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Additional Form F–6 Eligibility Requirement Related to the Listed Status of Deposited Securities Underlying American Depositary Receipts; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 239

[Release Nos. 33–8287, 34–48482, International Series Release No. 1273; File No. S7–16–03]

RIN 3235–A189

Additional Form F–6 Eligibility Requirement Related to the Listed Status of Deposited Securities Underlying American Depositary Receipts

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is publishing for comment a proposed amendment to Form F–6 to make the form unavailable to register under the Securities Act of 1933 depositary shares evidenced by unsponsored American depositary receipts if the foreign issuer has separately listed the deposited securities on a registered national securities exchange or automated inter-dealer quotation system of a national securities association. The proposed amendment is intended to benefit U.S. investors by ensuring that investors in the equity securities of the same foreign issuer all enjoy a similar level of shareholder rights and by minimizing potential investor confusion. It also is intended to improve the ability of foreign companies to control the form in which their securities are traded in U.S. markets.

DATES: Please submit your comments on or before October 17, 2003.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by hard copy or e-mail, but not by both methods. Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following electronic mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–16–03. This file number should be included in the subject line if electronic mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet website (*http://www.sec.gov*).[1]

FOR FURTHER INFORMATION CONTACT: Michael D. Coco, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at (202) 942–2990, U.S. Securities & Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0302.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment a proposed amendment to Form F–6,[2] the registration statement form under the Securities Act of 1933 (''Securities Act'')[3] for depositary shares evidenced by American depositary receipts.

I. Background and Overview of the Proposal

American depositary receipts (''ADRs'')[4] are certificates that represent an ownership interest in foreign securities on deposit with an intermediary. ADRs were developed as a means to facilitate U.S. trading in foreign securities when direct ownership would have been impractical. With the increasing globalization of securities markets and technological advancements in clearance procedures, an increasing number of foreign issuers[5] today choose to list their ordinary shares in the United States directly, rather than as ADRs. To better adapt the regulatory treatment of ADRs to the evolution of the market for foreign securities, the Commission is soliciting public comment on a proposed amendment to the eligibility requirements of Form F–6, the Securities Act registration form for ADRs. The Commission's proposed action has been prompted by proposals by market participants to issue unsponsored ADRs relating to the ordinary shares of a foreign issuer that are separately listed on a U.S. exchange.[6] The proposed amendment would not permit the use of Form F–6 to register ADRs that a foreign issuer has not sponsored if that issuer has listed its securities in ordinary share form on a national securities exchange or automated quotation system of a national securities association.

A. American Depositary Receipts

An American depositary receipt represents an ownership interest in a specified number or fraction of securities that have been deposited with a depositary (''deposited securities''). The deposited securities are typically equity securities[7] of a foreign issuer, and the depositary is usually a U.S. bank or trust company. ADRs were developed primarily to facilitate the transfer of ownership of foreign securities in the United States and the conversion of foreign currency dividends into U.S. dollars, as an alternative to purchasing ordinary shares on foreign markets.

ADRs were developed in an era of physical securities and physical settlement as a means to facilitate the transfer of ownership of foreign securities in the United States. Because a foreign company's stock transfer books were generally maintained outside the United States, and because of differences in clearance and settlement practices, ADRs were a more convenient way to trade foreign securities. Even with vastly improved communications and clearance and settlement technology, ADRs remain the most common form in which foreign securities trade in the United States.

An ADR facility may be ''sponsored'' or ''unsponsored.'' Although sponsored and unsponsored facilities are similar in many respects, for example each represents a fixed number or fraction of underlying securities on deposit with a depositary, there are a number of differences between them with regard to foreign issuer involvement, the rights and obligations of the ADR holders, and the practices of market participants.

1. Unsponsored ADRs

An unsponsored facility is established by the depositary acting on its own,

[1] We do not edit personal, identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information that you wish to make publicly available.

[2] 17 CFR 239.36.

[3] 15 U.S.C. 77a *et seq.*

[4] Since 1983, the Commission's regulations have made a distinction between ADRs and American depositary shares (''ADSs''). Under this distinction, an ADR is the physical certificate that evidences ADSs (in much the same way as a stock certificate evidences shares of stock), and an ADS is the security that represents an ownership interest in deposited securities (in much the same way as a share of stock represents an ownership interest in a corporation). Although conceptually accurate, it appears that ADR market participants largely do not differentiate between ADRs and ADSs. In this release, the term ''ADS'' is not used, and the term ''ADR'' may, depending on the context, refer to either the physical certificate or the security evidenced by the certificate.

