

documents”).¹² The Commission adopted Rule 12g3-2(b) more than 40 years ago in order to exempt from Section 12(g) registration foreign companies that have not obtained a listing on a national securities exchange or otherwise sought a public market for their equity securities in the United States.¹³

Acquiring the Rule 12g3-2(b) exemption enables a foreign private issuer to have its equity securities traded on a limited basis in the over-the-counter market in the United States while avoiding registration under Exchange Act Section 12(g). Typically a foreign private issuer obtains the Rule 12g3-2(b) exemption in order to have established an unlisted, sponsored or unsponsored depository facility for its American Depositary Receipts (“ADRs”).¹⁴ Establishing the Rule 12g3-2(b) exemption also permits registered broker-dealers to fulfill their current information obligations concerning foreign private issuers’ securities for which they seek to publish quotations.¹⁵ It further facilitates resales

¹² Current Exchange Act Rule 12g3-2(b)(1)(iii) (17 CFR 240.12g3-2(b)(1)(iii)).

¹³ Release No. 34-8066 (April 28, 1967). For additional background on the initial adoption of Rule 12g3-2(b), see Part I.A of Release No. 34-57350 (February 19, 2008), 73 FR 10102 (February 25, 2008) (“Proposing Release”).

¹⁴ An ADR is a negotiable instrument that represents an ownership interest in a specified number of securities, which the securities holder has deposited with a designated bank depository. The filing of Securities Act Form F-6 (17 CFR 239.36) is required in order to establish an ADR facility. The eligibility criteria for the use of Form F-6 include the requirement that the issuer of the deposited securities have a reporting obligation under Exchange Act Section 13(a) or have established the exemption under Rule 12g3-2(b). See General Instruction I.A.3 of Form F-6. While required to be registered on Form F-6 under the Securities Act, ADRs are exempt from registration under Exchange Act Section 12(g) pursuant to current Exchange Act Rule 12g3-2(c) (17 CFR 240.12g3-2(c)).

¹⁵ Brokers currently can comply with their obligations under Exchange Act Rule 15c2-11 (17 CFR 240.15c2-11) when a foreign company has established and maintains the Rule 12g3-2(b) exemption by, in part, reviewing the information furnished to the Commission under the exemption. See Rule 15c2-11(a)(4) (17 CFR 240.15c2-11(a)(4)).

Rule 12g3-2(b) currently requires that an applicant submit all of the necessary non-U.S. disclosure documents and other information before the date that a registration statement would otherwise become due under Section 12(g).²⁰ Once an issuer has timely submitted its application and obtained the exemption, the issuer may surpass any of the record holder, U.S. resident holder, or asset thresholds that would otherwise trigger an obligation to register a class of securities under Section 12(g) or the rules thereunder, as long as it maintains the exemption by submitting the required non-U.S. disclosure documents.

For most of its 40-year history, the Rule 12g3-2(b) disclosure regime has mandated paper submissions. Even after the adoption of EDGAR filing rules for foreign private issuers, the Commission has required a foreign private issuer to submit its initial Rule 12g3-2(b) supporting materials in paper.²¹ The Commission has based this treatment of Rule 12g3-2(b) materials on the analogous treatment of applications for an exemption from Exchange Act reporting obligations filed pursuant to Exchange Act Section 12(h).²²

In March 2007, the Commission voted to adopt amendments to Rule 12g3-2, which enable a foreign private issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of Exchange Act registration and reporting

²⁰ Current Exchange Act Rule 12g3-2(b)(2) (17 CFR 240.12g3-2(b)(2)).

²¹ See Release No. 33-8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

²² 15 U.S.C. 78l(h). We require the filing of Section 12(h) exemptive applications in paper pursuant to Regulation S-T Rule 101(c)(16) (17 CFR 232.101(c)(16)).

electronic information delivery system generally available to the public in its primary trading market.

