April 10, 2008

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

Subject: File Number S7-04-08

Dear Ms. Morris:

Pink OTC Markets Inc. ("Pink OTC") appreciates this opportunity to comment on the recent proposal by the Securities and Exchange Commission (the "Commission") to amend 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 (the "Exchange Act") based on the submission to the Commission of certain information published outside the United States.

Pink OTC is the leading provider of pricing and financial information for the over-the-counter (OTC) securities markets and, among other things, operates an Internet-based, real-time quotation service for OTC equities for market makers and other broker-dealers registered under the Exchange Act. Pink OTC also operates the "OTC Disclosure and News Service," an Internet repository where foreign private issuers can post the information currently required under Exchange Act Rule 12g3-2(b) in a U.S. market location that is freely available to all investors.

Introduction

Pink OTC believes there are several useful elements in the proposal.[1] Pink OTC strongly supports the proposal to make information supplied under Rule 12g3-2(b) available over the Internet. We think this part of the proposal can be strengthened by offering foreign private issuers the option to post this information on an Internet site maintained by the principal venue where the securities are traded in the United States, such as the OTC Disclosure and News Service,

[1] In the attached Appendix, we provide a point-by-point analysis of the issues raised by the Commission in the proposal, including some issues that are not discussed in the text.

because we believe U.S. investors will expect to find the information in this location.

We also strongly support the proposal to eliminate the obsolete exclusion for securities traded on an "automated interdealer quotation system." This definition, which applied only to securities traded on NASDAQ before its registration as a national securities exchange, is a source of confusion for foreign private issuers and their advisors.

We also support the intended purpose of the proposal that would limit the Rule 12g3-2(b) information supplying exemption to securities listed on non-U.S. exchanges. In general, listing exchanges are more likely to require disclosures required to protect investors. However, some tiers of non-U.S. stock exchanges lack meaningful disclosure requirements or the regulatory institutions necessary to support them. Rather than make an arbitrary rule that fails to take into account the disclosure practices in non-U.S. jurisdictions, we believe the Commission should determine on a case-by-case basis that the listing standards and regulatory environment of an issuer's home country market are adequate to protect U.S. investors.

Finally, we vigorously oppose the ill-conceived part of the proposal that would require foreign private issuers to register under the Exchange Act if the annual trading volume of a class of equity securities in the United States exceeds 20% of global trading volume. Foreign private issuers required to register under this rule would already be subject to the disclosure rules of another jurisdiction. U.S. registration rules would likely impose a duplicative and possibly inconsistent set of disclosure requirements on these issuers. Yet, the Commission has failed to demonstrate that imposing duplicative, inconsistent and burdensome disclosure requirements would in any way protect U.S. investors. We do not believe it is sufficient justification to impose U.S. registration requirements merely because U.S. investors are interested in a foreign security, no more than we would agree that a U.S. issuer should be subject to the disclosure rules of a non-U.S. jurisdiction merely because one-fifth of its world-wide trading volume occurs there.

We also believe the 20% rule, if adopted, will harm U.S. investors by encouraging certain foreign private issuers to take actions intended to reduce trading volumes in the United States. These actions will cause a loss of investment opportunities for U.S. investors and result in harm to our capital markets. The direct result will be that U.S. investors who wish to trade these securities will be forced to open non-U.S. accounts in foreign jurisdictions. These U.S. investors will be deprived of the strong regulatory protections available to

persons who trade on U.S. markets, and U.S. broker-dealers will lose business opportunities to trade these securities that would otherwise be available to them. The unintended consequence of the 20% Rule therefore will be to boost secondary trading of securities in London, Dubai, Hong Kong and other competing global financial centers to the detriment of U.S. investors, broker-dealers and capital markets.

Moreover, we think the rule would be unenforceable as proposed and would therefore affect only law-abiding issuers who comply voluntarily. The rule would therefore deprive U.S. investors of an opportunity to invest in foreign private issuers with a strong compliance culture, while rendering the pool of foreign investments that continue to trade in U.S. markets more likely to result in harm to investors.

The U.S. OTC markets are an important part of our capital markets ecosystem and enable the United States to compete effectively in the world's capital markets. A recent advertisement in the Wall Street Journal by a leading online broker has proclaimed: "International Returns SURPASS US."[2] The advertisement points out that growth has increased the demand by all U.S. investors for international investment opportunities. Sadly, over half of the non-U.S. securities in the FTSE All-World Index[3] are not available to U.S. investors on U.S. exchanges or in the OTC market.

We believe that for the good of U.S. investors the Commission should strive to make the securities of non-U.S. companies from regulated jurisdictions easily available to investors in the U.S. OTC markets through U.S. broker-dealers and take every opportunity to foster advances in technology and regulatory improvements to improve the competitiveness of U.S. OTC markets in an increasingly global arena. The Rule as proposed will render U.S. OTC markets less competitive and limit investment opportunities for U.S. investors.

We do not believe the Commission should take unilateral action to promulgate a rule that requires foreign private issuers to register securities under the Exchange Act when those issuers neither raise capital in the United States nor list securities on a national securities exchange. Nonetheless, if the Commission is determined to institute such a rule, it should be designed to protect U.S.

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[2] S&P Global 1200 5-Year Return of 17.64% vs. S&P 500 5-Year Return of 12.82%.

[3] The FTSE All-World ex US Index is part of a range of indexes designed to help US investors benchmark their international investments. The index comprises Large (83%) and Mid (17%) cap stocks providing coverage of Developed and Emerging Markets (47 countries) excluding the US. The index is derived from the FTSE Global Equity Index Series (GEIS), which covers 98% of the world's investable market capitalization.

investors. Foreign private issuers should have the opportunity to avoid registration by taking steps that will not harm U.S. investors. The rule should be fair. We propose in this comment an alternative method that will enable foreign private issuers to take direct action to avoid U.S. registration, treat issuers and investors fairly, and protect U.S. investors from harm.

Finally, we propose in this comment a practical, enforceable alternative to protect investors that can be implemented immediately.

The Current Rule in Relation to Pink OTC

In 2007, Pink OTC established the OTCQX market tiers and categorized all other securities quoted on the Pink Sheets[4] based on the quality of information disclosed by issuers to the investing public.[5] To be classified on an International OTCQX tier, a foreign private issuer that relies on Rule 12g3-2(b) must (i) maintain a listing on a qualified non-U.S. stock exchange, (ii) be listed in a U.S. securities manual, (i) post the disclosure it files with the Commission pursuant to Rule 12g3-2(b) on the Pink OTC websites and (iv) obtain the sponsorship of an ADR Depository Bank, U.S. Investment Bank or U.S. attorney that confirms the issuer's compliance with its obligations under Rule 12g3-2(b). OTCQX securities now represent over 13% of the trading volume on Pink Sheets. We believe the relatively large amount of trading volume attributable to securities listed on OTCQX results from the amount of information OTCQX issuers make easily available to U.S. investors on a U.S. website maintained by the venue where the securities are quoted. The quality of disclosure produced by OTCQX issuers distinguishes them from highly variable quality of other issuers quoted in the OTC equity markets.

It has been difficult for Pink OTC to classify foreign private issuers that have not applied for an International OTCQX classification. We have not been successful in determining whether foreign private issuers quoted in the Pink Sheets that have not applied for an International OTCQX classification are compliant with Rule 12g3-2(b). The Commission last published a list of issuers that rely on Rule 12g3-2(b) in 2005, and the disclosures made by issuers relying on Rule 12g3-2(b) are filed in paper form with the Commission. We were more successful in determining whether or not the securities of a foreign private issuer are listed on a qualified non-U.S. exchange. Our research has identified 7 ADRs that have been halted or delisted from a non-U.S. exchange, the majority of which have

[4] Pink Sheets is a quotation facility operated by Pink OTC.

[5] Information on OTCQX market tiers and Pink Sheets Categories is available at: http://www.pinksheets.com/pink/otcguide/investors_market_tiers.jsp

Exchange Act reporting obligations and were late in complying with those obligations. 8 issuers that purport to rely on Rule 12g3-2(b) have ordinary shares quoted in the Pink Sheets, but are not listed on any non-U.S. exchange. Of those 8 issuers, approximately one-half posted audited financials on a website maintained by Pink OTC. However, we have not received any letter from a U.S. attorney confirming the compliance of these issuers with Rule 12g3-2(b) and have therefore classified them as providing limited information. The remaining issuers have been classified as providing no information, a category that is marked with a stop sign as a warning to investors.

Based on this experience, we strongly support that part of the Commission's proposal that would limit reliance on the Rule 12g3-3(b) exemption to issuers that are listed on qualified non-U.S. exchanges.[6]

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[6] An International OTCQX issuer must be listed on one of the following non-U.S. stock exchanges:

Argentina - Buenos Aires Stock Exchange;
Australia - ASX-Australian Securities Exchange
Austria - Vienna Stock Exchange (Wiener Börse AG)- Official Market, Vienna Stock Exchange (Wiener Börse AG)- Second Regulated Market **Belgium -** Euronext Brussels
Brazil - Bovespa (Sao Paulo Stock Exchange)
Canada - Toronto Stock Exchange, TSX Venture Exchange
Chile - Santiago Stock Exchange
China - Hong Kong Stock Exchange
Colombia - Bogota Stock Exchange
Denmark - OMX Nordic Exchange Copenhagen
Dubai - Dubai International Financial Exchange (DIFX)
Finland - OMX Nordic Exchange Helsinki
France - Euronext Paris
Germany - Frankfurt Stock Exchange-Official Market, Frankfurt Stock Exchange-Regulated Market
Hungary - Budapest Stock Exchange
Iceland - OMX Nordic Exchange Iceland
India - Mumbai/Bombay Stock Exchange
Ireland - Irish Stock Exchange
Israel - Tel Aviv Stock Exchange (TASE)
Italy - Borsa Italiana S.p.A
Japan - Tokyo Stock Exchange
Korea - Korea Stock Exchange (KSE)- Main Board, Korea Stock Exchange (KSE)- KOSDAQ

The Proposed 20% of Trading Volume Registration Rule Will Harm U.S. Investors and Reduce the Competitiveness of U.S. Capital Markets

At the outset, it should be noted that the Commission's proposal applies only to securities traded over-the-counter. Securities listed on national securities exchanges are required to be registered under Exchange Act Section 12(b), regardless of trading volume.

It must also be stressed that the proposed Rule is significantly more stringent than the existing Rule. Under the current Rule, no foreign private issuer is ever required to register under Exchange Act Section 12, unless the issuer (i) engages in a public offering of securities in the United States or (ii) lists its securities on a national securities exchange. All other foreign private issuers, irrespective of the volume of trading in the United States, may rely on the information supplying exemption of Rule 12g3-2(b) to avoid Exchange Act registration. In contrast, the proposal requires registration of those foreign private issuers of securities that previously could have relied upon the exemption, if the average daily trading volume of their securities in the United States exceeds 20% of world-wide volume for that year.

