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SEC Amends Form F-6, which has Implications for Foreign Private Issuers that do not have ADR Programs

When the SEC recently adopted amendments to Rule 12g3-2(b) promulgated under the U.S. Securities Exchange Act of 1934 (the “**Exchange Act**”), it also modified the provisions of Form F-6. The combination of the changes to Rule 12g3-2(b) and Form F-6 have one particular implication for foreign private issuers that do not currently have American Depositary Receipt (“**ADR**”) programs.

Rule 12g3-2(b) is the principal means by which foreign private issuers that are not listed in the United States avoid Exchange Act registration that would otherwise be triggered by having a broad U.S. shareholder base (*i.e.*, more than 300 U.S. resident shareholders). Rule 12g3-2(b) recently was amended to provide for automatic availability of the exemption for a foreign private issuer that has a listing outside the United States and no listing in the United States, to the extent the issuer posts required information on its web site.

Form F-6 is the registration statement form used to register ADRs. Form F-6 was amended to permit depositary banks establishing unsponsored ADR programs to rely in good faith on the web site postings for purposes of satisfying one of the few conditions to filing the Form F-6. As a result, of the recent amendments, it is now far easier for unsponsored ADR programs to be established – without the consent of the issuer of the securities that underlie the ADRs.

This memorandum summarizes the implications of the recent modification to Form F-6.

Background

Overview

An ADR is a negotiable certificate, issued in registered form, that evidences American Depositary Shares (“**ADS**”). ADSs, in turn, represent one or more, or a fraction of, an underlying security (typically ordinary shares). The ADRs are issued by a U.S. commercial bank (the “**depositary**”) after the securities underlying the ADRs have been deposited in a local custodian bank (the “**custodian**”). ADR programs permit U.S. investors to invest in foreign securities through an instrument denominated in U.S. dollars and with a three-day settlement; dividends are also paid in U.S. dollars. (For purposes of this memorandum we refer to ADRs and ADSs as “**ADRs**.”)

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If the securities underlying the ADRs are listed on a U.S. national securities exchange, the ADRs and the underlying securities must be registered under the Exchange Act, as a result of which the issuer becomes subject to the Exchange Act reporting and disclosure obligations and the Sarbanes-Oxley Act.

Types of ADR Programs

Sponsored versus unsponsored. An ADR program may be sponsored or unsponsored, depending upon the issuer's involvement in the program. In a sponsored program, the issuer of the deposited securities is a party to the deposit agreement along with the depositary and is able to exercise control regarding the terms and operations of the program. Sponsored ADRs are issued by a single depositary and cannot be duplicated by another depositary, thereby giving the issuer ultimate control over the program.

Conversely, an unsponsored ADR program is set up by a depositary without the participation (or consent) of the issuer. While the depositary typically requests a letter of non-objection from the issuer before establishing an unsponsored program, there is effectively no limit on the number of unsponsored ADR programs that can be established and no ability to stop the proliferation of unsponsored programs (unless the issuer has its own sponsored program or otherwise has conducted a public offering in the United States).

As reiterated in the ADR Concept Release (1991), the SEC Staff takes the position that SEC-registered unsponsored programs may not co-exist with an SEC-registered sponsored program for the same underlying securities because of resulting market disorder or confusion. Sponsored programs in theory take precedence over unsponsored programs. Once an issuer establishes a sponsored program, unsponsored programs for the same underlying securities may not be established. Similarly, where a sponsored program is created, depositaries of any then existing unsponsored programs would be required to effect a transfer of the underlying securities and ADR holders to the new sponsored program, and terminate the unsponsored program. There may be fees associated with the deposit of the securities in the new program, and an issuer establishing a sponsored program may face obstacles in establishing its sponsored program over the fees payable to collapse the unsponsored programs. These fees may be paid by the issuer or the depositary of the sponsored program.

Levels of sponsored programs. Among sponsored programs, there are three principal levels of programs. (A fourth level would be a program for securities that are offered and sold under Rule 144A.)

In a Level I program, the ADRs are traded in the U.S. over-the-counter market with prices collected and published in a centralized quotation service. A Level I program falls short of a formal listing but permits U.S. residents and others to trade in securities in dollars in the U.S. settlement system. The establishment of this level of program does not trigger reporting obligations or compliance with U.S. rules, including Sarbanes-Oxley Act requirements. Generally, a Level I ADR issuer needs to complete and file a Form F-6 with the SEC and qualify for a Rule 12g3-2(b) exemption.

