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SEC Confidential Review of Registration Statements After the JOBS Act

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Two recent actions have significantly altered the conditions under which the staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) will review draft registration statements on a confidential basis.

First, on December 8, 2011, the Staff significantly narrowed the availability of confidential review of draft registration statements for initial public offerings and initial listings of foreign private issuers. Confidential review is no longer available in most cases for foreign private issuers that are not listed (or in the process of listing) on an exchange outside the U.S. Confidential review remains available for a foreign government registering its debt securities.

Second, on April 5, 2012, the JOBS Act (the “Act”) became law. It provides for new confidential review procedures for registration statements of “emerging growth companies” prior to their first registered sale of common equity. Generally speaking, an emerging growth company is an issuer that has less than \$1 billion in total annual gross revenues, has not publicly or privately issued over \$1 billion in non-convertible debt securities during the prior three-year period and is not a large accelerated filer.¹

Subsequent to the signing of the Act, the SEC’s Division of Corporation Finance has provided guidance regarding (i) the continued availability of confidential review for foreign private issuers under the pre-JOBS Act procedures and (ii) confidential submission procedures.²

CONTINUED AVAILABILITY OF PRE-JOBS ACT PROCEDURES FOR ALL FOREIGN PRIVATE ISSUERS:

The Staff will continue to provide confidential review of initial registration statements of eligible foreign private issuers pursuant to the pre-JOBS Act procedures, provided that the company does not choose to take advantage of any benefit available to emerging growth companies under the Act. The benefits that an emerging growth company is most likely to find relevant are (i) the ability to engage in “testing the waters” communications to determine potential interest in an IPO, (ii) the ability to include only two years of audited financial statements and selected financial data and a similarly reduced Management’s Discussion and Analysis in its registration statement, (iii) the ability for banks to engage in pre-deal and expanded post-deal research on the company and (iv) a delay for up to five

¹ There are other requirements. For a more in-depth description of emerging growth companies and the JOBS Act in general, please see our memorandum dated April 27, 2012, entitled “The JOBS Act: Reforms to the Capital Raising Process (Updated)”, available on our website.

² “Frequently Asked Questions on Confidential Submission Process for Emerging Growth Companies”, April 10, 2012, at <http://www.sec.gov/divisions/corpfin/cfjobsact.shtml>; “Frequently Asked Questions of General Applicability on Title I of the JOBS ACT”, April 16, 2012, at <http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm>. The original policy announcement regarding restrictions on availability of the pre-Act procedures can be found at <http://www.sec.gov/divisions/corpfin/internat/nonpublicsubmissions.htm>.

years in the requirement to provide an auditor's attestation under Section 404(b) of the Sarbanes-Oxley Act ("SOX").

The following categories of foreign private issuers are eligible for confidential review under the pre-JOBS Act procedures:

- 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; and
- 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.

As mentioned above, foreign governments may still take advantage of confidential review for registrations of their debt securities.

Notably, the Staff may require a foreign issuer to file its registration statement publicly even if the foreign issuer falls into one of the categories above where, for example, there is a competing bid in an acquisition transaction or in cases where there has been publicity about a proposed offering or listing. The Staff also indicated that shell companies, blank check companies and issuers with no or substantially no business operations will not be permitted to use the confidential submission procedures under any circumstances.

Under these confidential review procedures, an eligible foreign issuer may generally proceed through multiple rounds of comments and not file publicly until it is ready to distribute preliminary prospectuses and launch its "road show". Moreover, the confidentially submitted drafts are not made public, although the SEC comment letters and issuer responses are generally made publicly available 20 business days following completion of the offering.

JOBS ACT CONFIDENTIAL REVIEW PROCEDURES FOR EMERGING GROWTH COMPANIES

If a domestic or foreign private issuer qualifies as an "emerging growth company" it can utilize the following confidential review procedures, and, as noted above, if it chooses to use confidential submission and it takes advantage of any other benefit available to emerging growth companies, it may use ONLY these procedures.

- An emerging growth company may confidentially submit a draft registration statement to the SEC so long as it has not made any sale of its common equity securities under an effective registration statement.³
- The initial confidential submission and all amendments thereto must be publicly filed at least 21 days before the commencement of a road show related to the offering under the registration statement.⁴ Importantly, unlike the confidential submission procedures described above for foreign issuers, the Act requires "the initial confidential submission and all amendments" to be publicly filed as exhibits to the first registration statement filed on EDGAR.
- We expect that, consistent with current practice, SEC staff comment letters and the issuer's responses will not be made public by the SEC until 20 business days after the completion of the offering. Confidential review is not available for Exchange Act-only registration statements, e.g., Form 10 and Form 20-F.

³ The Division has advised that the date of the first sale of common equity securities under an effective registration statement could relate to an employee benefit plan or a registered secondary offering, as well as an IPO.

⁴ The section refers to a "road show" as defined in Rule 433(h)(4). It was initially unclear whether certain "testing the waters" communications could be considered a road show under Rule 433(h)(4) and trigger a requirement to file the registration statement 21 days before the date of those communications. The Division has stated in guidance materials that they "will not object if an emerging growth company does not treat test-the-waters communications conducted in reliance on new Section 5(d) [of the Securities Act] as a road show for purposes of [new] Section 6(e) [of the Securities Act]." The Division has not stated how issuers will demonstrate reliance on section 5(d) when such testing the waters communications contain the elements of a road show described in Rule 433(h)(4). Emerging growth companies that do not conduct a road show should file their registration statement and confidential submissions no later than 21 days before the anticipated effectiveness of the registration statement.

CONFIDENTIAL SUBMISSION PROCEDURES

The Division of Corporation Finance has asked that drafts of registration statements sent for confidential review be submitted as text searchable PDF files on CD/DVD, regardless of which confidential review procedure is sought by the issuer. The email address previously created for foreign issuers' submissions is no longer active. Drafts should be mailed to:

Draft Registration Statement
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Issuers that are emerging growth companies should include a transmittal letter with their submission confirming their emerging growth company status.

This memorandum relates to general information only and does not constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

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