

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 239, 240 and 249**

**[RELEASE NO. 34-58465; INTERNATIONAL SERIES RELEASE NO. 1309;  
FILE NO. S7-04-08]**

**RIN 3235-AK04**

**EXEMPTION FROM REGISTRATION UNDER SECTION 12(g) OF THE  
SECURITIES EXCHANGE ACT OF 1934 FOR FOREIGN PRIVATE ISSUERS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to the rule that exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") based on the submission to the Commission of certain information published by the issuer outside the United States. The exemption allows a foreign private issuer to have its equity securities traded in the U.S. over-the-counter market without registration under Section 12(g). The adopted rule amendments will eliminate the current written application and paper submission requirements under Rule 12g3-2(b) by automatically exempting from Exchange Act Section 12(g) a foreign private issuer that meets specified conditions. Those conditions will require an issuer to maintain a listing of its equity securities in its primary trading market located outside the United States, and require it to publish electronically in English specified non-United States disclosure documents. As a result, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-United States disclosure documents and thereby to make better

informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter market in the United States or otherwise. As is currently the case, issuers must continue to register their securities under the Exchange Act to have them listed on a national securities exchange or traded on the OTC Bulletin Board.

**EFFECTIVE DATE:** [Insert date 30 days after publication in the Federal Register.]

**FOR FURTHER INFORMATION CONTACT:** Elliot Staffin, Special Counsel, at (202) 551-3450, in the Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments to Commission Rules 12g3-2<sup>1</sup> and 15c2-11<sup>2</sup> under the Exchange Act,<sup>3</sup> Forms 15F,<sup>4</sup> 40-F,<sup>5</sup> and 6-K<sup>6</sup> under the Exchange Act, and Form F-6<sup>7</sup> under the Securities Act of 1933 ("Securities Act").<sup>8</sup>

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<sup>1</sup> 17 CFR 240.12g3-2.

<sup>2</sup> 17 CFR 240.15c2-11.

<sup>3</sup> 15 U.S.C. 78a et seq.

<sup>4</sup> 17 CFR 249.324.

<sup>5</sup> 17 CFR 249.240f

<sup>6</sup> 17 CFR 249.306.

<sup>7</sup> 17 CFR 239.36.

<sup>8</sup> 15 U.S.C. 77a et seq.

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Exchange Act Rule 12g3-2(b)<sup>9</sup> exempts a foreign private issuer<sup>10</sup> from Section 12(g) registration<sup>11</sup> if, among other requirements, the issuer furnishes to the Commission on an ongoing basis information it has made public or is required to make public under the laws of its jurisdiction of incorporation, organization or domicile, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders (collectively, its “non-U.S. disclosure

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<sup>9</sup> 17 CFR 240.12g3-2(b).

<sup>10</sup> See the definition of foreign private issuer at Exchange Act Rule 3b-4(c) (17 CFR 240.3b-4(c)).

<sup>11</sup> When read in conjunction with Exchange Act Rules 12g-1 (17 CFR 240.12g-1) and 12g3-2(a) (17 CFR 240.12g3-2(a)), Exchange Act Section 12(g) requires an issuer to file an Exchange Act registration statement regarding a class of equity securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, the number of its U.S. resident holders is 300 or more, and the issuer’s total assets exceed \$10 million.

documents”).<sup>12</sup> 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.<sup>13</sup>

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”).<sup>14</sup> 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.<sup>15</sup> It further facilitates resales

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

<sup>13</sup> 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”).

<sup>14</sup> 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)).

<sup>15</sup> 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)).

of an issuer's securities to qualified institutional buyers (“QIBs”) under Rule 144A.<sup>16</sup>

### **1. Current Rule 12g3-2(b) Requirements**

Currently, in order to establish the Exchange Act Rule 12g3-2(b) exemption, a foreign private issuer must initially submit to the Commission a list of its non-U.S. disclosure requirements as well as copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year.<sup>17</sup> An issuer must further submit its non-U.S. disclosure documents on an ongoing basis in order to maintain the exemption. The current Rule provides that an issuer need only submit copies of information that is material to an investment decision for the purpose of obtaining or maintaining the exemption.<sup>18</sup> At the time of the initial submission, an issuer must also provide the Commission with the number of U.S. holders of its equity securities and the percentage held by them, as well as a brief description of how its U.S. holders acquired those shares.<sup>19</sup>

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<sup>16</sup> See Securities Act Rule 144A(d)(4) (17 CFR 230.144A(d)(4)).

<sup>17</sup> Current Exchange Act Rule 12g3-2(b)(1)(i) (17 CFR 240.12g3-2(b)(1)(i)). Historically, an issuer has submitted its home jurisdiction materials as part of a letter application to the Commission, which has been processed through the Office of International Corporate Finance in the Division of Corporation Finance. The written application process does not apply to an issuer that receives the Rule 12g3-2(b) exemption upon the effectiveness of its Exchange Act deregistration pursuant to Exchange Act Rule 12h-6 (17 CFR 240.12h-6).

<sup>18</sup> Current Exchange Act Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)). As examples of material information, the Rule lists an issuer’s financial condition or results of operations, changes in its business, the acquisition or disposition of assets, the issuance, redemption or acquisition of securities, changes in management or control, the granting of options or other payment to directors or officers, and transactions with directors, officers or principal security holders.

<sup>19</sup> Current Exchange Act Rule 12g3-2(b)(1)(v) (17 CFR 240.12g3-2(b)(1)(v)). An issuer must also disclose the dates and circumstances of the most recent public distribution of securities by the issuer or an affiliate.

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).<sup>20</sup> 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.<sup>21</sup> 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).<sup>22</sup>

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

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

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

<sup>22</sup> 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)).

pursuant to contemporaneously adopted Exchange Act Rule 12h-6.<sup>23</sup> The March 2007 amendments require an issuer that has obtained the Rule 12g3-2(b) exemption, upon the effectiveness of its termination of registration and reporting pursuant to Rule 12h-6, to publish specified non-U.S. disclosure documents in English on an ongoing basis on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, rather than submit that information in paper to the Commission.<sup>24</sup> The amendments further permit, but do not require, a foreign private issuer that has obtained or will obtain the Rule 12g3-2(b) exemption, upon application to the Commission and not pursuant to Rule 12h-6, to publish electronically in the same manner its non-U.S. disclosure documents required to maintain the exemption.<sup>25</sup>

The March 2007 amendments further clarified the English translation requirements under Rule 12g3-2(b).<sup>26</sup> The amendments provide that, when electronically publishing its non-U.S. disclosure documents required to maintain the Rule 12g3-2(b) exemption, at a minimum, a foreign private issuer must electronically publish English translations of the following documents if in a foreign language:

- its annual report, including or accompanied by annual financial statements;

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<sup>23</sup> See Release No. 34-55540 (March 27, 2007), 72 FR 16934 (April 5, 2007).

<sup>24</sup> Current Exchange Act Rule 12g3-2(e) (17 CFR 240.12g3-2(e)).

<sup>25</sup> Current Exchange Act Rule 12g3-2(f) (17 CFR 240.12g3-2(f)).

<sup>26</sup> Current Exchange Act Rule 12g3-2(b)(4) (17 CFR 240.12g3-2(b)(4)) provides that copies furnished to the Commission of press releases and any materials distributed directly to security holders must be in English, and states that English summaries and versions may be used instead of English translations. However, the rule does not specify what other documents must be translated fully into English, and when summaries or versions may be used.