The proposal is troubling because a foreign private issuer cannot exercise direct control over the volume of trading in its securities. In contrast, an issuer can determine unilaterally whether or not to engage in a public offering of securities in

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Mexico - Bolsa Mexicana de Valores (Mexican Stock Exchange)
Netherlands - Euronext Amsterdam
New Zealand - New Zealand Exchange
Norway - Oslo Bors (Oslo Stock Exchange)
Peru - Bolsa de Valores de Lima (Lima Stock Exchange)
Philippines - Philippine Stock Exchange
Portugal - Euronext Lisbon
Russia - MICEX-Moscow Interbank Currency Exchange, RTS-Russian Trading System Stock Exchange
Singapore - Singapore Exchange
South Africa - Johannesburg Stock Exchange
Spain - Madrid Stock Exchange
Sweden - Stockholm Stock Exchange
Switzerland - SWX Swiss Exchange
Thailand - Stock Exchange of Thailand (SET)
United Kingdom - London Stock Exchange (LSE)-Main Board, AIM Market
Venezuela - Caracas Stock Exchange

the United States or list on a national securities exchange. An issuer that wishes to avoid registration under the proposed rule must therefore take actions that will have the indirect effect of causing reductions in the volume of trading. The obvious weapons available to such an issuer are the cancellation of its sponsored ADR program and restricting the information about the issuer available to U.S. investors. These actions are, however, extremely detrimental to U.S. investors.

Moreover, we respectfully suggest that the Rule is unenforceable as proposed. We believe the Commission is well aware of this grim reality.

The Commission currently estimates that 1,036 foreign issuers claim the current Rule 12g3-2(b) exemption. The Commission then estimates that an additional 150 issuers will claim the exemption under the proposed Rule. These 150 issuers cannot possibly represent all of the many foreign private issuers that may present interesting investment opportunities to U.S. investors. The FTSE Quality of Markets survey shows over 36,000 securities are listed on non-U.S. exchanges. Over 20,000 securities are listed on exchanges in developed markets, the vast majority of which can claim the current exemption.

The 150 additional issuers identified by the Commission must represent issuers that have failed to comply with the current Rule. The exemption from Section 12(g) registration under current Rule 12g3-2(b) is only available for foreign private issuers that file home country reports with the Commission *before* they have 300 holders of record in the United States. However, the 150 issuers identified by the Commission can neither currently be filing home country reports with the Commission nor have a class of securities registered with the Commission. Issuers filing home country reports with the Commission would be among the 1,036 issuers that claim the current Rule 12g3-2(b) exemption. Foreign private issuers with a class of securities currently registered with the Commission have no need for the new Rule; if they qualify under Exchange Act Rule 12-h, these issuers can deregister and then rely on the current version of Rule 12g3-2(b). If these registered foreign private issuers do not qualify for deregistration under Rule 12-h, the current proposal will not help them. By process of deduction, the 150 issuers identified by the Commission for whom the new Rule will make the exemption available are comprised entirely of foreign private issuers with more than 300 U.S. holders of record that neither file home country reports with the Commission nor register their securities under Section 12(g). The Commission apparently believes that these currently non-complying issuers will comply with the new Rule.

In any event, if more than 10% of foreign private issuers are not complying with the current version of the Rule (a number we believe is improbably low), how does the Commission expect to enforce compliance with the new more stringent version? After all, the Commission cannot exercise its authority on foreign soil, not to mention the host of diplomatic and other obstacles to enforcing U.S. registration rules against non-U.S. issuers. The Commission has acknowledged publicly "the practical problems of enforcement and compliance" involved in requiring the registration of foreign private issuers.[7]

Our research indicates that the Commission rarely brings actions to enforce compliance with Section 12(g) of the Exchange Act against domestic issuers.[8] We have found no examples of actions brought by the Commission against foreign issuers for failure to register under Section 12(g), although the current proposal indicates that the Commission is well aware that the current Rule is honored in its breach.

In the absence of an effective enforcement strategy, the proposed Rule will be harmful to investors.

There has been much discussion in financial circles regarding the effects of the enhanced disclosure standards implemented with Sarbanes-Oxley. These discussions generally fail to take account of the fact that disclosure standards in all of the major global market centers have risen considerably in recent years. As a result, issuers that must comply with multiple regulatory systems are confronted with inconsistent, duplicative and layered disclosure requirements. This greatly increased disclosure burden affects U.S. issuers with securities traded in multiple markets, as well as foreign issuers. In our meetings with foreign private issuers that do not have class of securities registered with the Commission, we have encountered the widely held viewpoint that issuers can provide the clearest and most credible disclosure to investors by meeting the one standard that is best understood by their management. For a non-U.S. issuer, this one standard is likely to be their home country accounting, disclosure and primary market listing standards. In a world of tightened standards, meeting a second standard creates an unacceptable risk of confusion and duplication for

[7] See, Temporary Exemption for Foreign Issuers from Section 12(g) of the Securities Exchange Act of 1934, Securities Exchange Act Release 7427.

[8] The only actions we have identified are: *SEC v Daniel Boone Fried Chicken, Inc.*, Litigation Release No. 4682 (July 13, 1970); *SEC v Hynes & Howes Real Estate, Inc.*, Litigation Release No. 6097 (October 11, 1973); and *SEC v California Flowland Ltd.*, Litigation Release No. 9148 (July 30, 1980). The Commission appears to bring many more actions to revoke registration than to compel it.

management, resulting in unintentionally confusing and erroneous disclosure to investors.

In recent years, the Commission has acknowledged the disclosure burden faced by foreign and domestic issuers. With respect to financial statements, the Commission has recently been willing to accept IFRS, rather than U.S. GAAP, in satisfaction of U.S. disclosure standards for foreign issuers, and is currently considering allowing U.S. issuers also to use IFRS. An issuer of securities traded in many markets would therefore only be required to employ one set of accounting standards. Despite these salutary efforts to reduce unnecessary regulatory burdens, the fact remains that U.S. registration requirements substantially increase the compliance burden on non-U.S. issuers, and those requirements are, in many cases, duplicative, inconsistent and costly to implement.

Foreign private issuers with a strong culture of compliance, but that wish to avoid the compliance burden, risks and duplicative costs of U.S. registration, will take steps to discourage trading in U.S. markets in an effort to avoid reaching the 20% trading volume hurdle. These issuers can be expected to terminate sponsored ADR programs if their trading volume rises close to the 20% threshold and to avoid providing information to U.S. investors. From an issuer's perspective, taking on the complexity and cost of a second disclosure regime could easily outweigh the value of a trading in a market that is the minority of the its worldwide trading volume. Moreover, trading volumes are not static. Accordingly, an issuer of securities with, for example, 10% of its trading volume in the United States will likely take steps to discourage trading activity in the United States to avoid reaching the 20% threshold.

These actions of foreign private issuers to avoid registration will injure the U.S. financial services industry. Foreign private issuers will avoid meetings with U.S. institutional investors. Conferences with investment managers will be held in London, Geneva, Dubai and Hong Kong and other places that are inconvenient or expensive for U.S. investment managers to attend. This will place the U.S. investment management industry at a competitive disadvantage to their foreign counterparts. Foreign private issuers will avoid providing information to U.S. broker-dealers and their financial analysts, rendering their research of lower quality than their foreign competitors. Sophisticated investors will quickly realize the diminished quality of U.S. research and will cease to use U.S. broker-dealers for this purpose. The proposal will therefore reduce the ability of the U.S. financial industry to compete effectively in global markets.

The proposed Rule also fails to accomplish the Commission's objectives because it will only protect investors that trade in U.S. markets. The trading interest of U.S. investors in a security traded on a non-U.S. market may be considerably greater than 20%, but no registration will be required. We believe the Commission has the duty to protect U.S. investors that invest in securities on a global basis. Yet, the design of the Rule encourages foreign issuers to take actions that will cause U.S. investors to trade their securities in non-U.S. markets beyond the reach of the Commission's registration prerogatives.

These concerns are very real. I have traveled extensively in Europe and Asia to acquaint foreign issuers, including issuers that have utilized the current Rule 12g3-2(b) information supplying exemption and those that have not, with the opportunities to communicate with U.S. investors available through the OTC Disclosure and News Service operated by Pink OTC. Many extremely robust foreign issuers that would provide splendid investment opportunities for U.S. investors fear that the Commission will attempt to reach them through some sort of extra-territorial jurisdictional exercise. Moreover, none of these issuers reported that institutional investors have asked them to consider Exchange Act registration to improve their disclosures. This Rule, if adopted, would serve to convince issuers with a strong compliance culture that the Commission intends to unilaterally extend the reach of U.S. securities laws abroad by any means possible. This Rule may cause many reputable issuers to discourage U.S. trading in their securities. Unfortunately, the tools available to discourage trading are blunt instruments – such as, the cancellation of sponsored ADR programs or otherwise cutting off the flow of information to U.S. investors and broker-dealers – none of which benefits U.S. investors or serves the public interest.

As legitimate issuers avoid U.S. markets, U.S. investors that wish to make foreign investments in the securities of issuers with a strong compliance culture will be required to open accounts with foreign broker-dealers. The Commission does not have jurisdiction over foreign broker-dealers, and it is difficult for U.S. persons to enlist the aid of foreign regulators and courts. U.S. investors are therefore placed at a disadvantage, even when compared to other non-U.S. customers of the same non-U.S. broker-dealers. The proposed rule therefore exposes U.S. investors that seek to invest in foreign securities to a greater risk of abusive or fraudulent tactics by foreign broker-dealers.

The Commission Has Not Provided A Compelling Reason for the Proposal

In the proposal's cost benefit analysis, the Commission has apparently identified 150 issuers that are currently not in compliance with the existing Rule 12g3-2(b) exemption that could achieve compliance under the proposed amendment.

However, the Commission has not provided an estimate of those issuers currently supplying information to the Commission in compliance with existing Rule 12g3-2(b) that will now be required to register because their annual trading volume in the United States is greater than 20% of global trading volume.[9]

We are naturally proud of U.S. disclosure standards, which in my view as a United States citizen, are superior to those that exist anywhere in the world. That said, it must be admitted that Exchange Act registration has not proven to be a panacea for U.S. investors.

Certain members of the Commission have from time to time cited the disclosure standards of the Alternative Investment Market (AIM) of the London Stock Exchange as an example of deficient disclosure. We agree that the disclosures required of issuers in this market sector could be improved. It must nonetheless be acknowledged that the average annual failure rate for issuers listed on AIM is less than 3%.[10] Most of these "failed issuers" have undergone liquidations, which investors in smaller public companies expect to occur from time to time. The number of issuers that are delisted due to fraud is much lower.

In contrast, except for banks and other credit institutions providing disclosures under other regulatory schemes, all of the securities quoted on the OTCBB® operated by FINRA are required to be registered under Exchange Act Section 12(g). Yet, it has been estimated that fully 25% of the issuers with securities

[9] It is our understanding that a study by the Commission's Office of Economic Analysis, dated March 10, 2008, has estimated that forty foreign private issuers that would be required to register a class of securities under the proposal. According to this study, this list includes 13 issuers with U.S. ADR programs and 32 issuers where U.S. investors trade the foreign shares directly.

It should be noted that the study does not estimate the number of issuers that will take steps to curtail U.S. trading volume to avoid U.S. registration. We believe foreign private issuers with a strong compliance culture will take action to reduce U.S. trading volume when it reaches 5% of world-wide trading volume because that is the level at which issuers can escape the U.S. registration system.