As proposed, a foreign private issuer that met the above requirements would be immediately exempt from Exchange Act registration under Rule 12g3-2(b) even if, on the last day of its most recently completed fiscal year, it exceeded the asset and shareholder thresholds for Section 12(g) registration, and although the 120-day window for filing a registration statement under Section 12(g) had elapsed. Further, as proposed, an issuer could immediately claim the Rule 12g3-2(b) exemption upon the effectiveness of, or following its recent Exchange Act deregistration, whether pursuant to the older exit rules of Rule 12g-4 or 12h-3,³⁰ or Rule 12h-6, or the suspension of its reporting obligations under Section 15(d),³¹ if it met the above requirements other than the electronic publication condition for its most recently completed fiscal year.

The proposed rules would require any issuer, whether a prior registrant or not, to maintain the Rule 12g3-2(b) exemption by publishing its specified non-U.S. disclosure documents on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The proposed rules would require

³⁰ 17 CFR 240.12g-4 or 240.12h-3. Both Rules 12g-4 and 12h-3 permit an issuer to exit the Exchange Act reporting regime following the filing of a Form 15 (17 CFR 249.323), which certifies that the issuer has fewer than 300 record holders or less than 500 record holders and total assets not exceeding \$10 million on the last day of each of its most recent 3 fiscal years.

³¹ An issuer may suspend its Section 15(d) reporting obligations under Rule 12h-3 or Section 15(d) itself. The statutory section provides that suspension occurs if, on the first day of the fiscal year, other than the year in which the issuer's registration statement went effective, the issuer's record holders number less than 300.

is substantially similar to the foreign listing condition adopted as part of the March 2007 amendments.³⁷

The purpose of the foreign listing condition is to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the trading of the issuer's securities and the issuer's disclosure obligations to investors. This foreign listing condition increases the likelihood that the principal pricing determinants for a foreign private issuer's securities are located outside the United States, and makes more likely the availability of a set of non-U.S. securities disclosure documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities in the U.S. over-the-counter market.

Several commenters supported the proposed foreign listing condition substantially as proposed or at least in principle.³⁸ Some commenters supported a condition that would require an issuer to be subject to a recognized foreign regulatory authority and a set of public disclosure obligations, but would not require a foreign listing.³⁹ We decline to adopt such a provision because, among other factors, we believe it could be difficult for market participants to determine whether an issuer is in fact subject to a complying foreign regulatory regime. In addition, a listing on a securities market generally involves the affirmative action of an issuer to be traded on that market and to be subject to the listing requirements of that market, including applicable ongoing disclosure

³⁷ Exchange Act Rule 12h-6(a)(3) (17 CFR 240.12h-6(a)(3)).

³⁸ See, for example, the letter of the Bank of New York (“BNY”), dated April 25, 2008. This letter, along with other comment letters, is available at <http://www.sec.gov/comments/s7-04-08/s70408.shtml>.

³⁹ See, for example, the letter of Sullivan & Cromwell, dated April 25, 2008.

foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for that purpose, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.⁴²

As proposed, we have based the adopted definition on the definition of primary trading market under the March 2007 amendments. Like the earlier amendments, the amendments we are adopting today will permit an issuer to aggregate its securities over multiple markets in one or two foreign jurisdictions in recognition that many foreign private issuers have listings on more than one exchange in one or more non-U.S. markets.⁴³

Some commenters urged the Commission to adopt a primary trading market definition that would permit an issuer to aggregate its trading over an unlimited number of foreign jurisdictions or permit an issuer's trading in its primary foreign markets to comprise less than 55 percent of its worldwide trading.⁴⁴ We decline to adopt these suggestions because, by defining an issuer's primary trading market to comprise no more

⁴² Note 1 to Rule 12g3-2(b)(1) (17 CFR 240.12g3-2(b)(1)).