- 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.<sup>27</sup>

## 2. Proposed Rule 12g3-2 Amendments

In February 2008, we proposed amendments to Rule 12g3-2(b) in order to adapt that exemptive regime to the several significant developments occurring since its initial adoption four decades ago.<sup>28</sup> Those developments include the increased globalization of securities markets, advances in information technology, and the increased use of ADR facilities by foreign companies to trade their securities in the United States, which have multiplied the number of foreign companies engaged in cross-border activities, as well as increased the amount of U.S. investor interest in the securities of foreign companies. Just as those developments led us to re-evaluate and revise the Commission rules governing when a foreign private issuer may terminate its Exchange Act registration and reporting obligations, so those same factors have led us to reconsider as well the Commission rules that determine when a foreign private issuer must enter the Section 12(g) registration regime.

We proposed to amend Exchange Act Rule 12g3-2 to permit a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit an application to, or otherwise notify, the Commission, as long as:

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<sup>27</sup> Note 1 to Current Exchange Act Rule 12g3-2(e).

<sup>28</sup> Release No. 34-57350.

- the issuer is not required to file or furnish reports under Exchange Act Section 13(a)<sup>29</sup> or 15(d);
- the issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities;
- either:
  - the average daily trading volume (“ADTV”) of the subject class of securities in the United States for the issuer’s most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or
  - the issuer has terminated its registration of a class of securities under Exchange Act Section 12(g), or terminated its obligation to file or furnish reports under Exchange Act Section 15(d), pursuant to Exchange Act Rule 12h-6; and
- unless claiming the exemption in connection with or following its recent Exchange Act deregistration, the issuer has published specified non-U.S. disclosure documents, required to be made public from the first day of its most recently completed fiscal year, in English on its Internet Web site or through an

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<sup>29</sup> 15 U.S.C. 78m(a).

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,<sup>30</sup> or Rule 12h-6, or the suspension of its reporting obligations under Section 15(d),<sup>31</sup> 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

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<sup>30</sup> 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.

<sup>31</sup> 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.

the electronic publication in English of the same types of information required under the March 2007 amendments.

As proposed, the Rule 12g3-2(b) exemption would remain in effect until:

- the issuer no longer satisfies the electronic publication condition;
- the issuer no longer maintains a listing for the subject class of securities on one or more exchanges in its primary trading market;
- the ADTV of the subject class of securities in the United States exceeds 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the issuer's most recently completed fiscal year, other than the year in which the issuer first claims the exemption; or
- the issuer registers a class of securities under Exchange Act Section 12 or incurs reporting obligations under Exchange Act Section 15(d).

#### **B. Principal Comments Regarding the Proposed Rule Amendments**

We received letters from 32 commenters, including law firms, business, industry and legal trade associations, depository banks, financial advisory firms, and an OTC market participant. Most commenters strongly supported the Commission's proposals to eliminate the written application process for the Exchange Act Rule 12g3-2(b) exemption and replace the paper submission process for an issuer's non-U.S. disclosure documents with mandated electronic publication as a condition to claiming and maintaining the exemption.

However, most commenters were critical of the proposal that, as a condition to claiming and maintaining the Rule 12g3-2(b) exemption, a foreign private issuer's U.S. ADTV must be no greater than 20% of its worldwide ADTV for the issuer's most

recently completed fiscal year. Those commenters urged us either to eliminate the trading volume condition in its entirety or else increase the U.S. ADTV threshold to a higher percentage, such as 35%, 40% or 50% of worldwide ADTV. Some commenters also requested that we impose a trading volume condition only as an initial requirement for claiming the exemption, and not as a condition for continued use in subsequent years.

Other areas receiving comment included whether:

- to adopt the foreign listing condition as a requirement for either initially claiming the exemption or maintaining it in subsequent years;
- to permit an issuer to publish English summaries, brief English descriptions, or English versions instead of English translations of its non-U.S. disclosure documents;
- to provide a period of time for an issuer to cure a deficiency in its compliance with one or more conditions before it would be required to register under the Exchange Act;
- to require an issuer to provide some form of public notice that it was claiming and intended to rely on the Rule 12g3-2(b) exemption;
- to modify Form F-6 in light of the rule amendments, including whether to adopt provisions regarding unsponsored ADR facilities; and
- to grandfather any issuer having the Rule 12g3-2(b) exemption before the effective date of the rule amendments.

### **C. Summary of the Adopted Rule Amendments**

We have carefully considered commenters' concerns regarding the proposed amendments to Rule 12g3-2(b), and have addressed many of them in the rule

amendments that we are adopting today. Most notably, we have determined to adopt a trading volume measure solely as part of the foreign listing/primary trading market condition, and not as a separate condition. As adopted, the rule amendments will enable a foreign private issuer to claim the Rule 12g3-2(b) exemption,<sup>32</sup> without having to submit a written application to the Commission, as long as the issuer:

- currently maintains a listing of the subject class of securities on one or more exchanges in its primary trading market, which is defined to mean, as proposed, that:
  - at least 55 percent of the trading in the 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; and
  - if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions, the trading for the issuer's securities in at least one of the two foreign jurisdictions is greater than the trading in the United States for the same class of the issuer's securities;
- the issuer is not required to file or furnish reports under Exchange Act Section 13(a) or 15(d), as proposed; and

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<sup>32</sup> By the use of the term “claim” in this release, we do not mean to imply that a foreign private issuer must apply for or provide notice of the Rule 12g3-2(b) exemption in order to qualify for that exemption. Rather, as amended, the Rule 12g3-2(b) exemptive regime is meant to be self-executing.

- unless claiming the exemption upon or following its recent Exchange Act deregistration, the issuer has published in English specified non-U.S. disclosure documents, from the first day of its most recently completed fiscal year, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market.<sup>33</sup>

The adopted rule amendments will require an issuer to maintain the Rule 12g3-2(b) exemption by electronically publishing the specified non-U.S. disclosure documents for subsequent years. An issuer will lose the exemption if it:

- fails to publish electronically the required non-U.S. disclosure documents;
- no longer meets the foreign listing/primary trading market condition; or
- incurs Exchange Act reporting obligations.

We are adopting the rule amendments regarding English translation requirements, as proposed. While we decline to permit the use of “brief English descriptions” or “English versions,” we have clarified that, generally, an issuer may provide an English summary for a non-U.S. disclosure document if such a summary would be permitted for a document submitted under cover of Form 6-K<sup>34</sup> or Exchange Act Rule 12b-12(d)(3).<sup>35</sup>

We are adopting conforming amendments to Form F-6 and Rule 15c2-11. Other adopted rule amendments include eliminating, as proposed:

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<sup>33</sup> These rule amendments relate solely to the application of Exchange Act Section 12(g) and not to antifraud or other provisions of the U.S. federal securities laws.

<sup>34</sup> 17 CFR 249.306.

<sup>35</sup> 17 CFR 240.12b-12(d)(3).

- the current provision that generally prohibits the Rule 12g3-2(b) exemption to successor issuers;
- the rarely used ability of a Canadian issuer filing under the Multijurisdictional Disclosure System (“MJDS”) to obtain the Rule 12g3-2(b) exemption for a class of equity securities while having Exchange Act reporting obligations regarding a class of debt securities;
- the current provision that prohibits an issuer from relying on the Rule 12g3-2(b) exemption if its securities are traded through an automated inter-dealer quotation system; and
- the related provision grandfathering Nasdaq-traded companies meeting specified conditions from Rule 12g3-2(b)’s automated inter-dealer quotation system prohibition.

While the adopted rule amendments do not include a grandfathering provision, we are establishing, as proposed, a three-year transition period to provide sufficient time for any current Rule 12g3-2(b)-exempt issuer, which will no longer qualify for the exemption under the rule amendments, either to comply with all of the conditions of amended Rule 12g3-2(b) or register under the Exchange Act. We also are establishing, as proposed, a three-month transition period following the effectiveness of the rule amendments during which the Commission will accept and process any non-U.S. disclosure documents submitted in paper by Rule 12g3-2(b)-exempt issuers. Thereafter, the Commission will no longer process paper Rule 12g3-2(b) submissions.

