

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 200, 232, 240 and 249

[Release No. 34-55005; International Series Release No. 1300; File No. S7-12-05]

RIN 3235-AJ38

#### 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

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Reproposed rule.

**SUMMARY:** We are reproposing amendments to the rules that govern when a foreign private issuer may terminate the registration of a class of equity securities under section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and the corresponding duty to file reports required under section 13(a) of the Exchange Act, and when it may cease its reporting obligations regarding a class of equity or debt securities under section 15(d) of the Exchange Act. Under the current rules, a foreign private issuer may find it difficult to terminate its Exchange Act registration and reporting obligations despite the fact that there is relatively little interest in the issuer's U.S.-registered securities among United States investors. Moreover, currently a foreign private issuer can only suspend, and cannot terminate, a duty to report arising under section 15(d) of the Exchange Act. Reproposed Exchange Act Rule 12h-6 would permit the termination of Exchange Act reporting regarding a class of equity securities under either section 12(g) or section 15(d) of the Exchange Act by a foreign private issuer that meets a quantitative benchmark designed to measure relative U.S. market interest for that class of securities, which does not depend on a head count of the issuer's U.S. security holders. The reproposed benchmark would require the comparison of the average daily trading volume of an issuer's securities in the United States with that in its primary trading market. Because the Commission did not fully address this approach when it originally proposed Rule 12h-6, and because of other proposed changes to Rule 12h-6 not fully discussed in the original rule proposal, we are reproposing Rule 12h-6 and the accompanying rule amendments. These rule amendments would seek to provide U.S. investors with ready access through the Internet

on an ongoing basis to material information about a foreign private issuer of equity securities that is required by its home country after it has exited the Exchange Act reporting system.

**DATES:** Comments must be received on or before February 12, 2007. Given the advanced stage of this rulemaking initiative, the Commission anticipates taking further action as expeditiously as possible after the end of the comment period. It therefore strongly encourages the public to submit their comments within the prescribed comment period. Comments received after that point cannot be assured of full consideration by the Commission.

**ADDRESSES:** Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's *Internet comment form* (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-12-05 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number S7-12-05. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site <http://www.sec.gov/rules/proposed.shtml>. Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Elliot Staffin, Special Counsel, at (202) 551-3450, in the Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We are reproposing amendments to Commission Rule 30-1,<sup>1</sup> Rule 101<sup>2</sup> of Regulation S-T,<sup>3</sup> and Rules 12g3-2, 12g-4 and 12h-3<sup>4</sup> under the Exchange Act,<sup>5</sup> and reproposing new Rule 12h-6<sup>6</sup> and Form 15F<sup>7</sup> under the Exchange Act.

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## I. Executive Summary and Background

### A. Introduction

On December 23, 2005, the Commission issued proposed amendments to its current rules governing when a foreign private

<sup>1</sup> 17 CFR 200.30-1.

<sup>2</sup> 17 CFR 232.101.

<sup>3</sup> 17 CFR 232.10 *et seq.*

<sup>4</sup> 17 CFR 240.12g3-2, 240.12g-4 and 240.12h-3.

<sup>5</sup> 15 U.S.C. 78a *et seq.*

<sup>6</sup> 17 CFR 240.12h-6, as reproposed.

<sup>7</sup> 17 CFR 249.324, as reproposed.

issuer<sup>8</sup> may exit the Exchange Act reporting regime.<sup>9</sup> The Commission proposed these rule amendments out of concern that, due to several trends, including the increased internationalization of the U.S. securities markets in recent decades, it has become difficult for a foreign private issuer to exit the Exchange Act reporting system even when there is relatively little U.S. investor interest in its U.S.-registered securities.<sup>10</sup>

We recognized that U.S. investors benefit from the investment opportunities provided by foreign private issuers registering their securities with the Commission and listing and publicly offering those securities in the United States. However, because of the burdens and uncertainties associated with terminating registration and reporting under the Exchange Act, the current exit process may serve as a disincentive to foreign private issuers accessing the U.S. public capital markets. In order to remove this disincentive, we proposed to amend the current Exchange Act exit rules for foreign private issuers.

We received over 50 letters commenting on the proposed rule amendments.<sup>11</sup> While most of the commenters supported the purpose and general framework of the proposed rulemaking, many expressed concern that the rule proposals would unduly restrict a significant portion of U.S.-registered foreign private issuers from terminating their Exchange Act registration and reporting obligations. We have carefully considered commenters' suggestions regarding the rule proposals, and have incorporated many of them into the rules that we are repropounding today.

A number of commenters have noted that many non-U.S. securities markets impose relatively few restrictions on the

ability of a foreign issuer to delist from those markets and to terminate all reporting and other compliance obligations in those markets.<sup>12</sup> In the United States, foreign companies are generally able to delist their securities from exchanges without significant restrictions.<sup>13</sup> However, although a foreign private issuer is able to delist its securities from U.S. exchanges, it may continue to have reporting obligations under the Exchange Act.

The rules we are repropounding today are intended to provide foreign private issuers with methods by which they can exit the U.S. public securities markets without significant burdens when U.S. market interest in the issuers' securities is relatively low. For foreign registrants of equity securities, that method would be based on a comparison of the average daily trading volume of its class of securities in the United States with that in its primary trading market.<sup>14</sup> Although we expressed some reservation about relying solely on trading volume data as the basis for measuring U.S. regulatory interest in the Proposing Release, in light of the comments received, we are reconsidering our position. We believe that a standard based on trading volume may in fact be superior to the originally proposed standard, which was based primarily on a comparison of an issuer's U.S. public float with its worldwide public float, because it is a direct measure of the issuer's nexus with the U.S. market, and because trading volume data is easier to obtain than public float or record holder data. In applying an exit standard based on trading volume data for the U.S. and an issuer's primary trading market, issuers will face reduced costs when determining whether they can terminate their registration and reporting obligations under the Exchange Act, compared to the earlier proposed measures that would have required an issuer to assess the U.S. residence of its security holders.

We believe the repropounded rules appropriately provide meaningful protection of U.S. investors by

permitting the termination of Exchange Act registration and reporting only by foreign registrants in whose U.S. registered securities relative U.S. market interest is low. We believe the proposed conditions governing eligibility to use the trading volume-based measure, along with the other proposed conditions concerning prior Exchange Act reporting, the prohibition against recent registered U.S. offerings, and required foreign listing should further serve to protect U.S. investors.

We believe the repropounded rules will provide foreign private issuers, regardless of size, with the meaningful option of terminating their Exchange Act reporting obligations when, after electing to access the U.S. public capital markets, they find that there is relatively little U.S. investor interest in their U.S.-registered securities. As a result, foreign private issuers should be more willing initially to register their securities with the Commission, to the benefit of U.S. investors who will have more investment choices.

#### *B. Overview of the Current Exchange Act Exit Rules*

Exchange Act Rule 12g-4 currently governs whether an issuer may terminate its registration of a class of securities under section 12(g) of the Exchange Act<sup>15</sup> and its corresponding section 13(a) reporting obligations.<sup>16</sup> Under this rule, a foreign private issuer may seek termination of its registration of a class of securities under section 12(g) by certifying in Form 15<sup>17</sup> that the subject class of securities is held of record by less than 300 residents in the United States or by less than 500 U.S. residents when the issuer's total assets have not exceeded \$10 million on the last day of each of the issuer's most recent three fiscal years.<sup>18</sup> To determine

<sup>8</sup> As defined in Rule 3b-4(c) (17 CFR 240.3b-4(c)), a foreign private issuer is a corporation or other organization incorporated or organized in a foreign country that either has 50 percent or less of its outstanding voting securities held of record by United States residents or, if more than 50 percent of its voting securities are held by U.S. residents, about which none of the following are true:

(1) A majority of its executive officers or directors are U.S. citizens or residents;

(2) More than 50 percent of its assets are located in the United States; and

(3) The issuer's business is administered principally in the United States.

<sup>9</sup> Release No. 34-53020 (December 23, 2005), 70 FR 77688 (December 30, 2005) (Original Proposing Release).

<sup>10</sup> See Original Proposing Release, 70 FR at 77689-77690.

<sup>11</sup> These comments are available on the Commission's Web site at <http://www.sec.gov/rules/proposed/s71205.shtml> and in the Commission's Public Reference Room in its Washington, DC headquarters.

<sup>12</sup> See, for example, the letter, dated February 9, 2004, from the Association Francaise Des Entreprises Privees (AFEP) and other European industry group representatives.

<sup>13</sup> See, for example, Exchange Act Rule 12d2-2 (17 CFR 240.12d2-2) and section 806.02 of the New York Stock Exchange (NYSE) Listed Company Manual.

<sup>14</sup> As discussed in greater detail in Part II.A. of this release, a foreign private issuer would be eligible to deregister a class of equity securities under repropounded Rule 12h-6 if the average daily trading volume in the United States was no greater than 5% of its average daily trading volume in its primary trading market over a recent 12-month period.

<sup>15</sup> This statutory section only applies to equity securities. See Exchange Act Section 12(g)(1) [15 U.S.C. 78l(g)(1)]. An issuer may register a class of equity securities under section 12(g) either voluntarily or because it had 500 or more security holders of record and more than \$10 million in total assets and, if a foreign private issuer, more than 300 shareholders resident in the United States on the last day of its most recently completed fiscal year. See Exchange Act Rules 12g-1 (17 CFR 12g-1) and 12g3-2(a) (17 CFR 240.12g3-2(a)). However, a foreign private issuer may avoid an Exchange Act registration obligation under section 12(g) by establishing the exemption under Exchange Act Rule 12g3-2(b) (17 CFR 240.12g3-2(b)).

<sup>16</sup> 15 U.S.C. 78m(a).

<sup>17</sup> 17 CFR 249.323.

<sup>18</sup> Exchange Act Rule 12g-4(a)(2) (17 CFR 240.12g-4(a)(2)). Alternatively, a foreign private issuer may seek to terminate its section 12(g) registration under the Rule 12g-4 provision that applies to any issuer, whether domestic or foreign. Under this provision, an issuer must certify on Form 15 that its class of equity securities is held

the number of U.S. resident shareholders under this rule, a foreign private issuer must use the method of counting provided under Exchange Act Rule 12g3-2(a).<sup>19</sup> This method requires looking through the record ownership of brokers, dealers, banks, depositaries or other nominees on a worldwide basis and counting the number of separate accounts of customers resident in the United States for which the securities are held.<sup>20</sup> Under this rule, issuers are required to make inquiries of all nominees, wherever located and wherever in the chain of ownership, for the purpose of assessing the number of U.S. resident holders.

Rule 12h-3<sup>21</sup> is the Exchange Act rule governing when an issuer may suspend its reporting obligations under section 15(d).<sup>22</sup> While Rule 12h-3's standards are substantially similar to those under Rule 12g-4,<sup>23</sup> there are two important differences. First, an issuer may generally not suspend its section 15(d) reporting obligations until it has filed one Exchange Act annual report after the offering in question. Second, an issuer cannot terminate its reporting obligations under section 15(d) but can only suspend those obligations.<sup>24</sup> Therefore, for as long as the subject class of securities is outstanding, a foreign private issuer must also determine at the end of each fiscal year whether the number of U.S. resident security holders or total number of record holders has increased enough to trigger anew its section 15(d) reporting obligations.

An issuer may be subject to Exchange Act reporting obligations under more than one statutory section or rule. While an issuer is deemed to have only one active set of reporting obligations, when an issuer attempts to exit the Exchange Act reporting system, it must consider

of record on a worldwide basis by less than 300 persons or by less than 500 persons when the issuer's total assets have not exceeded \$10 million on the last day of each of the issuer's most recent three fiscal years. Exchange Act Rule 12g-4(a)(1) (17 CFR 240.12g-4(a)(1)).

<sup>19</sup> 17 CFR 240.12g3-2(a).

<sup>20</sup> See 17 CFR 240.12g3-2(a)(1).

<sup>21</sup> 17 CFR 240.12h-3.

<sup>22</sup> The effectiveness of a registration statement under the Securities Act of 1933 (Securities Act) triggers Section 15(d) reporting obligations. That section provides that an issuer cannot suspend its reporting obligations unless the subject class of securities is held of record by less than 300 persons at the beginning of a fiscal year other than the year in which the Securities Act registration statement became effective.

<sup>23</sup> See, in particular, Rule 12h-3(b)(2) (17 CFR 240.12h-3(b)(2)). This provision imposes not only the same record holder standards as under Rule 12g-4 but also the same counting method required under Rule 12g3-2(a).

<sup>24</sup> Exchange Act Rule 12h-3(e) (17 CFR 240.12h-3(e)).

whether there are any dormant or suspended reporting obligations that would preclude the issuer from ceasing its Exchange Act reporting.

For example, an issuer may have active section 13(a) reporting obligations because it has a class of equity or debt securities listed on a national securities exchange and registered with the Commission under section 12(b) of the Exchange Act.<sup>25</sup> When attempting to exit the Exchange Act reporting system, the registrant not only must take steps to effect its delisting from the national securities exchange,<sup>26</sup> but also must consider whether it has any dormant or suspended reporting obligations under section 12(g) or 15(d)<sup>27</sup> that will become operative once its section 12(b) registration ceases.<sup>28</sup>

### C. Concerns Regarding the Current Exchange Act Exit Rules

It has been almost four decades since the Commission first adopted the "300 U.S. resident shareholder" standard as

<sup>25</sup> 15 U.S.C. 78j(b).

<sup>26</sup> To effect the delisting and subsequent termination of an issuer's registration of a class of securities under section 12(b), the national securities exchange or issuer must file a Form 25 (17 CFR 249.25) with the Commission pursuant to Exchange Act Rule 12d2-2 (17 CFR 240.12d2-2). We have adopted amendments to our rules and Form 25 to streamline the procedures for removing from listing, and withdrawing from registration, securities under section 12(b). See Release No. 34-52029 (July 14, 2005), 70 FR 42456 (July 22, 2005).

<sup>27</sup> A registrant may have section 12(g) reporting obligations following its termination of registration of a class of equity securities under section 12(b): (1) If it initially registered the class of securities under section 12(g) before listing the securities on a national securities exchange; or (2) under Exchange Act Rule 12g-2 (17 CFR 240.12g-2). That rule provides that any class of securities that would have been required to be registered under section 12(g), except for the fact that it was listed and registered on a national securities exchange, is deemed to be registered under section 12(g) upon the termination of registration under section 12(b) as long as the class of securities are not exempt from registration under section 12 and are held of record by 300 or more persons. Exchange Act section 15(d) automatically suspends the duty to file reports under that section regarding securities registered under an effective Securities Act registration statement once the issuer has registered the class of securities under section 12 of the Exchange Act.

<sup>28</sup> Because compliance with Rule 12d2-2 does not depend on the number of an issuer's record holders, termination of registration under section 12(b) does not raise the same concerns for an issuer as under section 12(g) or 15(d). As is currently the case, under the rule amendments repropounded today, a foreign private issuer that has a class of securities registered under section 12(b) will have to comply with Rule 12d2-2 before it can effect termination of registration under section 12(g) or termination of its reporting obligations under section 13(a) or section 15(d). Moreover, as under the current Exchange Act exit regime, a foreign private issuer will have to file a post-effective amendment to terminate the registration of any unsold securities under an existing Securities Act registration statement before it can terminate its registration and reporting under Rule 12h-6.

the benchmark for determining both when a foreign private issuer must register a class of equity securities under section 12(g) and when it may terminate that registration.<sup>29</sup> Moreover, it has been over two decades since the Commission adopted Form 15 under Rules 12g-4 and 12h-3.<sup>30</sup> Since then, market globalization, advances in information technology, the increased use of American Depositary Receipt ("ADR")<sup>31</sup> facilities by foreign companies to sell and list their securities in the United States, and other factors have increased significantly the number of foreign companies that have engaged in cross-border securities activities and sought listings in U.S. securities markets, as well as increased the amount of U.S. investor interest in the securities of foreign companies.

Representatives of foreign companies and foreign industry associations have voiced their concerns that the "300 U.S. resident shareholder" standard has become outdated and too easily exceeded by a foreign company that may have engaged in very little recent selling activity in the United States.<sup>32</sup> These representatives have further criticized the exit rules' reliance on the number of U.S. resident shareholders because, with the advent of book-entry recording,<sup>33</sup> it is difficult and costly to arrive at an accurate count of a foreign company's U.S. resident shareholders. These representatives have also been critical of Rule 12h-3 because it merely suspends rather than terminates a company's section 15(d) reporting obligations. As such, years after filing a Form 15, a foreign company may find

<sup>29</sup> See Release No. 34-8066 (April 28, 1967).

<sup>30</sup> See Release No. 34-20784 (March 22, 1984), 49 FR 12688 (March 30, 1984).

<sup>31</sup> An ADR is a negotiable instrument that represents an ownership interest in a specified number of securities, which the securities holder has deposited with a designated bank depositary. Use of an ADR facility makes it easier for a U.S. resident to collect dividends in U.S. dollars. Moreover, because the clearance and settlement process for ADRs generally is the same for securities of domestic companies that are traded in U.S. markets, a U.S. holder of an ADR is able to hold securities of a foreign company that trades, clears and settles within automated U.S. systems and within U.S. time periods.

<sup>32</sup> See, for example, the letter from AFEP.

<sup>33</sup> The last three decades have seen the development of a U.S. clearance and settlement system that relies on electronic book-entry to settle securities transactions and transfer ownership rather than one dependent on the use of paper certificates. For an overview of this development, see Release No. 33-8398 (March 11, 2004), 69 FR 12922 (March 18, 2004), the text surrounding n. 104. This movement to electronic book-entry clearance and settlement systems has taken place on a global basis as well, as both developed and developing securities markets have sought to improve efficiency.

that it has once again exceeded the 300 U.S. resident shareholder threshold, and thereupon again become subject to section 15(d) reporting duties, without regard to its U.S. market activity.<sup>34</sup>

Finally, these representatives have objected to our current rule, which does not permit a foreign private issuer to obtain the Exchange Act Rule 12g3-2(b) exemption<sup>35</sup> if, during the previous 18 months, it has had a class of securities registered under section 12 or a reporting obligation, suspended or active, under section 15(d) of the Exchange Act.<sup>36</sup>

#### *D. The Originally Proposed Rule Amendments*

In light of the changes to U.S. capital markets caused primarily by market globalization and advances in information technology, the Commission proposed to amend the rules allowing a foreign private issuer to exit the Exchange Act registration and reporting regime. We proposed to amend Rules 12g-4 and 12h-3 to eliminate the provisions that primarily condition a foreign private issuer's eligibility to cease its Exchange Act reporting obligations on whether the number of its U.S. resident security holders has fallen below the 300 or 500 person threshold. In their place, we proposed new Exchange Act Rule 12h-6 that would permit a foreign private issuer that meets the conditions discussed below to terminate:

- Its registration of a class of equity securities under section 12(g) and its resulting section 13(a) reporting obligations; and
- Its section 15(d) reporting obligations regarding a class of equity or debt securities.

<sup>34</sup> Similarly, as some commenters have noted, after terminating its registration regarding a class of securities under section 12(g), with little or no effort on its part, a foreign private issuer may discover at the end of a subsequent fiscal year that it once again has more than 300 U.S. resident shareholders and, therefore, must register the class of securities anew under that section of the Exchange Act.

<sup>35</sup> Rule 12g3-2(b) provides an exemption from registration under section 12(g) with respect to a foreign private issuer that submits to the Commission, on a current basis, the home country materials required by the rule.

<sup>36</sup> Exchange Act Rule 12g3-2(d)(1) (17 CFR 12g3-2(d)(1)). This exception to the Rule 12g3-2(b) exemption does not apply to registered Securities Act offerings filed by Canadian companies on certain Multijurisdictional Disclosure System ("MJDS") forms. The Rule 12g3-2(b) exemption is also not available for a foreign private issuer's securities issued to acquire by merger or similar transaction an issuer that had securities registered under section 12 or a reporting obligation, suspended or active, under section 15(d), except for a transaction registered on specified MJDS forms. See Exchange Act Rule 12g3-2(d)(2) (17 CFR 240.12g3-2(d)(2)).

Under proposed Rule 12h-6, a foreign private issuer would have been eligible to terminate its Exchange Act reporting obligations regarding a class of equity securities if it met one of a set of alternative benchmarks, not based on a record holder count, and which depended on whether the issuer was a well-known seasoned issuer ("WKSI").<sup>37</sup> As proposed, a foreign private issuer could have terminated its Exchange Act registration and reporting obligations:

- If a WKSI, as long as the U.S. average daily trading volume ("ADTV") of the subject class of securities had been no greater than 5 percent of the ADTV of that class of securities in its primary trading market during a recent 12 month period, and U.S. residents held no more than 10 percent of the issuer's worldwide public float as of a specified date; or
- If a WKSI with greater than 5 percent U.S. ADTV, or if a non-WKSI, regardless of U.S. trading volume, U.S. residents held no more than 5 percent of the issuer's worldwide public float as of a specified date.<sup>38</sup>

Proposed Rule 12h-6 also would have imposed the following conditions on a foreign private issuer before it could terminate its registration and reporting obligations regarding a class of equity securities:

- The issuer must have been an Exchange Act reporting company for the past two years, have filed or furnished all reports required for this period, and have filed at least two annual reports under section 13(a);
- The issuer's securities must not have been sold in the United States in either a registered or unregistered offering under the Securities Act during the preceding 12 months except for a few specified exempt securities or exempt transactions; and
- For the preceding two years, the issuer must have maintained a listing of the subject class of securities on an exchange in its home country, as

<sup>37</sup> For purposes of proposed Rule 12h-6, a "well-known seasoned issuer" would have meant a well-known seasoned issuer as defined in Securities Act Rule 405 (17 CFR 230.405), which would have required the worldwide market value of an issuer's outstanding voting and non-voting common equity held by non-affiliates to be \$700 million or more.

<sup>38</sup> If a foreign private issuer was unable to meet one of these proposed benchmarks, but satisfied the other conditions of the rule, it could still have terminated its Exchange Act registration and reporting obligations regarding a class of equity securities as long as that class of securities was held of record by less than 300 persons on a worldwide basis or less than 300 persons resident in the United States as of a specified date. Proposed Rule 12h-6 also included a similar "300 U.S. resident or worldwide holder" standard for debt securities issuers.

defined in Form 20-F,<sup>39</sup> which constituted the primary trading market for the securities.

Finally, we also proposed to:

- Streamline the counting method used to determine an issuer's U.S. public float or the number of its U.S. shareholders by permitting the look-through to be limited to the United States, the issuer's jurisdiction, and, if different, the jurisdiction of its primary trading market;
- Permit issuers to rely on the assistance of an independent information services provider when calculating the number of their U.S. resident holders; and
- Permit issuers to establish the Rule 12g3-2(b) exemption for a class of equity securities that was the subject of a Form 15F immediately upon termination of Exchange Act reporting, so long as the issuer publishes its home country materials electronically.

#### *E. Principal Comments Regarding the Proposed Rule Amendments*

We received 54 comment letters in response to our proposals. These letters represented the views of over 80 distinct entities, including business and legal associations, foreign companies, depository banks, stock exchanges and market operators, financial advisory and accounting firms, law firms, foreign governments, and academia. While most commenters supported the purpose and overall structure of the rule proposals, many also believed that the proposed rule amendments would be, like the existing rules, unnecessarily restrictive.

