

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

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

## 2. Sponsored ADRs

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

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

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

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

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

There are some foreign companies whose sole trading market is in the United States and therefore do not need to have securities transfer arrangements in more than one country. These

companies have a single transfer agent located in the United States. These companies, which are generally incorporated in Bermuda, the Bahamas or Cayman Islands, are identical to U.S. companies in this respect.

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

## C. Unsponsored ADR Facilities Relating to Listed Ordinary Shares

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

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

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

<sup>8</sup> 15 U.S.C. 78a et seq.

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

<sup>10</sup> See Section II, *infra*.

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

<sup>12</sup> See New York Stock Exchange (NYSE) Listed Company Manual, "Sponsored American Depositary Receipts or Shares," Section 103.04; American Stock Exchange (AMEX) Constitution and Rules, "Original Listing Applications of Foreign Issuers," Section 220.

<sup>13</sup> See The Nasdaq Stock Market, "Listing Requirements and Fees."