By enabling a qualified foreign private issuer to claim the Rule 12g3-2(b) exemption automatically, and without regard to the number of its U.S. shareholders, the



adopted rule amendments should encourage more foreign private issuers to claim the Rule 12g3-2(b) exemption. That would enable the establishment of additional ADR facilities, make it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2-11 with respect to the equity securities of a non-reporting foreign private issuer, and facilitate the resale of a foreign company's securities to QIBs in the United States under Securities Act Rule 144A. Consequently, the adopted rule amendments should foster the increased trading of a foreign private issuer's securities in the U.S. over-the-counter market.

By requiring the electronic publication in English of specified non-U.S. disclosure documents for an issuer claiming the Rule 12g3-2(b) exemption, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents, and make better informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter market in the United States or otherwise. Thus, the adopted amendments should foster increased efficiency in the trading of the issuer's securities for U.S. investors.

## **II. DISCUSSION**

### **A. Foreign Listing Condition**

We are adopting, as proposed, the condition that, in order to be eligible to claim the Rule 12g3-2(b) exemption, an issuer must currently maintain a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities.<sup>36</sup> This condition

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<sup>36</sup> Exchange Act Rule 12g3-2(b)(1)(ii) (17 CFR 240.12g3-2(b)(1)(ii)).

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

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.<sup>38</sup> 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.<sup>39</sup> 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

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

<sup>38</sup> 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>.

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

requirements. The foreign listing requirement therefore supports one of the underlying purposes of the Rule 12g3-2(b) exemption--to make material information available to investors.

A few commenters opposed the foreign listing condition on the grounds that it would impose costs on those issuers that have not yet obtained a foreign listing, and which are likely to be smaller companies.<sup>40</sup> As we noted when proposing the rule amendments, the foreign listing condition is consistent with the Commission staff's past and current practice of administering the Rule 12g3-2(b) exemption. Any issuer, regardless of size, has had to obtain a foreign listing before it could receive the exemption. Accordingly, the adopted rule should impose no new burdens in this regard.<sup>41</sup>

### **1. The Primary Trading Market Definition**

The adopted rule amendments define primary trading market, as proposed, to mean that at least 55 percent of the worldwide trading in the issuer's subject class of securities 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 rule amendments further instruct that, if a

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<sup>40</sup> See, for example, the letter of the American Bar Association, Business Law Section ("ABA"), dated April 30, 2008.

<sup>41</sup> As is currently the case, an issuer that, on the last day of its most recently completed fiscal year, has not exceeded the 500 worldwide holder threshold under Exchange Act Section 12(g), the 300 U.S. holder threshold under Rule 12g3-2(a), or the \$10 million annual asset threshold under Rule 12g-1, could claim an exemption from Section 12(g) registration for a class of equity securities based upon one or more of those provisions, and would not have to comply with Rule 12g3-2(b)'s foreign listing or other conditions, if it chose not to rely on that rule for its exemption from Section 12(g) registration. However, such an issuer would have to claim the Rule 12g3-2(b) exemption, and satisfy all of its conditions, if it sought to have established an ADR facility for its equity securities. ADRs must be registered on a Form F-6, which requires an issuer of the deposited securities to be either an Exchange Act reporting company or have the Rule 12g3-2(b) exemption.

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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup> We decline to adopt these suggestions because, by defining an issuer's primary trading market to comprise no more

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

<sup>43</sup> 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.

<sup>44</sup> 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,<sup>45</sup> 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

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<sup>45</sup> 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.

date of filing of the Form 15F, we expect most Form 15F filers will satisfy the adopted foreign listing requirement under Rule 12g3-2(b).<sup>46</sup>

## **2. Elimination of the Proposed 20 Percent Trading Volume Condition**

In addition to the trading volume standard under the primary trading market definition, we proposed that an issuer's U.S. ADTV must be no greater than 20 percent of its worldwide ADTV for its most recently completed fiscal year. We have determined not to adopt this separate trading volume condition.

Most commenters opposed the 20 percent trading volume condition. Several commenters maintained that a foreign private issuer cannot control the level of U.S. trading of its equity securities because U.S. investors are able to purchase a foreign private issuer's securities in the issuer's home market and subsequently trade them in the United States, or purchase the issuer's securities through unsponsored ADR facilities in the United States. According to these commenters, those factors could cause an issuer's U.S. trading volume to exceed the proposed trading volume threshold and thereby require the issuer to register its securities in the United States although it has not voluntarily sought a public market there.<sup>47</sup>

Some commenters further stated that the proposed trading volume condition would likely discourage foreign private issuers from establishing or maintaining sponsored ADR facilities or engaging in exempted offerings in the U.S., such as private

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<sup>46</sup> Unless the Commission objects, termination of an issuer's reporting and registration under Rule 12h-6 is effective 90 days after the filing of its Form 15F. Exchange Act Rule 12h-6(g)(1) (17 CFR 240.12h-6(g)(1)).

<sup>47</sup> See, for example, the letters of Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"), dated April 25, 2008, and EuropeanIssuers, dated April 25, 2008.

placements and Rule 144A resales, to the detriment of U.S. investors.<sup>48</sup> In addition, commenters noted that the proposed trading volume condition would be unnecessary should the Commission adopt the proposed foreign listing condition and accompanying definition of primary trading market.<sup>49</sup>

After consideration of the comments, we have determined that adopting these amendments without the 20 percent trading volume condition is consistent with the protection of U.S. investors. Most of the foreign private issuers that currently claim the Rule 12g3-2(b) exemption have U.S. trading volumes that fall below the proposed 20 percent threshold although there is no mandatory trading volume condition.<sup>50</sup> We expect that the primary trading market provision will serve to protect U.S. investors by making it more likely that foreign companies claiming the exemption will be subject to disclosure requirements where they are listed.

### **3. Treatment of Compensatory Stock Options**

Currently, the scope of the exemption afforded to a class of equity securities under Rule 12g3-2(b) may include compensatory stock options that relate to that class of equity securities.<sup>51</sup> Some commenters expressed their concern that, as proposed, the scope of the amended rule would not include compensatory stock options since the exemption extends to a class of equity securities, the compensatory stock options would

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<sup>48</sup> See, for example, the letters of the International Bar Association, dated April 25, 2008, and Linklaters, dated April 24, 2008.

<sup>49</sup> See, for example, the letters of BNY and O'Melveny & Myers LLP, dated April 25, 2008.

<sup>50</sup> See the Memo by Jennifer Marietta-Westberg, Office of Economic Analysis, dated March 10, 2008, which is available at <http://www.sec.gov/comments/s7-04-08/s70408-2.pdf>.

<sup>51</sup> See current Exchange Act Rule 12g3-2(b)(1), which states that "securities" of a foreign private issuer shall be exempt from Section 12(g) if the rule's conditions are met.

likely be deemed a separate class, and the compensatory stock options would typically not be listed in the issuer's primary trading market.<sup>52</sup>

It is not our intention to change the scope of Rule 12g3-2(b) in this regard. Accordingly, we have added a note to the amended rule to clarify that compensatory stock options for which the underlying securities are in a class exempt under Rule 12g3-2(b) are also exempt under that rule.<sup>53</sup>

## **B. Non-Exchange Act Reporting Condition**

We are adopting the condition, as proposed, that in order to be eligible for the Rule 12g3-2(b) exemption, an issuer must not have any reporting obligations under Exchange Act Section 13(a) or 15(d).<sup>54</sup> Like the current non-Exchange Act reporting condition of Rule 12g3-2(b),<sup>55</sup> the purpose of this provision is to prevent an issuer from claiming the Rule 12g3-2(b) exemption when it already has incurred active Exchange Act reporting obligations.