The study also does not identify the jurisdiction of securities traded by U.S. investors from direct foreign listings. Other than securities of Canadian issuers, any trades in foreign securities conducted in the United States must be cleared through the facilities of a foreign securities custodian. We believe that the U.S. market for non-Canadian non-ADR foreign securities must be small, due to the difficulties and expense involved in clearing U.S. trades of these securities.

[10] Arcot, Black and Owen, "From Local to Global – The Rise of AIM as a Stock Market for Growing Companies," *London School of Economics and Political Science* (September 2007).

quoted on the OTCBB are utterly fraudulent shells without a meaningful operating business.[11]

The London Stock Exchange requires issuers to undergo an extensive application process to list on AIM. In addition, each AIM-listed issuer must appoint a "NOMAD," a professional third party responsible for reviewing the issuer's disclosure and providing detached professional advice regarding the issuer's duty to provide ongoing market disclosure. The standards governing the conduct of NOMADs has been strengthened considerably in recent years. This three-pronged regulatory system arguably provides superior protection for investors in smaller public issuers than the Exchange Act regime, which relies entirely on the issuer's compliance with substantive disclosure requirements without the benefit of professional third-party review.

We respectfully submit that the Commission has not established that Exchange Act registration will protect U.S. investors better than regulatory systems already operating in the jurisdiction of any particular foreign private issuer's primary regulator. Instead, the 20% trading volume proposal reflects a regrettably chauvinistic attitude towards the regulatory systems that operate in other countries. There is no particularly good reason why a foreign private issuer should be subject to burdensome, duplicative and potentially inconsistent U.S. regulations merely because a minority of its trading volume occurs in U.S. OTC markets. The proposal, if adopted, will injure our relationships with foreign regulators and harm the image of the United States in foreign markets.

The Commission Should Seek to Enhance and Support U.S. OTC Markets

In recent years, returns on investments in non-U.S. equities have surpassed those available from investment in U.S. equities. As a result, increasing numbers of U.S. investors are seeking investment opportunities in securities that trade in foreign markets. We believe the Commission has a duty to protect all U.S. investors, including those who seek to make investments outside the United States. The Commission can best protect U.S. investors who invest in non-U.S. securities by fostering the development and growth of a strong and competitive U.S. OTC market in non-U.S. securities. The Commission may lack the authority to regulate non-U.S. issuers, but U.S. broker-dealers are clearly subject to the Commission's mandates.

The U.S. OTC equity markets and the competitive price efficiency that off exchange trading has given investors are the envy of financial markets

[11] Baines, David, "Bulletin Board, Pink Sheet Companies Give Vancouver Bad Image," *Vancouver Sun*, Business Section, p. G5 (June 29, 2006).

throughout the world, leading to heroic efforts to emulate their success. Most of the market structure innovations of our time have been introduced and developed in the OTC equity markets. Most recently, the European Community has instituted its Markets in Financial Services Directive (MiFID) to reduce the stranglehold of national exchanges on the trading of securities with a view to establishing a truly competitive European over-the-counter market.

A strong and efficient OTC market in non-U.S. securities enables U.S. capital markets to compete effectively with London and other global financial centers. The broker-dealers that comprise the market are well-regulated by the Commission and the Financial Industry Regulatory Authority (FINRA) and there are substantial sales practice protections for investors when dealing in securities not listed on a U.S. exchange. In turn, our OTC markets facilitate U.S. investor access to international investment opportunities.

Historically, U.S. OTC markets in international securities have catered to individual investors and smaller institutions, while the London markets have catered to larger, multi-national institutions. This historic market allocation is evolving, as U.S. broker-dealers in the OTC markets have an opportunity to threaten London's dominant position. U.S. OTC markets are entering a dynamic stage of development driven by technology and regulation that can enhance the competitiveness of U.S. financial institutions in the trading of securities issued by foreign private issuers.

Pink OTC has developed real-time quotation and trade messaging systems that enable U.S. broker-dealers to utilize the substantial infrastructure they have developed to trade NASDAQ securities. By creating quote transparency and electronically connecting OTC market participants, Pink OTC has facilitated the development of conditions where competition and transparency can flourish. Pink Sheets market makers are highly automated, efficient providers of best execution in international securities, providing tight spreads, competitive pricing and good liquidity, when compared to executions based on non-U.S. trading prices, currency rates and settlement costs. U.S. broker-dealers now have the technology in the U.S. OTC equity markets to offer trading services to individuals and institutions that are competitive globally in securities issued by foreign private issuers.

FINRA has launched two recent regulatory initiatives that will enhance the efficiency and competitiveness of U.S. OTC markets. The first initiative is a rule change that will provide limit order protection for OTC equity securities. We expect that this rule change will transform the OTC equity markets in much the same way that similar rules instituted in 1997 promoted the efficiency and

competitiveness of NASDAQ. Investors are expected to use limit orders more frequently, and quoted spreads are expected to narrow. Second, FINRA has submitted a proposal, not yet published by the Commission, providing for real-time dissemination of OTC ADR and Canadian F-share trade reports. We ask that the Commission immediately approve this FINRA proposal to provide more information to investors and other market participants. When implemented, this rule will enable investors to monitor the execution of their orders, which will enhance competition among broker-dealers and foster best execution practices.

It should be noted that two of biggest drivers of growth in the NASDAQ market were the distribution of trade data and limit order display. Rules that improve the functioning of OTC equity markets and enhance competition serve to protect U.S. investors and encourage them to do business with U.S financial institutions. We submit that the U.S. OTC markets should be encouraged to attract the fine investment opportunities available throughout the world to our shores. The rules should be designed so the securities of foreign private issuers trade here, in our markets, through broker-dealers supervised by U.S. regulators, not due to any mandate, but because our markets represent the best place to get the trade done for the largest to the smallest investor.

A Better Registration Test for Foreign Private Issuers

We reiterate our view that the Commission should not unilaterally institute a rule that would require foreign private issuers to register a class of securities, unless the issuer raises capital in the United States through a public offering of securities or voluntarily lists securities on a national securities exchange. Nonetheless, if such a rule must be implemented, in contrast to the current proposal, it should be pragmatically designed to protect U.S. investors.

Accordingly, if the Commission is determined to promulgate a unilateral registration test, we believe that the Commission should exempt from registration under Rule 12g3-2(b) any class of securities that is issued under a sponsored ADR program limited to 30% of the outstanding securities of the class. This rule would provide superior protection to U.S investors in practice as compared to the current proposal.

U.S. investors that trade and invest in foreign securities have two alternatives: They can invest in U.S. ADRs or invest directly in foreign securities by opening accounts with non-U.S. broker-dealers.

It cannot be seriously disputed that U.S. investors are best protected when they trade U.S. ADRs issued in issuer-sponsored ADR programs. U.S. ADRs are

traded through the facilities of U.S. broker-dealers. They are cleared through U.S. depositary facilities operated by DTCC. U.S. broker-dealers and securities depositaries are subject to Commission oversight. U.S. investors have ready access to U.S. administrative and judiciary institutions to resolve disputes with broker-dealers and clearing organizations. U.S. ADRs are dollar denominated.

On the other hand, non-U.S. ordinary shares, with the exception of shares issued by Canadian issuers, are very expensive and burdensome for U.S. investors and broker-dealers without global, multi-currency brokerage accounts to trade and hold as they are not cleared through DTCC and must be held and settled offshore. U.S. investors that open accounts with non-U.S. broker-dealers to trade foreign securities directly cannot appeal to the Commission when a dispute arises with a foreign broker-dealer or securities depositary. Foreign dispute procedures are difficult and expensive for U.S. investor to invoke. Trading must be conducted in foreign currencies, and foreign exchange involves an additional layer of complexity and a potential source of fraud for U.S. investors.

Sponsored ADR programs are superior to unsponsored ADR programs because they facilitate better pricing of securities. The pricing of an ADR reflects pricing of the underlying security in an issuer's home market. When the price of an ADR is lower than the foreign price, arbitrageurs will buy the ADR, convert it into the underlying and sell in the foreign market. Conversely, when the price of the foreign security is lower than the ADR price, arbitrageurs will buy the foreign security, convert it into an ADR and sell it in the U.S. market. These arbitraging transactions occur very rapidly at very tiny differentials in the U.S. OTC markets. As a result, this arbitraging process ensures that U.S. investors always receive pricing that is identical or very close to foreign pricing at any particular time.

Sponsored ADR programs reduce the cost of ADR facilities and tend to discourage the establishment of unsponsored ADR programs. When issuers do not sponsor ADR programs, ADR banks will establish unsponsored ADR programs in response to investor demand. This will often result in the establishment of several ADR programs for one foreign security. Multiple ADR programs raise the cost of arbitrage because a single trade in ADRs may need to be converted into the foreign security in several unsponsored ADR facilities. As a result, the pricing of ADRs is superior when foreign issuers sponsor ADR programs, and better pricing is obviously better for U.S. investors. Sponsored ADR programs also allow the issuer access to the ADR holders and the ability to communicate with their investors. Our conversations with foreign private issuers indicate that sponsored ADR issuers are much more engaged in communicating with their ADR holders than unsponsored program issuers. Any registration test

adopted by the Commission should therefore encourage the development of sponsored ADR programs.

Issuers that sponsor ADR programs can limit the amount of outstanding securities that will be the subject of an ADR program. In contrast to the trading volume test proposed by the Commission, over which the issuer has no direct control, this test based on the amount of outstanding securities would enable an issuer to exercise direct control over its registration obligations. It would encourage an issuer to establish a sponsored ADR program, which would benefit U.S. investors who wish to invest in foreign securities. Trades would be conducted through the facilities of U.S. broker-dealers and clearing organizations supervised by the Commission. The U.S. financial services industry would benefit by having the opportunity to engage in business that would otherwise take place in foreign markets through the facilities of foreign financial services institutions.

We have selected 30% of the outstanding securities as a minimum threshold that should be considered by the Commission for sponsored ADR programs. The Commission should also consider higher thresholds. The threshold should be set where a foreign private issuer sponsoring an ADR program would perceive the United States as an important venue for its investors. The goal should be to develop trading in U.S. markets to the point at which a foreign private issuer will seriously consider Exchange Act registration. We also believe that the threshold should be set where foreign regulators would concur that U.S. regulation should apply to the foreign private issuer. When these conditions occur, compliance with U.S. registration requirements is more likely to be voluntary, reducing the need for enforcement resources. And, where enforcement is necessary, foreign regulators are more likely to provide necessary assistance to the Commission to enforce Exchange Act registration requirements. We believe that a 20% threshold will not be perceived as fair because it only represents one-fifth of an issuer's outstanding securities. Accordingly, it is neither high enough to encourage voluntary registration by a foreign private issuer nor the support of foreign regulators.

The Commission's rules should be designed to encourage the trading of foreign securities in the United States because this is the best way to protect U.S. investors and foster the competitiveness of U.S. financial services institutions. We estimate that at the present time, there are 2,146 foreign private issuers, other than Canadian issuers, that comprise the FTSE All-World Index.[12] ADRs

[12] The FTSE All-World Index is a useful measure of U.S. market competitiveness because the Federal Reserve has determined that a U.S. investor that invests in a security that is part of the

of approximately 375 of foreign private issuers are listed on national securities exchanges and 435 are quoted on the Pink OTC.[13] This means that the majority of the foreign private issuers, other than Canadian issuers, in the FTSE All-World Index do not currently provide disclosure to U.S. investors in reliance on the Rule 12g3-2(b) information supplying exemption or ADR programs in the United States.