Level II ADRs are listed on a U.S. stock exchange and are used by issuers that do not wish to raise capital at that time. Along with filing of the Form F-6, Level II issuers are also required to file a Form 20-F registration statement and comply with the SEC's other disclosure and reporting obligations, including submission of an annual report (on Form 20-F).

Level III ADR programs are designed for non-U.S. companies that wish to list and raise capital from U.S. investors at the same time. Because these programs involve a registered offer of securities in the United States, Level III issuers must file, in addition to the Form F-6, a Form F-1 and become subject to the same Exchange Act reporting obligations as Level II issuers.

Registration of ADRs

Whether an ADR program is sponsored or unsponsored, the ADRs are newly issued securities, distinct from their underlying securities, and, therefore, must be registered under the Securities Act before being publicly traded. Form F-6 is the registration statement used to register the ADRs and it must be filed with, and declared effective by, the SEC. (Note that only where the issuer of the underlying securities conducts a public offering in the United States or lists its underlying securities on an exchange in the United States, must it register the underlying securities (*i.e.*, the ordinary shares) – which it would do on a Form F-1 or F-3 in the case of a public offering (Level III ADR program), or on a Form, 20-F, in the case of a listing (Level II ADR program).)

Because the ADRs are distinct from the underlying securities, the disclosure in a Form F-6 registration statement is limited to certain information regarding the depositary arrangements and consists of little more than a “cover” for the deposit agreement. It includes no information about the issuer or the underlying securities.

To file a Form F-6, three conditions must be met: ADR holders must generally be entitled to withdraw the underlying securities at any time; the securities to be deposited against the issuance of ADRs must either be registered under the Securities Act or acquired in exempt transactions (*e.g.*, secondary market purchases); and the issuer of the underlying securities must be an Exchange Act reporting company or exempt from Exchange Act registration by reason of Rule 12g3-2(b).

SEC Revisions to Form F-6

Prior to the most recent revisions to Form F-6, a registrant filing the Form F-6 (*i.e.*, the depositary) was required to state that the issuer of the securities underlying the ADRs is either an Exchange Act reporting company or furnishes public reports and other documents to the SEC pursuant to Rule 12g3-2(b).

The amendments to Form F-6 (Item 2 of Part II) now only require the registrant to state that, if the issuer of the underlying securities is not an Exchange Act reporting company, such issuer publishes on its Internet web site (or through an electronic information delivery system generally available to the public in its primary trading market) information in English required to maintain the Rule 12g3-2(b) exemption. The registrant is also required to disclose the address of the issuer’s web site or the electronic information delivery system in its primary trading market.

In the case of an unsponsored ADR program, the depositary can now base its representation that the issuer publishes information in English required to maintain the exemption from registration under Exchange Act Rule 12g3-2(b), upon its reasonable, good faith belief after exercising reasonable diligence.

Implications of the Revisions

Provided they meet the conditions of the Rule, foreign private issuers can claim the Rule 12g3-2(b) exemption automatically, without affirmative action by the SEC, thereby making it far easier to establish sponsored ADR programs.

Note, however, that the combination of the amendments to Rule 12g3-2(b) and the revisions to Form F-6 now also make it easier for ADR depositaries to establish unsponsored ADR programs. Before the amendments, a foreign private issuer that did not wish to have its securities traded in the United States in the form of ADRs could, by not formally applying for, or meeting the ongoing requirements of, the Rule 12g3-2(b) exemption, effectively impede the ability of ADR depositaries to establish unsponsored ADR programs. By making the Rule 12g3-2(b) exemption available to all otherwise eligible foreign private issuers that post materials on their web sites (or publish them through an electronic information delivery system in their primary trading market), the SEC has made it easier for ADR depositaries to establish unsponsored ADR programs for an expanded universe of foreign private issuers based upon a depositary's reasonable, good faith belief, after exercising reasonable diligence, that those issuers comply with Rule 12g3-2(b). The SEC has explicitly declined to require, as a condition to the registration of ADRs on Form F-6, that the depositary obtain the consent of the issuer of the underlying securities.

Foreign private issuers may now find that one or more unsponsored ADR programs have been established for their underlying securities. Foreign private issuers may also be approached by depositaries to establish sponsored Level I programs to foreclose the establishment of unsponsored programs.

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