⁴³ As under the earlier amendments, measurement for the primary trading market determination will be by reference to ADTV as reported by the relevant market. An issuer would measure the ADTV of on-exchange transactions in its securities aggregated over one or two foreign jurisdictions against its worldwide trading volume. The issuer could include in this measure off-exchange transactions in those jurisdictions comprising the numerator only if it includes those off-exchange transactions when calculating worldwide trading volume in the denominator. This denominator would consist of U.S. ADTV, which must include both on-exchange and off-exchange transactions, and non-U.S. ADTV, which must include on-exchange transactions, but could also include off-exchange transactions. See Note 1 to Rule 12g3-2(b)(1) and Release No. 34-55540 at 72 FR 16934, 16939.

⁴⁴ See, for example, the letters of JPMorgan Chase Bank ("JPMorganChase"), dated April 18, 2008, and the Organization for International Investment ("OFII"), dated April 23, 2008.

than two foreign jurisdictions, it becomes more likely that an eligible issuer will be subject to an overseas regulator with principal authority for regulating the issuance and trading of the issuer's securities and the issuer's disclosure to investors. Similarly, requiring an issuer's primary non-U.S. trading to constitute no less than 55 percent of its worldwide trading helps assure that a clear majority of an issuer's securities trading occurs outside the United States. If the United States was the sole or principal market for a foreign private issuer's securities, then the Commission would have a greater regulatory interest in subjecting the foreign company to the Exchange Act reporting regime.

The adopted rule amendments will not require an issuer establishing the exemption, but not deregistering, to have maintained a foreign listing for the previous twelve months, or for some other specified period of time, as was required under the March 2007 amendments. As noted in the Proposing Release, we see no reason to exclude newly listed foreign companies from eligibility. Many foreign exchanges require substantial initial disclosure before a listing is accepted. Moreover, there is currently no similar requirement for a non-reporting company applying for the Rule 12g3-2(b) exemption.

Under Rule 12h-6, an issuer must certify that, at the time it files its Form 15F,⁴⁵ it meets that rule's foreign listing requirement. That issuer will also have to meet Rule 12g3-2(b)'s foreign listing requirement upon the effectiveness of its Exchange Act termination of registration and reporting under Rule 12h-6 in order to be able to claim the Rule 12g3-2(b) exemption. Since typically that effectiveness occurs 90 days from the

⁴⁵ 17 CFR 249.324. Similar to a Form 15, Form 15F is the form that a foreign private issuer must file to certify that it meets the conditions for terminating its Exchange Act registration and reporting obligations under Rule 12h-6.

registration statement filed with the Commission under Section 12(b),⁵⁶ for example, covering a class of debt securities, or Section 12(g), covering a particular class of equity securities, would be ineligible to claim the exemption. This treatment is consistent with the current Exchange Act reporting prohibition under Rule 12g3-2(b).⁵⁷

We received relatively few comments on the proposed non-reporting condition. While some commenters supported the proposed condition,⁵⁸ others requested that, in the interest of increasing the flexibility of capital raising in the United States for foreign private issuers, we permit an issuer to claim the Rule 12g3-2(b) exemption with respect to a particular class of equity securities although it has Exchange Act reporting obligations regarding a class of debt securities or a different class of equity securities.⁵⁹ We decline to adopt this suggested modification because we believe that it could cause confusion for investors and other market participants regarding the scope of an issuer's Exchange Act reporting obligations and the protections available under the Exchange Act.

Currently an issuer may apply for the Rule 12g3-2(b) exemption, although it may have exceeded the Section 12(g) shareholder thresholds on the last day of its most recently completed fiscal year, as long as the statutory 120-day period for filing a Section 12(g) registration statement has not lapsed.⁶⁰ We proposed to eliminate this

⁵⁶ 15 U.S.C. 78l(b).

⁵⁷ Current Exchange Act Rule 12g3-2(d)(1).

⁵⁸ See, for example, the letter of Sullivan & Cromwell.

⁵⁹ See, for example, the letter of OFII.

⁶⁰ Current Exchange Act Rule 12g3-2(b)(2) (17 CFR 240.12g3-2(b)(2)).

private issuer that has suspended its reporting obligations pursuant to the statutory terms of Section 15(d) will satisfy the non-reporting condition immediately upon its determination that it had less than 300 shareholders as of the beginning of its most recent fiscal year.