[5] The term ''foreign issuer'' is defined in Securities Act Rule 405 [17 CFR 230.405]. A foreign issuer is any issuer that is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

[6] This is not the first time the Commission has addressed questions relating to unsponsored ADRs. In 1991, the Commission published a concept release to seek comment on several questions relating to ADRs. (Release No. 33–6894, May 23, 1991). One of the main issues at that time related to unsponsored ADRs that would essentially duplicate and be fungible with sponsored ADRs for the same securities of the same foreign issuer. The Commission did not propose or adopt any rules as a result of the concept release.

[7] Debt securities may also underlie ADRs.

usually in response to a perceived interest among U.S. investors in a particular foreign security that is not traded on a U.S. exchange or quotation system. An unsponsored ADR facility does not involve the formal participation, or even require the acquiescence of, the foreign company whose securities will be represented by the ADRs. If the foreign issuer is neither reporting under the Securities Exchange Act of 1934 (the ''Exchange Act'')[8] nor exempt from reporting obligations under the ''information supplying'' exemption of Exchange Act Rule 12g3–2(b),[9] the depositary requests that the issuer establish the exemption. Once the foreign issuer is either reporting under the Exchange Act or exempt, the depositary files a Securities Act registration statement on Form F–6 for the ADRs.[10]

An unsponsored ADR arrangement is essentially a two-party contract between the depositary and the ADR holders. The holders pay any fees relating to unsponsored ADRs, such as currency conversion fees, dividend distribution fees, and charges for other distributions and services. Under the deposit agreement for most unsponsored facilities, the depositary has no obligation to exercise voting rights on behalf of ADR holders, or to notify ADR holders about shareholder meetings or to distribute proxy information, annual reports, or other materials it receives from the foreign company.

2. Sponsored ADRs

A sponsored ADR arrangement is effectively a three party-contract: it is established jointly by a deposit agreement between the foreign company whose securities will be represented by the ADRs and the depositary, with ADR holders as third-party beneficiaries. The foreign company generally bears some of the costs, such as dividend payment fees, but the ADR holders may pay other costs such as deposit and withdrawal fees. Under most sponsored ADRs, the depositary undertakes, at the foreign company's request (and at the company's expense), to arrange for the exercise of voting rights, the distribution of proxy materials, and the forwarding of shareholder communications to the ADR holders. Although the terms of the deposit agreement for a sponsored ADR are different from those of an unsponsored ADR, sponsorship does not lead to different reporting or registration requirements under either the Exchange Act or the Securities Act.

[8] 15 U.S.C. 78a *et seq.*

[9] 17 CFR 240.12g3–2(b).

[10] *See* Section II, *infra.*

Foreign companies undertaking public offerings or listings of ADRs in the United States, and which then become reporting companies under the Exchange Act, virtually always establish sponsored arrangements.[11] The New York Stock Exchange (the ''NYSE'') and the American Stock Exchange (''AMEX'') will list only sponsored ADRs.[12] In practice Nasdaq will also list only sponsored ADRs, although its rules do not contain such a requirement.[13]

The majority of non-Canadian foreign companies whose securities are listed both in the United States and on a non-U.S. exchange use ADRs to list in the United States. ADRs have developed as a cost effective and relatively efficient means to provide for the clearance and settlement of foreign securities, and distribution of dollar-denominated dividends, in the United States.

B. Other Forms in Which Foreign Securities Are Listed on U.S. Trading Markets

Many foreign securities are listed in the United States in ordinary share form, without the use of ADRs. In this respect, these foreign securities are identical to securities of U.S. companies. For example, because the U.S. and Canadian securities markets and clearance and settlement systems developed along side one another over a long period of time, the markets have developed effective mechanisms that permit the same securities to list on a U.S. market and a Canadian market. As a result, Canadian companies list their securities in the United States without the use of ADRs. Some other foreign issuers, for example a number of Dutch issuers, issue a class of so-called ''New York shares'' rather than ADRs.

There are some foreign companies whose sole trading market is in the United States and therefore do not need to have securities transfer arrangements in more than one country. These companies have a single transfer agent located in the United States. These companies, which are generally incorporated in Bermuda, the Bahamas or Cayman Islands, are identical to U.S. companies in this respect.

