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Milbank

Global Securities Group Client Alert

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SEC LIMITS NON-PUBLIC SUBMISSION POLICY FOR FOREIGN ISSUERS

The Division of Corporation Finance of the Securities and Exchange Commission (“SEC”) recently announced a significant change in its policy towards reviewing first-time registration statements of foreign issuers. This announcement continues a trend by the SEC staff to limit confidential reviews. Initially, the SEC allowed all foreign private issuers and foreign governments to submit their registration statements, including any amendments, on a “draft” non-public basis. The SEC staff previously restricted this practice to initial filings by a foreign issuer. All foreign issuers continued to be afforded the opportunity to have registration statements for initial contacts with the SEC confidentially reviewed and commented on by the SEC staff and to respond to any SEC comments prior to filing the registration statement publicly through the EDGAR system. The new policy announced by the SEC drastically restricts the availability of this policy.

Beginning on December 8, 2011, the SEC will permit non-public review of initial registration statements for foreign issuers only where the registrant is:

- (1) a foreign government that is registering debt securities;
- (2) a foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange;
- (3) a foreign private issuer that is being privatized by a foreign government; or
- (4) 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, the SEC will no longer permit shell companies, blank check companies and issuers with “no or substantially no business operations” to use the non-public review procedure. Furthermore, the SEC noted that even if a foreign issuer falls within the general parameters of the new policy, circumstances may arise in which the SEC will request the foreign issuer to publicly file its registration statement. This may arise, for example, where there is a competing bid in an acquisition transaction or publicity about a proposed offering or listing.

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A non-public submission of a registration statement or amendment that does not fall within the parameters of the new policy but was received prior to December 8, 2011 will continue to be reviewed confidentially by the SEC without a public filing. However, any subsequent drafts of that registration statement or amendment, whether in response to SEC comments or otherwise, must be filed publicly through the EDGAR system.

Historically, the foreign issuers that took advantage of the non-public review procedure already had their securities listed on foreign exchanges, and often times, those foreign exchanges did not have disclosure requirements similar to those required under U.S. law. Under the old policy, foreign issuers were able to prepare for a public offering in the U.S. without having to make any public disclosure until they were ready to launch their offering. However, the SEC has recognized that in current practice, most foreign issuers who use the non-public review procedure are not listed, nor do they contemplate being listed, on a foreign exchange. The new policy comes in recognition of this trend in an effort to promote transparency and investor protection.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any member of our Global Securities group listed below.

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