### **1. Non-Reporting Issuers**

A foreign private issuer will satisfy the proposed non-reporting condition if it does not already have reporting obligations under either Exchange Act Section 13(a) or 15(d). Since Section 13(a) imposes reporting obligations on an issuer that has registered a class of securities under Section 12, a foreign private issuer that has an effective

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<sup>52</sup> See the letter of Gloria W. Nusbacher and 24 other attorneys.

<sup>53</sup> Note 3 to Exchange Act Rule 12g3-2(b)(1).

<sup>54</sup> Exchange Act Rule 12g3-2(b)(1)(i) (17 CFR 240.12g3-2(b)(1)(i)).

<sup>55</sup> Current Exchange Act Rule 12g3-2(d)(1) (17 CFR 240.12g3-2(d)(1)).



registration statement filed with the Commission under Section 12(b),<sup>56</sup> 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).<sup>57</sup>

We received relatively few comments on the proposed non-reporting condition. While some commenters supported the proposed condition,<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> We proposed to eliminate this

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<sup>56</sup> 15 U.S.C. 78l(b).

<sup>57</sup> Current Exchange Act Rule 12g3-2(d)(1).

<sup>58</sup> See, for example, the letter of Sullivan & Cromwell.

<sup>59</sup> See, for example, the letter of OFII.

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

120-day submission requirement because, under the revised Rule 12g3-2(b) exemptive scheme, we did not believe that this requirement would be necessary to protect investors.

The revised exemption does not depend on an issuer's determination of the number of its worldwide or U.S. shareholders, and does not require that it submit a written application disclosing that information. Instead, it affirmatively requires a foreign private issuer to meet a foreign listing requirement and electronically publish specified material non-U.S. disclosure documents in English. If we also required an issuer to claim the exemption within the 120-day period, we believe some issuers, particularly smaller ones, would be unable to meet that deadline.<sup>61</sup> Those issuers would have to wait until the end of their current fiscal year and the start of a new 120-day period before they could claim the exemption. We see little benefit in requiring issuers to wait several months before being able to claim the exemption. On the other hand, providing the exemption and encouraging these issuers to publish their material non-U.S. disclosure documents in English should benefit U.S. investors. Commenters uniformly agreed with our assessment on this issue. Therefore, we are eliminating the 120-day requirement for issuers under Rule 12g3-2(b), as proposed.

## **2. Deregistered Issuers**

Under the adopted, revised exemptive scheme, a foreign private issuer that has suspended its Exchange Act reporting obligations upon the filing of Form 15, pursuant to Rule 12g-4 or 12h-3, or Form 15F, pursuant to Rule 12h-6, will satisfy the non-reporting requirement upon the effectiveness of its deregistration, assuming that it has not otherwise incurred additional Exchange Act reporting obligations. Similarly, a foreign

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<sup>61</sup> Under current Rule 12g3-2(b), several issuers have applied for the exemption although the 120-day period has lapsed.

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.<sup>62</sup> 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.

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<sup>62</sup> 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.

## C. Electronic Publishing of Non-U.S. Disclosure Documents

### 1. Electronic Publishing Requirement to Claim Exemption

We are adopting, as proposed, the requirement that, unless in connection with or following a recent Exchange Act deregistration, in order to claim the Rule 12g3-2(b) exemption, an issuer must have published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, from the first day of its most recently completed fiscal year, it:

- has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;
- has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and
- has distributed or been required to distribute to its security holders.<sup>63</sup>

These are the same categories of information that the Commission has historically required a non-reporting company to submit in paper when applying for the exemption under Rule 12g3-2(b).<sup>64</sup> They also are the same non-U.S. disclosure documents that, more recently, the Commission has required an issuer to publish electronically in order to maintain its Rule 12g3-2(b) exemption claimed upon the effectiveness of its

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<sup>63</sup> Exchange Act Rule 12g3-2(b)(1)(iii) (17 CFR 240.12g3-2(b)(1)(iii)) and Note 2 to Exchange Act Rule 12g3-2(b)(1). As proposed, the adopted amendments do not require a deregistered issuer to satisfy the non-U.S. publication requirement in order to claim the Rule 12g3-2(b) exemption since that issuer will have filed Exchange Act reports for the prior fiscal year upon which investors may rely.

<sup>64</sup> Current Exchange Act Rule 12g3-2(b)(1)(i).

deregistration under Rule 12h-6.<sup>65</sup> Commenters strongly supported this electronic publication requirement.<sup>66</sup>

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.<sup>67</sup> 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,<sup>68</sup> such as:

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

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<sup>65</sup> Current Exchange Act Rule 12g3-2(e)(2).

<sup>66</sup> 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.

<sup>67</sup> 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).

<sup>68</sup> 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).

- acquisitions or dispositions of assets;
- the issuance, redemption or acquisition of securities;
- changes in management or control;
- the granting of options or the payment of other remuneration to directors or officers; and
- transactions with directors, officers or principal security holders.<sup>69</sup>

## **2. Electronic Publishing Requirement to Maintain Exemption**

In order to maintain the Rule 12g3-2(b) exemption, the adopted amendments will require an issuer to publish the same information specified in the prior fiscal year provision, on an ongoing basis and for subsequent fiscal years, on its Internet Web site or through an electronic information delivery system in its primary trading market.<sup>70</sup> This requirement will apply to any issuer claiming the exemption, whether or not a former Exchange Act registrant. Like the prior fiscal year publication condition, this ongoing publication condition will help assure that investors and other market participants have access to an issuer's specified non-U.S. disclosure documents, in English, which are material to an investment decision. Most commenters strongly supported this ongoing non-U.S. electronic publication condition.

Similar to the current rule,<sup>71</sup> the adopted rule amendments will require an issuer to publish electronically its non-U.S. disclosure documents promptly after the information

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<sup>69</sup> These are the same types of information specified in current Exchange Act Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)).

<sup>70</sup> Exchange Act Rule 12g3-2(b)(2)(i) (17 CFR 240.12g3-2(b)(2)(i)).

<sup>71</sup> Current Exchange Act Rule 12g3-2(b)(1)(iii).

has been made public, pursuant to its home jurisdiction laws, non-U.S. stock exchange rules, or shareholder meeting rules and practices.<sup>72</sup> As under current Commission staff practice, what constitutes “promptly” will depend on the type of document and the amount of time required to prepare an English translation. Currently an issuer typically must electronically publish or submit in paper a copy of a material press release on or around the same business day of its original publication.

The adopted amendments will permit an issuer to meet Rule 12g3-2(b)’s electronic publication requirement concurrently with the publishing in English of a non-U.S. disclosure document through an electronic information delivery system generally available to the public in its primary trading market. Thus, if an issuer’s non-U.S. stock exchange or securities regulatory authority permits the issuer to publish electronically a required report on its electronic delivery system, and the public has ready access to the report and other documents maintained on the system,<sup>73</sup> that electronic publication solely will satisfy the proposed Rule 12g3-2(b)’s electronic publishing requirements.

### **3. English Translation Requirement**

We are adopting, as proposed, the condition that, in order to claim or maintain the Rule 12g3-2(b) exemption, an issuer must publish electronically, at a minimum, English translations of the following documents if in a foreign language:

- its annual report, including or accompanied by annual financial statements;

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<sup>72</sup> Exchange Act Rule 12g3-2(b)(2)(ii) (17 CFR 240.12g3-2(b)(2)(ii)). Form 6-K imposes a similar requirement.