Other foreign companies have created ''global share'' arrangements, in which the same security is traded in two markets without the use of ADRs.[14] The first such global share arrangement was created in connection with Daimler-Benz's acquisition of Chrysler in 1998. Since that time, three other foreign companies listed in the United States have established global share arrangements: Celanese AG, UBS AG and Deutsche Bank.

C. Unsponsored ADR Facilities Relating to Listed Ordinary Shares

Some market participants have proposed to establish unsponsored ADRs relating to shares of foreign issuers that are listed directly on a national securities exchange. These ADRs would bear a different CUSIP number from the underlying securities, each unsponsored ADR would represent a fraction or multiple of the underlying shares, and the unsponsored ADRs would trade in the over-the-counter market while the underlying shares would continue to trade on an exchange.

The Commission is concerned that having listed shares and unsponsored ADRs for the same issuer could cause investor confusion and disadvantage investors who, by purchasing unsponsored ADRs, would not benefit from the same voting rights, shareholder communications and market liquidity as ordinary shareholders. We also are concerned that unsponsored ADRs representing listed shares might disadvantage foreign issuers that have chosen to list their shares directly by reducing the degree of control those companies retain over the form in which their securities trade in the United States compared to domestic issuers. The proposed amendment to Form F–6 is intended to address these concerns.

[11] Sponsored ADR facilities are described by market participants in terms of three categories based on the extent to which the foreign company has sought to access the U.S. capital markets. A ''Level I facility'' is a sponsored facility traded in the over-the-counter markets. A ''Level II facility'' denotes ADRs quoted on the Nasdaq Stock Market (''Nasdaq'') or listed on a national securities exchange when the ADRs have not been offered in a public offering in the United States (but are publicly traded in one or more markets outside the United States). A ''Level III facility'' refers to ADRs quoted on Nasdaq or listed on a national securities exchange following a U.S. public offering.

[12] *See* New York Stock Exchange (NYSE) Listed Company Manual, ''Sponsored American Depositary Receipts or Shares,'' Section 103.04; American Stock Exchange (AMEX) Constitution and Rules, ''Original Listing Applications of Foreign Issuers,'' Section 220.

[13] *See* The Nasdaq Stock Market, ''Listing Requirements and Fees.''

[14] Global shares allow foreign companies greater access to their shareholders, as they are no longer dependent on an ADR depositary bank for distribution of shareholder materials, tabulation of shareholder votes, distribution of dividends, and other shareholder services. They are also potentially attractive to investors wishing to trade foreign securities on a U.S. exchange, because investors who have purchased ordinary shares in a foreign market otherwise must first convert them into ADRs before being able to sell those securities on a U.S. exchange.

II. Securities Act Registration and Eligibility Requirements for Form F–6

For purposes of Securities Act registration, ADRs and the deposited securities are separate securities, requiring separate registration or exemption from Securities Act registration. The regulatory structure relating to ADRs was developed in 1955,[15] and, other than a minor amendment in 1983, that structure remains in place today. The Commission has adopted Form F–6 specifically for the registration of ADRs,[16] and this form may be used to register both sponsored and unsponsored facilities. A Form F–6 registration statement, which the depositary files with the Commission, must become effective before the depositary begins to accept deposits of securities and to issue ADRs. A Form F–6 registration statement contains no substantive disclosure about the foreign company whose securities the ADRs represent, and does not indicate where those securities are traded. The disclosure relates solely to the contractual terms of deposit.

Under the present eligibility requirements, ADRs may be registered under the Securities Act on Form F–6 if four conditions are satisfied:

- The deposited securities are those of a foreign issuer;[17]
- the holder of the ADR has the right to withdraw the deposited securities at any time, subject to temporary delays, payment of fees and compliance with legal requirements;[18]
- the deposited securities are exempt from Securities Act registration and freely tradable in the United States (for example, they are not restricted securities under Securities Act Rule 144) or are separately registered under the Securities Act;[19] and
- as of the filing date of the Form F–6, the foreign company is reporting under the periodic reporting requirements of Section 13(a)[20] or 15(d)[21] of the Exchange Act or exempt from registration under Exchange Act Rule 12g3–2(b).[22]

Form F–6 is signed and filed by the depositary bank and, for sponsored ADRs only, also by the foreign issuer and prescribed officers and directors. As a result, under the present eligibility requirements, a depositary bank could register and issue unsponsored ADRs relating to any foreign company that is registered under the Exchange Act and whose securities trade in the United States in ordinary share form.