Thus, unlike the current rule, the adopted rule amendments will not require an issuer to look back over the previous eighteen months and determine whether it had Exchange Act reporting obligations during that period.⁶² We eliminated the eighteen month requirement when adopting the March 2007 rule amendments that granted the Rule 12g3-2(b) exemption automatically to a foreign private issuer upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to Rule 12h-6. We see no reason to treat differently foreign private issuers that have terminated their Section 12(g) registration under the older Rule 12g-4 or suspended their Section 15(d) reporting obligations pursuant to that statutory section or under Rule 12h-3 and following the filing of Form 15. Elimination of a lengthy waiting period will hasten the electronic publication of a foreign private issuer's non-U.S. disclosure documents required under the exemption and, thus, help improve the ability of U.S. investors to make informed decisions regarding that issuer's securities. Commenters uniformly supported this revision, which we are adopting as proposed.

⁶² Current Exchange Act Rule 12g3-2(d)(1) provides that the Rule 12g3-2(b) exemption is generally not available to a foreign private issuer that, during the preceding 18 months, has registered a class of securities under Exchange Act Section 12 or had an active or suspended Section 15(d) reporting obligation.

deregistration under Rule 12h-6.⁶⁵ Commenters strongly supported this electronic publication requirement.⁶⁶

The purpose of this non-U.S. electronic publication condition is to provide U.S. investors with ready access to material information when trading in the issuer's equity securities in the over-the-counter market.⁶⁷ This condition also will assist U.S. investors who are interested in trading the issuer's securities in its primary securities market. Moreover, having a foreign private issuer's key non-U.S. disclosure documents electronically published in English will assist broker-dealers in meeting their Rule 15c2-11 obligations and facilitate resales of that issuer's securities to QIBs under Rule 144A.

As under the current rule, the adopted amendments will require an issuer only to publish electronically information that is material to an investment decision regarding the subject securities,⁶⁸ such as:

- results of operations or financial condition;
- changes in business;

⁶⁵ Current Exchange Act Rule 12g3-2(e)(2).

⁶⁶ While commenters uniformly supported the electronic publication condition, some questioned the proposed requirement to provide English translations of specified non-U.S. disclosure documents. See Part II.C.3 of this release.

⁶⁷ Any trading of a foreign private issuer's Rule 12g3-2(b)-exempt securities in the United States would have to occur through an over-the-counter market such as that maintained by the Pink Sheets, LLC since, as of April, 1998, the NASD has required a foreign private issuer to register a class of securities under Exchange Act Section 12 before its securities could be traded through the electronic over-the-counter bulletin board administered by Nasdaq. See, for example, NASD Notice to Members (January 1998).

⁶⁸ Exchange Act Rule 12g3-2(b)(3)(i) (17 CFR 240.12g3-2(b)(3)(i)). Although the substantive requirements are the same, we have made conforming changes to General Instruction E and Part II, Item 9 of Form 15F to reflect the renumbering of the non-U.S. publication requirements of Rule 12g3-2(b).

- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.⁷⁴

These are the same documents for which an issuer that has deregistered under Rule 12h-6 must currently provide English translations.⁷⁵

Some commenters requested that we permit an issuer to provide brief English descriptions or English versions of specified non-U.S. disclosure documents instead of English translations.⁷⁶ We decline to adopt this suggestion because, as we stated in the Proposing Release, the specified non-U.S. disclosure documents are the same documents for which the Commission staff has historically required English translations because of their importance to investors.⁷⁷

Some commenters also requested that we provide guidance regarding when an issuer may provide an English summary instead of an English translation.⁷⁸ Generally, if, as a registrant, an issuer could submit an English summary for a non-U.S. disclosure

⁷⁴ Exchange Act Rule 12g3-2(b)(3)(ii) (17 CFR 240.12g3-2(b)(3)(ii)).

⁷⁵ Note 1 to Current Exchange Act Rule 12g3-2(e) (17 CFR 240.12g3-2(e)).