We believe that many of the issuers comprising the FTSE All-World Index refuse to apply for the Rule 12g3-2(b) information supplying exemption or sponsor ADR programs due to their concerns about U.S. registration requirements. Yet, the securities issued by these foreign private issuers should clearly be considered by U.S. investors interested in maintaining a well-diversified portfolio of international securities. The registration rules adopted by the Commission should encourage these issuers to establish sponsored ADR programs. We believe the trading volume test in the current proposal will discourage the establishment of sponsored ADR programs and run counter to the interest of U.S. investors and U.S. financial services firms. In contrast, the test we propose here would encourage the development of sponsored ADR programs, which will benefit U.S. investors and enhance the ability of U.S. broker-dealers to compete with foreign financial services firms.

Recognition of Foreign Listed Markets

In 1965, when the Commission was first considering the question of how best to bring foreign securities under the ambit of the new Section 12(g), the Commission conducted a study in which it consulted with representatives of brokers, dealers, financial analysts, banks, issuers of ADRs and other domestic and foreign groups.[14] The study revealed continuing improvement in the reporting of financial and economic information by foreign issuers. These findings and others ultimately led to the adoption of the current Rule 12g3-2(b) information supplying exemption, which is based on the principle that the information provided by foreign private issuers to investors in foreign markets should be adequate for U.S. investors purchasing and selling these securities in the U.S. OTC markets. However true this was in 1965, it is certainly true that the

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index can obtain margin, and the Commission has determined that U.S. broker-dealers can treat ownership of the security as good capital under the "ready market" test.

[13] Not all of these 810 issuers are members of the FTSE All-World Index.

[14] See, Notice of Proposed Amendments to Rules 3a12-3 and 13a-11 and Proposed Rules 12g3-2, 13a-5, 15c1-10, 15d-16 and 17a-10 under the Securities Exchange Act of 1934, Exchange Act Release No. 7746.

reporting standards of foreign issuers, as well as those of U.S. issuers, have come a long way in four decades.

We agree with the Commission that these disclosure principles should be re-examined in light of the advent of global markets. This re-examination is particularly critical because U.S. investors, including retail investors, are obtaining information about the workings of markets in London, Frankfurt, Singapore, Tokyo and other locations and are being presented with the realistic opportunities to invest in securities traded in these foreign locations. To the extent feasible, U.S. investors should have the opportunity to make these investments through the facilities of a U.S. broker-dealer.

The Commission should make an affirmative determination that the disclosures provided to investors in certain non-U.S. stock exchanges[15] are adequate to protect U.S. investors. The Commission's determination should be based on the existence (i) of an effective regulatory authority (ii) continuing listing and disclosure requirements of the issuer's non-U.S. exchange and (ii) enforcement mechanisms that provide appropriate protection from fraud. We believe all issuers of securities listed in these markets should be entitled to rely on the information-supplying exemption from registration of Rule 12g3-2(b).

How Rule 12g3-2(b) Should Work

Pink OTC believes that the Rule should reduce regulatory burdens for the largest and most liquid issuers as well as recognize our unique relationship with Canada. At the same time, investors should be protected by having ready access to the issuer's home country information on a freely available Internet site published in English.

These principles suggest that the Rule 12g3-2(b) information-supplying exemption should be automatically available to foreign private issuers that make their home country disclosure available in English on the Internet and are listed in the FTSE All-World Index or on a Canadian Exchange. Issuers that establish sponsored ADR programs should be required to post on EDGAR the Internet location or locations where their home country disclosures are available in English and the identity of the non-U.S. exchange that is the primary market for their securities. Alternatively, if an issuer is unwilling to make these minimal disclosures available on EDGAR, we believe that an ADR bank should be permitted to make these disclosures with respect to the issuer to establish an

[15] Pink Sheets provides a list of Qualifying Foreign Exchanges for our International OTCQX Tiers that represents the majority of current 12g3-2(b) exchange listed issuers at: http://otcqx.com/otcqx/iQualifiedForeignExchange

unsponsored ADR program. We believe that the Commission will be able to make the affirmative determination described above for issuers satisfying these standards.

Other foreign private issuers that are listed on a foreign stock exchange qualified by the Commission should also be required to post on EDGAR the Internet location or locations where their home country disclosures are freely accessible to investors in English and the identity of the non-U.S. exchanges where their securities are listed. In addition, these issuers should disclose the number of outstanding shares and the last trade price at the end of each fiscal year. This posting should be updated annually within 180 days of their fiscal year end. These posting requirements will enable the Commission to determine readily whether these issuers are in compliance with Rule 12g3-2(b).

We expect the Commission will not be able to make the affirmative determination that the disclosures provided to investors in some markets are adequate to protect U.S. investors. In these cases, the information-supplying exemption should not be available.

We acknowledge that in the form of the exemption proposed here, no foreign private issuer would be required to register unless the issuer sold securities in a U.S. public offering or voluntarily listed on a national securities exchange. We do not think it is wise or appropriate for the Commission to promulgate rules that cannot be enforced. We think a registration test for foreign private issuers cannot be enforced without the express cooperation of foreign regulatory authorities.

Information Supplied under Rule12g3-2(b) Should be Readily Available

We strongly support that portion of the proposal that would require information supplied in connection with Exchange Act Rule 12g3-2(b) to be displayed on the Internet. We think the proposal could be strengthened in two ways. As described above, we think the issuer, or an ADR bank, should be required to post on EDGAR the web site address where the information can be viewed in English. We also believe that the issuer or an ADR bank should be offered the opportunity to display the home country information produced under the Rule on a publicly available Internet site maintained for the benefit of market participants.

Many foreign private issuers are large corporations with far-flung international operations. These issuers may operate many complex web sites to advertise their products. This fact of life will often require a U.S. investor to navigate through a large, complex website primarily devoted to the issuer's products or

services to find an issuer's non-U.S. disclosure documents. This task is made even more challenging for U.S. investors if the issuer's foreign website is in a language other than English, except for translations of the issuer's home country documents. It can be quite difficult for an investor to find information regarding the issuer's securities on an issuer's website that is primarily devoted to generic advertising about the issuer's operations and products, even when the precise web site address where information can be found is disclosed on EDGAR.

U.S. investors generally expect to see relevant investor information about issuers available from the markets where the issuer's securities are traded. The securities of many foreign private issuers are traded in the U.S. through Pink Sheets, a quotation facility operated by Pink OTC. Publicly available information regarding issuers with securities traded through Pink Sheets is made freely available to investors and regulators on the OTC Disclosure and News Service. Issuers are charged only a modest fee to display this information. We believe that a foreign private issuer should be offered the alternative to satisfy the information-supplying requirements of Rule 12g3-2(b) by posting an English version of information provided to its home country markets on the OTC Disclosure and News Service or any other Internet site operated by a substantial U.S. trading venue for the issuer's securities.

The "Automated Inter-Dealer Quotation System" Prohibition Should be Eliminated

The reference to "automated inter-dealer quotation system" in Exchange Act Rule 12g3-2(d), which applied to Nasdaq before it registered as a national securities exchange, is now a quaint artifact of history. Its presence only serves to confuse issuers and their advisors and should be eliminated.

We do not believe that the term can be usefully applied to any other entity. The prohibition reflected conditions that existed in 1983, before the rise of global markets. The structure of U.S. markets then was very different from the present day reality. The New York Stock Exchange was pre-eminent. Nasdaq was an emerging market power, to the surprise of many observers. The Internet, e-mail and the electronic markets of our time were in the realm of fantasy.

No useful purpose would be served by attempting to apply this prohibition to some other non-exchange system at this time.

Conclusion

We are proud of the disclosure standards that have been developed under the Exchange Act by the Commission over a period of many years. Ideally, the entire world would adopt the U.S. system of securities regulation. As it happens, the people of other nations seem equally proud of their disclosure standards and are unwilling to adopt U.S. regulations, or entirely support our efforts to enforce them. It cannot be denied that in some cases, the regulatory systems developed by other countries, while different from our own, have successfully provided substantial protection to investors. Much can be learned from these different approaches to investor protection.

Globalization means that U.S. investors have the ability to access global markets and obtain information about non-U.S. securities. We think the Commission nonetheless has the mandate to protect them. Since we lack the power to require global enforcement of our disclosure standards, we are required to be flexible and work with other regulators and regulatory systems.

The investing public is not well-served by a regulatory mentality that rejects out of hand any security that is "not registered here." Many foreign securities that are not registered present significant investment opportunities for U.S. investors. In many cases, U.S. investors are provided with substantial, if different, issuer regulation by non-U.S. regulatory systems. However, no foreign regime can afford U.S. investors with the sales practices protection that the Commission and FINRA provide to the customers of U.S. broker-dealers investing in the U.S. OTC market. Rather than forcing U.S. investors to take their business abroad, the Commission should design regulations that encourage U.S. investors to trade foreign securities in the United States, through broker-dealers and other financial institutions regulated by the Commission.

We believe U.S. investors are best protected if their investments in foreign securities are accomplished through orders placed with U.S. broker-dealers. This means that we must encourage the trading of foreign securities to occur through the facilities of U.S. broker-dealers. Encouraging the development of a competitive market for foreign equity securities in the United States furthers this objective. It also strengthens the U.S. financial services industry, thereby enabling U.S. financial institutions to compete on a global basis. We oppose the Commission's proposed 20% trading volume rule because it runs counter to these objectives.

Please call if you have any questions.

Very truly yours,

/s/ R. CROMWELL COULSON

R. Cromwell Coulson
Chief Executive Officer

Appendix : Additional Comments and Suggestions

A. Proposed Non-Reporting Condition

1. Should the SEC require an issuer not to have Exchange Act reporting obligations as a condition to claiming the Rule 12g3-2(b) exemption?[16]

   Answer: No. Many foreign issuers may not be aware of their obligations to register. First, information regarding U.S. citizenship may not be available, particularly for shares held in street name, making it difficult for an issuer to determine whether or not it has more than 300 U.S. holders of record. Second, a foreign issuer's compliance procedures often will not include considerations of U.S. securities law when it does not make any efforts to list securities on a national securities exchange or raise capital through the public offering process. It is therefore unfair in many cases to preclude a foreign private issuer from relying on the Rule 12g3-2(b) exemption merely because it failed to take action prior to the time it had registration obligations.

2. Should the SEC permit an issuer to claim the Rule 12g3-2(b) exemption if it meets the trading volume condition and the other proposed conditions although the statutory 120-day period has lapsed? If not, why should the SEC retain the 120-day statutory requirement for Rule 12g3-2(b) when that provision pertains to a shareholder-based requirement? What are the benefits to investors of eliminating or retaining the 120-day requirement?[17]

   Answer: Many foreign private issuers are not aware of the statutory 120-day period in which they must claim the Rule 12g3-2(b) exemption. It would be unfair to foreign issuers unaware of the statutory period to prevent them from claiming the exemption because of their lack of familiarity with the requirements of the exemption. An issuer qualified to rely on the exemption should always be permitted to do so.

[16] See "Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers", Securities and Exchange Commission Release No. 34-57350, at 21.
[17] *Id*.