III. Discussion of Proposed Changes

We propose to add one new eligibility requirement to Form F–6, which would preclude the use of Form F–6 to register unsponsored ADRs if the shares of the foreign issuer to be deposited already trade in the United States in ordinary share form on a registered national securities exchange[23] or an automated inter-dealer quotation system of a national securities association.[24] The proposed requirement would prevent a depositary from establishing an unsponsored ADR facility relating to the shares of a foreign issuer that are already listed in the United States in ordinary share form. As discussed in the following sections, we believe various rationales support this amendment.

A. Investor Rights

We are concerned that offering unsponsored ADRs for underlying securities of a foreign issuer that are also listed on a U.S. exchange or automated inter-dealer quotation system of a national securities association may create an imbalance between the information that ADR holders receive and the information that holders of the issuer's ordinary shares receive. Unsponsored ADR holders who neither receive shareholder communications nor enjoy voting rights are unable to participate in corporate actions or make fully informed investment decisions on equal footing with holders of the ordinary shares. The proposed amendment should benefit U.S. investors by ensuring that U.S. investors in equity securities of the same foreign issuer enjoy a similar level of shareholder rights.

Questions Related to Investor Rights

- Do the purchasers of unsponsored ADRs understand the terms of the security? Specifically, do they understand the differences in dividends, voting, and other rights between the unsponsored ADR and the ordinary shares when those shares are listed on a registered national securities exchange or automated inter-dealer quotation system of a national securities association? What weight do investors give to the rights attached to security ownership in determining whether to purchase ADRs or ordinary shares?
- Are investors aware, or are they made aware, by broker-dealers or otherwise, of any differences in their rights as holders of unsponsored ADRs compared to their rights as ordinary shareholders? What obligations do broker-dealers have to provide this type of information to investors? What information do broker-dealers provide to investors in this area?
- Is more disclosure about the differences between the rights of shareholders and unsponsored ADR holders necessary? If so, what additional disclosure would be helpful? Should these concerns be addressed by disclosure rather than by limiting the availability of unsponsored ADRs?

B. Potential for Investor Confusion

Concurrent trading of global shares and unsponsored ADRs on different U.S. markets by U.S. investors may create an element of investor confusion. Investors may not be aware of the differences between the global shares and unsponsored ADRs, which generally have more restricted voting rights, limited availability of information to holders, higher fees, and more limited liquidity.

Questions Related to Investor Confusion

- Would concurrent trading of unsponsored ADRs and global shares of the same issuer result in investor confusion? If so, would the confusion be disadvantageous to investors? What type

[15] In 1955, the Commission considered the regulatory framework for ADRs and permitted their registration on Form S–12, which was specifically adopted for the registration of ADRs [Securities Act Release No. 3593 (November 17, 1955)].

[16] Securities Act Release No. 6459 (March 24, 1983) [48 FR 12348]. The adoption of Form F–6 replaced Form S–12.

[17] *See* General Instruction I.A. to Form F–6.

[18] *See* General Instruction I.A.(1)(i)–(iii) to Form F–6.

[19] *See* General Instruction I.A.(2) to Form F–6.

[20] 15 U.S.C. 78m(a).

[21] 15 U.S.C. 78o(d).

[22] *See* General Instruction I.A.(3) to Form F–6.

[23] A ''national securities exchange'' is an exchange registered as such under section 6 of the Exchange Act [15 U.S.C. 78f]. There are currently nine national securities exchanges registered under section 6(a) of the Exchange Act: AMEX, Boston Stock Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, Cincinnati Stock Exchange, International Securities Exchange, NYSE, Philadelphia Stock Exchange and Pacific Exchange. In addition, an exchange that lists or trades security futures products (as defined in Exchange Act Section 3(a)(56) [15 U.S.C. 78c(a)(56)]) may register as a national securities exchange under Section 6(g) of the Exchange Act solely for the purpose of trading security futures products. Two have done so: NASDAQ Liffe and One Chicago.