We received the most comments concerning the proposed quantitative benchmarks that would enable a foreign private issuer of equity securities to exit the Exchange Act reporting regime regardless of the number of its U.S. resident shareholders. Numerous commenters urged the Commission to increase significantly the proposed benchmarks based on the calculation of the percentage of an issuer's worldwide public float held by U.S. residents. Several commenters also urged the Commission to adopt the same quantitative standards for smaller companies as for well-known seasoned issuers. Many commenters also suggested the adoption of a rule provision that would permit an issuer to exclude certain holders, such as qualified institutional buyers

<sup>39</sup> 17 CFR 249.220f. Form 20-F General Instruction F defines "home country" as the jurisdiction in which the issuer is legally organized, incorporated or established and, if different, the jurisdiction where it has its principal listing.

(“QIBs”),<sup>40</sup> from its U.S. public float percentage determination, as an alternative to adopting significantly raised quantitative benchmarks. Numerous commenters further favored significantly raising the alternative record holder threshold for equity securities issuers and the record holder standard for debt securities issuers.

Other issues raised by commenters included their request:

- To extend termination of Exchange Act reporting under Rule 12h-6 to prior Form 15 filers whose termination of registration or suspension of reporting became effective before the effective date of the new rule;
- To require a shorter prior reporting period for some or all classes of issuers;
- To permit an issuer that has succeeded to the Exchange Act reporting obligations of an acquired company under Exchange Act Rule 12g-3<sup>41</sup> or Rule 15d-5<sup>42</sup> to take into account the reporting history of the acquired company for the purpose of meeting the prior reporting condition under Rule 12h-6;
- To exclude unregistered offerings from the one year dormancy condition;
- To permit an issuer to meet the listing condition requirement if at least 55 percent of the trading volume of the subject class of securities occurs in the aggregate in more than one non-U.S. market;
- To increase the 300 record holder standard, which is included in both the alternative record holder provision for equity securities issuers and the provision for debt securities issuers;
- To extend the Exchange Act Rule 12g3-2(b) exemption to prior Form 15 filers even if 18 months has not elapsed;
- To extend the Rule 12g3-2(b) exemption to successor issuers;
- To permit all issuers having the Rule 12g3-2(b) exemption to publish electronically on their Web sites their home country documents; and
- To amend Exchange Act Rule 12g3-2(a), which governs when a foreign private issuer enters the Exchange Act registration and reporting regime under section 12(g), so as to conform that rule to the amended exit thresholds under Rule 12h-6.

#### F. Summary of the Reproposed Rule Amendments

We have addressed many of the commenters' concerns in the rules that

<sup>40</sup> A QIB is an entity specified under Securities Act Rule 144A (17 CFR 230.144A) that in the aggregate owns at least \$100 million in securities of issuers that are not affiliated with the entity.

<sup>41</sup> 17 CFR 240.12g-3.

<sup>42</sup> 17 CFR 240.15d-5.

we are reproposing today. Major revisions to the proposed rules include:

- Revising the quantitative benchmark provision for an issuer of equity securities by:
  - Applying the same quantitative benchmark, which does not require a head count of security holders, to any issuer of equity securities, regardless of size;
  - Permitting an issuer to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities, assuming it meets all the other conditions of Rule 12h-6, if the U.S. ADTV of the subject class of securities has been no greater than 5 percent of the ADTV of that class of securities in the issuer's primary trading market during a recent 12 month period, regardless of the size of its U.S. public float;
  - Requiring an issuer to wait 12 months before filing its Form 15F<sup>43</sup> in reliance on the trading volume standard if the issuer has delisted its class of equity securities from a national securities exchange or automated inter-dealer quotation system in the United States,<sup>44</sup> and, at the time of delisting, the U.S. ADTV of the subject class of securities exceeded 5 percent of the ADTV of that class of securities in the issuer's primary trading market for the preceding 12 months; and
  - Further requiring an issuer to wait 12 months before filing its Form 15F in reliance on the trading volume standard if the issuer has terminated an American Depository Receipts (ADR) facility;
- Shortening the prior reporting period required for an issuer of equity securities so that, under the reproposed rules, an issuer must have at least one year of Exchange Act reporting, must be current in reporting obligations for that period, and have filed at least one Exchange Act annual report;
- Permitting an issuer of equity securities during the one year dormancy period to sell unregistered securities exempted under the Securities Act, including securities sold in section 4(2) private placements,<sup>45</sup> pursuant to Securities Act Rule 144A,<sup>46</sup> under section 3(a)(10) schemes of

<sup>43</sup> Like current Rules 12g-4 and 12h-3, which require the filing of Form 15, reproposed Rule 12h-6 would require the filing of a form—Form 15F—by which an issuer would certify that it meets the conditions for ceasing its Exchange Act reporting obligations.

<sup>44</sup> Neither the OTC Bulletin Board operated by the NASD nor the market operated by the Pink Sheets LLC are deemed to be automated inter-dealer quotation systems. See Release 33-6862 (April 23, 1999), n.22.

<sup>45</sup> 15 U.S.C. 77d(2).

<sup>46</sup> 17 CFR 230.144A.

arrangement,<sup>47</sup> and pursuant to Securities Act Rules 801 and 802;<sup>48</sup>

- Expanding the types of registered offerings that are excluded from the dormancy condition's prohibition against the sale of registered securities, so that, in addition to permitting registered securities sold to its employees or by selling shareholders in a non-underwritten offering, an issuer may issue registered securities upon the exercise of outstanding rights that have been granted pro rata to all security holders, pursuant to a dividend or interest reinvestment plan, or upon the conversion of outstanding convertible securities;
- Revising the proposed home country listing condition for an issuer of equity securities by:
  - Shortening the minimum period of required non-U.S. listing to one year;
  - Permitting an issuer to have maintained that listing in a foreign jurisdiction that, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's subject class of securities;
  - Revising the definition of “primary trading market” to mean that at least 55 percent of the trading in the foreign private issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in no more than two foreign jurisdictions; and
  - Requiring that, if an issuer aggregates the trading of its securities in two foreign jurisdictions for the purpose of Rule 12h-6, the trading market for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the U.S. trading market for the issuer's securities;
- Revising the proposed counting method to apply only to an issuer's determination of its U.S. resident holders under the reproposed 300 record holder standard for equity and debt securities issuers, and to provide that an issuer that aggregates the trading volume of its securities in two foreign jurisdictions for the purpose of meeting the listing condition under Rule 12h-6 would have to look through nominee accounts in both foreign jurisdictions, which comprise its primary trading market, as well as in the United States and in its jurisdiction of incorporation if different from the two jurisdictions that comprise its primary trading market;
- Revising the proposed scope of Rule 12h-6 to extend termination of

<sup>47</sup> 15 U.S.C. 77c(a)(10).

<sup>48</sup> 17 CFR 230.801 and 230.802.

Exchange Act reporting to a successor issuer that meets specified conditions;

- Revising the proposed scope of Rule 12h-6 to extend termination of Exchange Act reporting to a foreign private issuer that filed a Form 15 and thereafter suspended or terminated its Exchange Act reporting obligations before the effective date of Rule 12h-6, as long as:

- Since the effective date of its termination or suspension of reporting under Form 15, the issuer has not engaged in any transaction or triggered any threshold that, under the current rules, would require it to resume or assume anew Exchange Act reporting obligations;

- The issuer files a Form 15F; and
- If its Form 15 applied to a class of equity securities, the issuer has satisfied Rule 12h-6's "primary trading market" listing condition for that class of securities;

- Extending the Rule 12g3-2(b) exemption to a foreign private issuer, including a successor issuer, immediately upon its termination of reporting under Rule 12h-6;

- Extending the Rule 12g3-2(b) exemption to a foreign private issuer that previously filed a Form 15, and thereafter terminated or suspended its Exchange Act reporting obligations regarding a class of equity securities before the effective date of Rule 12h-6, immediately upon the effectiveness of its termination of reporting under Rule 12h-6; and

- Permitting a non-reporting company that has received or will receive the Rule 12g3-2(b) exemption, upon application to the Commission and not pursuant to Rule 12h-6, to publish its "ongoing" home country documents required under Rule 12g3-2(b)(1)(iii)<sup>49</sup> on its Internet Web site rather than submitting them in paper to the Commission.

We are reproposing other proposed provisions with little to no change. These provisions include:

- The alternative record holder provision for equity issuers and the provision for debt securities issuers, both of which retain the current 300 record holder standard, as proposed;
- The provision permitting an issuer of equity or debt securities to rely on the assistance of an independent information services provider when calculating the number of its U.S. resident security holders;

- The requirement that a foreign private issuer publish a notice, such as a press release, which announces its intention to terminate its Exchange Act

reporting obligations, except that instead of the proposed requirement that the notice be published at least 15 business days before the filing of the Form 15F, we are reproposing to require that an issuer publish the notice before or at the time of filing of the Form 15F;

- The automatic suspension of an issuer's Exchange Act reporting obligations upon the filing of its Form 15F followed by a 90-day waiting period at the end of which, assuming the Commission has no objections, the suspension becomes a termination of reporting;

- The form and content of Form 15F, except that we have modified proposed Form 15F to conform to the changes to the proposed rule amendments that we are reproposing today; and

- The electronic furnishing of home country information on the Internet Web site of an issuer that has obtained the Rule 12g3-2(b) exemption upon the termination of its Exchange Act reporting obligations under Rule 12h-6.

We believe the rules we are reproposing today are consistent with the protection of U.S. investors. These rules would establish a new benchmark that reflects the balancing of potential benefits to U.S. investors, in the form of increased investment opportunities in foreign private companies listing in the United States, and the potential loss of the full protections of the Exchange Act for U.S. investors in foreign private issuers that elect to terminate their Exchange Act registration and reporting under reproposed Rule 12h-6. Compared to the current exit rules, the reproposed rule amendments would establish a more clearly defined process with more appropriate benchmarks by which a foreign private issuer can terminate its Exchange Act reporting obligations if, after a period of time, U.S. market interest is not significant relative to non-U.S. market interest. As a result, we believe foreign private issuers should be more willing initially to register their securities with the Commission, to the benefit of investors.

At the same time, we believe the conditions that determine a foreign private issuer's eligibility to terminate its Exchange Act registration and reporting under reproposed Rule 12h-6 will serve to protect U.S. investors. For example, the prior reporting condition is intended to provide investors with at least one complete year's worth of Exchange Act reports, including an annual report, upon which they can base their investment decisions about a particular foreign registrant before it exits the Exchange Act reporting system. The dormancy condition is designed to deter a foreign private issuer's

promotion of U.S. investor interest through recent registered capital-raising before exiting our reporting system. The foreign listing condition and U.S. trading volume benchmark support our view that, before a foreign private issuer may terminate its Exchange Act reporting obligations under Rule 12h-6, it must be subject to an ongoing disclosure and financial reporting regime, and have a significant market following, in its home market. The condition restricting the ability of an issuer to rely on the trading volume standard under specified circumstances should deter an issuer from excluding U.S. investors, particularly retail investors, from investing in their securities when U.S. market interest is still significant. The immediate availability of the exemption under Rule 12g3-2(b) would foster access by U.S. investors to ongoing home country information about an issuer after it terminates its Exchange Act registration and reporting under Rule 12h-6. Finally, the conditions relating to the filing of Form 15F and the publication of a press release or other notice would promote transparency in the exit process.

## II. Discussion

### A. Conditions for Equity Securities Issuers

#### 1. Quantitative Benchmarks

##### a. Non-Record Holder Benchmark

As reproposed, Rule 12h-6 would enable a foreign private issuer, regardless of size, to qualify for termination of its Exchange Act reporting by meeting a quantitative benchmark provision that does not depend on the number of its U.S. record holders or the percentage of its securities held by those holders. Specifically, an issuer would be able to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities, assuming it meets the other conditions of Rule 12h-6, if the ADTV of the subject class of equity securities in the United States has been 5 percent or less of the ADTV of that class of securities in the issuer's primary trading market during a recent 12-month period.<sup>50</sup>

<sup>50</sup> Reproposed Rule 12h-6(a)(4)(i). When calculating its U.S. ADTV, an issuer would have to take into account all U.S. trading of its subject securities, whether occurring on a registered national securities exchange or elsewhere, as reported through the U.S. transaction reporting plan. It would then divide its U.S. ADTV by the ADTV in the one or two jurisdictions that comprise its primary trading market. For a discussion of how an issuer would make its primary trading market

Continued

<sup>49</sup> 17 CFR 240.12g3-2(b)(1)(iii).

Although numerous commenters supported the adoption of a quantitative benchmark that is not based on the number of an issuer's U.S. shareholders, many commenters expressed concern that, based on their projections, too few existing reporting foreign private issuers would be eligible to terminate their Exchange Act registration and reporting obligations under the proposed benchmarks.<sup>51</sup> The proposed benchmarks were based either on a combination of U.S. public float and trading volume criteria or solely on U.S. public float data. According to these commenters, the proposed rules, if adopted, would continue to discourage foreign companies from entering U.S. public capital markets.<sup>52</sup>

While many commenters supported significantly increasing the proposed U.S. shareholder standard to a 25 percent threshold,<sup>53</sup> there was less agreement on whether a particular class of security holders should be included when making the U.S. public float determination. Some commenters suggested the possible exclusion of a number of classes of investors, such as qualified institutional buyers ("QIBs"), the top five or ten U.S. shareholders of an issuer's equity securities, and U.S. shareholders owning more than a specified amount (for example, \$10 million) of an issuer's equity securities.<sup>54</sup> Others supported the inclusion of all U.S. investors, regardless of type.<sup>55</sup>

Another commenter supported a quantitative benchmark based solely on trading volume criteria because that would best indicate the impact of U.S. deregistration on the broader market for the foreign issuer's securities.<sup>56</sup> Although we initially did not propose such an approach, after reconsideration, we now believe that a new quantitative benchmark based solely on trading

determination under repropoed Rule 12h-6, see Part II.A.4. of this release.

<sup>51</sup> See, for example, the letter of Sullivan & Cromwell.

<sup>52</sup> See, for example, the letter, dated February 28, 2006, of Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb letter").

<sup>53</sup> See the letter from the European Commission, the letter, dated February 28, 2006, from the European Association for Listed Companies and other designated associations of publicly traded European companies ("EALIC"), and the letters from the American Bar Association, Section of Business Law ("ABA (Business)"), Linklaters, Cleary Gottlieb, and Cravath, Swaine and Moore ("Cravath").

<sup>54</sup> See, for example, the letters from the European Commission, EALIC and Cleary Gottlieb.

<sup>55</sup> See the letters from the New York Stock Exchange and Galileo Global Advisors.

<sup>56</sup> See the letter from Fried, Frank, Harris, Shriver & Jacobson. Earlier letters from EALIC and Cleary Gottlieb, dated February 9, 2004, suggested a similar approach.

volume may more efficiently further the purposes of this rulemaking.

One advantage to a benchmark based solely on trading volume is that it is a fairly direct measure of U.S. market interest in a foreign private issuer's securities at a particular time. Another factor in favor of a trading volume only benchmark is that trading volume data for the U.S. and an issuer's primary market is easier to obtain and confirm than is the data required for a U.S. public float or record holder determination. As commenters have noted, it is difficult for a reporting foreign private issuer to determine accurately the specific identities of its U.S. investors.<sup>57</sup> A public float benchmark would require such a determination to varying degrees, particularly if classes of investors are excluded. As a result, the repropoed benchmark, based solely on trading volume, should result in reduced costs to issuers in determining whether they can terminate their Exchange Act reporting obligations.

Various markets may measure and report trading volume differently. For example, dealer interpositioning in dealer markets may result in a higher reported volume in securities transactions. In our other rules that use ADTV as a measure, however, we have not found it necessary or appropriate to make distinctions based on the type of market on which a security is traded for purposes of determining ADTV.<sup>58</sup> Nonetheless, as noted below, we seek comment as to whether Rule 12h-6 should take into account in some fashion the fact that ADTV may not be measured uniformly across trading markets.

Repropoed Rule 12h-6 does not mandate or expressly specify acceptable information sources for determining ADTV. This is consistent with other rules that use ADTV as a measure.<sup>59</sup> Issuers should have flexibility in determining the ADTV of their securities in the appropriate markets from information that is generally widely available from a number of reliable sources. Nonetheless, as noted below, we seek comment as to whether Rule 12h-6 should specify one or more acceptable sources of ADTV information.

As originally proposed, Rule 12h-6 would have established different deregistration thresholds for well-known seasoned issuers ("WKSIs").

<sup>57</sup> See, for example, the letter, dated March 18, 2005, from Cleary Gottlieb.

<sup>58</sup> See Regulation M, 17 CFR 242.100-105, and Release No. 33-7375 (December 20, 1996).

<sup>59</sup> See, for example, the definition of ADTV in Regulation M at 17 CFR 242.100.

Many commenters opposed having different standards for WKSIs and smaller companies. Those commenters maintained that smaller companies should benefit from the full range of options available to WKSIs under the new rule since the costs of Exchange Act reporting generally are disproportionately greater for smaller companies than for larger companies.<sup>60</sup> These comments have persuaded us to propose the same trading volume standard for smaller issuers as for larger issuers. Having the same benchmark for any foreign private issuer of equity securities, regardless of size, should add increased flexibility and simplification to the Exchange Act deregistration regime.<sup>61</sup> Moreover, setting the percentage of U.S. trading volume at a low level, at 5% of trading volume in the primary market, would serve to protect U.S. investors.

#### i. One Year Ineligibility Period After Delisting

Because the principal quantitative measure under proposed Rule 12h-6 would be based on a comparison of the trading volume in the United States and in one or two foreign markets of a foreign private issuer's equity securities, the rule should be structured so as not to create an incentive for a foreign private issuer to delist its securities from a U.S. exchange for the purpose of decreasing its U.S. trading volume. Indeed, as one commenter suggested, if we were to adopt a measure based solely on trading volume, a foreign private issuer that delisted its securities from a U.S. exchange before its trading volume fell below the applicable percentage should not be eligible to terminate its registration under such a standard.<sup>62</sup>

Companies should not be unnecessarily restricted in choosing the markets in which they wish their securities to trade. As a result, we do not believe that delisting from a U.S. exchange should result in a bar against

<sup>60</sup> See the letters from the European Commission, PricewaterhouseCoopers and Cleary Gottlieb.

<sup>61</sup> In the Proposing Release, in support of separate standards for WKSIs and non-WKSIs, we noted that there typically is a greater flow of information about a WKSI, both from the issuer and its analysts, than about a smaller company, and that this flow of information is more likely to continue after the WKSI's termination of reporting. After considering the numerous comments opposing a rule based on WKSI status, we are of the view that the proposed rules, if adopted, could well discourage smaller foreign companies from entering U.S. public capital markets, to the detriment of U.S. investors. In addition, we note that both smaller and larger companies will have to publish their material home country documents on their Internet Web sites as a condition to maintaining the Rule 12g3-2(b) exemption received upon termination of reporting under Rule 12h-6.

<sup>62</sup> See the letter, dated February 9, 2004, from Cleary Gottlieb.

a foreign private issuer from using the repropoed rule. Nonetheless, we share the concern about a possible negative impact stemming from a measure based solely on trading volume. In addition, by requiring companies to remain registered and reporting under the Exchange Act for a period of time after delisting when, before delisting, the company had a relatively active U.S. market for its securities, U.S. investors will have access to information prepared in accordance with the Commission's financial reporting and disclosure requirements for a period of time during which, most likely, the U.S. market will be diminishing.

To address these concerns, we are proposing, as a condition to the use of the trading volume standard of Rule 12h-6 and corresponding eligibility to file Form 15F, that if a foreign private issuer has had its equity securities delisted from a registered national securities exchange or automated inter-dealer quotation system within one year before filing the Form 15F, it must have satisfied the trading volume percentage as of the date of delisting, and as measured over the 12 months preceding the date of delisting. Under this proposed condition:

- A listed foreign private issuer that satisfied the trading volume condition would be able to delist from its stock exchange and terminate its Exchange Act registration and reporting obligations concurrently; and
- A listed foreign private issuer that did not satisfy the trading volume condition would be able to delist but would not be eligible to file a Form 15F and terminate its Exchange Act registration and reporting obligations until one year after the date of delisting, assuming that, at the date of filing its Form 15F, its U.S. ADTV for the recent 12 month period subsequent to its delisting did not exceed 5% of the ADTV in the issuer's primary trading market.<sup>63</sup>

ii. One Year Ineligibility Period After Termination of ADR Facility

Many foreign issuers have their securities trade in the United States in the form of American Depositary Receipts ("ADRs"). It appears that the current rules relating to termination of Exchange Act reporting by foreign private issuers may, as an unintended

consequence, encourage foreign private issuers to terminate their ADR facilities as they seek to have fewer than 300 U.S. resident holders of their securities.<sup>64</sup> When an issuer terminates its ADR facility, the holders of ADRs generally have the option to make arrangements to hold the underlying securities directly. However, if holders are unable or unwilling to make these arrangements, or to pay the costs associated with these arrangements, the holders will have their investment cashed out, that is, the underlying securities will generally be sold into the home market and the net proceeds (after deducting fees and expenses of the selling broker and the depository bank) remitted to the former ADR holders.

We believe foreign issuers should be encouraged to maintain their ADR facilities, even when they delist from a U.S. market and terminate their Exchange Act reporting obligations. After a foreign issuer delists and deregisters, its ADRs should continue to be able to be traded in the over-the-counter market in the United States. The termination of ADR facilities has a detrimental impact on holders, imposing fees and other charges on investors and, when investors are cashed out, subjecting investors to unplanned tax consequences. In addition, the termination of ADR facilities will effectively limit the ability of many U.S. investors to purchase the securities of the subject foreign company.

To address these concerns, we are proposing, as a condition to the use of Rule 12h-6 and eligibility to file Form 15F in reliance on the trading volume provision, that a foreign private issuer shall not have terminated any sponsored ADR facility within the 12-month period before filing the Form 15F.

Comment Solicited

We solicit comment on the proposed trading volume benchmark and on the proposed conditions restricting its use:

- Is the proposed trading volume benchmark an appropriate measure of the relative U.S. market interest in a foreign private issuer's securities?
- We assume that U.S. trading volume numbers reflect U.S. investor interest and U.S. resident trading activity in a security. We request data on the accuracy of these assumptions.
- Would the proposed trading volume benchmark provide adequate U.S.

investor protection, particularly of retail investors?

- Would the proposed trading volume benchmark affect the OTC trading in the securities of foreign issuers? If so, how so? Would investors in those OTC securities be adequately protected by the proposed trading volume benchmark?

- Is the proposed trading volume benchmark preferable to the originally proposed benchmarks that were based either, if a WKSJ, on a combination of trading volume and public float criteria, or solely on public float criteria?

- If the proposed trading volume threshold is preferable, is the threshold set at the appropriate level (5%)? Should it be set, instead, at a lower level, for example, 3% or 1%, or a higher level, for example, 7% or 10%?<sup>65</sup>

- Should the proposed trading volume benchmark require the measurement of the issuer's ADTV over a recent 12 month period, as proposed? Should it be measured over a shorter period, say, 6 months, 3 months, or two months, or over a longer period, for example, 18 months or 24 months? Would a longer or shorter period be more or less susceptible to manipulation or other distorting effects regarding certain transactions?

- Should the proposed trading volume benchmark require an issuer to measure U.S. trading volume as a percentage of its worldwide trading volume, rather than as a percentage of the trading volume in its primary market, as proposed? If so, should an issuer only have to obtain trading volume data from foreign jurisdictions in which it has listed its securities in addition to the United States? If the proposed benchmark should measure U.S. trading volume as a percentage of worldwide trading volume, should we reduce the threshold, for example, to 3% or 1%, to take account that some issuers may be listed or traded in several markets?

