



## All Good Things Must Come to an End: The SEC Limits Confidential Submissions by Foreign Private Issuers

Eight-track players – gone.

Sony Betamax – gone.

Vinyl records – gone.

For foreign private issuers, the 6-month deadline for annual reports is gone, along with the ability to effect SEC filings in paper form. And now, also (mostly) gone is the ability to confidentially submit registration statements for review by the SEC.

On December 8, 2011, the SEC's Division of Corporate Finance announced that it had revised its policies as to the ability of foreign private issuers to effect these confidential submissions.<sup>1</sup>

### Background

The SEC has historically afforded to foreign private issuers and foreign governments the ability to submit their first-time registration statements (and amendments) on a non-public basis.<sup>2</sup> These submissions permitted the SEC to review and comment on a first time registrant's disclosures, and the issuer to respond to SEC comments, before the issuer needed to make a public filing on the EDGAR system.<sup>3</sup>

This process had several benefits for issuers, including:

- maintaining the confidentiality of their offering process for a longer period<sup>4</sup>;
- and enabling issuers who were new to the U.S. markets to conform their disclosures to U.S. regulatory expectations, without revealing their earlier drafts to the public.

Due to the confidential submission process, a foreign private issuer could abandon its U.S. offering process before the filing became public if, for example, market conditions deteriorated, or the SEC demanded the disclosure of

<sup>1</sup> The SEC's new policy may be found at the following link: <http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

<sup>2</sup> This footnote does not include a citation to any SEC rule. Please do not try to find an SEC rule that permitted the confidential submissions; it was an informal policy of the SEC that was not included in any rule. (We know several lawyers who wasted a number of hours trying to find the relevant rules, and we would like you to avoid making the same mistake; we know your time is valuable.)

<sup>3</sup> Certain foreign private issuers have not had the benefit of the confidential submission procedure. For example, Canadian issuers filing under the multijurisdictional disclosure system ("MJDS") have not used this procedure, as the SEC does not typically review these registration statements in any event.

<sup>4</sup> This benefit did not inure to companies with blabbermouths on their teams, as public reports emerged about their offerings before the completion of the confidential review.

business or financial information that the company regarded as unduly sensitive. In addition, to the joy of the issuer's finance department, the issuer need not pay the required SEC filing fee until its first public filing is made.

## New Policy

Under the new policy, the SEC will only review initial registration statements on a confidential basis where the issuer is:

- a foreign government registering its debt securities;
- 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; or
- 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 issuers with no or substantially no business operations will not be permitted to use the non-public submission procedure.

The primary beneficiaries of the policy that will most notice the change in policy are foreign private issuers that are effecting their IPO in the U.S. and do not have a non-U.S. listing.

The SEC indicates that there may be circumstances in which the SEC will request a foreign issuer to publicly file its registration statement, even though its offering would generally fall within one of the permitted categories set forth above. As an example, the SEC mentioned the situation of a competing bid in an acquisition transaction or if there is publicity about a proposed offering or listing.<sup>5</sup>

## Effect on Pending Confidential Submissions

If your company has already submitted a registration statement confidentially, and you're currently waiting for, or responding to SEC comments – you'd better go and apply for EDGAR access codes.<sup>6</sup> According to the new policy, your next filing must be a public filing on the EDGAR system.

## Rationale for Policy Change

The SEC has stated that the new policy is intended to “promote transparency and investor protection.”

The SEC indicated that, when the confidential submission policy was initially developed, most foreign private issuers effecting a U.S. public offering also had or were having their securities traded on a non-U.S. securities exchange, and the non-U.S. market did not ordinarily have a practice of requiring public disclosure of the registration statement before the completion of its review. More recently, the SEC indicates, the vast majority of foreign private issuers using the confidential submission procedure did not and were not contemplating listing securities outside of the U.S. Accordingly, the SEC no longer believes that there is a useful purpose in offering the confidential submission procedure to these issuers.

<sup>5</sup> See footnote 4, *supra*. Issuers (and their underwriters) who do in fact qualify for the confidential submission procedure may wish to redouble their efforts to maintain the confidentiality of their offering process because publicity may result in the loss of the qualification.

<sup>6</sup> See SEC Form ID: <http://www.sec.gov/about/forms/formid.pdf>.

## Future Developments (?)

In its statement, the SEC indicated that it will continue to assess use of the procedure and may make additional changes in the future.

## Effect on Foreign Private Issuers Accessing the U.S. Capital Markets

The confidential submission procedure has long been regarded as one of several tools that the SEC had implemented in order to make the U.S. markets more attractive to, and convenient for, foreign issuers. That being said, we do not anticipate that the new policy will reduce the number of foreign issuers that offer their securities in the U.S. To the extent that the U.S. is a desired (or necessary) market for a particular issuer, we do not anticipate that the policy change will impact that issuer's plans.

Initial filings of many new foreign private issuer registration statements will now be public filings. Accordingly, issuers, their lawyers, their underwriters, and their auditors, to the extent they have not already been doing so, should exercise every effort to ensure that the filing is accurate, complete, and responsive to the SEC's rules. Underwriters who are not doing so should substantially complete their due diligence and committee approvals prior to the initial filing.

And of course, a number of new issuers will need to go and obtain some EDGAR codes a bit sooner than expected..

---

### Contacts

#### **John Moore**

Hong Kong  
+852 2585 0869  
[johnmoore@mofocom](mailto:johnmoore@mofocom)

#### **Elana M. Hahn**

London  
+44 20 7920 4036  
[ehahn@mofocom](mailto:ehahn@mofocom)

#### **Christopher M. Forrester**

Palo Alto  
+1 650 813 5655  
[cforrester@mofocom](mailto:cforrester@mofocom)

#### **Anna T. Pinedo**

New York  
+1 212 468 8179  
[apinedo@mofocom](mailto:apinedo@mofocom)

#### **Gregory Wang**

Hong Kong  
+852 2585 0856  
[gwang@mofocom](mailto:gwang@mofocom)

#### **Brandon C. Parris**

San Francisco  
+1 415 268 6617  
[bparris@mofocom](mailto:bparris@mofocom)

#### **David M. Lynn**

Washington D.C.  
+1 202 887 1563  
[dlynn@mofocom](mailto:dlynn@mofocom)

#### **James R. Tanenbaum**

New York  
+1 212 468 863  
[jtannenbaum@mofocom](mailto:jtannenbaum@mofocom)

#### **Andrew W. Winden**

Tokyo  
+81 3 3214 6522  
[awinden@mofocom](mailto:awinden@mofocom)

#### **Andrew D. Thorpe**

San Francisco  
+1 415 268 6966  
[athorpe@mofocom](mailto:athorpe@mofocom)

#### **Lloyd S. Harmetz**

New York  
+1 212 468 8061  
[lharmetz@mofocom](mailto:lharmetz@mofocom)

---

### About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofocom](http://www.mofocom). © 2011 Morrison & Foerster LLP. All rights reserved.

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*