

Confidentiality No Longer Available for Many Foreign Issuer Registration Statements

by Joseph J. Kaufman

As a result of a new government policy, many foreign private issuers may no longer be able to use the confidential submission process for an initial registration statement for an offering in the United States.

On December 8, 2011, the Securities and Exchange Commission (SEC)'s Division of Corporation Finance (Division) abruptly narrowed its policy that previously allowed foreign private issuers to submit to the Division registration statements and amendments on a non-public basis in connection with their first-time registration with the SEC, permitting the Division to review and comment on disclosure, and the issuer to respond to the Division's comments, before a public filing is made. Previously, a foreign private issuer could use this confidential submission process to keep its initial public offering plans confidential and also avoid the public disclosure of a draft registration statement that was likely to change in response to the Division's review.

The New Policy

Effective December 8, 2011, the Division now requires that a foreign issuer must file its initial draft registration statement (and all amendments) on the SEC's publicly available online EDGAR system, unless the issuer falls within at least one of the following categories:

- The issuer is a foreign government registering debt securities;
- The issuer is a foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange;
- The issuer is a foreign private issuer that is being privatized by a foreign government; or
- The issuer is 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.

In addition, shell companies, blank check companies and companies with no or substantially no business operations are now ineligible to submit confidential registration statements.

In addition, even if a company is eligible for confidential submission under the new policy, the Division staff will request the company to file its draft registration statement publicly under certain circumstances. As examples only, the Division staff stated that these circumstances include a competing bid in an acquisition transaction or if there is publicity about a proposed offering or listing.

Under the new policy, any draft registration statement that was submitted confidentially before December 8, 2011 by a company that is now ineligible for confidential review will continue to be kept confidential. However, if the company submits an amendment to its registration statement in response to staff comments or for any other reason, it must file the registration statement publicly through the SEC's EDGAR system.

We do not expect the Division to grant exemptions to foreign private issuers that do not fall within the specifically enumerated categories of exceptions or are otherwise ineligible, unless there are truly extraordinary circumstances. Companies that do not expect to be eligible to use the policy should therefore assume that they will not be able to use the confidential submission process.

Some Implications

Foreign private issuers with confidential draft registration statements currently under review, or that are considering an initial draft registration statement filing, must evaluate whether they are eligible for confidential treatment under the Division's new policy. Foreign private issuers that are not eligible to use the policy will lose confidentiality over information submitted except with respect to limited portions of documents required to be submitted as exhibits to the registration statement, letters of response to SEC comments, and certain other supplemental information, to the extent these materials are eligible for the general confidential treatment procedures available to all issuers. Registration statement drafts, exhibits, and amendments filed through EDGAR will be publicly available immediately or at 6:00 AM ET on the next business day if filed after 5:30 PM ET. If the general limited confidential treatment procedures are not enough to protect the company's confidential information, it may be unable to proceed with the contemplated offering. (The SEC staff has stated that it will release any SEC comment letters and letters of response through EDGAR "no earlier than 20 business days" after the review of a filing is complete beginning January 1, 2012, down from "45 days" under the current policy. The timing in this regard would generally not affect foreign private issuers eligible to use the new policy differently from those that are not since in both cases SEC correspondence would not be made publicly available until after the review process is complete, if ever.)

Another implication of the new policy is that companies ineligible to submit draft registration statements confidentially must consider whether they are prepared to comply with the Sarbanes-Oxley Act of 2002 (SOX). Whereas some of SOX's provisions affect all companies, the majority of its provisions apply to any company that has filed a registration statement through EDGAR and has not withdrawn the registration statement, as well as companies that are registered under or required to file reports under the Securities Exchange Act of 1934. The filing of a registration statement through EDGAR therefore triggers increased liability under SOX, whereas a confidential submission of a draft registration statement under the Division's policy for foreign private issuers would not have this effect. Foreign companies should take care to have all requisite corporate governance, auditing and other SOX functions enabled before proceeding with the registration statement filing. They should also consider purchasing directors and officers liability insurance prior to the initial draft filing.

One further implication of the new policy is that even foreign private issuers that are currently still eligible to use the policy must be vigilant in monitoring their continued eligibility and avoiding circumstances that might arise in the future that could cause the Division staff to request that they publicly file their draft

registration statement. The Division staff has left a number of questions unanswered in this regard. These include the frequency with which they will review a company's continuing eligibility, and a complete description of the types of circumstances that may cause the staff to request that an eligible company publicly file a registration statement.

Final Thoughts

Foreign companies considering an initial public offering in the United States or that have submitted a confidential draft registration statement with the SEC are strongly urged to consult with experienced U.S. securities counsel to determine how to proceed under the Division's new policy.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the author below.

Joseph J. Kaufman [\(bio\)](#)
Shanghai
+86.21.6137.7921
joseph.kaufman@pillsburylaw.com

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