3. Should the SEC require an issuer not to have Exchange Act reporting obligations over a specified period before claiming the exemption? If so, what should be the length of this specified period?[18]

Answer: No. We agree with the Commission that a foreign private issuer wishing to terminate its Exchange Act registration and reporting because it determines there is relatively low U.S. market interest in its U.S.-registered securities should be able to de-register and claim the exemption immediately. As the SEC previously observed, this will result in foreign private issuers being more willing to initially register their securities with the SEC, and consequently provide more investment choices for U.S. investors.[19]

4. Should the SEC permit an otherwise eligible issuer to claim the Rule 12g3-2(b) exemption immediately upon the termination of its Section 12(g) registration or the suspension of its Section 15(d) reporting obligations?[20]

Answer: Yes. The SEC should permit an otherwise eligible issuer to claim the Rule 12g3-2(b) exemption immediately. Among other things, this will encourage the immediate publication of the information required under the exemption to the benefit of U.S. investors.

B. Proposed Foreign Listing Condition

1. Should the SEC require an issuer to maintain a listing on one or more exchanges in one or two foreign jurisdictions comprising its primary trading market as a condition to the Rule 12g3-2(b) exemption? Should the SEC require that the foreign exchange be part of a recognized national market system or possess certain characteristics? If so, what characteristics would be appropriate?[21]

Answer: The SEC should require a foreign private issuer to maintain a listing on at least one qualified foreign trading market as a condition to claiming the Rule 12g3-2(b) exemption. The SEC should make the determination that a foreign market qualifies for the exemption

[18] *Id*.
[19] See "Termination of A Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) And Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934," Securities and Exchange Commission Release No. 34-55540, at 16.
[20] *Supra* note 2.
[21] *Id*. at 25.

because it has good disclosure requirements and effective enforcement of these requirements. It may wish to exclude certain foreign exchange tiers that are not a listing and more akin to our broker quotation driven OTC markets.[22] *In making this determination, the SEC should consider the extent to which some deficiencies in a foreign market's disclosure requirements are compensated by other regulatory practices. Accordingly, we believe the SEC determination should be based on a view that the regulatory regime, taken as a whole, provides adequate protection for investors.*

2. Should the SEC define primary trading market to mean that at least 55 percent of the 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? If not, is there another percentage that is more appropriate?[23]

   Answer: No. Instead, "primary trading market" should be defined as the largest trading market over the prior three years on which an issuer's securities have been traded, irrespective of percentage traded. In a world of global markets, it is most important to determine which market's regulatory practices should control an issuer's disclosure requirements. In principle, the largest trading market on which a foreign private issuer is listed should mandate the disclosure and other regulatory practices necessary to protect investors.

3. Should the SEC permit the trading volume in an issuer's primary trading market to be less than 50 percent of its worldwide trading volume as long as the primary trading market's trading volume is greater than its U.S. trading volume?[24]

   Answer: As previously discussed, we believe that an issuer's primary trading market should be defined as the largest trading market in which an issuer's securities trade, irrespective of the percentage traded on that market.

4. Should the SEC also require that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions

[22] Many OTCBB and Pink Sheets issuers claim they are "Listed" on Frankfurt or Berlin markets in what is essentially a broker listing of quotes with no issuer listing requirement.
[23] *Id*.
[24] *Id*.

for the purpose of the foreign listing condition, 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? Should the SEC instead permit an issuer to count the trading of its securities only in one foreign jurisdiction or only on one exchange in each of two foreign jurisdictions for the purpose of the foreign listing condition?[25]

Answer: We believe that the measure of a foreign private issuer's primary trading market should simply be the largest market on which its particular securities trade because this is the standard that it most likely to be acceptable to other regulators.

5. Are there a significant number of issuers that may be listed on a foreign exchange but that would not meet the 55 percent threshold under the primary trading market definition, for example, due to being traded on more than two foreign exchanges, and which would otherwise satisfy the current or proposed conditions of Rule 12g3-2(b)? If so, what are specific examples of those issuers? Should the SEC require those issuers to meet a lower U.S. relative trading threshold to be eligible for the Rule 12g3-2(b) exemption? If so, what percentage of worldwide trading volume should the threshold be? What would be the advantages or disadvantages of such an approach?[26]

   Answer: We do not believe that foreign private issuers should be required to register based on a trading volume threshold. We do not believe a properly regulated issuer should be forced to register securities with the Commission if the majority of trading volume takes place outside of the U.S.

6. Should the SEC require an issuer to maintain a listing in its jurisdiction of incorporation, organization or domicile instead of, or in addition to, a listing in its primary trading market? Would this increase the likelihood that a non-U.S. jurisdiction is principally regulating the trading in an issuer's securities?[27]

   Answer: No. We believe that the most important requirement is that there is a foreign regulator that has oversight, whether by imposing disclosure requirements or other devices to protect investors, over a

[25] *Id*. at 25-26.
[26] *Id*. at 26.
[27] *Id*.

foreign private issuer. Requiring an issuer to maintain a listing in its jurisdiction of incorporation, organization or domicile would not increase the likelihood that a foreign jurisdiction is principally regulating trading of an issuer's securities. The regulator of the primary market on which an issuer's securities trade provides this role, rendering additional Commission requirements unnecessary.

7. Should the SEC permit an unlisted issuer to claim the Rule 12g3-2(b) exemption as long as it publishes voluntarily the same documents that a listed company is required to publish in its home jurisdiction?[28]

   Answer: No. The SEC should only permit issuers that are listed in foreign markets that it has determined have adequate disclosure and investor protections in place, to claim the exemption. Disclosure by itself is not sufficient to protect investors. There must also be strong regulatory oversight, which is usually accomplished in other countries through the listing process.

C. Proposed Quantitative Standard

1. Should an issuer be able to claim the Rule 12g3-2(b) exemption if the U.S. trading volume of its subject class of securities is no greater than a specified percentage of its worldwide trading volume for the previous 12 months, even if the number of its U.S. shareholders is 300 or greater?[29]

   Answer: As we have emphasized in our comment letter, we oppose the Commission's 20% trading volume rule, or any similar rule that measures eligibility for the exemption based on percentage of trading volume, because we believe such a rule would run counter to the objective of encouraging the trading of foreign private issuers' securities in the U.S. A trading volume test would only make sense if other regulatory regimes recognized the test and accordingly, would help enforce it. Because it is unlikely that other regulators would recognize the Commission's proposed trading volume rule or assist the SEC in prosecuting foreign issuers for failing to meet the trading volume rule, we believe that the overall answer to this question is that a trading volume test simply does not make sense.

[28] *Id*.
[29] *Id*. at 30.

2. If so, should the U.S. trading volume standard be no greater than 20 percent of worldwide trading volume or should it instead be no greater than 5, 10, 15, 25, 30 or some other percent of worldwide trading volume?[30]

   Answer: A U.S. trading volume test would only make sense if it were recognized as a valid standard by non-U.S. regulators. We believe that non-U.S. regulators are most likely to recognize a test that assigned issuer disclosure regulation to the regulator of a foreign issuer's largest trading market. If a trading volume standard were adopted, we believe that a foreign private issuer should be able to claim the Rule 12g3-2(b) exemption unless its U.S. trading volume is greater than 50% of worldwide volume because the U.S. would then clearly be the primary market for the trading of the issuer's securities.

3. Is there another quantitative measure that is a more appropriate measure of relative U.S. investor interest in a foreign private issuer's securities than the proposed trading volume standard?[31]

   Answer: Relative U.S. investor interest would only be an appropriate standard if non-U.S. regulators agreed to support it. Any other standard will not be enforceable. We believe that a largest trading market standard, or some other standard that recognizes the importance of global regulatory cooperation, is more likely to protect investors.

   Nonetheless, we think an exemption for foreign private issuers that sponsor ADR programs, where the number of ADRs issued is limited to 30% of outstanding securities[32], would better protect investors and represent a more adequate measure of when U.S. registration requirements should apply to a class of securities.

4. Should the SEC not impose any quantitative measure relating to U.S. market interest when determining whether a foreign private issuer should be subject to Exchange Act registration?[33]

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[30] *Id*.
[31] *Id*.
[32] Issuers that are current in providing the information required under the Rule 12g3-2(b) information supplying exemption that have ADR programs representing more than 30% of their outstanding securities should be grandfathered for so long as they continue to provide the information required under the rule.
[33] *Id*. at 31.

Answer: Yes. We agree that the Commission should refrain from imposing a quantitative standard relating to U.S. interest when determining whether a foreign private issuer should be subject to Exchange Act registration. Unless the SEC can come to an agreement with foreign regulators as to a particular quantitative measure that will be uniformly recognized, implemented, and enforced, we believe the SEC would be creating an unenforceable standard that will be detrimental to the U.S. financial services industry and U.S. investors.

That said, if the Commission is determined to institute a quantitative measure, the test should be within the direct control of a foreign private issuer, encourage the trading of foreign securities in the United States and be perceived as fair. We think an exemption for foreign private issuers that sponsor ADR programs, where the number of ADRs issued is limited to 30% of outstanding securities, would satisfy this regulatory standard.

5. Should the SEC require an issuer to determine its relative U.S. trading volume for its most recently completed fiscal year or should the measuring period be a shorter or longer period? Should the measuring period be the same as a recent 12-month period, as under Rule 12h-6?[34]

Answer: As discussed, we are opposed to a unilateral trading volume test. However, if such a test is applied, it should be consistent with Rule 12h-6 to avoid confusion.

6. Should the SEC require an issuer to calculate its U.S. and worldwide trading volumes as under Rule 12h-6? Should the SEC require additional, or different, requirements or guidance regarding off-exchange transactions?[35]

Answer: If the SEC imposes a trading volume test, it should also publish a list of issuers that are required to register under the test. Foreign private issuers should be entitled to rely on this list. The list would also serve to provide useful disclosure for U.S. investors regarding the compliance of certain issuers with U.S. securities laws.

7. Should the SEC permit an issuer's sources of trading volume information to include publicly available sources, market data vendors

[34] *Id*.
[35] *Id*.

or other commercial information service providers upon which the issuer has reasonably relied in good faith? Are there other parties or services that the SEC should specify as permissible sources of trading volume information?[36]

Answer: As stated above, the SEC should publish a list of issuers that are required to register under its trading volume test, if the test is adopted as proposed. Otherwise, the SEC should determine what are acceptable sources of an issuer's trading volume information so that every issuer uses the same calculations and there is uniformity in the information disclosed to investors. The SEC should also engage in a full review on a jurisdiction by jurisdiction of trade reporting for off exchange transactions as well as trade reporting practices versus the U.S. OTC market so issuers can make a proper comparison of their market activity and the U.S. OTC dealer driven markets. The SEC should recognize the differences in trade reporting activity of exchange trading, as compared to dealer markets and permit issuers to weight volume figures appropriately. Numerous academic studies have shown that dealer markets tend to have more volume reporting activity due to the business processes involved in executing an OTC trade. The SEC should also take into account the artificial volume created in ADR and foreign ordinary trading by "Cross Book"[37] trade activity.

8. Should the SEC permit an issuer that has satisfied Rule 12h-6's trading volume benchmark to claim the Rule 12g3-2(b) exemption upon the effectiveness of its Rule 12h-6 deregistration, assuming it meets the proposed Rule 12g3-2(b) foreign listing requirement?[38]

   Answer: Yes. We agree that the SEC should permit an issuer that has satisfied the 5% trading volume benchmark of Rule 12h-6 to claim the Rule 12g3-2(b) exemption upon the effectiveness of its Rule 12h-6 deregistration, assuming it meets the proposed Rule 12g3-2(b) foreign listing requirement.