- Are there difficulties associated with determining trading volume in the United States or foreign markets for purposes of repropoed Rule 12h-6? How should the rule deal with any such difficulties?

- Should the U.S. ADTV component of the proposed trading volume benchmark include all U.S. trading in the subject class of securities, whether listed or over-the-counter, as proposed?

- Should the proposed trading volume benchmark require an issuer to

<sup>63</sup> Proposed Note 1 to paragraph (a)(4) of repropoed Rule 12h-6. An issuer that failed to meet the trading volume standard at the date of delisting would have to meet the trading volume standard one year later when filing its Form 15F. If, notwithstanding its delisting, an active U.S. over-the-counter market in the company's securities continued, the company would not be eligible to use proposed Rule 12h-6 and file a Form 15F in reliance on the trading volume benchmark.

<sup>64</sup> One ADR depository bank commented that it has recently been involved in at least a dozen ADR facility terminations for this purpose, which have eliminated thousands of U.S. retail holders. See the letter from the Bank of New York.

<sup>65</sup> We encourage commenters to provide appropriate economic support for any suggested change in the repropoed trading volume benchmark.



obtain trading volume data from particular sources? Should the re-proposed rule instead provide safe harbor procedures regarding sources that an issuer may use, but would not be required to use, to obtain trading volume data? If so, what are those procedures or sources?

- Should the proposed trading volume benchmark require an issuer to account for differences in calculating trading volume between different types of markets? If so, how should such differences be taken into account?

- Should one trading volume standard apply to all issuers, regardless of size, as proposed? Should we instead adopt different trading volume standards depending, for example, on the size of the issuer's U.S. public float?

- Would it be more appropriate to adopt an absolute trading volume measure that would require an issuer's U.S. trading volume not to have exceeded a specified amount for a 12-month period? If so, what should be the specified amount? What factors should determine that amount?

- Would the proposed trading volume benchmark create any unanticipated incentives in foreign private issuers that are undesirable? For example, is there a potential for manipulation in the calculation of average trading volume under re-proposed Rule 12h-6? If so, how should we address it?

- What are the approximate costs that an issuer is expected to incur when determining whether it meets the proposed trading volume threshold? Are these costs lower or higher than the costs that an issuer would incur under the originally proposed benchmarks?

- Should we adopt the originally proposed benchmarks instead?
- Should we instead adopt a benchmark or benchmarks that use public float criteria, with or without a trading volume component, but that are set at a higher level than the originally proposed public float benchmarks? For example, should we adopt a standard that permits deregistration if an issuer's U.S. public float is no greater than 15%, 20%, or 25% of its worldwide public float? Should the issuer's status as a WKSI be a factor?

- Is it appropriate to require an issuer to wait one year before being eligible to rely on Rule 12h-6's trading volume standard after delisting its securities from a U.S. stock market when, at the time of the delisting, the issuer did not satisfy the trading volume condition, as proposed?

- If so, should we adopt a one-year ineligibility period, as proposed? Should the period be more than one year, for example, 15, 18 or 24 months?

Should it be shorter than one year, for example, six or nine months?

- Should we apply the proposed one-year ineligibility period relating to delisting to issuers that delisted before the effective date of Rule 12h-6? If not, what type of relief should be provided to those issuers?

- Is it appropriate to require an issuer to wait one year before being eligible to use proposed Rule 12h-6 after terminating its ADR facility?

- If so, should we adopt a one year ineligibility period, as proposed? Should the period be more than one year, for example, 15, 18 or 24 months? Should it be shorter than one year, for example, six or nine months?

- Should the one year ineligibility condition apply only when, at the date of termination of its ADR facility, the ADTV of the issuer's U.S. market exceeded 5% of the ADTV in its primary trading market for the preceding 12 months?

- Should we adopt a condition requiring an issuer to maintain a sponsored ADR facility for a certain period of time following its deregistration under Rule 12h-6? If so, should the period be six months, more than six months, for example, three months, or longer than six months, for example, a year following deregistration?

- Should we apply the proposed condition relating to the termination of an ADR facility to issuers that terminated their ADR facilities before the effective date of Rule 12h-6? If not, what type of relief should be provided to those issuers?

b. Alternative 300 Holder Condition  
As an alternative to the proposed trading volume benchmark provision, re-proposed Rule 12h-6 would permit a foreign private issuer to terminate its Exchange Act reporting obligations regarding a class of equity securities if it has less than 300 record holders on a worldwide basis or who are U.S. residents as long as the issuer meets the rule's other conditions.<sup>66</sup> The purpose of this alternative 300 holder condition is to enable an issuer to terminate its Exchange Act reporting obligations if it cannot satisfy the new trading volume benchmark but does meet the current 300 holder standard. Otherwise, an issuer could find itself worse off under Rule 12h-6 than under the current exit rules.<sup>67</sup>

<sup>66</sup> Proposed Rule 12h-6(a)(4)(ii).

<sup>67</sup> The re-proposed alternative record holder condition is substantially the same as the proposed condition. We did not originally propose, and we are not now proposing, a similar 500 record holder condition, although one exists in the current rules for a small issuer with total assets that have not

While numerous commenters supported having an alternative record holder condition, most requested that the Commission significantly raise the 300 holder threshold.<sup>68</sup> Many supported an increase to 3,000 while others requested an increase to 500 or 1,000. Some commenters also requested that the Commission raise the record holder "entrance" threshold in Rule 12g3-2(a) to conform to any record holder increase in the new exit rule.

We are not proposing to increase the 300 holder threshold for foreign private issuers either in the exit or entrance rules at this time. We understand that, due to the increased internationalization of the U.S. securities markets in recent decades, the 300 holder standard may not reflect current market conditions and, therefore, may require updating. However, the principal purpose for retaining the 300 holder provision is to preclude disadvantaging those companies that could terminate their Exchange Act reporting obligations under the current exit rules but not under the proposed trading volume condition. In addition, since domestic registrants are subject to a substantially similar record holder standard, we believe any change would be more appropriately considered as part of a comprehensive evaluation of the record holder provisions in both the Exchange Act entrance and exit rules for both domestic and foreign registrants.<sup>69</sup>

#### Comment Solicited

We solicit comment on the re-proposed alternative 300 holder condition:

- Would it be appropriate to adopt a 300 holder standard as an alternative to the proposed trading volume standard, as re-proposed?

- Should we require an issuer to wait one year after terminating its ADR facility or after delisting before being eligible to rely on the 300 holder condition, as we have proposed for the trading volume standard?

- Does the adoption of the proposed trading volume benchmark obviate the need to increase the 300 holder standard under re-proposed Rule 12h-6?

exceeded \$10 million for its most recent three fiscal years. Based on current experience, we believe foreign private issuers seldom use the current standard.

<sup>68</sup> See, for example, the letters from Cleary Gottlieb and Linklaters.

<sup>69</sup> In this regard, we note that the Advisory Committee on Smaller Public Companies has made recommendations relating to Exchange Act registration and termination of registration. See the Final Report of the Advisory Committee on Smaller Public Companies, dated April 23, 2006, which is available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>.

## 2. Prior Exchange Act Reporting Condition

We are reproposing a prior Exchange Act reporting condition that a foreign private issuer must meet before it can terminate its section 12(g) registration or its section 15(d) reporting obligations regarding a class of equity securities under Rule 12h-6.<sup>70</sup> This condition would require an issuer of equity securities to have had reporting obligations under section 13(a) or section 15(d) of the Exchange Act for at least the 12 months preceding the filing of Form 15F, to have filed or furnished all reports required for this period, and to have filed at least one annual report pursuant to section 13(a) of the Exchange Act. The purpose of this prior Exchange Act reporting condition is to provide investors in U.S. securities markets with a minimum period of time to make investment decisions regarding a foreign private issuer's securities based on the information provided in an Exchange Act annual report and the interim home country materials furnished in English under cover of Form 6-K.<sup>71</sup>

Originally proposed Rule 12h-6 would have required a foreign private issuer to have had Exchange Act reporting obligations for the two years preceding the filing of its Form 15F and to have filed at least two Exchange Act annual reports before it could terminate its Exchange Act reporting obligations regarding a class of equity securities. Several commenters objected to this two year reporting condition on the grounds that it would impose a stricter reporting requirement than is the case under the current exit rules.<sup>72</sup> Some noted that section 15(d) and Rule 12h-3 only require at a minimum the filing of one Exchange Act annual report. Others stated that there is no mandatory minimum reporting requirement under section 12(g) and Rule 12g-4.<sup>73</sup>

Still other commenters opposed a prior reporting condition that required an issuer to have furnished all Form 6-K reports required during the applicable period. Those commenters stated that this requirement would make the rule unavailable if a foreign private issuer did not submit a single required Form

6-K report during the period because it was unsure of the underlying home country document's materiality.<sup>74</sup>

In order to prevent the rule from imposing a significantly greater burden on a foreign private issuer than the current exit regime, we propose to reduce the required prior reporting period to at least 12 months and require only one Exchange Act annual report. However, the repropose rule would also require a foreign private issuer to have submitted all Form 6-Ks required during the 12 months preceding the filing of its Form 15F in order to be eligible to terminate its reporting obligations regarding a class of equity securities. This requirement would help ensure that a U.S. investor is able to access through EDGAR<sup>75</sup> and in English all material interim information about a foreign private issuer as required by its home country. We believe this investor protection concern outweighs any difficulty that a foreign private issuer may experience when determining whether a particular home country document is material, particularly since a foreign private issuer must routinely make materiality judgments under existing Exchange Act reporting requirements.

From a practical point of view, the proposed 12-month prior reporting requirement should not be problematic since, based on current experience, most foreign companies that register securities with the Commission, including solely under Exchange Act section 12(g), stay in the U.S. market for at least a year and file at least one Exchange Act annual report.<sup>76</sup> Moreover, the prior reporting condition would require that a foreign private issuer must be current in its reporting obligations, not that it must have timely filed all reports required during the 12 month period. In the event that an issuer determines that it should have filed a Form 6-K during this period, it can do so before it files its Form 15F.<sup>77</sup>

<sup>74</sup> See the letter from Cleary Gottlieb.

<sup>75</sup> EDGAR is the Commission's Electronic Data Gathering, Analysis and Retrieval System.

<sup>76</sup> See the letter from PricewaterhouseCoopers, which, when maintaining that a two-year reporting period was unnecessary, stated its belief that "companies would not generally incur the cost to become an SEC registrant if they intended to deregister within a two-year period." See also Commission staff's annual review of foreign private issuers that are Exchange Act reporting companies at the end of each calendar year ("International Registered and Reporting Companies" Reports), which are available at the Commission's Internet Web site at <http://www.sec.gov/divisions/corpfin/internatl/companies.shtml>.

<sup>77</sup> See Part II.D.1. of this release for a discussion of the application of repropose Rule 12h-6, including its prior reporting condition, to successor issuers.

## Comment Solicited

We solicit comment on the repropose prior Exchange Act reporting condition:

- Is it appropriate to require, as a condition of deregistration under Rule 12h-6, that an issuer have been an Exchange Act reporting company for at least the 12 months prior to the filing of its Form 15F, and to have filed or submitted all Exchange Act reports, including one annual report, for that period, as repropose?
- Should this time period be longer in order to provide U.S. investors with a history of Exchange Act reports, including financial reports?
- If a foreign private issuer seeking to deregister has not timely filed its reports, should any adopted rule require a period of time to elapse within which the issuer would have to be both current and timely before it could file its Form 15F to cease its Exchange Act reporting obligations? If so, should the required period be one month or a period longer or shorter than one month?

## 3. The One Year Dormancy Condition

As repropose, a foreign private issuer would also have to comply with a one year dormancy condition before it could terminate its Exchange Act registration and reporting obligations regarding a class of equity securities under Rule 12h-6.<sup>78</sup> As repropose, Rule 12h-6 would prohibit sales of a foreign private issuer's securities in the United States in a registered offering under the Securities Act during the 12 months preceding the filing of its Form 15F other than securities issued:

- To the issuer's employees;
- By selling security holders in non-underwritten offerings;
- Upon the exercise of outstanding rights granted by the issuer if the rights are granted pro rata to all existing security holders of the class of the issuer's securities to which the rights attach;
- Pursuant to a dividend or interest reinvestment plan; or
- Upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer.

The primary purpose of the dormancy condition's prohibition of registered offerings is to preclude a foreign private issuer from exiting the Exchange Act reporting system shortly after it has engaged in U.S. capital raising.

As originally proposed, Rule 12h-6 would have excepted from the dormancy condition's prohibition of

<sup>78</sup> Repropose Rule 12h-6(a)(2).

<sup>70</sup> Repropose Rule 12h-6(a)(1).

<sup>71</sup> Under cover of a Form 6-K (17 CFR 249.306), a foreign private issuer is required to furnish in English a copy of any document that it publishes or is required to publish under the laws of its home country or the requirements of its local exchange or that it has distributed to shareholders, and which is material to an investment decision.

<sup>72</sup> See the letters from Simpson Thacher & Bartlett and the New York State Bar Association.

<sup>73</sup> See the letter from Skadden, Arps, Slate, Meagher & Flom.

sales of an issuer's registered securities in the United States only securities sold to an issuer's employees and those sold by selling security holders in non-underwritten offerings. The repropoed rule retains these exceptions because, as we noted in the Original Proposing Release, these sales are not undertaken primarily for capital-raising purposes or for the benefit of the issuer. The repropoed rule continues to prohibit sales of an issuer's securities by its selling security holders in an underwritten registered offering, despite some commenters who opposed this prohibition,<sup>79</sup> because there is a greater likelihood of issuer involvement in a U.S. underwritten offering than in a non-underwritten offering of selling security holders.

At the suggestion of some commenters, we propose to add three additional exceptions to the dormancy condition's prohibition of sales of an issuer's registered securities:<sup>80</sup> The issuance of registered securities pursuant to pro rata rights offerings, dividend or interest reinvestment plans, and the conversion of outstanding convertible securities. These transactions may occur for reasons unrelated to capital raising or for the benefit of the issuer, for example, to benefit current security holders or for the convenience of investors. However, the repropoed rule also provides that these exceptions do not apply to securities issued pursuant to a standby underwritten offering or other similar arrangement in the United States. This limitation is consistent with the Commission's previous treatment of these three types of registered offerings.<sup>81</sup>

As originally proposed, Rule 12h-6 would also have precluded a foreign private issuer from engaging in unregistered offerings in the United States during the dormancy period, other than those involving securities sold to its employees, securities exempt from registration under section 3 of the Securities Act<sup>82</sup> (except section 3(a)(10)) and obligations having a maturity at the time of issuance of less than nine months and exempted under section 4(2) of the Securities Act. We proposed to prohibit unregistered offerings, such as private placements, under the dormancy condition in order to prevent a foreign company that has actively engaged in U.S. capital raising efforts and sold securities to U.S.

investors relatively recently from exiting the Exchange Act reporting regime under Rule 12h-6 on the grounds that the U.S. securities markets no longer represent as viable an option for capital raising. In addition, we believed that proscribing only registered offerings could act as a disincentive to a foreign private issuer to conduct a registered offering in the United States.

Numerous commenters urged the Commission to exclude unregistered offerings from the one year dormancy condition on the grounds that an issuer that has engaged in exempted offerings, such as Rule 144A or section 4(2) private placements, has not taken advantage of its status as a reporting company since both reporting and non-reporting companies may engage in those exempted offerings, and since, without a contractual undertaking, purchasers in those offerings are not entitled to the full protections of the U.S. federal securities laws.<sup>83</sup> Many commenters also warned that, unless the Commission excluded from the dormancy requirement exempted unregistered offerings, such as rights offerings exempt under Securities Act Rule 801 or exchange offers exempt under Securities Act Rule 802, foreign private issuers would systematically exclude U.S. investors from these offerings,<sup>84</sup> thereby running counter to the Commission's stated goal of encouraging foreign companies to include U.S. holders in these offerings on an equal basis with foreign security holders when it adopted the cross-border transaction safe harbors of Securities Act Rules 801 and 802 and the Tier 1 tender offer rules.<sup>85</sup>

Several commenters specifically opposed including schemes of arrangement exempted under Securities Act section 3(a)(10) within the scope of the dormancy condition. Those commenters noted that many schemes of arrangement are undertaken for non-capital raising purposes, for example, to effect a redomicile or reorganization for tax purposes.<sup>86</sup> Others believed that prohibiting only registered offerings under the dormancy condition would only marginally encourage issuers to engage in unregistered offerings instead of registered ones, if at all.<sup>87</sup>

These comments have persuaded us that adoption of the originally proposed dormancy condition could well drive

many private placement financings and other unregistered offerings by foreign companies offshore, to the detriment of U.S. investors and U.S. broker-dealers, since many companies might prefer to finance outside the United States under Regulation S than inside the United States, for example, under section 4(2) and Rule 144A, in order to avoid triggering the dormancy condition. Therefore, we are repropoing a dormancy condition that is significantly less restrictive in scope than the proposed condition. The repropoed rule would permit the unregistered sale of securities that are exempted under the Securities Act. The permitted category of securities would include sales pursuant to section 4(2), Regulation D, Rule 144A, Rules 801 and 802, and exempt securities under section 3, including section 3(a)(10) of the Securities Act.

At the request of several commenters, the repropoed rule would include the definition of "employee" under Form S-8<sup>88</sup> for the purpose of applying the dormancy condition under Rule 12h-6.<sup>89</sup> That definition includes any employee, director, general partner, certain trustees, certain insurance agents, and former employees as well as executors, administrators or beneficiaries of the estates of deceased employees, and a family member of an employee who has received shares through a gift or domestic relations order.<sup>90</sup> Otherwise, a narrow interpretation of the term "employee" could result in an issuer being disqualified from terminating its Exchange Act registration and reporting obligations under Rule 12h-6 because it engaged in a sale of securities during the dormancy period to an employee's family member or other relationship permitted under Form S-8 but not explicitly allowed under the new rule.

#### Comment Solicited

We solicit comment on the repropoed dormancy condition:

- Would it be appropriate to adopt the dormancy condition, as repropoed?
- Is the repropoed amount of time required for the dormancy condition too long or too short?
- Are the repropoed exceptions to the dormancy condition appropriate?
- Are certain transactions we initially proposed to exempt from the dormancy

<sup>79</sup> See, for example, the letters from Cravath, the New York State Bar, and Skadden Arps.

<sup>80</sup> See, for example, the letter from Linklaters.

<sup>81</sup> See Release No. 33-7759 (October 26, 1999), 64 FR 61382 (November 10, 1999).

<sup>82</sup> See, for example, the letter from Cleary Gottlieb.

<sup>83</sup> See the letter from Linklaters.

<sup>88</sup> 17 CFR 239.16b. Form S-8 is the form used by an Exchange Act reporting company to register securities for issuance to its employees or those of its subsidiaries or parent under an employee benefit plan.

<sup>89</sup> See, for example, the letter from ABA (Business).

<sup>90</sup> See General Instruction A.1 to Form S-8.

<sup>79</sup> See the letter from Cravath.

<sup>80</sup> See the letter from ABA (Business).

<sup>81</sup> Instruction 2 to Item 8 of Form 20-F imposes a similar limitation.

<sup>82</sup> 15 U.S.C. 77c.

condition, when a public float standard was proposed, no longer appropriate for exemption? For example, is there a risk that foreign private issuers would issue securities to U.S. investors or employees who would then sell them in registered secondary offerings before deregistration?

#### 4. Foreign Listing Condition

As repropoed, Rule 12h-6 would require that, with respect to equity securities, for at least the 12 months preceding the filing of its Form 15F, a foreign private issuer must have maintained a listing of the subject class of securities on an exchange in a foreign jurisdiction, which, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's subject class of securities.<sup>91</sup> The repropoed rule defines "primary trading market" to mean that at least 55 percent of the trading in the foreign private issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in no more than two foreign jurisdictions during a recent 12-month period.<sup>92</sup> That definition further provides that if an issuer aggregates the trading of its securities in two foreign jurisdictions for the purpose of Rule 12h-6, the trading market for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the U.S. trading market for the issuer's securities.<sup>93</sup>

The purpose of this foreign listing condition is to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of the issuer's securities and the issuer's disclosure obligations to investors. This listing condition makes more likely the availability of a set of non-U.S. securities disclosure documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities following the termination of its disclosure obligations under Rule 12h-6. If the United States was the sole or principal market for the foreign private issuer's securities, then

the Commission would have a greater regulatory interest in continuing to subject the foreign company to the Exchange Act reporting regime.

As originally proposed, Rule 12h-6 would have required a foreign private issuer of equity securities to have maintained a listing of the subject class of securities for the preceding two years on an exchange in its home country. As originally proposed, "home country" would have had the same meaning as under Form 20-F, which defines "home country" as the jurisdiction in which the issuer is legally organized, incorporated or established and, if different, the jurisdiction where it has its principal listing. Originally proposed Rule 12h-6 would further have required that a foreign private issuer's home country constitute its primary trading market. We proposed to define the term "primary trading market" to mean that at least 55 percent of the trading in the foreign private issuer's securities took place in, on or through the facilities of a securities market in a single foreign country during a recent 12 month period.

We received a variety of comments on this home country listing condition. Although most commenters agreed in principle with a prior non-U.S. listing condition, several commenters expressed concern that many foreign private issuers would not be able to meet the "55 percent trading in a single non-U.S. market" threshold of the primary trading market definition.<sup>94</sup> Those commenters urged the Commission to adopt a prior listing condition that would permit an issuer to meet the 55 percent or greater trading threshold by aggregating its trading in more than one non-U.S. market.

Some commenters expressed concern that the proposed prior non-U.S. listing period was too long.<sup>95</sup> Other commenters noted that some foreign private issuers have their principal trading market in a jurisdiction that is different than its place of incorporation or principal listing.<sup>96</sup> For example, some companies are incorporated in Switzerland and listed on the Swiss Exchange (SWX), but are primarily traded on virt-x, a cross-border electronic trading platform based in London that is regulated by the United Kingdom's Financial Services Authority. Those companies would not meet the proposed home country listing condition because their primary trading

market is in the United Kingdom, and not in their jurisdiction of incorporation or principal listing.

In response to commenters' concerns, we are shortening the repropoed foreign listing period to one year from the originally proposed two years. This change is consistent with our similar revision of the proposed prior reporting condition. We also propose to permit an issuer to aggregate its trading over two non-U.S. markets for the purpose of meeting the foreign listing condition in order to address the concerns of issuers that have substantial trading markets in more than one country. Finally, we are proposing a "foreign listing" condition rather than a "home country" listing condition in order to accommodate issuers that have their primary trading market in jurisdictions other than their place of incorporation or principal listing. These proposed revisions should increase the flexibility of the new rule for many foreign private issuers.

At the same time, the repropoed foreign listing condition should serve to protect the interests of U.S. investors by requiring that at least 55 percent of the ADTV of the company's subject class of securities must have occurred through the facilities of no more than two foreign jurisdictions, and that, if an issuer does aggregate the ADTV of its subject class of securities over two non-U.S. jurisdictions, at least one of the two foreign markets must be larger than the U.S. market for the subject class of securities.<sup>97</sup> These proposed requirements should increase the likelihood that the principal pricing determinants for a foreign private issuer's securities are located outside the United States and that the issuer is subject to an overseas regulator with principal authority for regulating the issuance and trading of the issuer's securities and the issuer's disclosure to investors.<sup>98</sup> Consequently, for an issuer meeting these requirements, there should be less interruption in the flow of material information about the issuer

<sup>91</sup> Repropoed Rule 12h-6(a)(3) (17 CFR 240.12h-6(a)(3)).