<sup>73</sup> An example of such a system is the System for Electronic Document Analysis and Retrieval (“SEDAR”) maintained by the Canadian Securities Administrators.

- 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.<sup>74</sup>

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

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.<sup>76</sup> 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.<sup>77</sup>

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

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

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

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

<sup>77</sup> 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).

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



document under cover of Form 6-K or pursuant to Exchange Act Rule 12b-12(d)(3), it can do so when claiming or maintaining the Rule 12g3-2(b) exemption.

#### **D. Elimination of the Written Application Requirement**

The adopted rule amendments eliminate the current requirement that, in order to obtain the Rule 12g3-2(b) exemption, if not proceeding under Rule 12h-6, a foreign private issuer must submit written materials, typically in the form of a letter application, to the Commission. These materials currently include a list of the issuer's non-U.S. disclosure requirements, the number of U.S. holders of its subject securities and the percentage of outstanding shares held by them, the circumstances in which its U.S. holders acquired those securities, and the date and circumstances of the most recent public distribution of the securities of the issuer or its affiliate.<sup>79</sup> As long as an issuer satisfies the adopted rule's conditions, it no longer has to submit these materials to the Commission. Commenters strongly supported eliminating the written application process.

Elimination of Rule 12g3-2(b)'s written application process for all foreign private issuers is consistent with our adoption of an automatic application of the Rule 12g3-2(b) exemption upon the effectiveness of an issuer's deregistration under Rule 12h-6. Moreover, since the adopted rule amendments permit an issuer to claim the Rule 12g3-2(b) exemption based on a foreign listing/primary trading market condition, regardless of the number of its U.S. shareholders, the current shareholder information requirement would be of marginal use. Further, since, as adopted, as a condition to

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<sup>79</sup> Current Exchange Act Rules 12g3-2(b)(1), (2) and (5). As part of the written application process, an issuer must also submit paper copies of its non-U.S. disclosure documents published since the first day of its most recently completed fiscal year.

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.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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

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

<sup>81</sup> See the Proposing Release at n. 86.

<sup>82</sup> See, for example, the letters of Simpson Thacher and Sullivan & Cromwell.

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

Internet Web site that it has electronically published specified non-U.S. disclosure documents in order to claim or maintain the Rule 12g3-2(b) exemption.

**E. Duration of the Amended Rule 12g3-2(b) Exemption**

As adopted, the amended Rule 12g3-2(b) exemption will remain in effect until an issuer:

- no longer electronically publishes the specified non-U.S. disclosure documents required to maintain the exemption;
- no longer maintains a listing for the subject class of securities on one or more exchanges in a primary trading market, as defined by the rule; or
- registers a class of securities under Section 12 of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act.<sup>84</sup>

The duration of the amended Rule 12g3-2(b) exemption is similar to the duration of the current exemption. Both depend on an issuer's continued compliance with the requirement to publish its non-U.S. disclosure documents. Under both provisions, Section 12 registration or the inurrence of Section 15(d) reporting obligations terminates the exemption.<sup>85</sup> Moreover, currently, if an issuer can no longer claim the Rule 12g3-2(b) exemption because it has not complied with the rule's publication requirements, it must determine on the last day of the fiscal year whether, because of its record holder

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<sup>84</sup> Exchange Act Rule 12g3-2(c) (17 CFR 240.12g3-2(c)).

<sup>85</sup> See, for example, current Exchange Act Rule 12g3-2(e)(3). A Rule 12g3-2(b)-exempt issuer that acquires an Exchange Act reporting company following an exchange of shares, and thereby succeeds to the target company's Exchange Act reporting obligations under Exchange Act Rule 12g-3 (17 CFR 240.12g-3) or Exchange Act Rule 15d-5 (17 CFR 240.15d-5), would lose the Rule 12g3-2(b) exemption upon succession. If such successor issuer qualified for deregistration under Exchange Act Rule 12h-6, it could claim the Rule 12g3-2(b) exemption upon deregistration.

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.<sup>86</sup> 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.<sup>87</sup> We decline to adopt a specific cure period. We

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<sup>86</sup> 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.

<sup>87</sup> See, for example, the letter of the OFII.

believe that in order to best protect investors, an issuer that finds itself not in compliance with any of the conditions required to maintain the Rule 12g3-2(b) exemption must either re-establish compliance with the rule in a reasonably prompt manner or else register under the Exchange Act.

There is no cure period for domestic issuers that find they are subject to registration under Section 12(g). Thus, foreign private issuers are treated in a similar manner as domestic issuers in this respect. As noted, foreign private issuers may be able to avoid registration by re-establishing compliance with Rule 12g3-2(b), for example, by relisting its securities in its primary trading market.

#### **F. Elimination of the Successor Issuer Prohibition**

The adopted rule amendments will eliminate the provision that precludes an issuer from obtaining the Rule 12g3-2(b) exemption if, following the issuance of shares to acquire by merger, consolidation, exchange of securities or acquisition of assets, it has succeeded to the Exchange Act reporting obligations of another issuer.<sup>88</sup> Until recently, the sole exception to this successor issuer prohibition was for Canadian companies that registered the securities to be issued in the transaction on specified MJDS registration statements under the Securities Act.<sup>89</sup>

As part of the March 2007 rule amendments, we adopted a provision that permits a successor issuer to terminate its newly acquired Exchange Act reporting obligations as long as it meets Rule 12h-6's substantive requirements for equity or debt securities

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<sup>88</sup> Current Exchange Act Rule 12g3-2(d)(2). An issuer succeeds to the Exchange Act reporting obligations of another either under Exchange Act Rule 12g-3 (17 CFR 240.12g-3) or 15d-5 (17 CFR 240.15d-5).

<sup>89</sup> The specified MJDS registration statements are Forms F-8, F-9, F-10 and F-80 (17 CFR 239.38, 239.39, 239.40, and 239.41).

issuers.<sup>90</sup> We also amended Exchange Act Rule 12g3-2 to permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its termination of Exchange Act registration and reporting under Rule 12h-6. We see no reason to treat differently a successor issuer that qualifies for deregistration under one of the older exit rules, Rule 12g-4 or 12h-3, or under Section 15(d).

Elimination of the successor issuer prohibition will help encourage a successor issuer to claim the Rule 12g3-2(b) exemption and electronically publish its specified non-U.S. disclosure documents in English. No commenter opposed the proposed elimination of the successor issuer prohibition. Accordingly, we are removing the successor issuer prohibition under Rule 12g3-2(b), as proposed.

#### **G. Elimination of the Rule 12g3-2(b) Exception for MJDS Filers**

The adopted rule amendments will eliminate the Rule 12g3-2 provisions that make the Rule 12g3-2(b) exemption available to Canadian issuers that have only filed with the Commission specified registration statements under the MJDS,<sup>91</sup> although they may have filed those registration statements within the previous 18 months or to effect transactions in which they would succeed to Exchange Act reporting obligations.<sup>92</sup>

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<sup>90</sup> 17 CFR 240.12h-6(d). Under that rule, a non-Exchange Act reporting foreign private issuer that has acquired a reporting foreign private issuer in a transaction exempt under the Securities Act, for example, under Rule 802 (17 CFR 230.802), or Securities Act Section 3(a)(10) (15 U.S.C. 77c(a)(10)), may qualify immediately for termination of its Exchange Act reporting obligations under Rule 12h-6, without having to file an Exchange Act annual report, as long as the acquired company's reporting history fulfills Rule 12h-6's prior reporting condition and the successor issuer meets the rule's other conditions.

