

data to quantify the costs and value of the benefits identified.

#### V. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation Analysis

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),<sup>49</sup> we solicit data to determine whether the proposals constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

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

When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act<sup>50</sup> requires us to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, Section 3(f) of the Exchange Act<sup>51</sup> requires the Commission to consider whether the action will promote efficiency, competition and capital formation.

We expect that proposed Rule 13k-1 will have a beneficial effect on competition in U.S. capital markets by eliminating or significantly reducing the burden imposed by Sarbanes-Oxley Section 402's insider lending prohibition on most foreign bank issuers. In so doing, proposed Rule 13k-1 should encourage foreign banks to continue or achieve their status as Exchange Act reporting companies. Such encouragement could facilitate increased competition among U.S. capital market participants for the

securities of foreign and domestic bank reporting companies to the ultimate benefit of investors.

We request comment on whether proposed Rule 13k-1 and the proposed amendment to Form 20-F, if adopted, would impose a burden on competition or promote efficiency, competition, and capital formation as discussed above or in any other way. Commenters are requested to provide empirical data and other factual support for their views if possible.

#### VI. Regulatory Flexibility Act Certification

The Securities and Exchange Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that proposed Rule 13k-1 under the Securities Exchange Act of 1934 ("Exchange Act") and the proposed amendment to Form 20-F under the Exchange Act, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act. The reason for this certification is as follows.

Proposed Rule 13k-1 would exempt from the insider lending prohibition of Exchange Act Section 13(k) a foreign bank that meets specified criteria similar to the criteria that a domestic bank must meet in order to qualify for the exemption from the insider lending prohibition under Exchange Act Section 13(k)(3). This proposed rule would, thus, directly affect only foreign issuers and not domestic companies since Exchange Act Section 13(k) already exempts qualified domestic banks from the insider lending prohibition. Similarly, the proposed amendment to Form 20-F would only affect foreign issuers since only foreign issuers are permitted to use this form.

Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress did not intend that the Act apply to foreign issuers. Accordingly, the entities directly affected by the proposed rule and form amendment will fall outside the scope of the Act. For this reason, proposed Exchange Act Rule 13k-1 and the proposed amendment to Form 20-F should not have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We request in particular that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

#### VII. Statutory Basis of Proposed Amendment

We are proposing Exchange Act Rule 13k-1 and the proposed amendment to Form 20-F under the authority in Sections 6, 7, 10 and 19 of the Securities Act, Sections 3(b), 12, 13, 23 and 36 of the Exchange Act, and Section 3(a) of the Sarbanes-Oxley Act of 2002.

#### Text of the Proposed Amendment

##### List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

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

#### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7202, 7241, 7262, and 7263; and 18 U.S.C. 1350, unless otherwise noted.

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2. Add § 240.13k-1 to read as follows:

##### § 240.13k-1 Foreign bank exemption from the insider lending prohibition under section 13(k).

(a) For the purpose of this section:

- (1) *Foreign bank* means an institution:
  - (i) The home jurisdiction of which is other than the United States;
  - (ii) That is regulated as a bank in its home jurisdiction; and
  - (iii) That is engaged substantially in the business of banking.

(2) *Home jurisdiction* means the country, political subdivision or other place in which a foreign bank is incorporated or organized.

(3) *Engaged substantially in the business of banking* means engaged in:

- (i) Receiving deposits to a substantial extent in the regular course of business;
- (ii) Having the power to accept demand deposits; and
- (iii) Extending commercial or other types of credit.

(4) *Parent company of a foreign bank* means a corporation or other organization that directly or indirectly owns more than 50 percent of the voting securities or the equity of the foreign bank.

(b) An issuer that is a foreign bank or the parent company of a foreign bank is exempt from the prohibition of

<sup>49</sup> Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

<sup>50</sup> 15 U.S.C. 78w(a)(2).

<sup>51</sup> 15 U.S.C. 78c(f).