<sup>92</sup> Repropoed Rule 12h-6 defines "recent 12-month period" to mean a 12-calendar month period that ended no more than 60 days before the filing date of the Form 15F. Rule 12h-6(e)(7).

<sup>93</sup> Rule 12h-6(e)(6). As proposed and as adopted, measurement under this condition is by reference to average daily trading volume (ADTV) as reported by the relevant market. Although the proposing release noted that there are differences concerning how various markets measure and report trading volume (for example, dealer markets versus auction markets), no commenter addressed this point.

<sup>94</sup> See, for example, the letter from Cravath. However, commenters did not provide data or other specific information in this area.

<sup>95</sup> See the letter from Ziegler, Ziegler & Associates.

<sup>96</sup> See the letter from the Swiss Exchange.

<sup>97</sup> For the purpose of the repropoed primary trading market determination, an issuer would first measure the ADTV of its listed securities aggregated over one or two foreign jurisdictions. It would then divide this amount by its worldwide ADTV. This denominator would include the ADTV only for those foreign jurisdictions in which the issuer has listed the subject class of securities as well as its U.S. ADTV. Its U.S. ADTV would include all securities of the subject class, whether listed or unlisted.

<sup>98</sup> This "primary trading market" requirement would also help ensure that an issuer's foreign listing represents a significant trading market for its equity securities rather than a listing on a non-trading market such as the Luxembourg Stock Exchange.

once it exits the Exchange Act reporting system, to the benefit of U.S. investors.

As repropoed, Rule 12h-6 would require issuers to determine that the primary trading market for their equity securities is outside the United States and, if it is, that the trading volume of their securities in the United States does not exceed the threshold under the rule. In addition, as noted above, the condition relating to primary trading market would help assure that a foreign private issuer would be subject to the disclosure and other requirements of a foreign regulatory authority. The evolution of market structures could raise a number of issues in this area. Non-U.S., private non-exchange trading markets may develop in the future whose listed or traded issuers may not be subject to the same regulatory treatment by foreign securities regulators as listed companies today. Also, securities markets, which historically have been organized and regulated along national lines, and their listed companies, which also have been largely regulated by national securities regulatory authorities, may in the future become more transnational. The schemes of regulation for these markets and companies may change in response to these continued developments.

#### Comment Solicited

We solicit comment on the repropoed foreign listing condition:

- Would it be appropriate to adopt the foreign listing condition, as repropoed?
- Should the foreign listing condition be longer or shorter than the repropoed condition?
- Is the repropoed definition of primary trading market appropriate? Should we instead require an issuer's primary trading market to consist of one single foreign country, as initially proposed, rather than two foreign countries, as repropoed? Should we instead permit an issuer to aggregate the trading in its securities over three or more foreign jurisdictions as long as the trading volume in one of those jurisdictions is greater than its U.S. trading volume?
- Should the repropoed definition require that more than or less than 55% of an issuer's trading occur in the primary trading market?
- For purposes of the repropoed primary trading market determination, will issuers have difficulty making the necessary calculations? If so, what are these difficulties and how might they be addressed in the rule?
- Should the worldwide foreign trading component in the denominator of the primary trading market

calculation include all foreign markets in which an issuer's securities are traded, including unlisted or over-the-counter trading, rather than only for foreign listed markets, as repropoed?

- Should the denominator of the primary trading market calculation include only the foreign jurisdictions in the numerator plus U.S. ADTV?
- Should the U.S. ADTV component in the denominator of the primary trading market calculation include only listed securities rather than all U.S. traded securities, whether listed or unlisted, as repropoed?
- Will issuers have difficulty obtaining ADTV information for trading in the United States, in their primary trading market, or elsewhere?
- In the United States, issuers should be able to obtain information through the U.S. transaction reporting plan. Do other markets or jurisdictions have similar trade reporting arrangements? Is additional guidance from the Commission necessary in this area, or will issuers be able to make reasonable judgments?
- Should the proposed rule provide additional flexibility for the development of trans-national trading markets? If so, what types of provisions would be appropriate to address these types of markets?

#### B. Debt Securities Provision

As repropoed, Rule 12h-6 would enable a foreign private issuer to terminate its Exchange Act reporting obligations regarding a class of debt securities as long as the issuer has filed or furnished all reports required under Exchange Act section 13(a) or section 15(d), including at least one Exchange Act annual report, and has its class of debt securities held of record by less than 300 holders either on a worldwide basis or who are U.S. residents.<sup>99</sup> This provision reflects the minimum reporting requirement and current 300 holder standard under section 15(d) and Rule 12h-3.

The repropoed debt securities provision is substantially similar to the originally proposed provision.<sup>100</sup> We

<sup>99</sup> Repropoed Rule 12h-6(b).

<sup>100</sup> We have made one technical revision to the originally proposed debt securities provision. An issuer that has listed a class of debt securities on an exchange and registered the class under section 12(b), without also registering those securities under the Securities Act, would have reporting obligations under section 13(a), not section 15(d) of the Exchange Act. Yet the originally proposed debt securities provision only referred to section 15(d) obligations. In order to permit the termination of registration and reporting under Rule 12h-6 by listed debt issuers, we have revised the reporting condition to state that an issuer must have filed or furnished all reports required under Exchange Act section 13(a) or section 15(d). A listed debt issuer

did not originally propose, and we are not here proposing, a provision comparable to Rule 12h-3's 500 record holder threshold for debt securities issuers because we believe most foreign private issuers that are debt securities registrants would likely exceed the \$10 million asset threshold that accompanies the 500 record holder standard.<sup>101</sup>

A few commenters requested that the Commission increase the debt securities record holder threshold to as much as 1,000. We have decided against proposing to increase the debt securities threshold at this time for the same reasons that we also are not proposing to increase the record holder threshold for equity securities issuers as part of this rulemaking.

#### Comment Solicited

We solicit comment on the repropoed debt securities record holder condition:

- Would it be appropriate to adopt the debt securities record holder condition, as repropoed?

#### C. Revised Counting Method

As originally proposed, Rule 12h-6 would have permitted an issuer to use a modified version of the "look through" counting method under Rule 12g3-2(a) when determining the percentage of a foreign private issuer's outstanding equity shares held by its non-affiliates on a worldwide basis that are held by U.S. residents or the number of U.S. residents holding a foreign private issuer's equity or debt securities. Instead of having to look through the accounts of brokers, banks and other nominees on a worldwide basis to determine the number of its U.S. resident holders, as is required under the current rules, an issuer could limit its inquiry to brokers, banks and other nominees located in the United States, the issuer's jurisdiction of incorporation, legal organization or establishment and, if different, the jurisdiction of its primary trading market.<sup>102</sup> This revised counting method is substantially similar to the counting method that the Commission adopted under the exemptive rules for cross-border rights offerings, exchange offers and business combinations, as

must have terminated its listing and section 12(b) registration pursuant to Rule 12d-2 before it could effect its termination of reporting under Rule 12h-6.

<sup>101</sup> None of the commenters requested that we incorporate the 500 record holder and \$10 million asset standard into proposed Rule 12h-6's debt securities provision or into the alternative record holder condition for equity securities.

<sup>102</sup> Repropoed Rule 12h-6(d).

well as under the definition of foreign private issuer.

The repropoed counting method is substantially the same as originally proposed, except for two revisions. Since repropoed Rule 12h-6 would eliminate the public float benchmark, the repropoed counting method would apply only to an issuer of equity securities proceeding under the alternative 300 holder provision, or to a debt securities issuer that must meet the 300 holder standard. In addition, as repropoed, Rule 12h-6 would provide that an issuer that aggregates the trading volume of its securities in two foreign jurisdictions for the purpose of meeting the rule's listing condition will have to look through nominee accounts in both foreign jurisdictions, which comprise its primary trading market, and in the United States as well as in its jurisdiction of incorporation, if different from the two jurisdictions that comprise its primary trading market.

As part of the counting method provision, we are repropoing a presumption that we previously adopted under the cross-border rules and definition of foreign private issuer.<sup>103</sup> This presumption is that, if, after reasonable inquiry, an issuer is unable without unreasonable effort to obtain information about the amount of securities held by nominees for the accounts of customers resident in the United States, it may assume that the customers are the residents of the jurisdiction in which the nominee has its principal place of business.

Some commenters stated that, while this presumption is useful when determining the percentage of an issuer's worldwide public float that is held by U.S. residents, it is not much help when an issuer must calculate the actual number of its U.S. resident holders for the purpose of either the alternative record holder condition for equity issuers or the debt securities provision. Those commenters urged the Commission to adopt a presumption that would enable an issuer to count each nominee as one shareholder located in the nominee's principal place of business when the issuer is unable without unreasonable effort to obtain information about the nominee's customer accounts.

We did not adopt the suggested presumption when we adopted the counting method for the rule defining the term "foreign private issuer,"<sup>104</sup> and we decline to propose it as part of this

rulemaking. Based on our experience with that definitional rule, we are not persuaded that issuers are unable without undue burden to apply the current standard using the adopted presumption.

Some foreign jurisdictions have laws that provide an established and enforceable means for a public company to obtain information about its shareholders. We solicited comment regarding whether we should permit an issuer to rely on information obtained through these foreign statutory or code provisions when calculating the percentage of its worldwide public float held by U.S. residents or the number of its U.S. resident equity or debt holders. We received only two comment letters regarding this issue.<sup>105</sup>

Repropoed Rule 12h-6 does not provide that a foreign private issuer may rely solely on specified foreign statutory or code provisions. However, as part of its inquiry regarding whether it meets any of the quantitative benchmarks under Rule 12h-6, an issuer may refer to shareholder information obtained pursuant to those foreign statutory or code provisions to the extent that this shareholder information is reasonably reliable and accurate and furthers the purpose of the inquiry.

#### Comment Solicited

We solicit comment on the repropoed counting method provision:

- Would it be appropriate to adopt the counting method provision, as repropoed?
- How should issuers' experiences with applying the counting method under the cross-border rules and definition of foreign private issuer inform our decision whether to adopt the repropoed counting method?
- The repropoed counting method would limit the current required worldwide search for nominees of U.S. holders to the U.S., the jurisdiction of incorporation or organization, and possibly the primary trading market. Are these limits appropriate? If not, should the search be further limited or expanded?

#### D. Expanded Scope of Rule 12h-6

In response to comments on the appropriate scope of Rule 12h-6, we propose to expand the rule in two respects. First, we propose to provide

<sup>105</sup> Both commenters stated that they had successfully relied on section 212 of the United Kingdom Companies Act to obtain information about an issuer's shareholders. One of the commenters also cited Article L. 228-2 of the French Commercial Code as an established and reliable means for a company to obtain shareholder information.

that an issuer that has succeeded to the Exchange Act reporting obligations of an acquired company may terminate those reporting obligations under Rule 12h-6 as long as it satisfies specified conditions. Second, we propose to extend the application of Rule 12h-6 to a foreign private issuer that previously filed a Form 15 and effected its termination of registration or suspension of reporting under the current exit rules before the effective date of Rule 12h-6, subject to conditions.

#### 1. Application of Rule 12h-6 to Successor Issuers

In the Original Proposing Release, we requested comment on the prior Exchange Act reporting condition. Several commenters expressed their concern that, as proposed, an issuer that has succeeded to the Exchange Act reporting obligations of an acquired company pursuant to Rule 12g-3 or 15d-5<sup>106</sup> may not be able to terminate its reporting obligations under Rule 12h-6 because of the proposed rule's reporting condition, although the successor issuer satisfies the rule's other requirements. In order to address this concern, repropoed Rule 12h-6 specifically provides that, following a merger, consolidation, exchange of securities, acquisition of assets or otherwise, a foreign private issuer that has succeeded to the reporting obligations under Exchange Act section 13(a) of another issuer pursuant to Rule 12g-3, or to the reporting obligations of another issuer under Exchange Act section 15(d) pursuant to Rule 15d-5, may file a Form 15F to terminate those reporting obligations if, regarding a class of equity securities, the successor issuer meets Rule 12h-6's prior reporting, foreign listing, and quantitative benchmark conditions.<sup>107</sup> Regarding a class of debt securities, the successor issuer must meet the conditions under Rule 12h-6(b), including the revised reporting condition. Repropoed Rule 12h-6 then provides that, when determining whether it meets the prior reporting condition under either the equity or debt securities provision of the final rule, a successor issuer may take into account the reporting history of the issuer whose reporting obligations it has assumed pursuant to Rule 12g-3 or 15d-5.<sup>108</sup>

This successor issuer provision would enable a non-Exchange Act reporting foreign private issuer that acquires a reporting foreign private issuer in a

<sup>103</sup> See Securities Act Rule 800(h)(4) (17 CFR 230.800(h)(4)) and Instruction B to Exchange Act Rule 3b-4(c)(1) (17 CFR 240.3b-4(c)(1)).

<sup>104</sup> See Release No. 34-41936 (September 28, 1999), 64 FR 53900 (October 5, 1999).

<sup>106</sup> 17 CFR 240.12g-3 and 240.15d-5.

<sup>107</sup> Repropoed Rule 12h-6(c)(1).

<sup>108</sup> Repropoed Rule 12h-6(c)(2).

transaction exempt under the Securities Act, for example, under Rule 802 or section 3(a)(10), to qualify immediately for termination of its Exchange Act reporting obligations under Rule 12h-6, without having to file an Exchange Act annual report, as long as the successor issuer meets the rule's listing and quantitative benchmark conditions, and the acquired company's reporting history fulfills Rule 12h-6's prior reporting condition. Since the successor issuer would have assumed the acquired company's Exchange Act reporting obligations, we believe that it is appropriate that the issuer succeed to the acquired company's reporting history for the purpose of Rule 12h-6.

However, if a previously non-Exchange Act reporting foreign private issuer acquires an Exchange Act reporting company by consummating an exchange offer, merger or other business combination registered under the Securities Act, most likely on a Form F-4 registration statement, the acquiror would have to fulfill Rule 12h-6's prior reporting condition without reference to the acquired company's reporting history. Since the acquiror would have triggered its own section 15(d) reporting obligations upon the effectiveness of its Securities Act registration statement, it would have to meet Rule 12h-6's full reporting condition like any other section 15(d) reporting company before it could terminate its reporting obligations under the new rule.

#### Comment Solicited

We solicit comment on the proposed expanded scope of Rule 12h-6 with respect to successor issuers:

- Should an issuer be permitted to terminate its Exchange Act reporting obligations under Rule 12h-6 if, following a merger, acquisition or other similar transaction in which it has succeeded to Exchange Act reporting obligations pursuant to Rule 12g-3, it meets Rule 12h-6's foreign listing and quantitative benchmark requirements, and the acquired company's reporting history fulfills Rule 12h-6's prior reporting condition, as proposed?

- Should we require that the Exchange Act reporting target company have satisfied the trading volume or 300 record holder benchmark just prior to completing one of the above transactions before a successor issuer may proceed under Rule 12h-6?

- Should there be limitations placed on a successor issuer's eligibility to use Rule 12h-6? If so, what are those limitations?

#### 2. Application of Rule 12h-6 to Prior Form 15 Filers

As originally proposed, Rule 12h-6 would have applied only to reporting foreign private issuers that have not yet filed a Form 15 to cease their Exchange Act reporting obligations. In response to our request for comments concerning the scope of proposed Rule 12h-6 and on the current exemptive scheme for foreign private issuers,<sup>109</sup> numerous commenters urged the Commission to expand the scope of Rule 12h-6 by extending it to foreign private issuers that have previously filed a Form 15 and thereby already terminated or suspended their Exchange Act reporting obligations under the current exit rules.<sup>110</sup>

We agree with those commenters who stated that foreign private issuers should not be denied the benefits of the new exit regime simply because they met the requirements for ceasing their Exchange Act reporting obligations under the current rules and followed the only exit procedure available to them.<sup>111</sup> We see no meaningful distinction between an issuer that would qualify for termination of Exchange Act reporting under the alternative record holder provision of Rule 12h-6 and a Form 15 filer that has already met the record holder requirements under Rule 12g-4 or Rule 12h-3 but, under the proposed rule amendments, would continue to have to count its U.S. shareholders annually in order to determine whether it has renewed or assumed anew Exchange Act reporting obligations.

Accordingly, as repropoed, Rule 12h-6 would extend termination of Exchange Act reporting to a foreign private issuer that, before the effective date of Rule 12h-6, has already effected the suspension or termination of its Exchange Act reporting obligations after filing a Form 15. Since these filers have already met a quantitative standard under the current exit rules, they would not have to meet any other quantitative benchmark under Rule 12h-6. They also would not have to satisfy the prior reporting or dormancy provisions since they would already be non-reporting entities.

However, a prior Form 15 filer would have to meet the following conditions in order to obtain the benefits of Rule 12h-6:

<sup>109</sup> See Release No. 34-53020 at pp. 20 and 69-70.

<sup>110</sup> See the letters from the European Commission, Cleary Gottlieb and Makinson Cowell.

<sup>111</sup> These benefits include termination of Exchange Act reporting regarding a subject class of securities and the immediate availability of the Rule 12g3-2(b) exemption upon the termination of reporting.

- The issuer must currently not be required to register a class of securities under section 12(g) or be required to file reports under section 15(d);

- the issuer must file a Form 15F; and
- if its Form 15 applied to a class of equity securities, for at least the 12 months before the filing of its Form 15F, the issuer must have maintained a listing of the subject class of equity securities on an exchange in a foreign jurisdiction, which, either singly or together with another foreign jurisdiction, constitutes the primary trading market for the issuer's class of subject securities.

As with any other foreign private issuer of equity securities that elects to terminate its reporting obligations under Rule 12h-6, the purpose of the proposed listing condition is to help ensure that the prior Form 15 filer is subject to a foreign regulator and a non-U.S. body of regulation governing the trading of the issuer's securities and its disclosure obligations to its shareholders. This listing condition makes more likely the availability of a set of home country securities documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities following the termination of its disclosure obligations under Rule 12h-6.

The purpose of the proposed Form 15F filing requirement is to notify investors and alert the Commission that the prior Form 15 filer is claiming the benefits of Rule 12h-6, to have the issuer certify that it meets the conditions of the new rule, and to provide the issuer's Internet Web site address.<sup>112</sup>

#### Comment Solicited

We solicit comment on the proposed expanded scope of Rule 12h-6 with respect to prior Form 15 filers:

- Is it appropriate to permit an issuer that, before the effective date of Rule 12h-6, has terminated or suspended its Exchange Act reporting obligations by filing a Form 15, to obtain the benefits of termination under Rule 12h-6, as proposed?

- Are the proposed requirements that a prior Form 15 filer must meet in order to be eligible to proceed under Rule 12h-6 appropriate? Are there any other eligibility requirements that we should add?

<sup>112</sup> A prior Form 15 filer would have to furnish its home country documents, required under Rule 12g3-2(b), on the Internet the same as any other Form 15F filer. See Part II.H., below.

### E. Public Notice Requirement

We are reproposing a public notice requirement as a condition to termination of reporting under Rule 12h-6, except for prior Form 15 filers.<sup>113</sup> Pursuant to this requirement, an issuer of equity or debt securities or a successor issuer would have to publish, either before or on the date that it files its Form 15F, a notice in the United States that discloses its intent to terminate its section 13(a) or 15(d) reporting obligations. The issuer would have to publish the notice, such as a press release, through a means reasonably designed to provide broad dissemination of the information to the public in the United States. The issuer also would be required to submit a copy of the notice, either under cover of a Form 6-K before or at the time of filing of the Form 15F, or as an exhibit to the Form 15F. The primary purpose of this reproposed notice provision is to alert U.S. investors who have purchased the issuer's securities about the issuer's intended exit from the Exchange Act registration and reporting system.

The reproposed notice provision is substantially similar to the originally proposed notice requirement, except that, under the earlier proposed provision, the issuer would have had to publish the notice at least 15 business days before it files its Form 15F. At the suggestion of commenters, we have revised the notice provision simply to require an issuer to publish the notice before or on the date of filing of its Form 15F. We agree that a fixed, prior Form 15F notice requirement would be of little benefit to investors and would only serve to prolong the termination process.

The reproposed notice requirement would not apply to a prior Form 15 filer that files a Form 15F to terminate its registration and reporting obligations under Rule 12h-6(h). Since a prior Form 15 filer would already have ceased its Exchange Act reporting obligations, investors would gain little from the publishing of such a notice.

### Comment Solicited

We solicit comment on the reproposed notice requirement:

- Would it be appropriate to adopt the notice requirement, as reproposed?
- Should we require an issuer to mail a copy of the notice to each of its U.S. investors in addition to, or in lieu of, publishing the notice through a press release or other publicly disseminated means?

### F. Form 15F

Like our current exit rules, reproposed Rule 12h-6 would require a foreign private issuer to file electronically on EDGAR a form certifying that it meets the requirements for ceasing its Exchange Act reporting obligations. By signing and filing new Form 15F, a foreign private issuer would be certifying that:

- It meets all of the conditions for termination of Exchange Act reporting specified in Rule 12h-6; and
- There are no classes of securities other than those that are the subject of the Form 15F regarding which the issuer has Exchange Act reporting obligations.

Unlike current Form 15, reproposed Form 15F would require a foreign private issuer to provide disclosure regarding several items in order to provide investors with information regarding an issuer's decision to terminate its Exchange Act reporting obligations. The information would also assist Commission staff in monitoring the use of Rule 12h-6.

Most commenters that addressed the originally proposed Form 15F generally agreed with its form and content. Accordingly, the reproposed Form 15F is substantially similar to the earlier proposed Form 15F. Like the originally proposed form, the reproposed Form 15F would solicit information regarding:

- An issuer's Exchange Act reporting history;
- When it last sold registered securities in the United States other than those excluded from consideration under Rule 12h-6;
- The primary trading market for an issuer's equity securities that is the subject of its Form 15F;
- Trading volume data for an issuer's equity securities in the United States and in its primary trading market, if applicable;
- The number of an issuer's equity or debt securities record holders, if applicable; and
- The classes of equity and debt securities, if any, that are the subject of the Form 15F.

In addition, we have revised the proposed form to conform to the changes to the originally proposed Rule 12h-6, as reproposed today. These revisions include adding items to acquire material information concerning a Form 15F filer:

- That is a successor issuer;
- That is a prior Form 15 filer;
- That has a primary trading market composed of two foreign jurisdictions; and
- That may have delisted or terminated an ADR facility prior to filing the Form 15F.

As with Form 15, and as originally proposed, filing of the reproposed Form 15F would immediately suspend an issuer's Exchange Act reporting obligations regarding the subject class of securities and commence a 90-day waiting period. If, at the end of this 90-day period, the Commission has not objected to the filing, the suspension would automatically become a termination of registration and reporting. If the Commission denies the Form 15F or the issuer withdraws it, within 60 days of the date of the denial or withdrawal, the issuer would be required to file or submit all reports that would have been required had it not filed the Form 15F.<sup>114</sup>

Some commenters requested that we shorten the 90 day period to 60 days or lengthen the time in which an issuer must file or submit Exchange Act reports upon withdrawal of its Form 15F. We are not proposing to do so because the reproposed time periods are based on those established under Form 15 and the current exit rules, which we believe have proven adequate.