<sup>91</sup> The Commission adopted the Rule 12g3-2 provisions when adopting the MJDS in order to encourage Canadian issuers to use the MJDS. See Release No. 33-6879 (October 22, 1990), 55 FR 462881 (November 2, 1990), as adopted in Release No. 33-6902 (June 21, 1991), 56 FR 30036 (July 1, 1991). The MJDS generally permits a qualified Canadian issuer to file with the Commission its Canadian registration statements and reports under cover of the MJDS forms.

<sup>92</sup> Current Exchange Act Rules 12g3-2(d)(1) and (2).

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).<sup>93</sup>

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,<sup>94</sup> 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.<sup>95</sup>

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<sup>93</sup> 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.

<sup>94</sup> Pub. L. 107-204, 116 Stat. 745 (2002).

<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup>

Accordingly, we are adopting the elimination of this MJDS provision, as proposed.<sup>98</sup> 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.

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<sup>96</sup> See the letter of Osler, Hoskins & Harcourt, dated April 28, 2008.

<sup>97</sup> See Part II.K.1 below.

<sup>98</sup> 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).



## **H. Elimination of the “Automated Inter-Dealer Quotation System” Prohibition and Related Grandfathering Provision**

The adopted amendments will also eliminate the provision generally prohibiting a foreign private issuer from claiming the Rule 12g3-2(b) exemption if it has securities or ADRs quoted in the United States on an automated inter-dealer quotation system,<sup>99</sup> which, until recently, referred to the inter-dealer quotation system administered by the National Association of Securities Dealers Inc., and known as Nasdaq. The Commission initially adopted this prohibition in 1983 because of its belief that, since its establishment in 1971, Nasdaq had so matured into a trading system with substantial similarities to a national securities exchange that Nasdaq-traded foreign private issuers should be required to meet the same disclosure standards as exchange-traded foreign private issuers.<sup>100</sup> We are eliminating this prohibition, as proposed, because Nasdaq has since become a national securities exchange.<sup>101</sup>

When the Commission adopted the automatic inter-dealer quotation system prohibition, it recognized that the general prohibition could cause some Nasdaq-quoted foreign companies that already had obtained the Rule 12g3-2(b) exemption to withdraw from Nasdaq. Therefore, the Commission excepted from that prohibition securities that:

- were quoted on Nasdaq on October 5, 1983 and have been continuously traded since;

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<sup>99</sup> Current Exchange Act Rule 12g3-2(d)(3) (17 CFR 12g3-2(d)(3)).

<sup>100</sup> Release No. 34-20264 (October 6, 1983), 48 FR 46736 (October 14, 1983).

<sup>101</sup> Nasdaq ceased operations as an automated inter-dealer quotation system and became a national securities exchange effective August 1, 2006. See Release No. 34-53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

- 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.<sup>102</sup>

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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

Accordingly, we are adopting the elimination, as proposed.

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<sup>102</sup> 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.

<sup>103</sup> 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).

<sup>104</sup> 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.

<sup>105</sup> See the ABA letter and the letter of the Pink OTC Markets Inc. (“Pink OTC”), dated April 10, 2008.

## I. Revisions to Form F-6

Currently, a registrant of ADRs must state on Form F-6, the registration statement used to register ADRs under the Securities Act, that the issuer of the deposited securities against which the ADRs will be issued is either an Exchange Act reporting company or furnishes public reports and other documents to the Commission pursuant to Rule 12g3-2(b).<sup>106</sup> We proposed to require a Form F-6 registrant to state that, if the issuer of deposited securities is not an Exchange Act reporting company, such issuer publishes information in English required to maintain the Rule 12g3-2(b) exemption on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The registrant would also have to disclose the issuer's address of its Internet Web site or the electronic information delivery system in its primary trading market.<sup>107</sup>

Some commenters stated that, if the Commission elects not to publish an annual list of Rule 12g3-2(b)-exempt issuers, it will be difficult for a depository of an unsponsored ADR facility<sup>108</sup> to determine that the issuer of the subject securities has complied with the electronic publication condition of Rule 12g3-2(b). Those commenters requested that, for unsponsored facilities, we either eliminate the Form F-6 condition that

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<sup>106</sup> Part I, Item 2 of Form F-6. Form F-6 states that the registrant is the legal entity created by the deposit agreement for the issuance of ADRs for the deposited securities.

<sup>107</sup> A registrant that has effected a Form F-6 registration statement before the effective date of these final rules would not have to amend the Form F-6 to provide the issuer's Internet Web site address until the registrant's first substantive amendment of the Form F-6. However, once a registrant has disclosed the issuer's Internet address on the Form F-6, it should promptly amend the Form F-6 to disclose a subsequent change in that address.

<sup>108</sup> Currently an ADR facility may be either sponsored or unsponsored. With a sponsored facility, the issuer of the deposited securities is a party to the deposit agreement along with the depository and is able to exercise some control regarding the terms and operations of the facility. With an unsponsored facility, the depository solely controls the terms and operations of the facility.

an issuer must be subject to Exchange Act reporting or must furnish reports required under Rule 12g3-2(b),<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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

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<sup>109</sup> See the letter of JPMorganChase.

<sup>110</sup> See the letters of Ziegler, Ziegler & Associates and BNY.

<sup>111</sup> 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).<sup>112</sup>

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.<sup>113</sup> 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,<sup>114</sup> we are not adopting at this time any additional conditions regarding the formation of unsponsored ADR facilities.

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<sup>112</sup> 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.

<sup>113</sup> 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.

<sup>114</sup> See the letters of BNY and Pink OTC.

**J. Amendment of Exchange Act Rule 15c2-11**

Exchange Act Rule 15c2-11<sup>115</sup> contains requirements that are intended to deter broker-dealers from initiating or resuming quotations for covered over-the-counter securities that may facilitate a fraudulent or manipulative scheme. The Rule currently prohibits a broker-dealer from publishing (or submitting for publication) a quotation for a covered over-the-counter security in a quotation medium unless it has obtained and reviewed current information about the issuer.<sup>116</sup> One of the specified types of information satisfying this Rule 15c2-11 obligation is information furnished to the Commission pursuant to Rule 12g3-2(b). A broker-dealer must make this information reasonably available upon request to any person expressing an interest in a proposed transaction involving the security with the broker-dealer.<sup>117</sup>

We proposed to amend Rule 15c2-11 to conform to the proposed rule amendments so that a broker-dealer must have available the information that, since the beginning of its last fiscal year, the issuer has published pursuant to the Rule 12g3-2(b) exemption. We further proposed to permit a broker-dealer to fulfill its Rule 15c2-11 obligation to make reasonably available upon request the information published pursuant to Rule 12g3-2(b) by providing the requesting person with appropriate instructions regarding how to obtain the information electronically. This reflects our view that most

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<sup>115</sup> 17 CFR 240.15c2-11.

<sup>116</sup> Rule 15c2-11(a) (17 CFR 240.15c2-11(a)). The broker-dealer must also have a reasonable basis for believing that the issuer information, when considered along with any supplemental information, is accurate and is from a reliable source.

<sup>117</sup> Rule 15c2-11(a)(4) (17 CFR 240.15c2-11(a)(4)).

investors will have ready access to the electronically published documents of Rule 12g3-2(b)-exempt issuers.

The proposed amendment of Rule 15c2-11 received little comment. Because this proposal will make it easier for broker-dealers to fulfill their Rule 15c2-11 obligations for the benefit of investors, we are adopting it, as proposed. Because some issuers currently still make paper submissions to maintain their Rule 12g3-2(b) exemption, we expect that, during the first year of the amended rules' effectiveness, a broker-dealer may have to resort to both paper submissions and electronically published materials in order to fulfill its Rule 15c2-11 obligations regarding a particular issuer. Eventually, however, a broker-dealer will only have to look to an issuer's electronically published materials for the purpose of Rule 15c2-11.