⁷⁶ See, for example, the letters of Sullivan & Cromwell and Simpson Thacher & Bartlett (“Simpson Thacher”), dated April 18, 2008.

⁷⁷ See Part II.D.1 of the Proposing Release. We similarly eliminated the ability of foreign registrants to provide English versions or brief English descriptions of specified non-U.S. documents submitted under cover of Form 6-K because of the vagueness and lack of utility of such versions and descriptions submitted to the Commission. See Release No. 33-8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

⁷⁸ See, for example, the letters of Shearman & Sterling, dated April 25, 2008, and Sullivan & Cromwell.

claiming and maintaining the Rule 12g3-2(b) exemption, an issuer will have to publish electronically its non-U.S. disclosure documents, investors should be able to ascertain many of the issuer's non-U.S. disclosure requirements from a review of those publicly available documents.

From time to time, the Commission has published a list of issuers claiming the Rule 12g3-2(b) exemption that have submitted relatively current information pursuant to that rule.⁸⁰ Commission staff has compiled this list based on a review of submitted paper documents. As we stated in the Proposing Release, as part of the streamlining of the Rule 12g3-2(b) process that the adopted rule amendments are intended to effect, the Commission anticipates it will no longer publish these lists subsequent to the effective date of the new rules.⁸¹

Some commenters suggested that, as a substitute for these lists, we adopt a requirement that an issuer must notify the Commission and other market participants that it is claiming and intends to rely on the Rule 12g3-2(b) exemption.⁸² We decline to adopt such a notice requirement because we believe that, as other commenters have noted, a notice requirement could run contrary to the goal of encouraging an issuer to claim the Rule 12g3-2(b) exemption and electronically disseminate its non-U.S. disclosure documents in English.⁸³ Nevertheless, an issuer that wants to provide notice to investors, broker-dealers and other market participants may do so by, for example, stating on its

⁸⁰ See, for example, Release No. 34-51893 (June 21, 2005), 70 FR 37128 (June 28, 2005).

⁸¹ See the Proposing Release at n. 86.

⁸² See, for example, the letters of Simpson Thacher and Sullivan & Cromwell.

⁸³ See the letters of Ziegler, Ziegler & Associates, dated April 28, 2008, and BNY.

count, it would be required to register a class of securities under Section 12(g). The same would hold true under the rule amendments for a non-compliant issuer.

We are also adopting the provision, as proposed, that an issuer will lose the Rule 12g3-2(b) exemption if it no longer meets the foreign listing condition. An issuer will no longer satisfy the foreign listing condition either because it is no longer listed in its primary trading market, or because the one or two foreign jurisdictions in which it trades no longer qualifies as its primary trading market, as defined by the rule. Since the definition of primary trading market uses a trading volume standard for the issuer's most recently completed fiscal year, an issuer will have to redetermine its relative U.S. and foreign trading volumes on an annual basis.

Some commenters opposed basing the duration of the Rule 12g3-2(b) exemption on whether an issuer remains listed in its primary trading market.⁸⁶ We believe this provision is necessary in order to help ensure the continued availability of a set of non-U.S. disclosure documents to which investors may turn when making decisions regarding an issuer's securities. It is also necessary to help make sure that an issuer's principal trading market has not become the U.S. market, which would require the issuer to register and report under the Exchange Act.

Some commenters requested that we at least establish a "cure" period, such as six or twelve months, during which an issuer would either have to correct any deficiency or else register under the Exchange Act.⁸⁷ We decline to adopt a specific cure period. We

⁸⁶ See the letters of the ABA and Sullivan & Cromwell. The primary objection was that adherence to the electronic publication condition should be a sufficient basis for maintaining the exemption as it is under the current rule.

⁸⁷ See, for example, the letter of the OFII.

Because the adopted amendments will eliminate the 18 month and successor issuer prohibitions under Rule 12g3-2(b), they will remove as unnecessary the MJDS filer exceptions to those prohibitions.