After filing the reproposed Form 15F, an issuer would have no continuing obligation to make inquiries or perform other work concerning the information contained in the Form 15F, including its assessment of trading volume or ownership of its securities. However, the reproposed Form 15F would require an issuer to undertake to withdraw its Form 15F before the date of effectiveness if it has actual knowledge of information that causes it reasonably to believe that, at the date of filing the Form 15F:

- The average daily trading volume of its subject class of securities in the United States during a recent 12-month period exceeded 5 percent of the average daily trading volume of that class of securities in the issuer's primary trading market during the same period, if proceeding under Rule 12h-6(a)(4)(i);
- Its subject class of securities was held of record by 300 or more United States residents or 300 or more persons worldwide, if proceeding under Rule 12h-6(a)(4)(ii) or Rule 12h-6(b); or
- It otherwise no longer qualified for termination of its Exchange Act reporting obligations under Rule 12h-6.

While this reproposed undertaking is substantially similar to the originally proposed undertaking, in response to commenters, we have added the phrase "at the date of filing" to clarify that an issuer would not be required to withdraw a Form 15F due to changes in

<sup>113</sup> Reproposed Rule 12h-6(g).

<sup>114</sup> Reproposed Rule 12h-6(f).



its trading volume or share ownership occurring after the date of filing.<sup>115</sup>

#### Comment Solicited

We solicit comment on the repropoed Form 15F filing requirement:

- Would it be appropriate to adopt the Form 15F filing requirement, as repropoed?
- Are there any items that should be added to the Form 15F? Are there any repropoed items that should be removed?

#### G. Amended Rules 12g-4 and 12h-3

Although similar to the current 300 record holder standard, repropoed Rule 12h-6's alternative threshold record holder condition and its debt securities provision would offer advantages compared to the current exit rules. As repropoed, Rule 12h-6's revised counting method would limit the jurisdictions in which a foreign private issuer must search for records of its U.S. resident holders. Moreover, repropoed Rule 12h-6 would enable a foreign private issuer to terminate, rather than merely suspend, its section 15(d) reporting obligations regarding a class of equity or debt securities. In addition, under repropoed Rule 12h-6, a foreign private issuer would be able to claim the benefits of the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of reporting regarding a class of equity securities under section 12(g) or 15(d). In each instance, once its termination of reporting becomes effective under Rule 12h-6, an issuer would no longer have to concern itself with whether the number of its U.S. resident or worldwide holders of the class of subject securities has risen above the statutory or regulatory threshold.

Given these advantages, we believe that, following the adoption of repropoed Rule 12h-6, few, if any, foreign private issuers would elect to proceed under the provisions of Rule 12g-4 or Rule 12h-3 that allow a foreign private issuer to terminate its registration of a class of securities under

<sup>115</sup> We also are repropoing amendments to the rules governing the Commission's delegated authority to permit staff of the Division of Corporation Finance to accelerate the effectiveness of an issuer's termination of registration and reporting under Rule 12h-6 before the 90th day at the issuer's request. The issuer must make this request in writing and file it on EDGAR. Nevertheless, Division of Corporation Finance staff may submit requests to accelerate the effectiveness of an issuer's termination of registration and reporting pursuant to Rule 12h-6 to the Commission for consideration, as appropriate. As we noted in the Original Proposing Release, there is currently a similar delegation relating to Form 15, which is rarely used.

section 12(g) or suspend the duty to file reports under section 15(d) if the class of securities is held by less than 300 U.S. residents or by 500 U.S. residents and the issuer has had total assets not exceeding \$10 million on the last day of each of its most recent three fiscal years.<sup>116</sup> Accordingly, we are repropoing the amendments to eliminate these provisions in Rules 12g-4 and 12h-3, as originally proposed.

#### Comment Solicited

We solicit comment on the repropoed amendments to Rules 12g-4 and 12h-3:

- Would it be appropriate to adopt the amendment to the current exit rules, as repropoed?

#### H. Amendment Regarding the Rule 12g3-2(b) Exemption

We are repropoing, substantially as originally proposed, an amendment to Exchange Act Rule 12g3-2<sup>117</sup> that would apply the exemption under Exchange Act Rule 12g3-2(b) immediately to an issuer of equity securities upon the effectiveness of its termination of reporting under Rule 12h-6.<sup>118</sup> As a condition to the immediate application of the Rule 12g3-2(b) exemption upon its termination of reporting under Rule 12h-6, an issuer would have to publish subsequently in English material home country documents required under Rule 12g3-2(b)(1)(iii) on its web site or through an electronic information delivery system generally available to the public in its primary trading market.<sup>119</sup>

The purpose of this condition is to provide U.S. investors with access to material information about an issuer of equity securities following its termination of reporting pursuant to Rule 12h-6.<sup>120</sup> In addition, an issuer

would be able to maintain a sponsored ADR facility with respect to its securities.<sup>121</sup> This condition also would facilitate resales of that issuer's securities to qualified institutional buyers under Rule 144A.<sup>122</sup> Moreover, having a foreign private issuer's key home country documents posted in English on its web site would assist U.S. investors who are interested in trading the issuer's securities in its primary securities market.<sup>123</sup>

The repropoed extension of Rule 12g3-2(b) would apply both to a class of equity securities formerly registered under section 12(g) and one that formerly gave rise to section 15(d) reporting obligations, as originally proposed. The Rule 12g3-2(b) exemption received under repropoed Rule 12g3-2(e) would remain in effect for as long as the foreign private issuer satisfies the rule's electronic publication conditions or until the issuer registers a new class of securities under section 12 or incurs section 15(d) reporting obligations by filing a new Securities Act registration statement, which has become effective.<sup>124</sup>

Some commenters have suggested that we make the application of the Rule 12g3-2(b) exemption optional rather than automatic upon the termination of reporting under Rule 12h-6. We decline to do so as part of the repropoed rule amendments because we do not believe that such an amendment would be in the best interests of U.S. investors. Enabling an issuer to claim the exemption immediately upon termination of reporting under Rule 12h-6, rather than upon application or notice to the Commission at some later date, should foster the prompt publishing of that issuer's material home country documents on its Internet Web site, to the benefit of investors.<sup>125</sup>

<sup>116</sup> See Exchange Act Rules 12g-4(a)(2) and 12h-3(b)(2).

<sup>117</sup> Repropoed Rule 12g3-2(e).

<sup>118</sup> Currently, foreign private issuers that registered a class of securities under section 12 must wait at least 18 months following their termination of reporting before they would be eligible to apply for the Rule 12g3-2(b) exemption. In addition, foreign private issuers with an active or suspended reporting obligation under section 15(d) have thus far not been eligible to claim the Rule 12g3-2(b) exemption. See Rule 12g3-2(d)(1) (17 CFR 240.12g3-2(d)(1)), which currently excepts from the 18 month requirement issuers that have filed Securities Act registration statements using the Multijurisdictional Disclosure Act (MJDS) forms.

<sup>119</sup> Repropoed Rule 12g3-2(e)(2).

<sup>120</sup> Any post-termination trading of a foreign private issuer's securities in the United States would have to occur through over-the-counter markets such as that maintained by the Pink Sheets, LLC since, as of April, 1998, the NASD and the Commission have required a foreign private issuer to register a class of securities under Exchange Act section 12 before its securities could be traded

through the electronic over-the-counter bulletin board administered by Nasdaq. See, for example, NASD Notice to Members (January 1998).

<sup>121</sup> In order to establish an ADR facility, an issuer must register the ADRs on Form F-6 (17 CFR 239.36) under the Securities Act. The eligibility criteria for the use of Form F-6 include the requirement that the issuer have a reporting obligation under Exchange Act section 13(a) or have established the exemption under Rule 12g3-2(b).

<sup>122</sup> See Securities Act Rule 144A(d)(4) (17 CFR 230.144A(d)(4)).

<sup>123</sup> Brokers currently are exempt from complying with certain information obligations under Exchange Act Rule 15c2-11 (17 CFR 240.15c2-11) when a foreign company has established and maintains the Rule 12g3-2(b) exemption. See Release No. 34-41110 (February 25, 1999), 64 FR 11124 (March 8, 1999).

<sup>124</sup> See Repropoed Rule 12g3-2(e)(3).

<sup>125</sup> An issuer that does not want to claim the Rule 12g3-2(b) exemption immediately following its deregistration under Rule 12h-6 could abstain from posting its home country documents on its Web site at that time.

1. Extension of the Rule 12g3-2(b) Exemption Under Reproposed Rule 12g3-2(e)

As repropoed, because Rule 12g3-2(e) applies to any issuer that has terminated its reporting under Rule 12h-6, the rule amendment would effectively extend the Rule 12g3-2(b) exemption to:

- A foreign private issuer of equity securities immediately upon its termination of reporting pursuant to Rule 12h-6(a);
- A successor issuer immediately upon its termination of reporting pursuant to Rule 12h-6(c); and
- A prior Form 15 filer immediately upon its termination of reporting pursuant to Rule 12h-6(h).

Currently Rule 12g3-2(d)(2) precludes extending the Rule 12g3-2(b) exemption to a foreign private issuer, other than a Canadian issuer using the MJDS forms, that has issued securities in a merger or other similar transaction to acquire a company that has registered a class of securities under section 12 or has a reporting obligation under section 15(d). As repropoed, we would amend Rule 12g3-2(d)(2) effectively to extend the Rule 12g3-2(b) exemption to a successor issuer that has terminated its Exchange Act reporting obligations under Rule 12h-6(c). Since we have proposed to permit a successor issuer to rely on its predecessor's reporting history for the purpose of Rule 12h-6, we believe the issuer should also benefit from claiming the Rule 12g3-2(b) exemption immediately upon the effectiveness of its Form 15F.

We also propose to extend the Rule 12g3-2(b) amendment immediately upon the termination of reporting pursuant to Rule 12h-6(h) to a foreign private issuer that, before the effective date of Rule 12h-6, terminated its registration or suspended its reporting obligations regarding a class of equity securities after filing a Form 15. This is consistent with our proposed expansion of the scope of Rule 12h-6 to encompass prior Form 15 filers. Without this change, a prior Form 15 filer would find itself subject to the 18 month waiting period that currently exists under Rule 12g3-2(d), although the issuer qualified for termination of reporting under Rule 12h-6(h).

We further propose to permit a foreign private issuer that filed a Form 15F solely to terminate its reporting obligations regarding a class of debt securities to apply for the Rule 12g3-2(b) exemption for a class of equity securities any time after the effectiveness of its termination of reporting regarding the class of debt

securities.<sup>126</sup> Since we are repropoing to abolish the 18 month "waiting period" for equity securities issuers that have terminated their Exchange Act reporting obligations pursuant to Rule 12h-6, it would serve no useful purpose to impose this waiting period on a debt securities issuer that has terminated its reporting obligations regarding a class of debt securities under Rule 12h-6 and, sometime thereafter, determines that it will need the Rule 12g3-2(b) exemption for a class of equity securities.

However, contrary to the suggestions of some commenters, we are not proposing to permit a debt securities issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of termination of its debt securities under Rule 12h-6 on the possibility that, at some future date, it may require the exemption for a class of equity securities. When that date arrives, the issuer may submit an application for the Rule 12g3-2(b) exemption, which will provide the Commission with current information about the outstanding class of equity securities, including U.S. ownership information.

#### Comment Solicited

We solicit comment on the repropoed amendments to Rule 12g3-2:

- Would it be appropriate to extend the Rule 12g3-2(b) amendment to an issuer immediately upon the effectiveness of its termination of Exchange Act reporting obligations under Rule 12h-6, as repropoed?
- Would it be appropriate to extend the Rule 12g3-2(b) amendment to successor issuers and prior Form 15 filers that are eligible to file a Form 15F under Rule 12h-6, as repropoed?
- What are the estimated annual costs of electronically publishing the material home country documents required by Rule 12g3-2(b), as proposed?

#### 2. Electronic Publishing of Home Country Documents

Currently foreign companies claim the Rule 12g3-2(b) exemption by submitting to the Commission on an ongoing basis the material required by the rule. This material may only be submitted in paper format.<sup>127</sup> Because paper submissions

<sup>126</sup> Repropoed Rule 12g3-2(e)(4).

<sup>127</sup> A non-Exchange Act reporting issuer that has successfully filed an application for the Rule 12g3-2(b) exemption must currently furnish its home country documents in paper because the application is analogous to one submitted for an exemption under Exchange Act section 12(h). See Regulation S-T Rule 101(c)(16) (17 CFR 232.101(c)(16)). Although the Commission's EDGAR database contains an entry signifying the receipt of

are more difficult to access, we are repropoing Rule 12g3-2(e), which relies on electronic access to a foreign company's home country securities documents, although not through the Commission's electronic database.

As part of the condition requiring an issuer to publish its home country documents required under Rule 12g3-2(b)(1)(iii) on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, repropoed Rule 12g3-2(e) would require an issuer to publish English translations of the following documents on its web site:

- Its annual report, including or accompanied by annual financial statements;
- Interim reports that include financial statements;
- Press releases; and
- All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.<sup>128</sup>

Repropoed Rule 12g3-2(e) would further require a foreign private issuer of equity securities to disclose in the Form 15F the address of its Internet Web site or that of the electronic information delivery system in its primary trading market on which it will publish the information required under Rule 12g3-2(b)(1)(iii).<sup>129</sup> The purpose of this requirement is to alert investors and the Commission regarding where investors and others may find the company's home country documents should a problem arise concerning the Internet location of those documents.

Currently non-reporting issuers that seek the Rule 12g3-2(b) exemption must submit their letter application for the exemption and their home country documents to the Commission in paper. We agree with the commenters who stated that the same primary reason for requiring an issuer to publish its home country documents on its Internet Web site after it terminates its reporting obligations under Rule 12h-6 applies equally to current Rule 12g3-2(b)

paper documents, materials received in paper are not accessible through the EDGAR system.

<sup>128</sup> Repropoed Note 1 to Rule 12g3-2(e). Rule 12g3-2(b) requires an exempt issuer to submit substantially the same categories of home country documents as a reporting issuer must furnish to the Commission under cover of Form 6-K. Moreover, both Rule 12g3-2(b) and Form 6-K state that only material information need be furnished under the rule and form. See Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)) and General Instruction B to Form 6-K.

<sup>129</sup> Note 3 to repropoed Rule 12g3-2(e). An issuer would not have to update the Form 15F to reflect a change in that address.

exempt companies and the non-reporting companies that eventually will apply for the exemption. In each case, the electronic posting of an issuer's home country documents would increase an investor's ability to access those documents.

Therefore, we propose to amend Rule 12g3-2 to permit a foreign private issuer that, upon application to the Commission and not after filing Form 15F, has obtained or will obtain the Rule 12g3-2(b) exemption to publish its home country documents that it is required to furnish on a continuous basis under Rule 12g3-2(b)(1)(iii) on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market.<sup>130</sup> As a condition to this electronic posting, an issuer that wishes to use this procedure would have to comply with the English translation requirements of repropoed Rule 12g3-2(e). It also would have to provide the Commission with the address of its Internet Web site or that of the electronic information delivery system in its primary trading market in its application for the Rule 12g3-2(b) exemption or in an amendment to that application.

Because currently the Commission does not have an established means for a non-reporting company to submit electronically to the Commission its initial documents under Rule 12g3-2(b)(1)(i) and (ii),<sup>131</sup> an applicant would have to continue to submit its letter application and the home country documents submitted in support of its initial application to the Commission in paper.<sup>132</sup> Commenters provided several suggestions in response to our request for comments relating to the operation of Rule 12g3-2(b) in general. We will consider these suggestions in future rulemaking, as appropriate.

Some commenters suggested that the Commission impose a specific time limit, for example 3 years, governing how long an issuer must keep its home country documents on its Internet Web site. We decline to propose a specific time limit primarily because different types of home country documents may require different periods of electronic posting. While an issuer would be required to post electronically a home country document for a reasonable period of time, what constitutes a reasonable period would depend on the nature and purpose of the home country

document. At a minimum, we suggest companies provide Web site access to their home country reports for at least a 12 month period.

We solicit comment on the repropoed electronic publishing requirement:

- Is it appropriate to require an issuer, which has claimed the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of Exchange Act reporting obligations under Rule 12h-6, to publish in English its material home country documents required by Rule 12g3-2(b) on its Internet web site or through an electronic information delivery system generally available to the public in its primary trading market, as repropoed?
- Is it appropriate to permit an issuer that has obtained the Rule 12g3-2(b) exemption upon application to the Commission, and not under repropoed Rule 12h-6, to publish in English its material home country documents required by Rule 12g3-2(b) on its Internet web site or through an electronic information delivery system generally available to the public in its primary trading market, as repropoed?

#### General Request for Comments

We solicit comment on repropoed Rule 12h-6, repropoed Form 15F, repropoed amendments to Rules 12g-4, 12h-3, and 12g3-2, as well as to all other aspects of the repropoed rule amendments. Here and throughout the release, when we solicit comment, we are interested in hearing from all interested parties, including members and representatives of the investing public, representatives of foreign companies and foreign industry groups, representatives of broker-dealers, domestic issuers, and other participants in U.S. securities markets. We are further interested in learning from all parties what aspects of the rule repropoal they deem essential, what aspects they believe are preferred but not essential, and what aspects they believe should be modified. We also would like to know whether there are any facts or considerations not discussed in the comment letters submitted in response to the Original Proposing Release that, in your opinion, make adoption of repropoed Rule 12h-6 and the accompanying repropoed rule amendments inappropriate? We are still interested in commenters' views on the questions posed in the Original Proposing Release, as we are still considering those questions in light of the repropoal. Due to the advanced stage of this rulemaking, we intend to act expeditiously on the repropoed

rules, so we encourage you to submit your comments promptly.

### III. Paperwork Reduction Act Analysis

The repropoed rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").<sup>133</sup> The titles of the affected collection of informations are Form 20-F (OMB Control No. 3235-0288), Form 40-F (OMB Control No. 3235-0381), Form 6-K (OMB Control No. 3235-0116), new Form 15F, and submissions under Exchange Act Rule 12g3-2 (OMB Control No. 3235-0119).<sup>134</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information such as Form 20-F or new Form 15F unless it displays a currently valid OMB control number. Compliance with the disclosure requirements of new Form 15F and new Rule 12h-6, which will affect the above collections of information, is mandatory.

Form 20-F sets forth the disclosure requirements for a foreign private issuer's annual report and registration statement under the Exchange Act as well as many of the disclosure requirements for a foreign private issuer's registration statements under the Securities Act. We adopted Form 20-F pursuant to the Exchange Act and the Securities Act in order to provide investors with information about foreign private issuers that have registered securities with the Commission.

Form 40-F sets forth the disclosure requirements regarding the annual report and registration statement under the Exchange Act for a Canadian issuer that is qualified to use the Multijurisdictional Disclosure System ("MJDS"). We adopted Form 40-F pursuant to the Exchange Act in order to permit qualified Canadian issuers to prepare their Exchange Act annual reports and registration statements based primarily in accordance with Canadian requirements.

Form 6-K is used by a foreign private issuer to report material information that it:

<sup>133</sup> 44 U.S.C. 3501 *et seq.*

<sup>134</sup> 134 A limited number of foreign private issuers file annual reports on Form 10-K (17 CFR 249.310) and a limited number of foreign private issuers file annual reports on Form 10-KSB (17 CFR 249.310b). In voluntarily electing to file periodic reports using domestic issuer forms, these issuers seem to have closely aligned themselves with the U.S. market. Accordingly, for the purpose of the Paperwork Reduction Act Analysis, these issuers do not appear likely to terminate their Exchange Act registration under new Rule 12h-6, and we have assumed that none of these companies will seek to use Rule 12h-6. Foreign private issuers that file periodic reports using domestic issuer forms will be eligible, nonetheless, to use Rule 12h-6.

<sup>130</sup> Repropoed Rule 12g3-2(f).

<sup>131</sup> 17 CFR 240.12g3-2(b)(1)(i) and (ii).

<sup>132</sup> As under current practice, the applicant should send these initial materials to the Commission's Office of International Corporate Finance in the Division of Corporation Finance.

- Makes or is required to make public under the laws of the jurisdiction of its incorporation, domicile or organization (its "home country");

- Files or is required to file with its home country stock exchange that is made public by that exchange; or

- Distributes or is required to distribute to its security holders.

A foreign private issuer may attach annual reports to security holders, statutory reports, press releases and other documents as exhibits or attachments to the Form 6-K. We adopted Form 6-K under the Exchange Act in order to keep investors informed on an ongoing basis about foreign private issuers that have registered securities with the Commission.

As repropoed, new Form 15F is the form that a foreign private issuer would have to file when terminating its Exchange Act reporting obligations under new Exchange Act Rule 12h-6. Form 15F would require a filer to disclose information that would help investors understand the foreign private issuer's decision to terminate its Exchange Act reporting obligations and assist Commission staff in assessing whether the Form 15F filer is eligible to terminate its Exchange Act reporting obligations pursuant to Rule 12h-6.

Exchange Act Rule 12g3-2 is an exemptive rule that, under paragraph (b) of that rule, provides an exemption from Exchange Act section 12(g) registration for a foreign private issuer that, in addition to satisfying other requirements, submits copies of its material home country documents to the Commission on an ongoing basis. We adopted paragraph (b) of Rule 12g3-2 in order to provide information for U.S. investors concerning foreign private issuers with limited securities trading in U.S. capital markets.

The hours and costs associated with preparing, filing and sending Forms 20-F, 40-F, 6-K and 15F, and making submissions under Exchange Act Rule 12g3-2(b) constitute reporting and cost burdens imposed by those collections of information. We based our estimates of the effects that the repropoed rule amendments would have on those collections of information primarily on our review of the most recently completed PRA submissions for Forms 20-F, 40-F, and 6-K, and for submissions under Rule 12g3-2(b), on the particular requirements for those forms and submissions, and on relevant information, for example, concerning comparative trading volume for numerous filers of those forms.

Repropoed Rule 12h-6 would permit a foreign private issuer to terminate its

Exchange Act reporting obligations, including the obligation to file an annual report on Form 20-F or 40-F and the obligation to submit interim Form 6-K reports, after filing a Form 15F. Repropoed Rule 12h-6 and the accompanying rule amendments would also enable a foreign private issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of reporting pursuant to the repropoed, new exit rule, and to publish copies of its home country documents required by Rule 12g3-2(b) on its Internet Web site instead of submitting them in paper to the Commission. We have based the annual burden and cost estimates of the adopted rule amendments on Forms 20-F, 40-F, 6-K and 15F, and on the home country submissions required under Rule 12g3-2(b), on the following estimates and assumptions:

- A foreign private issuer incurs or will incur 25% of the annual burden required to produce each Form 20-F or 40-F report or Form 15F;

- Outside firms, including legal counsel, accountants and other advisors, incur or will incur 75% of the burden required to produce each Form 20-F or 40-F report or Form 15F at an average cost of \$400 per hour;

- A foreign private issuer incurs or will incur 75% of the annual burden required to produce each Form 6-K report and Rule 12g3-2(b) submission, not including English translation work, and 25% of the annual burden required to perform the English translation work for Form 6-K reports and Rule 12g3-2(b) submissions; and

- Outside firms, including legal counsel, accountants and other advisors, incur or will incur 25% of the burden required to produce each Form 6-K report and Rule 12g3-2(b) submission, not including English translation work, at an average cost of \$400 per hour, and 75% of the annual burden resulting from the English translation work for Form 6-K reports and Rule 12g3-2(b) submissions, at an average cost of \$125 per hour.<sup>135</sup>

As was the case with the originally proposed rule amendments, the estimated effects of the repropoed rule amendments reflect the initial phase-in period of the Exchange Act termination process under new Rule 12h-6 and

<sup>135</sup> We relied on most of these estimates and assumptions for the proposed rulemaking. However, at the original proposing stage, we used an estimated hourly rate of \$300 for work performed by an outside firm, not including English translation work. We recently increased the estimated outside firm rate to \$400/hour after consulting with several private law firms. We have used the \$400/hour rate for outside firms in this repropoing rulemaking.