[24] A ''national securities association'' is an association of brokers and dealers registered as such under Section 15A of the Exchange Act [15 U.S.C. 78o–3]. The National Association of Securities Dealers (NASD) is the only national securities association registered with the Commission under Section 15A(a) of the Exchange Act. The NASD partially owns and operates The Nasdaq Stock Market (Nasdaq). Nasdaq has filed an application with the Commission to register as a national securities exchange. In addition, Section 15A(d) of the Exchange Act [15 U.S.C. 78o–3(k)] provides that a futures association registered under Section 17 of the Commodity Exchange Act [7 U.S.C. 21] shall be a national securities association for the limited purpose of regulating the activities of members who are registered as broker-dealers in security futures products pursuant to Section 15(b)(11) of the Exchange Act [15 U.S.C. 78o(b)(11)].

of investors might be affected and how would they be disadvantaged?

• Would different CUSIP numbers and different pricing,[25] and the fact that the unsponsored ADRs and ordinary listed shares trade on different markets, be sufficient to prevent investor confusion? If not, how could investor confusion be further reduced? Would greater disclosure ameliorate the situation?

• Who are the likely purchasers of these unsponsored ADRs? Are there circumstances where an unsponsored ADR is a more appropriate investment for a U.S. investor, or in which an investor may prefer to purchase unsponsored ADRs rather than the ordinary shares? If so, what are those circumstances?

• Are there prohibitions, restrictions, or limitations on ownership by some U.S. investors of ordinary shares of a foreign company that are listed on a national securities exchange or automated system of a national securities association that would not apply in the case of ADRs representing those shares? To what type of investors would these restrictions apply?

• Should Form F–6 be amended to require disclosure regarding the markets on which the deposited securities are traded? Would this disclosure be helpful to investors?

C. Equal Treatment of Foreign Issuers and Domestic Issuers

The regulatory structure for ADRs under the Federal securities laws, in permitting a depositary to establish unsponsored ADRs without issuer participation, may disadvantage foreign issuers as compared to domestic companies. The Commission is of the view that a foreign company seeking full access to U.S. capital markets by listing on a U.S. exchange or Nasdaq should be able to retain a degree of control over the form in which its securities are traded comparable to that of a domestic issuer.

The regulation of ADRs, in allowing for unsponsored facilities relating to shares of a foreign issuer that are listed in the United States in ordinary share form, may inadvertently operate to the detriment of foreign companies that have chosen to list their ordinary shares directly by facilitating an undesirable division in the market for their shares. For example, the ADRs relating to global shares would trade over-the-counter while the global shares themselves continue to trade on a registered national exchange. This potential does not exist for U.S. companies, to which Form F–6 does not apply.

Our proposal to modify the eligibility requirements of Form F–6 to exclude its use to register unsponsored ADRs if the foreign company has listed the underlying securities directly in the U.S. market is intended to remedy this imbalance and place the ordinary shares of foreign companies on equal footing with the shares of U.S. issuers.

Questions Regarding Equal Treatment and Competitive Effects

• Would a foreign issuer that has ordinary shares listed in the United States be placed at a competitive or other disadvantage with regard to either domestic companies, or to other foreign issuers, if an unsponsored ADR were created relating to the listed ordinary shares? If so, how? How would the possibility that an unsponsored ADR might be created affect the decision of a foreign issuer to seek a U.S. listing?

• To what degree, if any, would unsponsored ADRs increase the risk of fragmentation and disorder in the market for securities of a listed foreign issuer?

• Are there circumstances under which a foreign issuer would choose both to list its ordinary shares on a U.S. market and to sponsor an ADR facility relating to those securities? If so, under what circumstances? Would the sponsored ADRs and the underlying shares trade on the same U.S. market? Would they raise the same concerns related to investor rights and investor confusion? Would it be appropriate to defer to an issuer's choice to have its securities traded in both sponsored ADR form and ordinary share form?

• Would the proposed amendment to Form F–6 create competitive burdens for depositaries or other ADR market participants? If so, what are those burdens and how could they be minimized or avoided?

• Is the proposed amendment to Form F–6 appropriate to address these concerns?

D. Interference With the Corporate Governance Objectives of Foreign Companies

As discussed above, some foreign companies have chosen not to have their securities trade as ADRs. Permitting unsponsored ADRs for listed securities may create a disincentive for foreign companies to list in global or ordinary share form. A foreign company's decision to list directly as a global or ordinary share may be based on corporate governance considerations, such as direct access to shareholders, and often entails a more costly procedure to coordinate the clearance and settlement systems in different jurisdictions. Unsponsored ADRs for listed shares may interfere with this decision by foreign companies, and may make foreign companies reluctant to enter or remain listed in the United States.