## **K. Transition Periods**

### **1. Regarding Section 12 Registration**

While we believe most issuers that currently have the Rule 12g3-2(b) exemption will continue to be able to claim the exemption upon the effectiveness of the adopted rule amendments, some may not be able to do so because, for example, they no longer maintain a foreign listing or their principal foreign trading market comprises less than 55 percent of their worldwide trading and, therefore, does not meet the definition of primary trading market under the amended rule. Those issuers will have to file a Section 12 registration statement if they are unable to meet all of the amended rule's conditions or fail to qualify under another exemption from Section 12(g). In order to provide those issuers with sufficient time to prepare for and complete the Section 12 registration process, including obtaining required audited financial statements, we are adopting a

three-year transition period, as proposed. Those issuers must become Exchange Act registrants no later than three years from the effective date of the adopted rule amendments if they are unable to comply fully with all of the amended rule's conditions.<sup>118</sup>

We believe this three-year transition period is necessary for the benefit not just of issuers, but of broker-dealers and investors as well. If a currently exempt issuer is unable to claim the Rule 12g3-2(b) exemption upon the effectiveness of the rule amendments because it no longer has a foreign listing or cannot meet the primary trading market definition, but continues to comply with the electronic publishing condition, a broker-dealer will be able to rely on that issuer's electronic postings to meet its Rule 15c2-11 obligations to investors and to facilitate resales of that issuer's securities in Rule 144A transactions during the transition period.

Several commenters urged the Commission to grandfather indefinitely current Rule 12g3-2(b)-exempt companies.<sup>119</sup> Most of those issuers also stated their support for a three-year transition period as an alternative to a grandfathering provision.<sup>120</sup> We decline to adopt a grandfathering provision because, in the interest of protecting investors, we believe that any issuer that claims the Rule 12g3-2(b) exemption must comply fully with the foreign listing condition and definition of primary trading market.

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<sup>118</sup> We adopted a similar three-year transition period to enable those grandfathered Nasdaq-traded foreign companies that were Rule 12g3-2(b)-exempt to register under Section 12(b) after Nasdaq became an exchange. See Release No. 34-54241 (July 31, 2006), 71 FR 45359 (August 8, 2006).

<sup>119</sup> See the letters of the ABA, BNY, JPMorganChase, Pink OTC, and Shearman & Sterling.

<sup>120</sup> The ABA suggested a five-year transition period.



Adoption of a three-year transition period will enable issuers to achieve full compliance with Rule 12g3-2(b) or Exchange Act registration without unduly burdening them.

## **2. Regarding Processing of Paper Submissions**

We expect that, following the effectiveness of the adopted rule amendments, some Rule 12g3-2(b)-exempt companies will continue to submit their non-U.S. disclosure documents in paper to the Commission either because they are unaware of the amendments or lack electronic publishing capabilities. In order to assist those companies in complying with the new amendments, and because there may also be some investors who currently do not have ready access to the Internet, we are adopting a three-month transition period, as proposed. During this period, the Commission will continue to process paper Rule 12g3-2(b) submissions and make them publicly available in the Public Reference Room for three months following the effectiveness of the rule amendments. Thereafter, the Commission will no longer process paper Rule 12g3-2(b) submissions. An issuer that continues to make Rule 12g3-2(b) submissions in paper after this three-month period, and does not publish the submitted documents electronically as required, will no longer be able to claim the Rule 12g3-2(b) exemption.

Those commenters that addressed the matter supported such a transition period,<sup>121</sup> although one commenter suggested a one-year period instead of a three-month period.<sup>122</sup> Because of recent advances in information technology, we continue to believe that three months will be sufficient time for all Rule 12g3-2(b)-exempt issuers to develop the capabilities to publish electronically their non-U.S. disclosure documents, and for

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<sup>121</sup> See the letters of the ABA, BNY and Pink OTC.

<sup>122</sup> See the BNY letter.

investors and other interested persons to determine how and where to access those electronically published documents.

### **III. PAPERWORK REDUCTION ACT**

The final rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").<sup>123</sup> The title of the affected collections of information are submissions under Exchange Act Rule 12g3-2 (OMB Control No. 3235-0119) and Securities Act Form F-6 (OMB Control No. 3235-0292). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the amendments to Rule 12g3-2 and Form F-6 is mandatory.

Exchange Act Rule 12g3-2 is an exemptive rule that, under paragraph (b) of that rule, provides an exemption from Exchange Act Section 12(g) registration for a foreign private issuer that, on an ongoing basis, either submits copies of its material non-U.S. disclosure documents to the Commission in paper or publishes those documents on its Internet Web site or through an electronic information delivery system in its primary trading market. We adopted paragraph (b) of Rule 12g3-2 in order to provide information for U.S. investors concerning foreign private issuers with limited securities trading in U.S. capital markets.

Securities Act Form F-6 is the form used to register ADRs, which are a special type of security issued by a U.S. bank, representing a specified amount of securities issued by a foreign company that are deposited with the bank. We adopted Form F-6 in order to provide investors with information concerning a foreign company's ADRs, as

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<sup>123</sup> 44 U.S.C. 3501 *et seq.*

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.<sup>124</sup> 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.

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<sup>124</sup> 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.

We have prepared the annual burden and cost estimates of the final rule amendments on Rule 12g3-2(b) submissions or publications and Form F-6 based on the following current estimates and assumptions:

- a foreign private issuer incurs 75% of the burden required to produce each Rule 12g3-2(b) submission or publication, excluding the initial application for the Rule 12g3-2(b) exemption and English translation work, and 25% of the burden required to perform work for the initial application and English translation for the Rule 12g3-2(b) submissions or publications;
- outside firms, including legal counsel, accountants and other advisors incur 25% of the burden required to produce each Rule 12g3-2(b) submission or publication, not including the initial application for the Rule 12g3-2(b) exemption and English translation work, at an average cost of \$400 per hour, and 75% of the burden required to produce the initial application at an average cost of \$400 per hour, and 75% of the burden resulting from English translation work at an average cost of \$125 per hour;
- English translation work constitutes on average 25% of the total work required for the Rule 12g3-2(b) submissions;
- a registrant satisfies 25% of the burden required to produce each Form F-6; and
- outside firms, including legal counsel, accountants and other advisors, satisfy 75% of the burden required to produce each Form F-6 at an average cost of \$400 per hour.

We published a notice requesting comment on the collection of information requirements in the Proposing Release and submitted these requirements to the Office of

Management and Budget ("OMB") for review in accordance with the PRA.<sup>125</sup> We received several comment letters regarding the proposed rule amendments, although none addressed their estimated effects on the collection of information requirements. We have revised the proposed rule amendments in response to those comments. As a result, we have revised the estimated reporting and cost burdens of the rule amendments, as discussed below.

**A. Rule 12g3-2(b) Submissions or Publications**

We estimate that, currently under Rule 12g3-2(b), on an annual basis:

- 1,036 foreign private issuers claim the Rule 12g3-2(b) exemption;
- each issuer makes on average 12 submissions or publications, for a total of 12,432 submissions or publications under Rule 12g3-2(b);
- production of those Rule 12g3-2(b) submissions or publications requires a total of 49,728 burden hours, or an average of 4 burden hours per submission or publication (for all work performed by foreign private issuers and outside firms);
- of those total burden hours, 13,700 hours result from work incurred by 685 issuers to produce their initial Rule 12g3-2(b) applications;<sup>126</sup>

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<sup>125</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>126</sup> We previously estimated that 685 issuers obtained the Rule 12g3-2(b) exemption before the adoption of Rule 12h-6, which eliminated the application process for issuers that deregister pursuant to that new rule. See Release No. 34-55540. All of the 685 issuers obtained the Rule 12g3-2(b) exemption after having submitted a letter application to the Commission. Based on a review of several Rule 12g3-2(b) applications, and an assessment of Rule 12g3-2(b)'s requirements and current practice, we estimated then, and continue to estimate, that it takes approximately 20 hours on average to complete a Rule 12g3-2(b) letter application. 685 x 20 hrs. = 13,700 hrs.