Form 15F during the first year of use. We expect that most of these estimated effects would occur on a one-time, rather than a recurring, basis. While we expect that some issuers would terminate their Exchange Act reporting under Rule 12h-6 and file Form 15F in subsequent years, we do not expect the resulting burdens and costs to be of the same magnitude as the burdens and costs currently expected during the first year. Moreover, we expect that, over time the number of foreign private issuers that are encouraged to enter the Exchange Act reporting system as a result of the repropoed rule amendments would increase so that, on an annual basis, the number of foreign companies entering the Exchange Act reporting regime would exceed the number exiting that regime.

We published a notice requesting comment on the collection of information requirements in the Original Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.<sup>136</sup> OMB subsequently approved the proposed requirements without change. As discussed in Part II above, we received several comment letters regarding the proposed rule amendments, although none addressed their estimated effects on the collection of information requirements. We have revised proposed Rule 12h-6 and the accompanying proposed rule amendments in response to these comments. Because of these changes, we have revised the estimated reporting and cost burdens of the repropoed rule amendments, as discussed below.

#### A. Form 20-F

During the first year of effectiveness of repropoed Rule 12h-6, we estimate that as many as 25% of Form 20-F filers could terminate their Exchange Act reporting obligations under the new rule, compared to the 15% previously estimated under the earlier, proposed rule amendments.<sup>137</sup> However, we continue to believe that Rule 12h-6 would encourage some foreign companies to enter the Exchange Act

<sup>136</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>137</sup> This estimate has increased due to a number of revisions to the proposed rule, which should enable more foreign private issuers to qualify for termination of Exchange Act reporting under repropoed Rule 12h-6 than under the proposed rule. A review by the Commission's Office of Economic Analysis of trading volume data on a sample of foreign Exchange Act reporting companies that filed Form 20-F during 2004 suggests that approximately 30% of filers would meet the U.S. trading volume threshold of the repropoed rule. That percentage may vary by region.

registration and reporting regime for the first time. Consequently, during the first effective year of Rule 12h-6, the number of Form 20-F annual reports filed could increase by 5%, leading to a net decrease of 20% for Form 20-Fs filed over this same period. This net decrease would cause:

- The number of Form 20-Fs filed to decrease to 880, which is 110 less than the 990 estimated under the originally proposed rule;<sup>138</sup>
- The total number of burden hours required to produce Form 20-F<sup>139</sup> to decrease to 2,314,400 total hours, which is 289,300 hours less than the decrease to 2,603,700 total hours estimated under the originally proposed rule;<sup>140</sup>
- The total number of burden hours required by foreign private issuers to produce Form 20-F to decrease to 578,600 total hours, which is 72,325 hours less than the decrease to 650,925 total hours estimated under the originally proposed rule;<sup>141</sup> and
- The cost incurred by outside firms to produce Form 20-F to total \$694,320,000,<sup>142</sup> which is \$108,487,500 more than the \$585,832,500 estimated under the originally proposed rule.<sup>143</sup>

#### B. Form 40-F

During the first year of effectiveness of repropoed Rule 12h-6, we estimate that as many as 10% of Form 40-F filers could terminate their Exchange Act reporting obligations under the new rule, which is the same percentage previously estimated under the originally proposed rule

<sup>138</sup> 1,100 Form 20-Fs filed annually (prior to this rulemaking)  $\times .20 = 220$ ;  $1,100 - 220 = 880$  Form 20-Fs filed annually.

<sup>139</sup> As in the Original Proposing Release, we estimate that a foreign private issuer requires on average 2,630 hours to produce each Form 20-F.

<sup>140</sup> 880 Form 20-Fs filed annually  $\times 2,630$  hours per Form 20-F = 2,314,400 hours.

<sup>141</sup> 880 Form 20-Fs  $\times 2,630$  hours per Form 20-F  $\times .25 = 578,600$  hours. Thus, we estimate that, during the first year of effectiveness of Rule 12h-6, foreign private issuers could incur a reduction of 144,650 hours in the number of burden hours required to produce Form 20-F.  $220$  Form 20-Fs  $\times 2,630$  hrs  $\times .25 = 144,650$  hours. Using an estimated hourly rate of \$175 for in-house work, foreign private issuers could incur Form 20-F cost savings of \$25,313,750 during Rule 12h-6's first year of effectiveness.  $144,650$  hrs.  $\times$  \$175/hr. = \$25,313,750.

<sup>142</sup> 880 Form 20-Fs  $\times 2,630$  hours  $\times .75 \times$  \$400/hour = \$694,320,000. The \$108,487,500 increase reflects the increase in the estimated outside firm hourly rate from \$300 to \$400.

<sup>143</sup> We further estimate cost savings of \$173,580,000 regarding outside firms' production of Form 20-Fs during Rule 12h-6's first year of effectiveness.  $220$  Form 20-Fs  $\times 2,630$  hrs.  $\times .75 \times$  \$400/hr. = \$173,580,000. Thus, during the first year of its effectiveness, Rule 12h-6 could result in total estimated Form 20-F cost savings of \$198,893,750.  $\$25,313,750 + \$173,580,000 = \$198,893,750$ .

amendments.<sup>144</sup> However, the repropoed rule could encourage some foreign companies to enter the Exchange Act registration and reporting regime for the first time, including some that would be eligible to use the MJDS forms, including the Form 40-F annual report. Consequently, over this same period, the number of Form 40-F annual reports filed could increase by approximately 3%, resulting in a net decrease of 7% for Form 40-Fs filed over this same period.<sup>145</sup> This net decrease would cause:

- The number of Form 40-Fs filed to total 125;<sup>146</sup>
- The number of burden hours required to produce Form 40-F<sup>147</sup> to total 53,375 total hours;<sup>148</sup>
- The number of burden hours required by foreign private issuers to produce Form 40-F to total 13,344 hours;<sup>149</sup> and
- The cost incurred by outside firms to produce Form 40-F to total \$16,012,500, which is \$4,003,125<sup>150</sup> more than the \$12,009,375 estimated under the originally proposed rule.<sup>151</sup>

<sup>144</sup> We do not expect the expanded scope of repropoed Rule 12h-6 to have as great an effect on MJDS filers as other foreign reporting companies since, typically, the percentage of an MJDS filer's shares held by U.S. residents and the U.S. trading volume relating to those shares is significant. Moreover, because of their close proximity to U.S. capital markets, we believe MJDS filers are less likely to seek to terminate their Exchange Act reporting obligations than other foreign private issuers. Accordingly, based on current experience, we expect no more than 10% of Form 40-F filers would terminate their Exchange Act reporting obligations under repropoed Rule 12h-6.

<sup>145</sup> This is the same percentage previously estimated under the originally proposed rule amendments.

<sup>146</sup> 134 Form 40-Fs filed annually (prior to this rulemaking)  $\times .07 = 9$ ;  $134 - 9 = 125$  Form 40-Fs filed annually.

<sup>147</sup> As in the Original Proposing Release, we estimate that it takes 427 hours on average to produce a Form 40-F report.

<sup>148</sup> 125 Form 40-Fs filed annually  $\times 427$  hours per Form 40-F = 53,375 hours.

<sup>149</sup> 125 Form 40-Fs filed annually  $\times 427$  hours per Form 40-F  $\times .25 = 13,344$  hours. Thus, we estimate that, during the first year of effectiveness of repropoed Rule 12h-6, foreign private issuers could incur a reduction of 961 hours in the number of burden hours required to produce Form 40-F.  $9$  Form 40-Fs  $\times 427$  hrs.  $\times .25 \times = 961$  hrs. This could result in estimated Form 40-F cost savings for foreign private issuers of \$168,175.  $961$  hrs.  $\times$  \$175/hr. = \$168,175.

<sup>150</sup> The \$4,003,125 increase results from an increase in the estimated outside firm hourly rate from \$300 to \$400.

<sup>151</sup> 125 Form 40-Fs filed annually  $\times 427$  hours per Form 40-F  $\times .75 \times$  \$400/hour = \$16,012,500. This estimate corresponds to estimated cost savings of \$1,152,900 in connection with outside firms' production of Form 40-F during repropoed Rule 12h-6's first year of effectiveness.  $9 \times 427$  hrs.  $\times .75 \times$  \$400/hr. = \$1,152,900. Thus, during the first year of its effectiveness, Rule 12h-6 could result in estimated total Form 40-F cost savings of \$168,175 + \$1,152,900 = \$1,321,075.

#### C. Form 6-K

During the first year of effectiveness of repropoed Rule 12h-6, we estimate that as many as 23% of foreign private issuers that furnish Form 6-K reports could terminate their Exchange Act reporting obligations under the new rule,<sup>152</sup> compared to the 14% previously estimated under the originally proposed rule amendments. However, the repropoed rule could encourage some foreign companies to enter the Exchange Act registration and reporting regime for the first time, including those that would furnish Form 6-K reports. Consequently, over this same period, the number of Form 6-K reports furnished could increase by as much as 5%,<sup>153</sup> resulting in a net decrease of 18% for Form 6-Ks furnished over this same period. This net decrease would cause:

- The number of Form 6-K reports furnished to decrease to 12,022, which is 1,320 less than the 13,342 estimated under the originally proposed rule;<sup>154</sup>
- The total number of burden hours required to produce the Form 6-Ks<sup>155</sup> to decrease to 104,591 total hours,<sup>156</sup> which is 12,054 hours less than the decrease to 116,645 total hours estimated under the originally proposed rule;
- The total number of burden hours required by foreign private issuers to produce Form 6-K<sup>157</sup> to decrease to 65,369 hours,<sup>158</sup> which is 17,572 hours

<sup>152</sup> This estimate is based on the estimated number of Form 20-F and Form 40-F filers that are expected to terminate their Exchange Act reporting obligations under repropoed Rule 12h-6.  $1,100$  Form 20-Fs  $\times .25 = 275$ ;  $134$  Form 40-Fs  $\times .10 = 13$ ;  $288 - .23 \times 1,234$ .

<sup>153</sup> This estimate is based on the estimated number of foreign private issuers that are expected to enter the Exchange Act reporting regime and file Form 20-Fs or Form 40-Fs as a result of this repropoed rulemaking during the first year of effectiveness.  $1,100$  Form 20-Fs  $\times .05 = 55$ ;  $134$  Form 40-Fs  $\times .03 = 4$ ;  $59 - .05 \times 1,234$ .

<sup>154</sup>  $14,661$  Form 6-K reports  $\times .18 = 2,639$ ;  $14,661 - 2,639 = 12,022$  Form 6-K reports.

<sup>155</sup> In the Original Proposing Release, we estimated that, prior to this rulemaking, it took a total of 127,197 annual burden hours to produce the 14,661 Form 6-Ks, or approximately 8.7 hours per Form 6-K (for work performed by foreign private issuers and outside firms). We continue to use this 8.7 hour estimate for the repropoed rule amendments.

<sup>156</sup>  $12,022$  Form 6-K reports  $\times 8.7$  hours = 104,591 hours.

<sup>157</sup> In the Original Proposing Release, we estimated that the amount of time required to translate foreign language materials into English constitutes approximately 8% of the total hours required to produce Form 6-K. We have revised this estimate to 25% based on updated information provided by financial printer representatives.

<sup>158</sup>  $104,591$  hours  $\times .25 = 26,148$  hours for English translation work;  $104,591$  hours  $- 26,148$  hours =  $78,443$  hours for non-English translation work;  $78,443$  hours  $\times .75 = 58,832$  hours for non-English translation work performed by foreign private

less than the decrease to 82,941 total hours estimated under the originally proposed rule;<sup>159</sup> and

- The cost incurred by outside firms to produce Form 6-K to total \$10,295,775,<sup>160</sup> which is \$2,078,475 more than the \$8,217,300 estimated under the originally proposed rule.<sup>161</sup>

#### D. Form 15F

During the first year of effectiveness of repropoed Rule 12h-6, we estimate that as many as 351 foreign private issuers<sup>162</sup> could file a Form 15F to terminate their Exchange Act reporting obligations compared to the 178 previously estimated under the originally proposed rule amendments. This increase in the estimated number of Form 15F filers could cause:

issuers; 26,148 hours  $\times$  .25 = 6,537 hours of English translation work performed by foreign private issuers; 58,832 hours + 6,537 hours = 65,369 total hours for Form 6-K work performed by foreign private issuers, or 5.4 hours for foreign private issuer work per Form 6-K.

<sup>159</sup> We further estimate that, during the first year of effectiveness of repropoed Rule 12h-6, foreign private issuers could incur a reduction of 14,349 hours in the number of burden hours required to produce Form 6-K. 2,639 Form 6-Ks  $\times$  8.7 hours = 22,959 hours; 22,959 hours  $\times$  .25 = 5,740 hours of English translation work; 5,740 hours  $\times$  .25 = 1,435 hours of English translation work for foreign private issuers; 22,959  $\times$  .75 = 17,219 hours of non-English translation work; 17,219  $\times$  .75 = 12,914 hours of non-English translation work for foreign private issuers; 1,435 + 12,914 = 14,349 hours. This could result in estimated Form 6-K cost savings of \$2,511,075 for foreign private issuers during the first year of repropoed Rule 12h-6's effectiveness. 14,349 hrs.  $\times$  \$175/hr. = \$2,511,075.

<sup>160</sup> 78,443 hours  $\times$  .25 = 19,611 hours  $\times$  \$400/hour = \$7,844,400 for non-translation work; 26,148 hours  $\times$  .75 = 19,611 hours  $\times$  \$125/hour = \$2,451,375 for English translation work; \$7,844,400 + \$2,451,375 = \$10,295,775 for total work performed by outside firms. The \$2,078,475 increase reflects the increase in the estimated outside firm hourly rate from \$300 to \$400, and the increase in the estimated outside firm rate for English translation work from \$75 to \$125/hour based on current information provided by financial printer representatives.

<sup>161</sup> This estimate corresponds to estimated cost savings of \$2,260,025 in connection with outside firms' production of Form 6-K during Rule 12h-6's first year of effectiveness. 5,740 hrs.  $\times$  .75  $\times$  \$125/hour = \$538,125 for English translation work; 17,219  $\times$  .25  $\times$  \$400/hour = \$1,721,900 for non-English translation work. \$538,125 + \$1,721,900 = \$2,260,025 in Form 6-K cost savings for outside firms. Thus, Rule 12h-6 could result in total estimated Form 6-K cost savings of \$4,771,100. \$2,511,075 + \$2,260,025 = \$4,771,100.

<sup>162</sup> We derived this estimate from the number of Form 20-F filers (275) and Form 40-F filers (13) estimated to elect to terminate their Exchange Act reporting obligations under repropoed Rule 12h-6 during the first year of the rule's effectiveness. We then added to this sum (288) the number of prior Form 15 filers (63) estimated to file a Form 15F during the first year of repropoed Rule 12h-6's effectiveness in order to make their Form 15 termination or suspension of reporting obligations. The latter number is based on the approximate number of foreign private issuers that filed a Form 15 from 2003 through the present.

- The number of burden hours required to produce Form 15F<sup>163</sup> to total 10,530 hours,<sup>164</sup> which is 5,190 hours more than the 5,340 hours estimated under the originally proposed rule amendments;

- Foreign private issuers to incur a total of 2,633 hours to produce Form 15F,<sup>165</sup> which is 1,298 hours more than the 1,335 hours estimated under the originally proposed rule amendments; and

- Outside firms to incur a total cost of \$3,159,200 to produce Form 15F,<sup>166</sup> which is \$1,174,700 more than the \$1,984,500 estimated under the originally proposed rule amendments.<sup>167</sup>

#### E. Rule 12g3-2(b) Submissions

We estimate that 685 foreign private issuers currently have obtained the Rule 12g3-2(b) exemption.<sup>168</sup> In addition, we estimate that each Rule 12g3-2(b) exempt issuer currently makes 12 Rule 12g3-2(b) submissions per year for a total of 8,220 Rule 12g3-2(b) submissions. We further estimate that it takes a total of 32,880 annual burden hours, or 4 annual burden hours per submission (for work performed by foreign private issuers and outside firms), to produce the 8,220 Rule 12g3-2(b) submissions.<sup>169</sup>

<sup>163</sup> In the Original Proposing Release, we estimated that the production of each Form 15F would require 30 hours. Although we have revised some aspects of the originally proposed Form 15F, we do not believe these changes are significant enough to affect materially this 30 hour estimate. Therefore, we continue to use this estimate for the repropoed rule amendments.

<sup>164</sup> 351 Form 15Fs  $\times$  30 = 10,530 hours.

<sup>165</sup> 10,530 hours  $\times$  .25 = 2,633 hours. This could result in estimated Form 15F costs for foreign private issuers of \$460,775 during repropoed Rule 12h-6's first year of effectiveness. 2,633 hrs.  $\times$  \$175 = \$460,775.

<sup>166</sup> 10,530 hours  $\times$  .75 = 7,898 hours; 7,898 hours  $\times$  \$400/hour = \$3,159,200. The \$3,159,200 increase reflects the increase in the number of estimated Form 15F filers and the increase in the estimated outside firm hourly rate from \$300 to \$400.

<sup>167</sup> Thus, repropoed Rule 12h-6 could result in total estimated Form 15F costs of \$3,619,975 during its first year of effectiveness. \$460,775 + \$3,159,200 = \$3,619,975.

<sup>168</sup> This estimate is based on Commission staff's most recent annual review of the number of current Rule 12g3-2(b) exempt companies, which will be available soon on our Internet Web site at <http://www.sec.gov/divisions/corpfin.shtml>.

<sup>169</sup> These estimates represent an adjustment of 31,080 hours from the 1,800 total hours previously reported for Rule 12g3-2(b) submissions. As part of this rulemaking, we have re-evaluated the number of foreign private issuers that currently claim the Rule 12g3-2(b) exemption, the number of Rule 12g3-2(b) submissions made by them, and the number of burden hours required for their production, in addition to assessing the effects on Rule 12g3-2(b) submissions expected to result from adoption of the final rule amendments. We believe these estimates more accurately reflect the current burden hours required for the collections of information submitted under Rule 12g3-2(b).

During the first year of effectiveness of repropoed Rule 12h-6, we estimate that as many as 351 foreign private issuers could claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of their termination of reporting under repropoed Rule 12h-6.<sup>170</sup> This increase in the number of Rule 12g3-2(b) exempt issuers would cause:

- The number of issuers claiming the Rule 12g3-2(b) exemption to total 1,036;

- The number of Rule 12g3-2(b) submissions made annually to total 12,432;

- The number of annual burden hours required to produce these Rule 12g3-2(b) submissions to total 49,728 hours;

- Foreign private issuers to incur a total of 31,080 annual burden hours to produce these Rule 12g3-2(b) submissions, or 2.5 annual burden hours per submission;<sup>171</sup> and

- Outside firms to incur a total cost of \$4,909,275<sup>172</sup> to produce the Rule 12g3-2(b) submissions.<sup>173</sup>

<sup>170</sup> This amount includes the estimated 288 Form 20-F and 40-F filers expected to terminate their Exchange Act reporting obligations under repropoed Rule 12h-6 as well as the estimated 63 prior Form 15 filers expected to file a Form 15F to make their prior termination or suspension of reporting under Rule 12h-6.

<sup>171</sup> Because the home country document submission requirement under Rule 12g3-2(b) is similar to the home country document submission requirement under Form 6-K, we have used the same assumptions regarding the English and non-English translation work required under Rule 12g3-2(b) that we adopted for Form 6-K submissions. Accordingly: 49,728 hours  $\times$  .25 = 12,432 total annual burden hours for English translation work; 49,728 - 12,432 = 37,296 total annual burden hours required for non-English translation work; 37,296 hours  $\times$  .75 = 27,972 total annual burden hours incurred by foreign private issuers for non-English translation work; 12,432 hours  $\times$  .25 = 3,108 total annual hours incurred by foreign private issuers for English translation work; 27,972 + 3,108 = 31,080 total annual burden hours incurred by foreign private issuers for Rule 12g3-2(b) submissions, or 2.5 annual burden hours per submission. Of the 31,080 hours, 10,530 hours would result from adoption of the repropoed rules and 20,550 hours represents an adjustment from the previous PRA estimates for Rule 12g3-2 submissions.

<sup>172</sup> 49,728 hours  $\times$  .25 = 12,432 hours for English translation work; 12,432 hours  $\times$  .75 = 9,324 hours; 9,324 hours  $\times$  \$125 = \$1,165,500 for English translation work; 49,728 hours - 12,432 hours = 37,296 hours for non-English translation work; 37,296 hours  $\times$  .25 = 9,324 hours; 9,324 hours  $\times$  \$400 = \$3,729,600 for non-English translation work; \$1,165,500 + \$3,729,600 = \$4,895,100 for total work performed by outside firms. Of that total amount, \$1,658,475 would result from adoption of the repropoed rules and \$3,236,625 constitutes an adjustment from the previous PRA estimates for Rule 12g3-2 submissions.

<sup>173</sup> We further estimate that repropoed Rule 12h-6 and the accompanying rule amendments could result in total estimated Rule 12g3-2(b) costs of \$3,501,225 during the first year of their effectiveness. 351 issuers  $\times$  12 submissions/issuer  $\times$  2.5 hrs./submission = 10,530 hours; 10,530 hours  $\times$  \$175/hr. = \$1,842,750 in Rule 12g3-2(b) submission

Continued

### Comment Solicited

We solicit comment on the expected effects of repropoed Rule 12h-6 and the accompanying repropoed rule amendments on Form 20-F, Form 40-F, Form 6-K and Rule 12g3-2(b) submissions and on the expected effects of repropoed Form 15F under the PRA. In particular, we solicit comment on:

- The extent to which foreign private issuers would respond to repropoed Rule 12h-6 by electing to file Form 15F to terminate their registration and reporting in the U.S.;
- How many foreign private issuers would join the Exchange Act registration and reporting regime for the first time as a result of the repropoed rule;
- How accurate are our burden hour and cost estimates for Forms 20-F, 40-F, and 6-K, and Rule 12g3-2(b) submissions expected to result from the repropoed rule amendments;
- How accurate are our burden hour and cost estimates for repropoed Form 15F; and
- Whether most of the effects of repropoed Rule 12h-6 would occur during the first year, as expected, or over a longer period, for example, during the first two or three years.

We further solicit comment in order to:

- Evaluate whether the repropoed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the repropoed rule amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning these burden and cost estimates and any suggestions for reducing the burdens

costs for foreign private issuers. For outside firm costs: 351 issuers × 12 submissions/issuer × 4 hrs./ submission = 16,848 hours; 16,848 × .25 = 4,212 hours of English translation work; 4,212 × .75 × \$125 = \$394,875 of English translation costs for outside firms. 16,848 hours × .75 = 12,636 hours of non-English translation work; 12,636 × .25 × \$400 = \$1,263,600 of non-English translation costs for outside firms. \$394,875 + \$1,263,600 = \$1,658,475 in total Rule 12g3-2(b) submission costs for outside firms. \$1,842,750 + \$1,658,475 = \$3,501,225 in total estimated Rule 12g3-2(b) costs.

and costs. Persons who desire to submit comments on the collections of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303, with reference to File No. S7-12-05. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-12-05, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

### IV. Cost-Benefit Analysis

#### A. Expected Benefits

Repropoed Rule 12h-6 and the accompanying rule amendments would benefit U.S. investors to the extent that they remove a possible disincentive for foreign companies that are not currently Exchange Act reporting companies to register their equity and debt securities with the Commission. In response to foreign companies' concerns about Exchange Act reporting and other obligations, these rules would fine-tune the criteria by which a foreign company may terminate those obligations. In so doing, the repropoed rule amendments should over time remove an impediment to foreign company access and participation in U.S. public capital markets while still providing U.S. investors with the protections afforded by our Exchange Act reporting regime.

