

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

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

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

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

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

C. Equal Treatment of Foreign Issuers and Domestic Issuers

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

The regulation of ADRs, in allowing for unsponsored facilities relating to shares of a foreign issuer that are listed in the United States in ordinary share form, may inadvertently operate to the detriment of foreign companies that have chosen to list their ordinary shares directly by facilitating an undesirable division in the market for their shares. For example, the ADRs relating to global shares would trade over-the-counter while the global shares themselves

continue to trade on a registered national exchange. This potential does not exist for U.S. companies, to which Form F-6 does not apply.

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

Questions Regarding Equal Treatment and Competitive Effects

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

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

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

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

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

D. Interference With the Corporate Governance Objectives of Foreign Companies

As discussed above, some foreign companies have chosen not to have their securities trade as ADRs. Permitting unsponsored ADRs for listed securities may create a disincentive for foreign companies to list in global or ordinary share form. A foreign company's decision to list directly as a global or ordinary share may be based on corporate governance considerations,

such as direct access to shareholders, and often entails a more costly procedure to coordinate the clearance and settlement systems in different jurisdictions. Unsponsored ADRs for listed shares may interfere with this decision by foreign companies, and may make foreign companies reluctant to enter or remain listed in the United States.

Questions Regarding Potential Interference With Corporate Governance Objectives of Foreign Issuers

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

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

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

IV. General Request for Comments

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

- The proposed changes that are the subject of this release,
- Additional or different changes, or
- Other matters that may have an effect on the proposals contained in this release, including whether there are other approaches or alternative means of addressing the concerns that it discusses.

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

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