- foreign private issuers incur a total of 25,943 burden hours<sup>127</sup> to produce the Rule 12g3-2(b) submissions or publications, or an average of 2.1 burden hours per submission or publication;<sup>128</sup> and
- outside firms perform service at a total cost of \$7,656,375<sup>129</sup> to produce the Rule 12g3-2(b) submissions or publications.<sup>130</sup>

We estimate that, on an annual basis, up to 350 additional foreign private issuers could claim the Rule 12g3-2(b) exemption as a result of the amendments to Rule 12g3-2 we are adopting today.<sup>131</sup> This increase in the number of Rule 12g3-2(b)-exempt issuers would cause:

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<sup>127</sup> 49,728 hrs. - 13,700 hrs. = 36,028 hrs. for work excluding application work. 36,028 hrs. x .25 = 9,007 hrs. for English translation work. 36,028 hrs. - 9,007 hrs. = 27,021 hrs. x .75 = 20,266 hrs. for non-English translation work. 9,007 hrs. x .25 = 2,252 hrs. for English translation work. 13,700 hrs. x .25 = 3,425 hrs. for application work. 20,266 hrs. + 2,252 hrs. + 3,425 hrs. = 25,943 hrs. for total work performed by foreign private issuers. 25,943 hrs./12,432 = 2.1 hrs per submission or publication.

<sup>128</sup> The last OMB-approved submission for Rule 12g3-2(b) reported 31,080 burden hours for foreign private issuers. Our current estimate of 25,943 burden hours is due to our assessment of the average annual burden hours required to produce written applications under Rule 12g3-2(b), most of which are incurred by outside firms. The decrease in hours represents an adjustment to the previous OMB-approved burden estimate for Rule 12g3-2(b), which we noted when submitting the PRA estimate for the Proposing Release.

<sup>129</sup> 27,021 hrs. x .25 = 6,755 hrs. x \$400/hr. = \$2,702,000 for non-English translation work. 9,007 hrs. x .75 = 6,755 hrs. x \$125/hr. = \$844,375 for English translation work. 13,700 hrs. x .75 = 10,275 hrs. x \$400/hr. = \$4,110,000 for application work. \$2,702,000 + \$844,375 + \$4,110,000 = \$7,656,375 for total work performed by outside firms.

<sup>130</sup> The last OMB-approved submission for Rule 12g3-2(b) reported \$4,895,100 in total costs for outside firms. Our current estimate of \$7,656,375 is due to the previously noted assessment of the average annual burden hours required to produce written applications under Rule 12g3-2(b). This increase in costs represents an adjustment to the previous OMB-approved cost estimate for Rule 12g3-2(b), which we noted when submitting the PRA estimate for the Proposing Release.

<sup>131</sup> We previously estimated that the proposed rule amendments would cause an additional 150 issuers to claim the Rule 12g3-2(b) exemption. We have increased the estimated number of issuers affected by the final rule amendments in part due to the elimination of the proposed condition that would have required an issuer to have its U.S. trading volume no greater than 20 percent of its worldwide trading volume for its last fiscal year. Under the final rule amendments,

- the number of issuers claiming the Rule 12g3-2(b) exemption to total 1,386;
- the number of Rule 12g3-2(b) publications to total 16,632;<sup>132</sup>
- the number of burden hours required to produce these Rule 12g3-2(b) publications to total 59,528 hours (for all work performed by issuers and outside firms);<sup>133</sup>
- the number of burden hours incurred by foreign private issuers to produce the Rule 12g3-2(b) publications to total 37,206 hours, or 2.2 burden hours per publication;<sup>134</sup> and
- outside firms perform services at a total cost of \$5,860,050<sup>135</sup> to produce the

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an issuer must still meet the foreign listing/primary trading market condition, which effectively limits the issuer's U.S. trading volume to no greater than 45%. The increase in the estimated number of issuers affected by the final rule amendments is also due to a reconsideration of the number of unsponsored ADR facilities that could result from the amended rules.

<sup>132</sup>  $1,386 \times 12 = 16,632$  publications.

<sup>133</sup>  $16,632 \times 4 \text{ hrs.} = 66,528 \text{ hrs.}$   $350 \times 20 \text{ hrs.} = 7,000 \text{ hrs.}$  of work saved by the elimination of the written application requirement.  $66,528 \text{ hrs.} - 7,000 \text{ hrs.} = 59,528 \text{ hrs.}$

<sup>134</sup>  $59,528 \text{ hrs.} \times .25 = 14,882 \text{ hrs.}$  for English translation work.  $59,528 \text{ hrs.} - 14,882 \text{ hrs.} = 44,646 \text{ hrs.}$ ;  $44,646 \text{ hrs.} \times .75 = 33,485 \text{ hrs.}$  for non-English translation work;  $14,882 \text{ hrs.} \times .25 = 3,721 \text{ hrs.}$  for English translation work;  $33,485 \text{ hrs.} + 3,721 \text{ hrs.} = 37,206 \text{ total hrs.}$  incurred by foreign private issuers.  $37,206 \text{ hrs.} / 16,632 = 2.2 \text{ hrs. per publication.}$  This represents an increase of 6,126 hrs. from the most recent OMB-approved burden estimate for Rule 12g3-2(b) submissions or publications. Using a rate of \$175/hr. for in-house work, the adopted amendments could result in \$6,511,050 of in-house costs incurred by foreign private issuers compared to \$5,439,000 of in-house costs based on the previous OMB-approved burden estimate for Rule 12g3-2(b) submissions or publications.  $37,206 \text{ hrs.} \times \$175/\text{hr.} = \$6,511,050.$   $31,080 \text{ hrs.} \times \$175/\text{hr.} = \$5,439,000.$

<sup>135</sup>  $44,646 \text{ hrs.} \times .25 = 11,162 \text{ hrs.} \times \$400/\text{hr.} = \$4,464,800$  for non-English translation work;  $14,882 \text{ hrs.} \times .75 = 11,162 \text{ hrs.} \times \$125/\text{hr.} = \$1,395,250$  for English translation work;  $\$4,464,800 + \$1,395,250 = \$5,860,050$  for total costs incurred by outside firms. This represents an increase of \$964,950 from the most recent OMB-approved cost estimate for Rule 12g3-2(b) submissions or publications.















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)<sup>146</sup> of the Securities Act and Section 3(f) of the Exchange Act<sup>147</sup> 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

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<sup>146</sup> 15 U.S.C. 77b(b).

<sup>147</sup> 15 U.S.C. 78c(f).

























**PART II****Item 9. Rule 12g3-2(b) Exemption**

Disclose the address of your Internet Web site or of the electronic information delivery system in your primary trading market on which you will publish the information required to maintain the exemption under Rule 12g3-2(b).

**Instruction to Item 9.**

Refer to Rule 12g3-2(b)(3)(ii) (17 CFR 240.12g3-2(b)(3)(ii)) for instructions regarding providing English translations of documents required to maintain the Rule 12g3-2(b) exemption.

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By the Commission.

Florence E. Harmon  
Acting Secretary

Dated: September 5, 2008