The repropoed rule amendments should remove a disincentive for foreign firms to enter our Exchange Act reporting regime by lowering the cost of exiting from that regime. Investors are expected to benefit from the amendments by being able to purchase shares in foreign firms that have been registered with the Commission and that, therefore, provide a high level of investor protection. In addition, U.S. investors may incur lower transaction costs when trading a foreign company's shares on a U.S. exchange relative to a foreign exchange.

To remove a disincentive for foreign companies to enter U.S. public capital markets, the repropoed rule amendments would benefit U.S. investors by enabling a foreign Exchange Act reporting company to lower its costs of compliance in connection with Exchange Act deregistration. This reduction in the cost of compliance would directly benefit both foreign companies and their investors, including those resident in the United States.

The repropoed rule amendments would result in foreign private issuers incurring lower costs of Exchange Act compliance in four possible ways. First, rather than require a foreign private issuer to determine the number of its U.S. holders, as is the case under the current exit rules, repropoed Rule 12h-6 would enable a foreign private issuer to rely solely on trading volume data regarding its securities in the United States and its primary trading market when determining whether it may terminate its Exchange Act reporting obligations. Because trading volume data is more easily obtainable than information regarding its U.S. shareholders, the repropoed rule should lower the costs of Exchange Act termination for foreign private issuers.

Second, repropoed Rule 12h-6 would allow a foreign firm to terminate its Exchange Act reporting obligations regarding a class of equity securities and immediately obtain the Rule 12g3-2(b) exemption. Accordingly, such a terminating foreign private issuer would be able to avoid the costs associated with continued annual verification that its number of holders of record remains below 300.

Third, the repropoed rule would permit an issuer to rely on the assistance of an independent information services provider when determining whether it falls below the 300 U.S. holder standard. The option to hire an independent information services provider may be a more efficient and cost-effective mechanism to make that determination. Moreover, a foreign company may save costs when assessing its eligibility to terminate its registration and reporting under the 300 record holder provision of repropoed Rule 12h-6, since the rule would limit the number of jurisdictions in which a foreign private issuer must search for the amount of securities represented by accounts of customers resident in the United States held by brokers, dealers, banks and other nominees. The current rules require a foreign private issuer to conduct a worldwide search for such U.S. customer accounts.

Fourth, once having terminated its reporting obligations under repropoed Rule 12h-6, a foreign company would no longer be required to incur costs associated with producing an Exchange Act annual report or interim Form 6-K reports.<sup>174</sup> Based on estimates and assumptions used for the purpose of the Paperwork Reduction Act, these estimated cost savings could total approximately \$200,000,000 for the first year of repropoed Rule 12h-6's effectiveness.<sup>175</sup>

### B. Expected Costs

Investors could incur costs from the repropoed rule amendments to the extent that currently registered foreign companies respond to the rule changes by terminating their Exchange Act registration and reporting obligations with respect to their equity and debt securities. If Exchange Act disclosure requirements provide more information or protection to U.S. or other investors than is provided in an issuer's primary trading market, then all investors, both U.S. and foreign, may suffer the costs of losing that information and protection upon Exchange Act termination.<sup>176</sup> If this is the case, the announcement that a foreign firm is terminating its Exchange Act reporting may result in a loss of share value and the incurrence by investors of higher costs from trading in the firm's equity and debt securities.

There are costs associated with the filing of repropoed Form 15F, which is a requirement for a foreign private issuer that terminates its Exchange Act registration and reporting under Rule 12h-6.<sup>177</sup> A foreign private issuer will also incur costs in connection with having to post on its Internet Web site in English its material home country documents required to maintain the Rule 12g3-2(b) exemption that it will have received upon the effectiveness of

its termination of reporting under repropoed Rule 12h-6.<sup>178</sup>

We expect that repropoed Rule 12h-6 would enable some foreign registrants to avoid other recent U.S. regulation, such as the Sarbanes-Oxley Act.<sup>179</sup> Investors would lose the benefits afforded by the Sarbanes-Oxley Act to the extent a current foreign registrant is not fully subject to that Act.

Some U.S. investors might seek to trade in the equity securities of a foreign company following its termination of Exchange Act reporting under repropoed Rule 12h-6. U.S. investors seeking to trade the former reporting company's securities in the U.S. may be forced to trade in over-the-counter markets such as the one administered by Pink Sheets, LLC, which could result in higher transaction costs than if the foreign company had continued to have a class of securities registered with the Commission.

U.S. investors seeking to trade the former reporting company's securities in its primary trading market also could incur additional costs. For example, U.S. investors who held the securities in the form of ADRs could incur costs associated with the depositary's conversion of the ADRs into ordinary shares.<sup>180</sup> Moreover, some U.S. investors could incur costs associated with finding and contracting with a new broker-dealer who is able to trade in the foreign reporting company's primary trading market. U.S. investors may face additional costs due to the cost of currency conversion and higher transaction costs trading the securities in a foreign market.

Some investors who wish to make investment decisions regarding former Exchange Act reporting foreign companies also may incur costs to the extent that the information provided by such companies pursuant to any home country regulations is different from that which currently is required under the Exchange Act. Such investors could

incur costs associated with hiring an attorney or investment adviser, to the extent that they have not already done so, to explain the material differences, if any, between a foreign company's home country reporting requirements, as reflected in its home country annual report posted on its Internet Web site, and Exchange Act reporting requirements.

### Comment Solicited

We solicit comment on the costs and benefits to U.S. and other investors, foreign private issuers, and others who may be affected by repropoed Rule 12h-6, repropoed Form 15F and the associated repropoed rule amendments. We request your views on the costs and benefits described above as well as on any other costs and benefits that could result from adoption of the repropoed rules. We also request data to quantify the costs and value of the benefits identified. In particular, we solicit comment on:

- The number of current foreign private issuers that are expected to terminate their Exchange Act registration and reporting as a result of repropoed Rule 12h-6 and the accompanying repropoed rule amendments and the timing of such termination;
- The number of prospective foreign companies that are expected to join the Exchange Act reporting regime as a result of the repropoed rules and the timing of such initial registration and reporting; and
- How investors would be affected both directly and indirectly from the rule proposals, as discussed in this section.

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

When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act<sup>181</sup> requires us to consider the impact that any new rule would have on competition. Section 23(a)(2) also 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 us to consider or determine whether an action is necessary or appropriate in the public interest, Section 3(f) of the Exchange Act<sup>182</sup> requires the Commission to

<sup>174</sup> We recognize that, as a result of terminating their Exchange Act reporting obligations under repropoed Rule 12h-6, foreign firms may accrue other cost savings that are not specifically quantified in this section. One such example is an investment in an internal control system in order to comply with the Sarbanes-Oxley Act.

<sup>175</sup> As discussed in Part III of this release, for the first year of repropoed Rule 12h-6's effectiveness, estimated cost savings in connection with Forms 20-F, 40-F and 6-K could amount to, respectively, \$198,893,750, \$1,321,075, and \$4,771,100, for a total of \$204,985,925.

<sup>176</sup> Conversely, in countries that have similar regulatory regimes and levels of investor protection, the impact of U.S. deregulation may be mitigated.

<sup>177</sup> As discussed in Part III of this release, based on estimates and assumptions adopted for the purpose of the Paperwork Reduction Act, these costs could total \$3,619,975 during the first year of the repropoed form's use.

<sup>178</sup> As discussed in Part III of this release, based on estimates and assumptions adopted for the Paperwork Reduction Act, these resulting Rule 12g3-2(b) costs could amount to \$3,501,225.

<sup>179</sup> 15 U.S.C. 7201 *et seq.*

<sup>180</sup> A foreign company may terminate its ADR facility whether or not it is an Exchange Act registrant, and repropoed Rule 12h-6 does not require the termination of ADR facilities. In fact, by granting foreign private issuers the Rule 12g3-2(b) exemption immediately upon their termination of reporting with regard to a class of equity securities, Rule 12h-6 would enable foreign private issuers to retain their ADR facilities as unlisted facilities following their termination of reporting under Rule 12h-6. As repropoed, Rule 12h-6 would require an issuer that has terminated a sponsored ADR facility to wait a year before it may file a Form 15F in reliance on the trading volume provision of repropoed Rule 12h-6.

<sup>181</sup> 15 U.S.C. 78w(a)(2).

<sup>182</sup> 15 U.S.C. 78c(f).



consider whether the action will promote efficiency, competition and capital formation.

In the Original Proposing Release, we considered proposed Rule 12h-6 and the accompanying proposed rule amendments in light of the standards set forth in the above statutory sections. We solicited comment on whether, if adopted, proposed Rule 12h-6 and the other proposed rule amendments would result in any anti-competitive effects or promote efficiency, competition and capital formation. We further encouraged commenters to provide empirical data or other facts to support their views on any anti-competitive effects or any burdens on efficiency, competition or capital formation that might result from adoption of proposed Rule 12h-6 and the other proposed rule amendments.

Although most commenters did not submit any empirical data to support their views, many commenters maintained that proposed Rule 12h-6 would not achieve its intended purpose—to facilitate the exit from the Exchange Act reporting system of a foreign private issuer in which there is relatively little U.S. market interest and thereby remove a disincentive for other foreign companies to join that system. According to these commenters, because a significant number of foreign reporting companies would not benefit from the proposed new rules, other foreign companies would avoid registering their securities with the Commission out of concern that once an issuer became an Exchange Act reporting company, it would remain one indefinitely. Consequently, according to these commenters, contrary to the Commission's intention, the rule proposals would not promote competition and capital formation by foreign private issuers in the U.S. securities markets.

In response to these concerns, we have revised the rule proposals in several respects, including proposing a provision that would enable a foreign registrant to terminate its Exchange Act reporting obligations based solely on trading volume data, which should be more easily obtainable than information regarding the number of a foreign registrant's U.S. holders or the percentage of shares held by such holders. We believe the repropoed rule amendments will provide a foreign reporting company with a more efficient option of exiting the Exchange Act reporting system when U.S. investor interest has become relatively scarce. In so doing, repropoed Rule 12h-6 and the other repropoed rule amendments should encourage foreign private issuers

to register their equity and debt securities with the Commission by reassuring foreign private issuers that, should interest in the U.S. market for their securities decline sufficiently, they may exit the Exchange Act reporting system with little difficulty.

By providing increased flexibility for foreign private issuers regarding our Exchange Act reporting system, the repropoed rule amendments should encourage foreign companies to participate in U.S. capital markets as Exchange Act reporting companies to the benefit of investors. In so doing, the repropoed rule amendments should foster increased competition between domestic and foreign firms for investors in U.S. capital markets.

Moreover, by requiring a foreign private issuer that has terminated its Exchange Act reporting under repropoed Rule 12h-6 to publish its home country documents required under Exchange Act Rule 12g3-2(b) in English on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market, the repropoed rules would help ensure that U.S. investors continue to have ready access to material information in English about the foreign private issuer.<sup>183</sup> Thus, repropoed Rule 12h-6 and the accompanying rule amendments should foster increased efficiency in the trading of the issuer's securities for U.S. investors following the issuer's termination of Exchange Act reporting.

#### *Comment Solicited*

We solicit comment on whether the repropoed rules would impose a burden on competition or whether they would promote efficiency, competition and capital formation. 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 repropoed Rule 12h-6 and repropoed Form 15F under the Exchange Act, the repropoed amendments to Rules 12g3-2, 12g-4 and 12h-3 under the Exchange Act, and the repropoed amendments to Rule 30-

1 of its Delegation of Authority rules and Rule 101 of Regulation S-T, 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.

Repropoed Rule 12h-6, repropoed Form 15F and the accompanying repropoed rule amendments would permit the termination of Exchange Act reporting by a foreign private issuer regarding a class of equity securities under either Exchange Act section 12(g) or section 15(d) for which U.S. markets show relatively little interest. The repropoed rules would further permit a foreign private issuer that seeks termination of reporting regarding a class of equity or debt securities to also terminate its section 15(d) reporting obligations regarding a class of debt securities as long as it meets conditions similar to those currently required for suspending reporting obligations under section 15(d). The repropoed rule amendments would also automatically extend the Exchange Act Rule 12g3-2(b) exemption to a foreign private issuer that has terminated its Exchange Act reporting obligations with regard to a class of equity securities pursuant to repropoed Rule 12h-6 on the condition that it publish material information required by its home country in English on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. The repropoed rule amendments would similarly extend an electronic publishing option to a foreign private issuer that has obtained the Rule 12g3-2(b) exemption upon application and not under Rule 12h-6.

Because repropoed Rule 12h-6 and the accompanying repropoed rule amendments would only apply to foreign private issuers, they would directly affect only foreign companies and not domestic companies. Similarly, repropoed Form 15F would only affect foreign companies since only foreign private issuers would be 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 repropoed rule and form amendments will fall outside the scope of the Act. For this reason, repropoed Exchange Act Rule 12h-6, repropoed Form 15F, and the accompanying repropoed rule amendments should not have a significant economic impact on a substantial number of small entities.

<sup>183</sup> Similarly, by expanding the scope of proposed Rule 12h-6 to permit prior Form 15 filers to terminate their Exchange Act reporting obligations under the repropoed, new exit rule and claim the Rule 12g3-2(b) exemption immediately upon such termination, the repropoed rules would help promote the availability of material home country information in English about those issuers for U.S. investors.

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 and Text of Proposed Rule Amendments

We are repropounding the amendments to Rule 30-1 of Part 200, Rule 101 of Regulation S-T, and Exchange Act Rules 12g3-2, 12g-4 and 12h-3, new Exchange Act Rule 12h-6 and new Exchange Act Form 15F under the authority in sections 6, 7, 10 and 19 of the Securities Act<sup>184</sup> and sections 3(b), 12, 13, 23 and 36 of the Exchange Act.<sup>185</sup>

### List of Subjects

#### 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies).

#### 17 CFR Parts 232, 240 and 249

Reporting and recordkeeping requirements, Securities.

### Text of Proposed Rule Amendments

For the reasons set out in the preamble, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

## PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The general authority citation for part 200 is revised to read as follows:

**Authority:** 15 U.S.C. 77s, 77o, 77sss, 78d, 78d-1, 78d-2, 78w, 78ll(d), 78mm, 80a-37, 80b-11, and 7202, unless otherwise noted.

\* \* \* \* \*

2. Amend § 200.30-1 by adding paragraph (e)(17) to read as follows:

### § 200.30-1 Delegation of authority to Director of Division of Corporation Finance.

\* \* \* \* \*

(e) \* \* \*

(17) At the request of a foreign private issuer, pursuant to Rule 12h-6 (§ 240.12h-6 of this chapter), to accelerate the termination of the registration of a class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) or the duty to file reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78o(d)).

\* \* \* \* \*

## PART 232—REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

3. The general authority citation for part 232 is revised to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 *et seq.*; and 18 U.S.C. 1350.

\* \* \* \* \*

4. Amend § 232.101 by:

a. Removing the word “and” at the end of paragraph (a)(1)(x);  
b. Removing the period and adding “; and” at the end of paragraph (a)(1)(xi); and  
c. Adding paragraph (a)(1)(xii).

The addition reads as follows:

### § 232.101 Mandated electronic submissions and exceptions.

(a) \* \* \*

(1) \* \* \*

(xii) Forms 15 and 15F (§ 249.323 and § 249.324 of this chapter).

\* \* \* \* \*

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

5. The general authority citation for part 240 is revised to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

6. Amend § 240.12g3-2 by revising paragraphs (d)(1) and (d)(2) and adding paragraphs (e) and (f) to read as follows:

### § 240.12g3-2 Exemptions for American depositary receipts and certain foreign securities.

\* \* \* \* \*

(d) \* \* \*

(1) Securities of a foreign private issuer that has or has had during the prior eighteen months any securities registered under section 12 of the Act or a reporting obligation (suspended or active) under section 15(d) of the Act (other than arising solely by virtue of the use of Form F-7, F-8, F-9, F-10 or F-80), except as provided by paragraph (e) of this section;

(2) Securities of a foreign private issuer issued in a transaction (other than a transaction registered on Form F-8, F-9, F-10 or F-80) to acquire by merger, consolidation, exchange of securities or acquisition of assets, another issuer that had securities registered under section 12 of the Act or a reporting obligation

(suspended or active) under section 15(d) of the Act, except as provided by paragraph (e) of this section; and

\* \* \* \* \*

(e)(1) A foreign private issuer that has filed a Form 15F (§ 249.324 of this chapter) pursuant to § 240.12h-6 shall receive the exemption provided by paragraph (b) of this section for a class of equity securities immediately upon the effectiveness of the termination of registration of that class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) or the termination of the duty to file reports regarding that class of securities under section 15(d) of the Act (15 U.S.C. 78o(d)), or both.

(2) Notwithstanding any provision of § 240.12g3-2(b), in order to satisfy the conditions of the § 240.12g3-2(b) exemption received under this paragraph, the issuer shall publish in English the information required under paragraph (b)(1)(iii) of this section on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, rather than furnish that information to the Commission.

(3) The § 240.12g3-2(b) exemption received under this paragraph will remain in effect for as long as the foreign private issuer satisfies the electronic publication condition of paragraph (e)(2) of this section or until the issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

(4) Notwithstanding the time period specified in § 240.12g3-2(d)(1), a foreign private issuer that filed a Form 15F solely with respect to a class of debt securities under section 15(d) of the Act (15 U.S.C. 78o(d)) may apply for the exemption provided by paragraph (b) of this section for a class of equity securities at any time following the effectiveness of its termination of reporting regarding the class of debt securities.

**Note 1 to Paragraph (e):** 1. In order to maintain the § 240.12g3-2(b) exemption obtained under this paragraph, at a minimum, a foreign private issuer shall electronically publish English translations of the following documents required to be furnished under paragraph (b)(1)(iii) of this section if in a foreign language:

a. Its annual report, including or accompanied by annual financial statements;  
b. Interim reports that include financial statements;

c. Press releases; and

d. All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

<sup>184</sup> 15 U.S.C. 77f, 77g, 77j, and 77s.

<sup>185</sup> 15 U.S.C. 78c, 78l, 78m, 78w, and 78mm.

**Note 2 to Paragraph (e):** As used in paragraph (e)(2) of this section, *primary trading market* has the same meaning as under § 240.12h-6(e).

**Note 3 to Paragraph (e):** A foreign private issuer that filed a Form 15F regarding a class of equity securities shall disclose in the Form 15F the address of its Internet Web site or that of the electronic information delivery system in its primary trading market on which it will publish the information required under paragraph (b)(1)(iii) of this section. An issuer need not update the Form 15F to reflect a change in that address.

**Note 4 to Paragraph (e):** A foreign private issuer that filed a Form 15F solely with respect to a class of debt securities must provide the Commission with the address of its Internet Web site or that of the electronic information delivery system in its primary trading market when it applies for the exemption under § 240.12g3-2(b) regarding a class of equity securities.

(f)(1) A foreign private issuer that, upon application to the Commission and not after filing a Form 15F, has obtained or will obtain the exemption under § 240.12g3-2(b), may publish the information required under paragraph (b)(1)(iii) of this section on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, rather than furnish that information to the Commission, as long as it complies with the English translation requirements provided in paragraph (e) of this section.

(2) Before a foreign private issuer may publish information electronically pursuant to this paragraph, it must provide the Commission with the address of its Internet Web site or that of the electronic information delivery system in its primary trading market in its application for the exemption under § 240.12g3-2(b) or in an amendment to that application.

7. Amend § 240.12g-4 by:

- a. Removing the authority citations following the section; and
- b. Revising paragraph (a) to read as follows:

**§ 240.12g-4 Certifications of termination of registration under section 12(g).**

(a) Termination of registration of a class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) shall take effect 90 days, or such shorter period as the Commission may determine, after the issuer certifies to the Commission on Form 15 (17 CFR 249.323) that the class of securities is held of record by:

- (1) Less than 300 persons; or
- (2) Less than 500 persons, where the total assets of the issuer have not exceeded \$10 million on the last day of each of the issuer's most recent three fiscal years.

\* \* \* \* \*

8. Amend § 240.12h-3 by:

- a. Removing the authority citations following the section;
- b. Adding the word "and" at the end of paragraph (b)(1)(ii);

c. Removing paragraph (b)(2), including the undesignated paragraph;

d. Redesignating paragraph (b)(3) as (b)(2);

e. Revising the cite "paragraphs (b)(1)(ii) and (2)(ii)" to read "paragraph (b)(1)(ii)" in paragraph (c); and

f. Revising the phrase "criteria (i) and (ii) in either paragraph (b)(1) or (2)" to read "either criteria (i) or (ii) of paragraph (b)(1)" in paragraph (d).

9. Add § 240.12h-6 to read as follows:

**§ 240.12h-6 Certification by a foreign private issuer regarding the termination of registration of a class of securities under section 12(g) or the duty to file reports under section 13(a) or section 15(d).**

(a) A foreign private issuer may terminate the registration of a class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) or terminate the obligation under section 15(d) of the Act (15 U.S.C. 78o(d)) to file or furnish reports required by section 13(a) of the Act (15 U.S.C. 78m(a)), or both, with respect to a class of equity securities, after certifying to the Commission on Form 15F (17 CFR 249.324) that:

(1) The foreign private issuer has had reporting obligations under section 13(a) or section 15(d) of the Act for at least the 12 months preceding the filing of the Form 15F, has filed or furnished all reports required for this period, and has filed at least one annual report pursuant to section 13(a) of the Act;

(2) The foreign private issuer's securities have not been sold in the United States in a registered offering under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) during the 12 months preceding the filing of the Form 15F, other than securities issued:

- (i) To the issuer's employees;
- (ii) By selling security holders in non-underwritten offerings;

(iii) Upon the exercise of outstanding rights granted by the issuer if the rights are granted pro rata to all existing security holders of the class of the issuer's securities to which the rights attach;

(iv) Pursuant to a dividend or interest reinvestment plan; or

(v) Upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer;

**Note to Paragraph (a)(2):** The exceptions in paragraphs (a)(2)(iii)-(v) do not apply to securities issued pursuant to a standby underwritten offering or other similar arrangement in the United States;

(3) The foreign private issuer has maintained a listing of the subject class of securities for at least the 12 months preceding the filing of the Form 15F on

an exchange in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities; and

(4)(i) The average daily trading volume of the subject class of securities in the United States during a recent 12-month period has been no greater than 5 percent of the average daily trading volume of that class of securities in the issuer's primary trading market during the same period; or

(ii) On a date within 120 days before the filing date of the Form 15F, a foreign private issuer's subject class of equity securities is either held of record by:

- (A) Less than 300 persons on a worldwide basis; or
- (B) Less than 300 persons resident in the United States.

**Note 1 to Paragraph (a)(4):** If an issuer has delisted a class of equity securities from a national securities exchange or inter-dealer quotation system in the United States, and at the time of delisting, the average daily trading volume of that class of securities in the United States exceeded 5 percent of the average daily trading volume of that class of securities in the issuer's primary trading market threshold for the preceding 12 months, the issuer must wait at least 12 months before it may file a Form 15F to terminate its section 13(a) or 15(d) reporting obligations in reliance on paragraph (a)(4)(i).

