also note that the Staff has stated in recent months that it is reviewing additional foreign private issuer accommodations, particularly as they apply to foreign private issuers that have no non-U.S. listing. It would not be unreasonable to expect changes to the Form 6-K regime, for example, for companies with no non-U.S. listings.

* * *

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:

Mark S. Bergman
+44 20 7367 1601
mbergman@paulweiss.com

Adam M. Givertz
+1 416 504 0525
agivertz@paulweiss.com

David S. Huntington
+1 212 373 3124
dhuntington@paulweiss.com

Edwin S. Maynard
+1 212 373 3024
emaynard@paulweiss.com

Tong Yu
+81 3 3597 6306
tyu@paulweiss.com

Andrew J. Foley
+1 212 373 3078
+1 416 504 0523
afoley@paulweiss.com

Christopher J. Cummings
+1 416 504 0522
ccummings@paulweiss.com

Lyudmila Bondarenko contributed to this client alert.

NEW YORK

1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING

Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG

12th Fl., Hong Kong Club Building
3A Chater Road Central
Hong Kong
+852-2846-0300

LONDON

Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO

Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

TORONTO

Toronto-Dominion Centre
77 King Street West, Suite 3100
P.O. Box 226
Toronto, ON M5K 1J3
Canada
+1-416-504-0520

WASHINGTON, D.C.

2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON

500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410