Questions Regarding Potential Interference With Corporate Governance Objectives of Foreign Issuers

• What role do corporate governance issues, such as access to shareholders, play in a foreign issuer's determination of how it lists in the United States? Are unsponsored ADRs disadvantageous to foreign issuers from this perspective? If so, how?

• Why do foreign issuers elect to list their securities in the form of global or ordinary shares? What are the advantages and disadvantages of these shares to market participants, including investors, broker-dealers, and exchanges? What are the costs, monetary and other, involved in listing directly global or ordinary shares as compared to ADRs? Would the possibility that an unsponsored ADR may be created deter foreign issuers from creating global shares?

• Do investors prefer more direct access to issuers afforded by ownership of global or ordinary shares compared to unsponsored ADRs? Would they be likely to purchase global or ordinary shares over unsponsored ADRs for this reason? Do investors prefer more options in the form of securities available when investing in foreign issuers? Are issuers concerned if their securities trade in more than one form?

IV. General Request for Comments

We request and encourage any interested persons to submit comments regarding:

• The proposed changes that are the subject of this release,

• Additional or different changes, or

• Other matters that may have an effect on the proposals contained in this release, including whether there are other approaches or alternative means of addressing the concerns that it discusses.

We request comment from the point of view of registrants, investors, depositaries, national securities exchanges, national securities associations and others who are involved in the market for ADRs and the securities of foreign issuers in the United States. With regard to any comments, we note that such comments are of greatest assistance to our

[25] If an unsponsored ADR represented a multiple of underlying securities, presumably the ADRs and the underlying securities would trade at different prices.

rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

In addition to responding to the questions presented in this release, the Commission invites comments to supplement or correct the information and assumptions it contains related to:

- The functioning of the ADR market,
- The roles of market participants,
- Advantages and disadvantages of unsponsored ADRs that either represent underlying shares that are listed in the U.S. or that duplicate sponsored ADRs,
- The effects of unsponsored ADRs on investors, and
- Any other related matters.

V. Paperwork Reduction Act

The proposed amendment to Form F–6 contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[26] We are submitting the proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[27] The title for the collection of information is ''Form F–6.'' 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.

Form F–6 (OMB Control No. 3235–0292) prescribes information that an issuer must disclose to register American depositary receipts under the Securities Act. Preparing and filing a registration statement on Form F–6 is a collection of information. Respondents to this collection of information are institutions, usually U.S. banks or trust companies, that act as depositaries and establish ADR facilities. Foreign companies that sponsor ADR facilities are also respondents.

The proposed amendment, if adopted, would add an eligibility requirement to Form F–6. The proposed eligibility requirement would not permit the use of Form F–6 to register ADRs that a foreign issuer has not sponsored if that issuer has listed its securities in ordinary share form on a national securities exchange or automated quotation system of a national securities association. We believe the proposed amendment would bring the ability of foreign companies to control the form in which their securities are traded in U.S. markets to a level comparable to that of domestic issuers and reduce the potential for investor confusion.

We currently estimate that Form F–6 results in a total annual compliance burden of 2,550 hours and an annual cost of $765,000. The burden was calculated by multiplying the estimated number of respondents filing Form F–6 annually (150) by the estimated average number of hours each entity spends completing the form (34 hours). We estimate that 50% of the burden is prepared by the respondent ($150 \times 34 \times 0.50 = 2,550$). We estimate that 50% of the burden is prepared by outside advisors retained by the respondent at an average cost of $300 per hour ($150 \times 34 \times 0.50 \times \$300 = \$765,000$). This portion of the burden is reflected as a cost.

A. Reporting and Cost Burden Estimates

For our proposal regarding eligibility for use of Form F–6, the amount of information required to be included in a Form F–6 registration statement would remain the same. Accordingly, for purposes of the Paperwork Reduction Act, our preliminary estimate is that the amount of time necessary to prepare the registration statement, and hence, the total amount of burden hours, would not change. However, there may be the possibility that determining eligibility for use of Form F–6 may result in the respondent investing more resources in technology, relying to a greater extent on outside advisors, or that the average cost associated with the portion of the burden prepared by outside advisors may increase. We request comment on whether, for purposes of the Paperwork Reduction Act, the burden will increase or decrease. If so, by what amount? Would the proposal have any other effect on the total compliance burden?