**Note 2 to Paragraph (a)(4):** An issuer that has terminated a sponsored American Depositary Receipts facility must wait 12 months before it may file a Form 15F to terminate its section 13(a) or 15(d) reporting obligations in reliance on paragraph (a)(4)(i).

(b) A foreign private issuer may terminate its duty to file or furnish reports pursuant to section 13(a) or section 15(d) of the Act with respect to a class of debt securities after certifying to the Commission on Form 15F that:

(1) The foreign private issuer has filed or furnished all reports required by section 13(a) or section 15(d) of the Act, including at least one annual report pursuant to section 13(a) of the Act; and

(2) On a date within 120 days before the filing date of the Form 15F, the class of debt securities is either held of record by:

- (i) Less than 300 persons on a worldwide basis; or
- (ii) Less than 300 persons resident in the United States.

(c)(1) Following a merger, consolidation, exchange of securities, acquisition of assets or otherwise, a foreign private issuer that has succeeded to the reporting obligations under section 13(a) of the Act of another issuer pursuant to § 240.12g-3, or to the reporting obligations of another issuer

under section 15(d) of the Act pursuant to § 240.15d-5, may file a Form 15F to terminate those reporting obligations if:

(i) Regarding a class of equity securities, the successor issuer meets the conditions under paragraphs (a)(1), (a)(3) and (a)(4) of this section; or

(ii) Regarding a class of debt securities, the successor issuer meets the conditions under paragraph (b) of this section.

(2) When determining whether it meets the prior reporting requirement under paragraph (a)(1) or paragraph (b)(1) of this section, a successor issuer may take into account the reporting history of the issuer whose reporting obligations it has assumed pursuant to § 240.12g-3 or § 240.15d-5.

(d) *Counting method.* When determining under this section the number of United States residents holding a foreign private issuer's equity or debt securities:

(1)(i) Use the method for calculating record ownership § 240.12g3-2(a), except that you may limit your inquiry regarding the amount of securities represented by accounts of customers resident in the United States to brokers, dealers, banks and other nominees located in:

(A) The United States;

(B) The foreign private issuer's jurisdiction of incorporation, legal organization or establishment; and

(C) The foreign private issuer's primary trading market, if different from the issuer's jurisdiction of incorporation, legal organization or establishment.

(ii) If you aggregate the trading volume of the issuer's securities in two foreign jurisdictions for the purpose of complying with paragraph (a)(3) of this section, you must include both of those foreign jurisdictions when conducting your inquiry under paragraph (d)(1)(i) of this section.

(2) If, after reasonable inquiry, you are unable without unreasonable effort to obtain information about the amount of securities represented by accounts of customers resident in the United States, for purposes of this section, you may assume that the customers are the residents of the jurisdiction in which the nominee has its principal place of business.

(3) You must count securities as owned by United States holders when publicly filed reports of beneficial ownership or information that is otherwise provided to you indicates that the securities are held by United States residents.

(4) When calculating under this section the number of your United States resident security holders, you

may rely in good faith on the assistance of an independent information services provider that in the regular course of its business assists issuers in determining the number of, and collecting other information concerning, their security holders.

(e) *Definitions.* For the purpose of this section:

(1) *Debt security* means any security other than an equity security as defined under § 240.3a11-1, including non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer.

(2) *Employee* has the same meaning as the definition of employee provided in Form S-8 (§ 239.16b).

(3) *Equity security* has the same meaning as under § 240.3a11-1.

(4) *Foreign private issuer* has the same meaning as under § 240.3b-4.

(5) *Primary trading market* means that:

(i) At least 55 percent of the trading in a foreign private issuer's class of securities that is the subject of Form 15F took place in, on or through the facilities of a securities market in a single foreign jurisdiction or in no more than two foreign jurisdictions during a recent 12-month period; and

(ii) If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of this section, the trading market for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the United States trading market for the same class of the issuer's securities.

(6) *Recent 12-month period* means a 12-calendar-month period that ended no more than 60 days before the filing date of the Form 15F.

(f)(1) Suspension of a foreign private issuer's duty to file reports under section 13(a) or section 15(d) of the Act shall occur immediately upon filing the Form 15F with the Commission if filing pursuant to paragraph (a), (b) or (c) of this section. If there are no objections from the Commission, 90 days, or such shorter period as the Commission may determine, after the issuer has filed its Form 15F, the effectiveness of any of the following shall occur:

(i) The termination of registration of a class of securities under section 12(g); and

(ii) The termination of a foreign private issuer's duty to file reports under section 13(a) or section 15(d) of the Act.

(2) If the Form 15F is subsequently withdrawn or denied, the issuer shall, within 60 days after the date of the withdrawal or denial, file with or submit to the Commission all reports that would have been required had the issuer not filed the Form 15F.

(g) As a condition to termination of reporting under paragraph (a), (b) or (c) of this section, a foreign private issuer must, either before or on the date that it files its Form 15F, publish a notice in the United States that discloses its intent to terminate its reporting obligations under section 13(a) or section 15(d) of the Act or both. The issuer must publish the notice through a means reasonably designed to provide broad dissemination of the information to the public in the United States. The issuer must also submit a copy of the notice to the Commission, either under cover of a Form 6-K (17 CFR 249.306) before or at the time of filing of the Form 15F, or as an exhibit to the Form 15F.

(h)(1) A foreign private issuer that, before the effective date of this section, terminated the registration of a class of securities under section 12(g) of the Act or suspended its reporting obligations regarding a class of equity or debt securities under section 15(d) of the Act may file a Form 15F in order to:

(i) Terminate under this section the registration of a class of equity securities that was the subject of a Form 15 (§ 249.323 of this chapter) filed by the issuer pursuant to § 240.12g-4; or

(ii) Terminate its reporting obligations under section 15(d) of the Act, which had been suspended by the terms of that section or by the issuer's filing of a Form 15 pursuant to § 240.12h-3, regarding a class of equity or debt securities.

(2) In order to be eligible to file a Form 15F under this paragraph:

(i) An issuer must currently not be required to register a class of securities under section 12(g) of the Act or be required to file reports under section 15(d) of the Act; and

(ii) If a foreign private issuer terminated the registration of a class of securities pursuant to § 240.12g-4 or suspended its reporting obligations pursuant to § 240.12h-3 or section 15(d) of the Act regarding a class of equity securities, for at least the 12 months before the filing of its Form 15F, the issuer must have maintained a listing of the subject class of equity securities on an exchange in a foreign jurisdiction that, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's class of equity securities.

(3)(i) If the Commission does not object, 90 days after the filing of a Form 15F under this paragraph, or such shorter period as the Commission may determine, the effectiveness of any of the following shall occur:

(A) The termination under this section of the registration of a class of equity securities, which was the subject of a Form 15 filed pursuant to § 240.12g-4, and the duty to file reports required by section 13(a) of the Act regarding that class of securities; or

(B) The termination of a foreign private issuer's reporting obligations under section 15(d) of the Act, which had previously been suspended by the terms of that section or by the issuer's filing of a Form 15 pursuant to § 240.12h-3, regarding a class of equity or debt securities.

(ii) If the Form 15F is subsequently withdrawn or denied, the foreign private issuer shall, within 60 days after the date of the withdrawal or denial, file with or submit to the Commission all reports that would have been required had the issuer not filed the Form 15F.

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

11. Add § 249.324 to read as follows:

**§ 249.324 Form 15F, certification by a foreign private issuer regarding the termination of registration of a class of securities under section 12(g) or the duty to file reports under section 13(a) or section 15(d).**

This form shall be filed by a foreign private issuer to disclose and certify the information on the basis of which it meets the requirements specified in Rule 12h-6 (§ 240.12h-6 of this chapter) to terminate the registration of a class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) or the duty to file reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78(o)(d)). In each instance, unless the Commission objects, termination occurs 90 days, or such shorter time as the Commission may direct, after the filing of Form 15F.

12. Add Form 15F (referenced in § 249.324) to read as follows:

(Note: The text of Form 15F will not appear in the Code of Federal Regulations.)

### OMB APPROVAL

OMB Number: 3235-0621.

Expires:

Estimated average burden hours per response: 30.0.

## United States Securities and Exchange Commission, Washington, DC 20549

### Form 15F—Certification of a Foreign Private Issuer's Termination of Registration of a Class of Securities Under Section 12(g) of the Securities Exchange Act of 1934 or Its Termination of the Duty to File Reports Under Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934

Commission File Number \_\_\_\_\_

(Exact name of registrant as specified in its charter)

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

(Title of each class of securities covered by this Form)

Place an X in the appropriate box(es) to indicate the provision(s) relied upon to terminate the duty to file reports under the Securities Exchange Act of 1934:

Rule 12h-6(a)  Rule 12h-6(c)   
Rule 12h-6(b)  Rule 12h-6(h)

#### General Instructions

##### A. Who May Use Form 15F and When

1. A foreign private issuer may file Form 15F, pursuant to Rule 12h-6(a) (17 CFR 240.12h-6(a)) under the Securities Exchange Act of 1934 ("Exchange Act"), when seeking to terminate:

- The registration of a class of securities under section 12(g) of the Exchange Act and the corresponding duty to file or furnish reports required by section 13(a) of the Exchange Act; or
- The obligation under section 15(d) of the Exchange Act to file or furnish reports required by section 13(a) of the Act regarding a class of equity securities; or
- Both.

2. A foreign private issuer may file Form 15F, pursuant to Rule 12h-6(b) (17 CFR 240.12h-6(b)), when seeking to terminate its reporting obligations under section 13(a) or section 15(d) of the Exchange Act regarding a class of debt securities.

3. A foreign private issuer may file Form 15F, pursuant to Rule 12h-6(c) (17 CFR 240.12h-6(c)), when seeking to terminate reporting obligations under section 13(a) or section 15(d) of the Exchange Act to which it has succeeded pursuant to Rule 12g-3 (17 CFR 240.12g-3) or Rule 15d-5 (17 CFR 240.15d-5).

4. A foreign private issuer may file Form 15F, pursuant to Rule 12h-6(h) (17 CFR 240.12h-6(h)), if, before the effective date of Rule 12h-6, it terminated the registration of a class of securities under section 12(g) of the Act, or suspended its reporting obligations regarding a class of equity or debt securities under section 15(d) of the Act, in order to:

- Terminate under Rule 12h-6 the registration of a class of equity securities that

was the subject of a Form 15 (§ 249.323 of this chapter) filed by the issuer pursuant to § 240.12g-4; or

- Terminate its reporting obligations under section 15(d) of the Act, which had been suspended by the terms of that section or by the issuer's filing of a Form 15 pursuant to § 240.12h-3, regarding a class of equity or debt securities.

##### B. Certification Effected by Filing Form 15F

By completing and signing this Form, the issuer certifies that:

- It meets all of the conditions for termination of Exchange Act reporting specified in Rule 12h-6 (17 CFR 240.12h-6); and
- There are no classes of securities other than those that are the subject of this Form 15F regarding which the issuer has Exchange Act reporting obligations.

##### C. Effective Date

For an issuer filing Form 15F under Rule 12h-6(a), (b) or (c), the duty to file any reports required under section 13(a) of the Exchange Act will be suspended immediately upon filing the Form 15F. If there are no objections from the Commission, 90 days, or within a shorter period as the Commission may determine, after the issuer has filed its Form 15F, there shall take effect:

- The termination of registration of a class of securities under section 12(g) of the Act;
- The termination of the issuer's duty to file or submit reports under section 13(a) or section 15(d) of the Act; or
- Both.

For an issuer that has already terminated its registration of a class of equity securities pursuant to Rule 12g-4 or suspended its reporting obligations under section 15(d) or Rule 12h-3, the effectiveness of its termination of section 12(g) registration under Rule 12h-6 and the corresponding duty to file reports required by section 13(a) of the Act, or the termination of its previously suspended reporting obligations under section 15(d) of the Act, shall also occur 90 days after the issuer has filed its Form 15F under Rule 12h-6(h), or within a shorter period as the Commission may determine, if there are no objections from the Commission.

Regardless of the particular Rule 12h-6 provision under which it is filing the Form 15F, an issuer that seeks an effective date sooner than 90 days after the filing of its Form 15F must submit its request to the Commission in writing.

##### D. Other Filing Requirements

You must file Form 15F and related materials, including correspondence, in electronic format via our Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232). The Form 15F and related materials must be in the English language as required by Regulation S-T Rule 306 (17 CFR 232.306). You must provide the signature required for Form 15F in accordance with Regulation S-T Rule 302 (17 CFR 232.302). If you have technical questions about EDGAR, call the EDGAR Filer Support Office at (202) 551-8900. If you have questions about the EDGAR

rules, call the Office of EDGAR and Information Analysis at (202) 551-3610.

If the Form 15F is subsequently withdrawn or denied, you must, within 60 days after the date of the withdrawal or denial, file with or submit to the Commission all reports that would have been required had you not filed the Form 15F. See Rule 12h-6(f)(2) (17 CFR 240.12h-6(f)(2)) and Rule 12h-6(h)(3)(ii) (17 CFR 240.12h-6(h)(3)(ii)).

#### *E. Rule 12g3-2(b) Exemption*

Regardless of the particular Rule 12h-6 provision under which it is proceeding, a foreign private issuer that has filed a Form 15F regarding a class of equity securities shall receive the exemption under Rule 12g3-2(b) (17 CFR 240.12g3-2(b)) for the subject class of equity securities immediately upon the effective date of its termination of registration and reporting under Rule 12h-6. Refer to Rule 12g3-2(e) or (f) (17 CFR 240.12g3-2(e) or (f)) for the conditions that a foreign private issuer must meet in order to maintain the Rule 12g3-2(b) exemption following its termination of Exchange Act registration and reporting.

#### **Part I**

The purpose of this part is to assist the Commission in assessing whether you meet the requirements for terminating your Exchange Act reporting under Rule 12h-6. If, pursuant to Rule 12h-6, there is an item that does not apply to you, mark that item as inapplicable.

#### *Item 1. Exchange Act Reporting History*

A. State when you first incurred the duty to file reports under section 13(a) or section 15(d) of the Exchange Act.

B. State whether you have filed or submitted all reports required under Exchange Act section 13(a) or section 15(d) and corresponding Commission rules for the 12 months preceding the filing of this form, and whether you have filed at least one annual report under section 13(a).

#### *Instruction to Item 1*

If you are a successor issuer that has filed this Form 15F pursuant to Rule 12h-6(c), and are relying on the reporting history of the issuer to which you have succeeded under Rule 12g-3 (17 CFR 12g-3) or Rule 15d-5 (17 CFR 240.15d-5), identify that issuer and provide the information required by this section for that issuer.

#### *Item 2. Recent United States Market Activity*

State when your securities were last sold in the United States in a registered offering under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) ("Securities Act").

#### *Instructions to Item 2*

1. Do not include registered offerings involving the issuance of securities:

- a. To your employees, as that term is defined in Form S-8 (17 CFR 239.16b);
- b. By selling security holders in non-underwritten offerings;
- c. Upon the exercise of outstanding rights granted by the issuer if the rights are granted pro rata to all existing security holders of the class of the issuer's securities to which the rights attach;

d. Pursuant to a dividend or interest reinvestment plan; or

e. Upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer.

However, you must include registered offerings described in paragraphs (c) through (e) of this instruction if undertaken pursuant to a standby underwritten offering or other similar arrangement in the United States.

2. If you have registered equity securities on a shelf or other Securities Act registration statement under which securities remain unsold, disclose the last sale of securities under that registration statement. If no sale has occurred during the preceding 12 months, disclose whether you have filed a post-effective amendment to terminate the registration of unsold securities under that registration statement.

#### *Item 3. Primary Trading Market*

A. Identify the exchange outside the United States, and the foreign jurisdiction in which that exchange is located, on which you have maintained a listing of the class of securities that is the subject of this Form.

B. Provide the date of initial listing on that foreign exchange. In addition, disclose whether you have maintained a listing of the subject class of securities on that foreign exchange for at least the 12 months preceding the filing of this Form.

C. Disclose the percentage of trading in the subject class of securities that occurred in the jurisdiction of your foreign listing as of a recent 12-month period.

#### *Instruction to Item 3*

When responding to this item, refer to the definition of "primary trading market" in Rule 12h-6(e) (17 CFR 240.12h-6(e)). In accordance with that definition, if your primary trading market consists of two foreign jurisdictions, provide the information required by this section for each foreign jurisdiction. In addition, disclose whether the trading market for your securities in at least one of those two foreign jurisdictions is larger than the trading market for your securities in the United States as of the same recent 12-month period. Disclose the first and last days of that recent 12-month period.

#### *Item 4. Comparative Trading Volume Data*

If relying on Rule 12h-6(a)(4)(i) (17 CFR 240.12h-6(a)(4)(i)), provide the following information:

A. Identify the first and last days of the recent 12-month period used to meet the requirements of that rule provision.

B. For the same recent 12-month period, disclose the average daily trading volume of the class of securities that is the subject of this Form both in the United States and in your primary trading market.

C. For the recent 12-month period, disclose the average daily trading volume of the subject class of securities in the United States as a percentage of the average daily trading volume for that class of securities in your primary trading market.

D. Disclose whether you have delisted the subject class of securities from a national securities exchange or inter-dealer quotation system in the United States. If so, provide the

date of delisting, and, as of that date, disclose the average daily trading volume of the subject class of securities in the United States as a percentage of the average daily trading volume for that class of securities in your primary trading market for the preceding 12-month period.

E. Disclose whether you have terminated a sponsored American depository receipt (ADR) facility regarding the class of subject securities. If so, provide the date of the ADR facility termination.

#### *Instructions to Item 4*

1. "Recent 12-month period" means a 12-calendar-month period that ended no more than 60 days before the filing date of this form, as defined under Rule 12h-6(e). You may disclose the comparative trading volume data in response to this item in tabular format and attached as an exhibit to this Form.

2. An issuer is ineligible to rely on paragraph (a)(4)(i) of Rule 12h-6 if, as of the date of delisting, the average daily trading volume of the subject class of securities in the United States exceeded 5 percent of the average daily trading volume of that class of securities in the issuer's primary trading market, as measured over the preceding 12 months, and 12 months has not elapsed from the date of delisting.

3. An issuer is ineligible to rely on paragraph (a)(4)(i) of Rule 12h-6 if it has terminated a sponsored ADR facility and 12 months has not elapsed from the date of termination.

#### *Item 5. Alternative Record Holder Information*

If relying on Rule 12h-6(a)(4)(ii) (17 CFR 240.12h-6(a)(4)(ii)):

Disclose the number of record holders of the subject class of equity securities on a worldwide basis or who are United States residents at a date within 120 days before filing this Form. Disclose the date used for the purpose of Item 5.

#### *Item 6. Debt Securities*

If relying on Rule 12h-6(b) (17 CFR 240.12h-6(b)):

Disclose the number of record holders of your debt securities either on a worldwide basis or who are United States residents at a date within 120 days before the date of filing of this Form. Disclose the date used for the purpose of Item 6.

#### *Instructions to Items 5 and 6*

1. When determining the number of record holders of your equity or debt securities who are United States residents, refer to Rule 12h-6(d) (17 CFR 240.12h-6(d)) for the appropriate counting method.

2. If you have relied upon the assistance of an independent information services provider to determine the number of your United States equity or debt securities holders, identify this party in your response.

#### *Item 7. Notice Requirement*

If filing Form 15F pursuant to Rule 12h-6(a), (b) or (c):

A. Disclose the date of publication of the notice, required by Rule 12h-6(g) (17 CFR 240.12h-6(g)), disclosing your intent to terminate your duty to file reports under

section 13(a) or 15(d) of the Exchange Act or both.

B. Identify the means, such as publication in a particular newspaper, used to disseminate the notice in the United States.

Instruction to Item 7

If you have submitted a copy of the notice under cover of a Form 6-K (17 CFR 249.306), disclose the submission date of the Form 6-K. If not, attach a copy of the notice as an exhibit to this Form. See Rule 12h-6(g).

*Item 8. Prior Form 15 Filers*

If relying on Rule 12h-6(h):

A. Disclose whether, before the effective date of Rule 12h-6, you filed a Form 15 (17 CFR 249.323) to terminate the registration of a class of equity securities pursuant to Rule 12g-4 (17 CFR 240.12g-4) or to suspend your reporting obligations under section 15(d) of the Act regarding a class of equity or debt securities pursuant to Rule 12h-3 (17 CFR 240.12h-3). If so, disclose the date that you filed the Form 15. If you suspended your reporting obligations by the terms of section 15(d), disclose the effective date of that suspension as well as the date that you filed a Form 15 to notify the Commission of that suspension pursuant to Rule 15d-6 (17 CFR 240.15d-6).

B. Disclose whether, since the effectiveness of your termination of registration pursuant to Rule 12g-4, or of your suspension of reporting pursuant to Rule 12h-3 or section 15(d) of the Exchange Act, your reporting obligations under section 13(a) or section 15(d) of the Exchange Act have remained terminated or suspended.

C. If you terminated the registration of a class of equity securities pursuant to Rule 12g-4 or suspended your reporting obligations regarding a class of equity securities pursuant to Rule 12h-3 or section 15(d) of the Exchange Act, provide the disclosure required by Item 3 of this Form, "Primary Trading Market."

**Part II**

*Item 9. Rule 12g3-2(b) Exemption*

Disclose the address of your Internet Web site or of the electronic information delivery system in your primary trading market on which you will publish the information required under Rule 12g3-2(b)(1)(iii) (17 CFR 240.12g3-2(b)(1)(iii)).

Instruction to Item 9

Refer to Note 1 to Rule 12g3-2(e) for instructions regarding providing English translations of documents published pursuant to Rule 12g3-2(b)(1)(iii) (17 CFR 240.12g3-2(b)(1)(iii)).

**Part III**

*Item 10. Exhibits*

List the exhibits attached to this Form.

Instruction to Item 10

In addition to exhibits specifically mentioned on this Form, you may attach as an exhibit any document providing information that is material to your eligibility to terminate your reporting obligations under Exchange Act Rule 12h-6. You should refer to any relevant exhibit when responding to the items on this Form.

*Item 11. Undertakings*

Furnish the following undertaking:

The undersigned issuer hereby undertakes to withdraw this Form 15F if, at any time before the effectiveness of its termination of reporting under Rule 12h-6, it has actual knowledge of information that causes it reasonably to believe that, at the time of filing the Form 15F:

(1) The average daily trading volume of its subject class of securities in the United States during a recent 12-month period exceeded 5 percent of the average daily trading volume of that class of securities in the issuer's primary trading market during the same

period, if proceeding under Rule 12h-6(a)(4)(i);

(2) Its subject class of securities was held of record by 300 or more United States residents or 300 or more persons worldwide, if proceeding under Rule 12h-6(a)(4)(ii) or Rule 12h-6(b); or

(3) It otherwise no longer qualified for termination of its Exchange Act reporting obligations under Rule 12h-6.

Instruction to Item 11

After filing this Form, an issuer has no continuing obligation to make inquiries or perform other work concerning the information contained in this Form, including its assessment of trading volume or ownership of its securities in the United States.

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934, [name of registrant as specified in charter] has duly authorized the undersigned person to sign on its behalf this certification on Form 15F. In so doing, [name of registrant as specified in charter] certifies that, as represented on this Form, it has complied with all of the conditions set forth in Rule 12h-6 for terminating its registration under section 12(g) of the Exchange Act, or its duty to file reports under section 13(a) or section 15(d) of the Exchange Act, or both.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By the Commission.

Dated: December 22, 2006.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E6-22405 Filed 1-10-07; 8:45 am]

**BILLING CODE 8011-01-P**