The adopted rule amendments will also eliminate the current ability of a Canadian issuer that already has the Rule 12g3-2(b) exemption, but that subsequently acquires Exchange Act reporting obligations as a MJDS filer, for example, with regard to a class of debt securities, to retain the Rule 12g3-2(b) exemption for its equity securities. Such a MJDS filer currently may submit its non-U.S. disclosure documents simultaneously to fulfill its Exchange Act reporting obligations under the MJDS and its non-U.S. publication obligations under Rule 12g3-2(b).⁹³

We proposed to eliminate this ability of a MJDS filer simultaneously to maintain the Rule 12g3-2(b) exemption both because few issuers have ever used that ability and because it no longer is the case that a MJDS filer must file the same documents to fulfill its obligations under the Exchange Act and Rule 12g3-2(b). Since the enactment of the Sarbanes-Oxley Act,⁹⁴ and Commission rules adopted under that Act, Canadian issuers must respond to several U.S. disclosure requirements when preparing their Form 40-F annual reports.⁹⁵

⁹³ Under the current rules, a Canadian issuer that checks the appropriate box on the cover of each filed Form 40-F and submitted Form 6-K is able to use those Exchange Act reports to maintain its Rule 12g3-2(b) exemption as well.

⁹⁴ Pub. L. 107-204, 116 Stat. 745 (2002).

⁹⁵ See, for example, Form 40-F's certifications required concerning an issuer's disclosure controls and procedures and its internal controls over financial reporting, and the disclosure required concerning its audit committee financial expert, its code of ethics, and its off-balance sheet arrangements.

Only one commenter opposed eliminating this rarely used ability to be a MJDS filer while simultaneously claiming the Rule 12g3-2(b) exemption.⁹⁶ The primary ground for objection was that some issuers may already be relying on the ability to use MJDS reports for this dual purpose. We continue to believe that this ability is rarely used if at all. Moreover, as explained below, we are adopting a three-year transition period following effectiveness of the adopted rule amendments, that will provide ample time for a MJDS registrant of debt securities, which has simultaneously claimed the Rule 12g3-2(b) exemption for a class of equity securities, to register that class of securities under the Exchange Act.⁹⁷

Accordingly, we are adopting the elimination of this MJDS provision, as proposed.⁹⁸ Under the adopted rule amendments, a MJDS registrant will be eligible to claim the Rule 12g3-2(b) exemption on the same grounds as other foreign registrants. If it has recently exited the Exchange Act reporting regime under Rule 12h-6, 12g-4 or 12h-3 or Section 15(d), it can claim the exemption, assuming it satisfies the rule amendments' other conditions. Otherwise, the filing of a MJDS registration statement under the Securities Act or Exchange Act will trigger Exchange Act reporting obligations and preclude that issuer from claiming the exemption.

⁹⁶ See the letter of Osler, Hoskins & Harcourt, dated April 28, 2008.

⁹⁷ See Part II.K.1 below.

⁹⁸ The adopted rule amendments remove the instruction on the cover page of Form 40-F and Form 6-K requiring a registrant to indicate whether it also is furnishing the materials pursuant to Rule 12g3-2(b).

- were exempt under Rule 12g3-2(b) on October 5, 1983 and have remained so since; and
- after January 2, 1986, were issued by a non-Canadian company.¹⁰²

The adopted rule amendments will eliminate this grandfathering provision because, as we stated in the Proposing Release, due to developments occurring since its adoption, we no longer believe the grandfathering provision is necessary. Only nine of the grandfathered issuers remain listed on Nasdaq.¹⁰³ Pursuant to Commission order, Nasdaq is now a national securities exchange, and those issuers must register their securities under Exchange Act Section 12(b) by August 1, 2009 if they wish to remain listed on Nasdaq.¹⁰⁴ Pursuant to the terms of the Commission order, as long as the nine grandfathered issuers continue to comply with the conditions of Rule 12g3-2(b), brokers and dealers may trade their securities in reliance on the Rule 12g3-2(b) exemption until the above deadline for Exchange Act registration. Those few commenters that addressed the issue supported the proposed elimination of the grandfathering provision.¹⁰⁵

Accordingly, we are adopting the elimination, as proposed.

