

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

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

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

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

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

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

¹⁷ See General Instruction I.A. to Form F-6.

¹⁸ See General Instruction I.A.(1)(i)-(iii) to Form F-6.

¹⁹ See General Instruction I.A.(2) to Form F-6.

²⁰ 15 U.S.C. 78m(a).

²¹ 15 U.S.C. 78o(d).

²² See General Instruction I.A.(3) to Form F-6.

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

III. Discussion of Proposed Changes

We propose to add one new eligibility requirement to Form F-6, which would preclude the use of Form F-6 to register unsponsored ADRs if the shares of the foreign issuer to be deposited already trade in the United States in ordinary share form on a registered national securities exchange²³ or an automated inter-dealer quotation system of a national securities association.²⁴ The proposed requirement would prevent a depositary from establishing an unsponsored ADR facility relating to the shares of a foreign issuer that are already listed in the United States in ordinary share form. As discussed in the following sections, we believe various rationales support this amendment.

A. Investor Rights

We are concerned that offering unsponsored ADRs for underlying securities of a foreign issuer that are also listed on a U.S. exchange or automated inter-dealer quotation system of a national securities association may create an imbalance between the

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

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

information that ADR holders receive and the information that holders of the issuer's ordinary shares receive. Unsponsored ADR holders who neither receive shareholder communications nor enjoy voting rights are unable to participate in corporate actions or make fully informed investment decisions on equal footing with holders of the ordinary shares. The proposed amendment should benefit U.S. investors by ensuring that U.S. investors in equity securities of the same foreign issuer enjoy a similar level of shareholder rights.

Questions Related to Investor Rights

- Do the purchasers of unsponsored ADRs understand the terms of the security? Specifically, do they understand the differences in dividends, voting, and other rights between the unsponsored ADR and the ordinary shares when those shares are listed on a registered national securities exchange or automated inter-dealer quotation system of a national securities association? What weight do investors give to the rights attached to security ownership in determining whether to purchase ADRs or ordinary shares?

- Are investors aware, or are they made aware, by broker-dealers or otherwise, of any differences in their rights as holders of unsponsored ADRs compared to their rights as ordinary shareholders? What obligations do broker-dealers have to provide this type of information to investors? What information do broker-dealers provide to investors in this area?

- Is more disclosure about the differences between the rights of shareholders and unsponsored ADR holders necessary? If so, what additional disclosure would be helpful? Should these concerns be addressed by disclosure rather than by limiting the availability of unsponsored ADRs?

B. Potential for Investor Confusion

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

Questions Related to Investor Confusion

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