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[36] *Id*.

[37] Cross Book trades occur when an arbitrageur is long one side of an ADR "create or cancellation" trade and simultaneously has an offsetting short position in the underlying ordinary shares. Rather than pay the fee to create or cancel the ADR, an arbitrageur may attempt to cross with another dealer holding a conversely matching position (short the ADR and long the ordinary). The resulting trade will generate trade reports in the ADR and the ordinary that represent book-keeping entries, rather than investor interest.

[38] *Id*.

9. Should the SEC permit an issuer that has satisfied Rule 12h-6's alternative record holder condition to claim the Rule 12g3-2(b) exemption upon the effectiveness of its Rule 12h-6 deregistration as long as it meets the proposed Rule 12g3-2(b) foreign listing requirement?[39]

   Answer: Yes. There is no reason to impose greater requirements on issuers with less than 300 U.S. holders of record.

10. Are there some currently Rule 12g3-2(b)-exempt companies that would lose the exemption upon the effectiveness of the proposed rule amendments because their U.S. trading volume exceeds the proposed threshold and the number of their U.S. holders is 300 or greater? If so, are there a significant number of such companies and how should the SEC treat them? Should the SEC provide a transition period for those companies that would grant them a longer period of time before they would have to register their securities under Exchange Act Section 12(g) or provide a "grandfather" provision? Alternatively, should the SEC issue an order that would permit issuers that have currently claimed the exemption under Rule 12g3-2(b), but would exceed the proposed trading volume threshold, to continue to be exempt from Section 12(g) provided that they comply with all other conditions? Provide specific examples of such companies.[40]

    Answer: Currently, we estimate there are 25 issuers, all but six of which are Canadian issuers, that would lose the exemption upon the effectiveness of the proposed rule amendments. Two of these issuers are listed on the Australian Stock Exchange, which is their primary market. Chairman Cox recently made the following observations after a meeting with Australian government and regulatory officials intended to enhance cross-border law enforcement cooperation, facilitate regulatory coordination, and increase investor access to well-regulated capital markets: "I appreciate the leadership of Prime Minister Kevin Rudd, Federal Treasurer Wayne Swan, and ASIC Chairman Tony D'Aloisio in promoting high-quality securities regulation, investor protection, and transparent markets on a global basis."

    Many of the ADR issues traded on the OTC market with over 20% trading volume in the U.S. are securities issued by reporting issuers that are late in their reporting obligations. The forty non-reporting

[39] *Id*. at 31-32.
[40] *Id*. at 32.

issuers identified by the Commission that would lose the Rule 12g3-2(b) exemption under the proposed rule are already complying with U.S. securities laws.[41] *The best approach would be to grandfather these companies so that they continue to be exempt, provided that they continue to provide the disclosures required under the exemption. These companies have voluntarily complied with U.S. requirements and relied on the Rule 12g3-2(b) exemption. It is not fair to these complying issuers to change the terms of the exemption to add a trading volume test.*

11. Should the SEC establish a different U.S. trading volume threshold for companies from certain countries such as Canada, which may have a greater relative U.S. market presence than other foreign companies? If so, what is the appropriate threshold? [42]

Answer: We think the Commission should acknowledge the special relationship it enjoys with the Canadian regulatory authorities. Among other evidences of this relationship, the U.S. and Canada have established the Multi-Jurisdictional Disclosure System, which is a successful "mutual recognition" system. The U.S. should not institute a trading volume test for Canadian issuers, unless Canadian regulators agree with the test and will assist in its enforcement. If there is any trading volume test for Canadian issuers, the test should be that a majority of trading volume takes place in the U.S. (50% or greater) and thus the U.S. is the primary trading market.

D. Proposed Electronic Publishing of Non-U.S. Disclosure Documents

1. Should the SEC require an issuer to publish its non-U.S. disclosure documents, made public since the beginning of its most recently completed fiscal year, on its Internet Web site or through an electronic information delivery system in its primary trading market, as a condition to claiming the Rule 12g3-2(b) exemption, other than in connection with or following the issuer's recent deregistration? Should the SEC also require an issuer that has recently deregistered to publish those non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system if it has not already done so as a condition to claiming the exemption? [43]

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[41] See footnote 6.
[42] *Id*.
[43] *Id*. at 37-38.

Answer: Whether as a result of deregistration or qualification independent of deregistration, foreign issuers should be required to publish their non-U.S. disclosure documents electronically in order to claim the Rule 12g3-2(b)exemption. The Internet is a vastly superior method of delivering information to investors than a paper filing with the SEC. Furthermore, requiring that a foreign issuer publish all of its non-U.S. disclosure electronically in either its own website or a common information repository for a particular market will help ensure the same information is available in an established location to all investors in a foreign issuer's securities.

2. Should the SEC require an issuer to publish electronically its non-U.S. disclosure documents on an ongoing basis and for subsequent fiscal years as a condition to maintaining the Rule 12g3-2(b) exemption?[44]

   Answer: Yes. Investors require current information and would benefit from ongoing consistent disclosure.

3. Should the SEC expand the jurisdictional scope of the required non-U.S. disclosure documents to include all documents that the issuer has made or is required to make public under the law of any jurisdiction in its primary trading market? Should all documents, provided they are material, required to be published by an issuer pursuant to any governmental authority or stock exchange be included in the scope of non-U.S. disclosure documents?[45]

   Answer: The SEC should require a foreign issuer to publish all material documents it makes publicly available in all of the markets in which its securities trade. By requiring this, the SEC will ensure that U.S. investors are on a level playing field with other market investors because they have access to the same information. Issuers should not be required to publish documents for U.S. investors, even if material, if the issuer is not required to make the documents publicly available in non-U.S. jurisdictions.

4. Where an issuer is organized in one jurisdiction and domiciled in another, should the issuer have to comply voluntarily with the obligations of both jurisdictions, or only one? If only one, should the issuer be permitted to elect which one or should the manner of

[44] *Id*. at 38.
[45] *Id*.

choosing be specified by rule? If so, what standards should govern the decision?[46]

Answer: We believe that the SEC should require an issuer to publish the information it is required to make available in its primary trading market where its securities are listed.

5. For both the conditions to claim and maintain the Rule 12g3-2(b) exemption, should we require an issuer to publish electronically the types of information deemed to be material as specified in the proposed rule? Are there other types of information that should be expressly stated in the non-exclusive list of deemed material information? Are there types of information that should be excluded from the list of required material documents?[47]

   Answer: The current list of documents required to be provided pursuant to the Rule 12g3-2(b) exemption represents the minimum information issuers should be required to publish electronically in order to claim or maintain the exception. However, to the extent that an issuer discloses any additional material information in a foreign market, the SEC should require issuers to also publish that information in order to claim or maintain the Rule 12g3-2(b) exemption.

6. For both the conditions to claim and maintain the Rule 12g3-2(b) exemption, should the SEC permit an issuer to publish its non-U.S. disclosure documents through an electronic information delivery system that is generally available to the public, even if that system is located outside of the issuer's primary trading market?[48]

   Answer: Yes, the SEC should allow a foreign issuer to have the option to publish disclosure documents required by the Rule 12g3-2(b) exemption on a public electronic information delivery system located outside of its primary trading market. It would be most beneficial to U.S. investors if issuers publish disclosure documents on a public website or electronic information delivery system located in the U.S. and that is associated with the U.S. market on which foreign private issuers' securities trade and that makes the information freely available to U.S. investors. The OTC Disclosure and News Service operated by

[46] *Id*.
[47] *Id*. at 38-39.
[48] *Id*. at 39.

Pink OTC satisfies these criteria and is freely available to U.S. investors.

7. Should the SEC permit an issuer to satisfy the rule's electronic publication requirements concurrently with the publishing of its non-U.S. disclosure document through an electronic information delivery system that is generally publicly available in the issuer's primary trading market? Should the SEC also require the issuer to publish its non-U.S. document on its Internet Web site?[49]

   Answer: Electronic delivery systems where foreign private issuers can publish their non-U.S. disclosure materials may not be available in every trading market. Accordingly, we think it is best for issuers to be able to satisfy the exemption's disclosure requirements by publishing non-U.S. disclosure documents in a U.S. electronic information repository or website, such as the OTC Disclosure and News Service operated by Pink OTC, that is associated with the U.S. trading market of a foreign issuers' securities.

8. Is it reasonable to expect that all electronic information delivery systems that are generally available to the public will be accessible and useable by U.S. investors? Should the SEC require an issuer to publish its non-U.S. disclosure documents on its Internet Web site if the electronic delivery system is not navigable in English or requires users to register or pay a fee for access? Should the SEC require an issuer to note on its Internet Web site that documents supplied to maintain the Rule 12g3-2(b) exemption are available on an electronic delivery system, and provide a link to that system?[50]

   Answer: Some foreign websites or electronic information delivery systems will be difficult for U.S. investors to navigate because they may not be published in English or may be hard to locate. Investors should not be required to pay a fee to access non-U.S. disclosure documents. While it may be useful to U.S. investors for foreign issuers to publish their non-U.S. disclosure documents on their own websites in English free of charge or prominently display a link to such documents on their homepages, we believe U.S. investors would benefit by having ready access to such disclosures on a U.S. website associated with the U.S. market for a foreign private issuer's securities,

[49] *Id*.
[50] *Id*.

such as the OTC Disclosure and News Service maintained by Pink OTC.

9. Should the SEC require an issuer to publish electronically an English translation of the specified non-U.S. documents? Are there other documents that should be subject to an English translation requirement? Should the SEC exclude any of the specified documents from the English translation requirement? Will a translation requirement into English inadvertently encourage issuers to provide the minimal level of disclosure in their primary trading market in order to limit the burden of translating such documents into English?[51]

   Answer: All the disclosure documents required by the exemption should be published in English to avoid unfairness to U.S. investors. U.S. investors should be able to understand as well as have access to the same information as non-U.S. investors trading in a foreign issuer's securities.

10. Should the SEC provide specific guidance regarding when an issuer may provide an English summary instead of a line-by-line English translation of a required non-U.S. disclosure document?[52]

    Answer: If the SEC allows foreign issuers to provide summaries, it should provide guidance as to what documents may be summarized and which may not. On the whole, we are not in favor of summaries because we believe they disadvantage U.S. investors.

11. Should the SEC require an issuer to publish electronically a non-U.S. document required to be filed with its non-U.S. regulator or non-U.S. exchange, but which is not made public by that non-U.S. regulator or non-U.S. exchange, if it is material to investors?[53]

    Answer: No. If a foreign regulator does not require a particular document to be made public, the SEC should not make issuers publish this document here. Doing so would defeat the purpose of the exemption and the premise behind it that foreign regulation of foreign issuers provides investors with adequate protection.

[51] *Id*. at 39-40.
[52] *Id*. at 40.
[53] *Id*.

12. Should the SEC require an issuer to maintain the publishing of specified documents on its Internet Web site for a particular length of time? If so, which documents and how long should each document type remain posted?[54]

Answer: Disclosure documents published in order to claim and maintain the exemption should be maintained indefinitely, or for as long as an issuer is publicly traded. This is consistent with the disclosures made by U.S. issuers.