We estimate that determining whether the proposed additional eligibility requirement for the use of Form F–6 is satisfied would add 0.50 burden hours to each registration statement on Form F–6. Thus, we estimate this aspect of the proposal will add an additional 75 burden hours to the current Form F–6 (0.50 hours $\times 150$ respondents). We estimate that 50% of the burden is prepared by the respondent ($0.50 \times 150 \times 0.50 = 37.5$). We estimate that 50% of the burden is prepared by outside advisors retained by the respondent at an average cost of $300 per hour ($0.50 \times 150 \times 0.50 \times \$300 = \$11,250$). This portion of the burden is reflected as a cost.

As a result, we estimate the total annual compliance burden for Form F–6 after our proposed revisions to be 2,587.5 hours and an annual cost of $776,250, an increase of 37.5 hours and $11,250 in cost. Compliance with the revised eligibility requirements for Form F–6 would be mandatory. There would be no mandatory retention period for the information disclosed, and responses to the requirements would not be kept confidential. We do not believe that the imposition of this requirement would alter significantly the number of respondents that file registration statements on Form F–6.

B. Request for Comment

We request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, with reference to File No. S7–16–03. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–16–03, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW., Washington DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

[26] 44 U.S.C. 3501 *et seq.*

[27] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

VI. Cost-Benefit Analysis

Globalization of capital markets and technological developments have contributed to increased interest among U.S. investors in foreign securities. Those factors also have led a greater number of foreign companies to list their shares directly in the United States. We are proposing to amend Form F–6 to not permit registration of unsponsored American depositary receipts relating to shares of foreign companies that are listed on a national securities exchange or automated quotation system of a national securities association. We are sensitive to the costs and benefits of our proposal, which we discuss below.

A. Expected Benefits

The proposed amendment to Form F–6 should benefit both U.S. investors and foreign issuers who have their shares listed directly in the United States. The proposed amendment should benefit U.S. investors by ensuring that equity investors in the same foreign issuer enjoy a comparable level of shareholder rights. Unlike ordinary or global shareholders, unsponsored ADR holders typically neither receive shareholder communications from the issuer nor enjoy voting rights, and are therefore less able to participate in corporate actions. By eliminating unsponsored ADRs for listed foreign securities, the proposed amendment would provide that U.S. investors in equity securities of the same foreign company benefit from the rights attached to holding ordinary or global shares.

We also expect that the proposed amendment would benefit investors by minimizing potential confusion between unsponsored ADRs that trade in the over-the-counter market and global or ordinary shares of the same foreign issuer that trade on an exchange or automated quotation system of a national securities association. We also anticipate that because the proposed rule may encourage more foreign issuers to seek listings of their shares in the United States in ordinary or global share form, U.S. investors may benefit by having a greater number of foreign issuers in which they may invest directly.

Foreign issuers who have chosen to list their shares directly on a U.S. exchange or automated quotation system of a national securities association should, as a result of the proposed amendment, have more control over the form in which their securities are traded in the United States. This should discourage the detrimental segmentation of the market for their shares in the United States and avoid a potential imbalance as compared to the shares of U.S. issuers, for which a depositary would be less likely to create a depositary receipt. We believe this may encourage more foreign companies to enter U.S. capital markets.

Foreign issuers may choose to list as global or ordinary shares directly in the United States for reasons related to corporate governance, including more direct access to U.S. shareholders. This decision to pursue a direct listing may entail greater financial, administrative and other costs to the company, as compared to listing in ADR form. The proposed amendment, if adopted, should allow foreign issuers that have chosen to list their shares directly in the United States to derive more completely the intended benefits of a direct listing as compared to listing as an ADR, and for which they have undertaken the greater expense.

B. Expected Costs

The proposed amendment to Form F–6 may result in some costs to institutions that act as depositaries and other participants in the ADR market. If the amendment were adopted, depositaries seeking to establish unsponsored ADRs would be required to ascertain whether the securities of the foreign issuer to be deposited were already listed on a national exchange or automated quotation system of a national securities association. This would increase the time necessary to prepare a Form F–6 registration statement. For purposes of the PRA, we have estimated that the proposed amendment would increase the annual compliance cost for Form F–6 by 37.5 hours and $11,250. The proposed amendment also may create a competitive cost to depositaries, which would no longer be able to establish unsponsored ADRs to compete with directly listed foreign securities.

The proposed amendment may also create a cost to investors who may prefer ADRs as the form in which they invest in a foreign company. To the extent unsponsored ADRs for listed companies would no longer be permitted if the proposal were adopted, the investment choice of these investors may be limited. These other costs are difficult to quantify.

