

SEC Staff Limits Non-Public Submission Policy

In connection with its ongoing efforts to promote transparency and investor protection, the Staff of the U.S. Securities and Exchange Commission (SEC) recently issued a statement revising its policy regarding the non-public submission of registration statements pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. Specifically, the revised policy focuses on the non-public submission by foreign private issuers (FPIs) and foreign governments (FGs) of their initial registration statements.

Registration statements for first-time public offerings and U.S. listings of securities issued by FPIs and FGs have historically been afforded atypical submission treatment, namely non-public (or confidential) submission. The policy permitting the non-public submission of initial registration statements by FPIs and FGs is an outgrowth of the SEC Staff's recognition of the unique circumstances faced by FPIs and FGs when accessing the U.S. capital markets for the first time.

Traditionally, the SEC Staff has enabled FPIs and FGs to submit their registration statements on a non-public basis in connection with their initial SEC registration. This practice permitted the SEC Staff to review and comment on disclosure, and, in turn, allowed the issuer to respond to SEC Staff comments, all prior to the filing being made public. The SEC Staff's allowance of non-public submissions was premised on the fact that (i) the majority of FPIs registering securities had securities trading on securities exchanges outside the U.S., and (ii) such markets typically did not require public disclosure of the registration statement prior to completion of the review process. Based upon its review of recent registrations, the SEC Staff concluded that most FPIs availing themselves of the SEC Staff's non-public submission treatment were not, in fact, contemplating a non-U.S. listing of their securities.

As a result of this assessment, the SEC Staff revised its policy relating to non-public submissions by limiting the instances in which initial registration statements filed by FPIs and FGs may be submitted for review by the SEC Staff on a confidential basis. Starting from December 8, 2011, foreign issuers may only submit initial registration statements on a non-public basis for SEC Staff review in the following instances:

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

FPIs and FGs that have submitted their initial registration statements on a non-public basis prior to December 8, 2011 and do not otherwise fall within one of the categories noted above have been advised by the SEC Staff that such submissions will effectively be "grandfathered" and, as such, will continue to be reviewed by the SEC without public filing. However, the SEC Staff has stated that the next draft of such "grandfathered" registration statements must be filed publicly via the EDGAR system. In addition, the SEC expressly identified shell companies, blank check companies

and issuers with no, or substantially no, business operations as barred from using the non-public submission procedure for their initial registration statements.

The SEC Staff has also instructed FPIs and FGs that the Office of International Corporate Finance of the SEC should be contacted in advance of any non-public submission relying upon the revised policy.

The SEC Staff statement on non-public submissions of registration statements can be found on the SEC website at www.sec.gov/divisions/corpfin/international/nonpublicsubmissions.htm. ♦

If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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