¹⁰² Current Exchange Act Rule 12g3-2(d)(3). The Commission based the more limited grandfathering of Canadian securities on the more active U.S. market for those securities, which had led to abuses under Rule 12g3-2(b). Release No. 34-20264.

¹⁰³ Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006), attached to Release No. 34-54240 (July 31, 2006), 71 FR 45246 (August 8, 2006).

¹⁰⁴ Release No. 34-54241 (July 31, 2006), 71 FR 45359 (August 8, 2006). The Commission granted the grandfathered issuers an additional three years to register their securities under Section 12(b) in order to avoid disruptions in the trading of their securities caused by their delisting from Nasdaq and to provide them with time to meet U.S. disclosure requirements.

¹⁰⁵ See the ABA letter and the letter of the Pink OTC Markets Inc. ("Pink OTC"), dated April 10, 2008.

an issuer must be subject to Exchange Act reporting or must furnish reports required under Rule 12g3-2(b),¹⁰⁹ or revise the proposed Form F-6 amendment to permit the depositary to base its representation concerning an issuer's Rule 12g3-2(b) electronic publication upon the depositary's reasonable, good faith belief.¹¹⁰

We are not revising the requirement under Form F-6 that the issuer of the deposited securities be either an Exchange Act reporting company or be exempt from registration under Rule 12g3-2(b) because such revision would eliminate any ongoing disclosure obligations as a condition of Form F-6 registration, which would not be in the best interest of investors. However, we are amending Form F-6 to state that, in the case of an unsponsored ADR facility, a Form F-6 filer may base its representation that the issuer publishes information in English required to maintain the exemption from registration under Exchange Act Rule 12g3-2(b) upon the filer's reasonable, good faith belief after exercising reasonable diligence.¹¹¹ Except for this one change, we are adopting the Form F-6 amendment, as proposed.

Currently an issuer that does not seek to have its securities traded in the United States in the form of ADRs is able, by not formally establishing the Rule 12g3-2(b) exemption and submitting documents to the Commission, to restrict the ability of ADR depositary banks to establish unsponsored ADR facilities. Because the adopted rule amendments will expand the availability of the Rule 12g3-2(b) exemption by making it available to all otherwise eligible foreign private issuers that post materials to their Web

¹⁰⁹ See the letter of JPMorganChase.

¹¹⁰ See the letters of Ziegler, Ziegler & Associates and BNY.

¹¹¹ See the Note to Form F-6, Part I, Item 2.

sites or publish them through an electronic information delivery system in their primary trading market, ADR depositaries will be able to establish unsponsored ADRs on this expanded group of foreign private issuers based upon their reasonable, good faith belief, after exercising reasonable diligence, that those issuers comply with Rule 12g3-2(b).¹¹²

We solicited comment on whether, because of the expanded availability of the Rule 12g3-2(b) exemption under the proposed rule amendments, we should require, as a condition to the registration of ADRs on Form F-6, that the issuer give its consent to the depositary, or at least that the depositary must have notified the issuer of its intention to register ADRs and must not have received an affirmative statement of objection from the issuer. Those few commenters that addressed this matter disagreed on whether imposing such additional conditions on the creation of unsponsored ADR facilities was necessary or advisable.¹¹³ Given this disagreement, and because we concur with those commenters who stated that imposing such additional conditions could run counter to the goal of streamlining the Rule 12g3-2(b) regime for the benefit of investors and issuers,¹¹⁴ we are not adopting at this time any additional conditions regarding the formation of unsponsored ADR facilities.

¹¹² ADR depositaries will also be able to establish sponsored ADR facilities with foreign private issuers that choose to have their shares represented by ADRs in the United States.