13. Should the SEC require an issuer to commence publishing electronically the required non-U.S. disclosure documents before the date that its Section 12(g) registration statement would be due, as a condition to the Rule 12g3-2(b) exemption?[55]

Answer: The SEC should allow a foreign issuer to claim the Rule 12g3-2(b) exemption for the most current period so long as it meets all the requirements of the exemption, regardless of whether the issuer has failed to comply with the requirements of the exemption in prior periods. Many foreign issuers may not be aware of the obligations imposed by the rule. We are concerned that denying the exemption would only encourage foreign private issuers that are made aware of their obligation to remain non-compliant. It would hurt investors, who could benefit from the disclosures made available under the exemption, to preclude issuers who become aware of their ability to claim the Rule 12g3-2(b) exemption and are currently willing to meet its requirements from doing so because of past non-compliance.

14. For the condition to maintain the Rule 12g3-2(b) exemption, should the SEC require an issuer to publish electronically a required non-U.S. disclosure document promptly after the document has been published pursuant to its home jurisdiction laws, stock exchange rules, or shareholder rules and practices or should the SEC instead provide a particular due date for the electronic publication of a specified document?[56]

Answer: Yes. The SEC should require an issuer to publish its disclosure documents promptly after it publishes them in its home country or primary trading market. This will ensure that U.S. investors

[54] *Id*. at 40-41.
[55] *Id*. at 41.
[56] *Id*.

have access to the same information foreign investors have regarding the foreign issuer soon after it becomes available.

15. Should the SEC permit or require an issuer to publish its non-U.S. disclosure documents on EDGAR or through another specified central electronic repository for documents instead of requiring the publishing of those documents on an issuer's Internet Web site or through an electronic information delivery system in its primary trading market?[57]

Answer: No. The disclosure documents have not been reviewed by the Commission and their publication on EDGAR could create the potentially misleading impression with investors that the information had been filed with the SEC and reviewed by the Commission staff. We believe the Commission should make EDGAR available for foreign private issuers to post the location of their disclosure documents so that U.S. investors would have ready access to this information. A foreign private issuer's publication of the information required for exemptive relief under Rule 12g3-2(b) on the OTC Disclosure and News Service operated by Pink OTC would make this information available on an Internet site associated with the primary U.S. trading venue for the securities of most foreign private issuers relying on the exemption.

E. Proposed Elimination of the Written Application Requirement

1. Should the SEC permit an issuer, which has not terminated its registration and reporting obligations under Rule 12h-6, to claim the Rule 12g3-2(b) exemption as long as it meets the proposed rule's conditions, without submitting a written application to the SEC?[58]

Answer: No. The public should know when an issuer terminates its Exchange Act reporting obligations for a class of securities and why it has chosen to do so.

2. Should the SEC continue to permit an issuer to claim the Rule 12g3-2(b) exemption automatically upon the effectiveness of its deregistration under Rule 12h-6?[59]

Answer: Yes. As long as the issuer continues to notify the public

[57] *Id*.
[58] *Id*. at 43.
[59] *Id*.

through EDGAR of where its non-U.S. disclosure information is published, an issuer should be entitled to claim the exemption automatically upon its effective deregistration.

3. As a condition of claiming or maintaining the Rule 12g3-2(b) exemption, should the SEC require an issuer to publish, and to update as necessary, a list of its non-U.S. disclosure requirements on its Internet Web site or its primary trading market's electronic information delivery system?[60]

   Answer: No. This list would be burdensome to produce and of little value to U.S. investors. We think it would be equally burdensome if a U.S. issuer were required in a foreign jurisdiction to publish a list of the disclosure requirements of U.S. securities laws.

4. As a condition of claiming or maintaining the Rule 12g3-2(b) exemption, should the SEC require an issuer to publish electronically other information with respect to its eligibility for the Rule 12g3-2(b) exemption such as identification of its non-U.S. primary market, and its U.S. trading volume as a percentage of its worldwide trading volume for its most recently completed fiscal year?[61]

   Answer: We are opposed to eligibility for the exemption being measured by a trading volume standard. However, if the rule is approved as proposed, we think that an issuer should be required to publish information such as identification of its non-U.S. primary market and its U.S. trading volume as a percentage of its worldwide trading volume for its most recently completed fiscal year. This information would disclose an important feature of the issuer's compliance program relating to U.S. securities laws, which would be material to U.S. investors.

5. What use do investors currently make of the information contained in an initial application under Rule 12g3-2(b)? Does it assist them in making informed investment decisions?[62]

   Answer: It is our experience that investors find the information Pink OTC currently publishes regarding foreign issuers on its OTC Disclosure and News Service, which includes the same information

[60] *Id*.
[61] *Id*.
[62] *Id*. at 44.

required in order to claim the exemption, extremely useful in making investment decisions.

6. If it is appropriate to eliminate the application process for the Rule 12g3-2(b) exemption, should the SEC at least require an issuer to notify the Commission that it is claiming the Rule 12g3-2(b) exemption? If so, what form should the notification take? Would the filing of an amended Form F-6, as proposed, serve as sufficient notice for most issuers claiming the Rule 12g3- 2(b) exemption?[63]

   Answer: We have no objections to eliminating the application process for foreign issuers wishing to claim the exemption. However, we believe that the SEC should require either an issuer or its ADR Bank to notify the SEC that the issuer is claiming the exemption. Otherwise, there can be no effective regulatory oversight of the issuer's compliance with its registration obligations.

7. What effects, if any, would the proposed elimination of the written application requirement and the lack of a formal notice requirement have on other market participants, for example, broker-dealers and their ability to fulfill their Rule 15c2-11 obligations to investors or facilitate the resale of a foreign company's securities to QIBs in the United States under Securities Act Rule 144A?[64]

   Answer: Since the Commission has not published a list of 12g3-2(b) exempt companies since 2005, the market is not currently operating with any notification of which issuers are accessing the exemption or in compliance with the exemption.

F. Proposed Duration of the Amended Rule 12g3-2(b) Exemption

1. Should an issuer be able to claim the Rule 12g3-2(b) exemption only for as long as it complies with the rule's non-U.S. publication requirement?[65]

   Answer: Yes. An issuer's ability to claim the exemption should be contingent on it providing adequate information to U.S. investors so that they are on a level playing field with foreign investors. If a foreign

[63] *Id*.
[64] *Id*.
[65] *Id*. at 46.

issuer ceases to comply with Rule 12g3-3(b)'s non-U.S. publication requirement, it should no longer be able to claim the exemption.

2. Should an issuer lose the Rule 12g3-2(b) exemption if its U.S. trading volume exceeds 20 percent of its worldwide trading volume for its most recently completed fiscal year, other than the year in which the issuer first claimed the exemption, even if the issuer has fully complied with Rule 12g3-2(b)'s non U.S. jurisdiction publication requirement? Should an issuer have to make the trading volume determination for the fiscal year in which the issuer first claims the exemption as well or should compliance with the rule's non-U.S. publication and foreign listing requirements suffice as a basis for continuing the exemption, regardless of the relative U.S. trading volume of its securities?[66]

Answer: As previously discussed, we do not agree with the 20 percent trading volume standard and accordingly, do not think an issuer should lose the Rule 12g3-3(b) exemption if the issuer's U.S. trading volume exceeds 20 percent of its worldwide trading volume. The Rule's non-U.S. publication and foreign listing requirements should suffice as a basis for continuing the exemption, regardless of the relative U.S. trading volume of its securities. The largest trading market in an issuer's securities should drive listing and disclosure, not a market with one-fifth of the volume.

3. Should an issuer be able to claim the Rule 12g3-2(b) exemption only for as long as it maintains a listing in its primary trading market? Should it instead be able to continue to claim the exemption if, despite being delisted in its primary trading market, it voluntarily continues to publish electronically the documents required by its former foreign exchange and its U.S. trading volume remains at 20 percent or less of its worldwide trading volume?[67]

Answer: We believe that as a general proposition a foreign issuer should be required to maintain a listing in a well-regulated trading market to continue to claim the exemption.

4. Should an issuer no longer be able to claim the Rule 12g3-2(b) exemption if it registers the same or a different class of securities under Exchange Act Section 12(g) or incurs reporting obligations as to such a class under Section 15(d), as proposed? Should an issuer

[66] *Id*. at 47.
[67] *Id*.

instead be able to maintain the Rule 12g3-2(b) exemption for a class of equity securities if it incurs Section 15(d) reporting obligations regarding debt securities?[68]

Answer: Yes.

5. Should other factors or conditions cause an issuer to lose the Rule 12g3-2(b) exemption? For example, if an issuer sells a significant percentage of its equity securities to U.S. investors in one or more exempt transactions during a specified period of time, such as six months or a year, should it be able to continue to claim the Rule 12g3-2(b) exemption as long as its U.S. trading volume does not exceed 20 percent of its worldwide trading volume at the end of that year? Is there a point when the percentage of outstanding shares owned by U.S. investors becomes as or more important than relative U.S. trading volume as a measure of U.S. market interest for determining the duration of the Rule 12g3-2(b) exemption? If so, what is that point?[69]

Answer: An issuer should lose the Rule 12g3-2(b) exemption when it offers or sells securities in a U.S. public offering or lists its securities on a national securities exchange. Trading volume should not be a measure of when an issuer loses the exemption.

In general, we are not in favor of any test of registration obligations that is unilaterally imposed by the Commission on foreign private issuers without the concurrence of foreign regulatory authorities. However, if the Commission is determined to adopt such a test, we think that requiring registration when the number of securities issued under U.S. tradeable ADR programs is greater than 30% of an issuer's outstanding securities would be vastly preferable to a trading volume test. An issuer has direct control over the number of securities issued through a sponsored ADR program and can therefore control the point at which it becomes subject to U.S. registration. The test would therefore be perceived as fair, encouraging voluntary compliance and support from foreign regulatory authorities. Sponsored ADR programs protect investors by facilitating superior pricing and by permitting investors to trade and clear through U.S. broker-dealers and securities depositaries regulated by the Commission. Encouraging the establishment of sponsored ADR programs would increase the

[68] *Id*.
[69] *Id*. at 47-48.

investment opportunities available to U.S. investors and would enhance the ability of U.S. financial services firms to compete with their foreign counterparts.

G. Proposed Elimination of the Successor Issuer Prohibition

1. Should we permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its exit from the Exchange Act reporting regime under Rule 12g-4, Rule 12h-3 or Section 15(d), as proposed? [70]

Answer: The SEC should permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the successful deregistration of its securities if the successor issuer would otherwise qualify for the exemption.

H. Proposed Elimination of the "Automated Inter-Dealer Quotation System" Prohibition and Related Grandfathering Provision

1. Should the SEC eliminate the automatic inter-dealer quotation system prohibition?[71]

Answer: Yes. The inter-dealer quotation system prohibition is obsolete and only applies to Nasdaq.