C. Comment Solicited

We request your views on the costs and benefits described above, particularly with regard to the questions raised in Sections III and IV, as well as on any other costs and benefits that could result from adoption of the proposed amendment to Form F–6. For example, what benefits do unsponsored ADRs that relate to listed securities bring to depositaries, investors or others? What effect would eliminating this particular product have on depositaries, investors or others? Would those parties incur a cost if the ADRs were not available? Would there be any effect on the trading of other securities? What is the likely economic impact of these or other costs or benefits? Can they be quantified in any meaningful way? If so, how and what conclusions should be drawn? The Commission also requests data to quantify the expected costs and the value of the anticipated benefits.

VII. Regulatory Flexibility Act Certification

The Commission hereby certifies pursuant to 5 U.S.C. 605(b), that the amendment to Form F–6 under the Securities Act contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposal would add one new eligibility requirement to Form F–6 that would preclude the use of Form F–6 to register unsponsored ADRs if the shares of the foreign issuer to be deposited already trade in the United States in ordinary or global share form on a registered national securities exchange or an automated quotation system of a national securities association. Unsponsored ADR facilities are established by institutions that act as depositaries, which are typically large banks; these depositaries are not small entities. The ordinary or global shares underlying the unsponsored ADRs are listed foreign issuers; these foreign issuers are not small entities.[28] The ordinary or global shares underlying the unsponsored ADRs are listed on registered securities exchanges or an automated quotation system of a national securities association; these exchanges and national securities associations are not small entities. For this reason, the proposed amendment should not have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We solicit comment as to whether the proposed changes could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide

[28] Based on an analysis of the language and legislative history of the Act, Congress does not appear to have intended the Regulatory Flexibility Act to apply to foreign issuers.

empirical data to support the extent of the impact.

VIII.Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[29] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 2(b) of the Securities Act [30] and Section 3(f) of the Exchange Act [31] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [32] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The purpose of this proposed amendment is to improve the ability of foreign companies to control the form in which their securities are traded in U.S. markets and to avoid potential investor confusion. We think that the proposal would promote efficiency by enhancing the ability of foreign issuers to access their U.S. shareholders. We also believe that the proposal would update the regulatory framework for ADRs to reflect the globalization and technological developments that have occurred in securities markets, eliminate the potential for differential treatment between foreign issuers with directly listed shares and domestic issuers, and make the U.S. capital markets more attractive to foreign issuers. In fact, we expect that the proposals would enhance competition among foreign issuers seeking to list in the United States by encouraging them to list in ordinary or global share form. The proposal may create a competitive burden for depositaries that would seek to establish unsponsored ADR facilities relating to foreign shares that are listed in the United States, and to any investors who would prefer to own such ADRs rather than ordinary shares.

We solicit comment on these matters with respect to the proposed rules. Would the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Securities Act? Would eliminating the use of Form F–6 for unsponsored ADRs related to listed securities give an unfair advantage to other market participants? Would the proposed amendments, if adopted, promote efficiency, competition and capital formation? Commenters are requested to provide empirical data and other factual support for their views, if possible.

IX. Statutory Basis and Text of Proposed Rule Amendment

We propose the amendment to Securities Act Form F–6 pursuant to sections 6, 7, 10, and 19 of the Securities Act, as amended,[33] and sections 12, 13, 15(d), and 23(a) of the Exchange Act.[34]

Text of Proposed Amendment

List of Subjects in 17 CFR Part 239

Reporting requirements, Securities.

In accordance with the foregoing, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Amend Form F–6 (referenced in § 239.36), General Instruction I.A., by adding paragraph 4 to read as follows:

Note: The text of Form F–6 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F–6

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General Instructions

I. Eligibility Requirements for Use of Form F–6

A. General.

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(4) The deposited securities are not listed on a registered national securities exchange or automated inter-dealer quotation system of a national securities association, unless the issuer of the deposited securities sponsors the ADR arrangement.

* * * * *

By the Commission.

Dated: September 11, 2003.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 03–23737 Filed 9–16–03; 8:45 am]

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[29] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[30] 15 U.S.C. 77b(b).

[31] 15 U.S.C. 78c(f).

[32] 15 U.S.C. 78w(a)(2).

[33] 15 U.S.C. 77f, 77g, 77j, and 77s.

[34] 15 U.S.C. 78*l*, 78m, 78o(d), and 78w.