¹¹³ See the letters of Cleary Gottlieb and EuropeanIssuers, both of which favored requiring a depositary to notify an issuer before establishing an unsponsored ADR facility, and requiring it to terminate an unsponsored facility created without the consent of an issuer if the issuer decides to create a sponsored facility. But see the letters of BNY and Pink OTC, both of which opposed the adoption of a condition requiring a depositary to obtain the consent of an issuer before establishing an unsponsored ADR facility, and the letter of Deutsche Bank, dated April 21, 2008, which stated that, because, in practice, depositary banks typically obtain the issuer's consent before establishing an unsponsored ADR facility, a rule requiring such consent was not necessary.

¹¹⁴ See the letters of BNY and Pink OTC.

disclosed in the deposit agreement, which must be attached as an exhibit to the Form F-6.

The hours and costs associated with making submissions under Exchange Act Rule 12g3-2(b) and preparing and filing Form F-6 constitute reporting and cost burdens imposed by those collections of information. We based our estimates of the effects that the final rule amendments will have on those collections of information primarily on our review of the most recently completed PRA submissions for Rule 12g3-2(b) documents and Form F-6, on the particular requirements for those submissions and form, and on other information, for example, concerning relative U.S. and foreign trading volume for foreign private issuers whose equity securities trade in the U.S. over-the-counter market.

The final rule amendments to Exchange Act Rule 12g3-2 will permit a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit paper copies of written materials to the Commission, if, among other requirements, it maintains a listing of the subject class of securities on one or more exchanges in its primary trading market. The final rule amendments define primary trading market to mean that at least 55 percent of the trading in the issuer's subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. The final rule amendments also provide that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of meeting the primary trading market definition, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.

The final rule amendments further require that, as a condition to claiming the Rule 12g3-2(b) exemption, a non-Exchange Act reporting issuer must publish in English specified non-U.S. disclosure documents required by Rule 12g3-2(b) for its most recently completed fiscal year on its Internet Web site or through an electronic information delivery system in its primary trading market, instead of requiring their submission in paper as part of a written application to the Commission. The final rule amendments also require an issuer similarly to publish electronically specified non-U.S. disclosure documents in English on an ongoing basis for subsequent fiscal years as a condition to maintaining the Rule 12g3-2(b) exemption, rather than permitting their submission in paper to the Commission.

The final amendments to Form F-6 will require a registrant to state that the issuer of the deposited securities, which is not an Exchange Act reporting company, publishes information in English required to maintain the Rule 12g3-2(b) exemption on the issuer's Internet Web site or through its primary trading market's electronic information delivery system.¹²⁴ The final amendments will also require the registrant to disclose the address of the issuer's Internet Web site or electronic information delivery system. A registrant that already has an effective Form F-6 will have to disclose the address of where the issuer electronically publishes its non-U.S. disclosure documents under Rule 12g3-2(b) when the registrant first amends its Form F-6 following the effective date of the final rule amendments.

¹²⁴ The final amendments provide that the registrant of an unsponsored ADR facility may make the required representation based upon its reasonable good faith belief after exercising reasonable diligence.

competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, Section 2(b)¹⁴⁶ of the Securities Act and Section 3(f) of the Exchange Act¹⁴⁷ require the Commission to consider whether the action will promote efficiency, competition and capital formation.

In the Proposing Release, we considered the proposed rule amendments in light of the standards set forth in the above statutory sections. We solicited comment on whether, if adopted, the proposed rule amendments would result in any anti-competitive effects or promote efficiency, competition and capital formation. We further encouraged commenters to provide empirical data or other facts to support their views on any anti-competitive effects or any burdens on efficiency, competition or capital formation that might result from adoption of the proposed amendments.

We did not receive any comments or any empirical data in this regard concerning the proposed amendments. Accordingly, since the adopted rule amendments are similar to the proposed rule amendments, we continue to believe the amended rules will contribute to efficiency, competition and capital formation.

The adopted amendments revise the rules that determine when a foreign private issuer may claim the exemption from Exchange Act Section 12(g) registration under Exchange Act Rule 12g3-2(b). That exemption permits limited trading of an issuer's exempted equity securities in the over-the-counter market in the United States as long as

¹⁴⁶ 15 U.S.C. 77b(b).

¹⁴⁷ 15 U.S.C. 78c(f).