2. Are there alternative trading systems or other non-exchange trading platforms that raise similar concerns as those that caused the SEC to adopt the Nasdaq-focused automatic inter-dealer quotation system prohibition? If so, should the SEC prohibit an issuer whose securities are traded on those non-exchange systems from relying on the Rule 12g3-2(b) exemption?[72]

Answer: No. The concerns that caused the SEC to adopt the prohibition reflected circumstances that existed in the mid-1980s. At that time, the SEC was concerned that foreign private issuers were listing on Nasdaq to access U.S. capital markets. In part, these concerns reflected the fact that Nasdaq was the only truly electronic market that operated in the United States and was surprisingly successful. In contrast, electronic markets are common in the current

[70] *Id*. at 50.
[71] *Id*. at 54.
[72] *Id*. at 54-55.

environment, while floor-based markets are increasingly uncommon. In the developing global market, the notion that foreign private issuers will access U.S. capital markets through trading on non-exchange markets seems quaint and reflects the technology and concerns of a different period. In response to the development of technology, the SEC adopted Regulation ATS to regulate non-exchange electronic markets, rather than attempting to apply the inter-dealer quotation prohibition in this context. Regulation has therefore evolved along a different path than reflected by the automated inter-dealer quotation system prohibition, rendering it vestigal. At the present time, the prohibition only serves to confuse issuers and their advisors and should be abandoned.

3. Should the SEC eliminate the grandfathering provision to Rule 12g3-2(b)'s automatic inter-dealer quotation system prohibition?[73]

   <u>Answer:</u> The grandfathering provision currently allows nine foreign private issuers that were listed on Nasdaq prior to the automatic inter-dealer quotation system prohibition to remain listed until August 1, 2009, when they must either register under Exchange Act Section 12(b) or delist. There is no reason to continue the grandfathering provision subsequent to August 1, 2009.

I. Proposed Revisions to Form F-6

1. Should the SEC require a Form F-6 registrant to disclose on Form F-6 that, if the issuer of deposited securities is not an Exchange Act reporting company, such issuer electronically publishes the documents required to maintain the Rule 12g3-2(b) exemption, and to provide the address of the issuer's Internet Web site or electronic information delivery system in its primary trading market?[74]

   <u>Answer</u>: Yes. The Form F-6 registrant should disclose all this information on EDGAR so that investors will ready access to the issuer's disclosure.

2. Should the SEC clarify the proposed requirement that a registrant that already has an effective Form F-6 for either a sponsored or unsponsored facility has to disclose the address where the issuer of

[73] *Id*. at 55.
[74] *Id*. at 56.

the underlying securities has electronically published its non-U.S. disclosure documents under Rule 12g3- 2(b) when the registrant files its first post-effective amendment to the Form F-6 following the effective date of the proposed rule amendments?[75]

Answer: Yes. Registrants should be required to file a post-effective amendment to the Form F-6 following the effective date of the proposed rule amendments disclosing the Internet address they have electronically published their disclosure documents.

3. Should the SEC delete the requirement under Form F-6 that the foreign private issuer whose securities are to be represented by an ADR be an Exchange Act reporting company or be exempt from registration under Rule 12g3-2(b)?[76]

Answer: No, the SEC should not delete this requirement. It is important that U.S. investors have adequate current information about the issuers of securities underlying ADRs, either as a result of Exchange Act registration or because the issuer publishes adequate current information pursuant to Rule 12g3-2(b).

4. As a condition to the registration of ADRs on Form F-6 relating to the shares of a foreign private issuer, should the SEC require that the issuer give its consent to the depositary? Should the SEC require that the depositary have notified the foreign private issuer of its intention to register ADRs and have either received an affirmative statement of no objection from the issuer or not received an affirmative statement of objection from the issuer?[77]

Answer: Issuers of securities traded over-the-counter, whether domestic or foreign, are not required to provide their consent to such trading. This is an important feature of the market because it promotes the free movement of capital by enabling investors to purchase and sell securities in cases where an issuer may be hostile or indifferent to the trading of its securities. For the same reasons, foreign issuers are not required to consent to the trading of Level 1 ADRs traded in the over-the-counter market, and there is no good reason to require their consent or to give them notice of such trading.

[75] *Id*. at 57.
[76] *Id*.
[77] *Id*.

It is important that investors have access to adequate current information about the issuer of securities traded over-the-counter. As a result, if an issuer is unwilling to sponsor or consent to the creation of an ADR program, an ADR bank should be permitted to register the securities on Form F-6, provided that the information required by the Rule 12g3-2(b) exemption is available and the ADR bank can identify the Internet location of the information. The ADR banks creating unsponsored ADR programs should be provided with guidelines in the adopting release describing the steps they must undertake to have a reasonable basis for believing an issuer is making its disclosure available in English.

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

1. Should the SEC require a broker-dealer to have available the information published by an issuer to maintain the Rule 12g3-2(b) exemption?[78]

   Answer: No. Rule 15c2-11 was promulgated in the 1970s and reflects a time when information about securities was obtained primarily through broker-dealers. Good information about securities is now available through multiple sources on the Internet. Investors are adequately protected in the current environment if broker-dealers that trade a foreign issuers' securities are only required to reasonably ascertain that the information required under Rule 12g3-2(b) is available for free to investors on the issuer's website or through a publicly available electronic information repository maintained by the issuer's foreign exchange, EDGAR or associated with the principal U.S. trading venue for the issuer's securities, such as the OTC Disclosure and News Service maintained by Pink OTC.

2. Should the SEC continue to require a broker-dealer to make this information reasonably available upon request? Should a broker-dealer be able to satisfy this requirement by providing appropriate instructions regarding how to obtain the information electronically?[79]

   Answer: No. Issuers should be responsible for their disclosure, not broker-dealers. The SEC should neither require a broker-dealer to make this information available by request nor require a broker-dealer to provide instructions on how to obtain the information electronically.

[78] *Id*. at 59.
[79] *Id*.

Instead, the issuer or ADR bank should identify through a filing on EDGAR where the information required under Rule 12g3-2(b) is available. That is where investors will expect to find it. Investors no longer expect broker-dealers to be the primary source of good information about securities. Of course, broker-dealers that are recommending OTC traded securities will continue to be required to comply with the highly developed sales practice rules that require them to determine that the investment is appropriate for their customers.

K. Proposed Transition Periods

1. Should the SEC adopt a three-year transition period for currently-exempt issuers that cannot claim the Rule 12g3-2(b) exemption on the effective date of the rule amendments? Alternatively, should the SEC instead adopt a shorter or longer transition period or not adopt any transition period? [80]

   Answer: The SEC should grandfather currently exempt issuers that fail the volume test. However, if the SEC does not grandfather these issuers, it should adopt, at a minimum, a three-year transition period for currently-exempt issuers that cannot claim the Rule 12g3-2(b) exemption on the effective date of the rule amendments. These issuers may take steps to curtail U.S. trading or register their securities. In any event, affected issuers should be provided with sufficient time to meet with their advisors and take appropriate action. It is clearly better for the SEC to grandfather currently-exempt issuers indefinitely. These are foreign private issuers that are in compliance with the SEC's mandates and should not be penalized for their compliance.

2. Is a transition period necessary to provide issuers with sufficient time to publish electronically their non-U.S. disclosure documents required under Rule 12g3-2(b) or to enable investors to learn how to access those electronically published documents? If so, would the three-month transition period be sufficient or should it be shorter or longer? [81]

   Answer: A transition period is necessary to provide issuers with sufficient time to publish electronically their disclosure documents and translate them into English. We believe that a three-month period would be adequate.

[80] *Id*. at 60.
[81] *Id*. at 61-62.

L. COST-BENEFIT ANALYSIS

1. What are the costs and benefits to U.S. and other investors, foreign private issuers, and others who may be affected by the proposed amendments to Exchange Act Rule 12g3-2 and the associated proposed rule amendments?[82]

   Answer: The costs to issuers of translating into English and electronically publishing existing disclosure documents are small. U.S. investors will benefit from having access to English-language disclosure documents readily available online that will place them on an level playing field with foreign investors.

   On the other hand, the costs to foreign issuers to register their securities, should their U.S. trading volume exceed a certain percent of their worldwide trading volume, would be great. Furthermore, the costs would be especially large if, for example, U.S. disclosure requirements and an issuer's primary market disclosure requirements were inconsistent because such issuers would have to expend a substantial amount of resources and time to comply with both systems. U.S. investors are likely to suffer because some foreign issuers will attempt to discourage trading in the U.S. to avoid Exchange Act registration, particularly where U.S. disclosure requirements are inconsistent with an issuer's foreign regulation.

   We also believe that the lack of ADR programs in over half of the FTSE All-World Ex-US Index is creating a substantial missed opportunity cost for U.S. investors. The Commission should be seeking ways to make the securities issued by more reputable, regulated non-U.S. traded companies available to U.S. investors through U.S. broker-dealers.

M. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION ANALYSIS

1. What is the potential impact of the proposed rule amendments on the following factors: (a) an annual effect on the economy of $100 million or more (either in the form of an increase or decrease), (b) a major

[82] *Id*. at 73-74.

increase in costs or prices for consumers or individual industries, or (c) significant adverse effects on competition, investment or innovation? What empirical data and other factual support, if any, exists to support any comments as to the potential impact of the proposed rule amendments? [83]

Answer: If the proposed 20% trading volume test for the Rule 12g3-2(b) exemption is adopted, we believe that many foreign issuers will take steps to discourage trading in the U.S., which would have significant adverse effects on U.S. financial firms' ability to compete against foreign financial firms. This would also negatively affect U.S. investors because it would deprive them of investment opportunities in foreign issuers' securities.

If the proposed percentage threshold is not adopted, U.S. broker-dealers and investors will be better positioned to compete globally with other foreign financial firms and investors, provided that adequate current information available to foreign investors and investment firms is readily available to U.S. investors and investment firms.

2. Would the proposed rules impose a burden on competition or would they promote efficiency, competition and capital formation? What empirical data and other factual support, if any, exists to support either view? [84]

Answer: The 20% trading volume test for registration will impair the ability of U.S. financial services firm to compete with their global counterparts. London's recent success has been driven by the critical mass achieved by offering trading services in foreign securities to international investors. Over 80% of the issuers listed on the FTSE All-World Ex-US index participants have chosen not to register securities with the SEC or list on a national securities exchange. These securities represent a vast opportunity for U.S. investors and U.S broker-dealers, and the Commission should support the trading of these securities in the U.S. OTC markets.

N. REGULATORY FLEXIBILITY ACT CERTIFICATION

1. What are Pink OTC' comments regarding the certification by the SEC that the proposed rule amendments would not have a significant

[83] *Id*. at 74.
[84] *Id*. at 77.

economic impact on a number of small entities for the purposes of the Regulatory Flexibility Act? Please describe the nature of any impact on small entities, if any, and provide empirical data to support the extent of the impact.[85]

Answer: Pink OTC disagrees that the proposed rule amendments would not have a significant economic impact on a number of small entities for the purposes of the Regulatory Flexibility Act. Many U.S. broker-dealers are small businesses. We expect that the 20% trading volume test for registration will cause a substantial number of foreign issuers that currently sponsor ADR programs to takes steps to discourage trading in the U.S. Large firms with global operations will not be affected to the same extent as smaller financial firms without overseas operations. Large firms will trade the securities in their foreign offices. Smaller broker-dealers will lose this business to large U.S. firms and smaller foreign firms and will suffer a significant economic impact on their business.[86]

[85] *Id*. at 78.
[86] *Id*. at 78.