

participant markets in time to participate in the opening trade of a listed IPO security on the second day the security trades.

IV. Exchange Rules for Securities to Which Unlisted Trading Privileges are Extended (Rule 12f-5)

Section 12(f)(1)(D) of the Exchange Act, as amended, authorizes the Commission to prescribe, by rule or regulation, such additional procedures or requirements for extending UTP to any security as the Commission deems necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of the Exchange Act. Pursuant to this authority, the Commission proposed Rule 12f-5, which would prohibit an exchange from extending UTP to any security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP.

The Commission solicited comment on whether proposed Rule 12f-5 would help ensure that an exchange has the necessary rules in place to provide for fair and orderly markets in all securities to which the exchange extends UTP. The Commission received one response to this question.³⁸ This commenter supported the rule, and requested that the Commission, in this release, clarify that, prior to commencing UTP trading, an exchange should be required to have entered into appropriate information sharing agreements with foreign exchanges (or the Commission with foreign regulators), comparable to that required of the listing exchange for the particular product.³⁹

The Commission is adopting Rule 12f-5, as proposed, as a means to ensure that exchanges meet their obligation under the Exchange Act to have these rules and oversight mechanisms in place on their exchanges for the relevant securities before extending UTP to the securities. As discussed in the Proposing Release, the rule is intended to preserve a benefit of Commission review of UTP applications that was required by Section 12(f) prior to the

UTP Act. Previously, the Commission reviewed each UTP application to ensure that the applicant exchange had rules in place to cover the trading of the product class of the security for which the exchange applied. Now that the Commission will no longer review UTP applications, the Commission believes that the requirements set forth in Rule 12f-5 are appropriate because the rule confirms to exchanges their obligation to evaluate their extensions of UTP to determine that the exchanges are authorized to list the product class of securities before allowing their members to trade the securities. Finally, in regard to the comment that exchanges must enter into an appropriate information sharing agreement for all securities traded thereon, Rule 12f-5 will ensure that an exchange granting UTP in a security has secured previous Commission approval to trade the product class of security pursuant to Section 19(b) of the Exchange Act.⁴⁰ The Commission, in such approval process, will have determined the adequacy of information sharing arrangements for the particular exchange.

V. Amendments to Rules 12f-1 and 12f-3, and Rescission of Previous Rules 12f-2 and 12f-6

Several of the rules prescribed under former Section 12(f) concerned the application process for extensions of UTP. The Commission proposed to amend or rescind these rules to reflect statutory changes, and solicited comment on whether the proposed changes were appropriate. No comments were received on these proposals. The Commission is adopting the amendments to existing Rules 12f-1 and 12f-3, and is rescinding existing Rules 12f-2 and 12f-6, as proposed.

First, Rule 12f-1⁴¹ is amended to limit its operation to an exchange's application to reinstate UTP after a Commission suspension. The amended rule will require essentially the same format for applications to reinstate UTP as was required by the rule under former Section 12(f) for applications to extend UTP. The Commission believes the amendment is an appropriate means to carry out the intention of the new Section 12(f)(2) requirement for exchange UTP applications in cases where exchanges seek to reinstate UTP for a security that was previously suspended by the Commission.

Second, Rule 12f-2 is rescinded and Form 27, referred to in previous Rule 12f-2, is removed.⁴² This rule and form

dealt with instances where an exchange might have been required to cease extending UTP, and to reapply for UTP, in a security that was "changed" (as described in the rule) immaterially for those purposes. The rule and form provide an exemption from reapplication for UTP in these cases. The Commission is rescinding these items because the application procedures, from which the rule provided an exemption, no longer exist.

Third, the Commission is rescinding the last sentence of paragraph (b) of Rule 12f-3.⁴³ Rule 12f-3 allows the issuer of a security that is traded pursuant to UTP, or any broker or dealer who makes a market in the security, or any other person having a bona fide interest in the question of termination or suspension of UTP in the security, to apply to the Commission for the termination or suspension of UTP in the security. The Rule also identifies the categories of information that should be provided in the application, which include the applicant's statement that it has sent a copy of the application to the exchange from which the suspension or termination is sought. Thereafter, the Rule provides that the exchange may terminate or suspend UTP in the security in accordance with its rules. The Rule also required the exchange, upon suspension or termination, promptly to file Form 28 with the Commission.

This final requirement no longer is necessary because exchanges are no longer required to apply to the Commission to extend UTP to a security. The Commission, therefore, is rescinding that last requirement from the Rule concerning Form 28 and is removing Form 28 to conform further with efforts to streamline the regulatory process concerning UTP.

Finally, the Commission is rescinding Rule 12f-6, which exempted a merged exchange from the UTP application process in certain circumstances.⁴⁴ The exemption no longer is necessary because the waiting period that restrained exchanges from extending UTP to most securities no longer exists.

VI. Effects on Competition and Regulatory Flexibility Act Considerations

Section 23(a)(2) of the Exchange Act⁴⁵ requires that the Commission, when adopting rules under the Exchange Act, consider the anticompetitive effects of those rules, if any, and balance any anticompetitive impact against the

³⁸ See Amex letter, *supra* note 4.

³⁹ The commenter also suggested that the Commission make clear that OTC transactions in exchange-listed securities must be subject to the same regulatory requirements as those imposed by the listing exchange and by other exchanges trading the security pursuant to UTP, which could be accomplished by an amendment to the rules of the National Association of Securities Dealers. The Commission believes that this recommendation is outside the scope of the present rulemaking, which deals specifically with exchange extensions of UTP.

⁴⁰ 15 U.S.C. 78s(b).

⁴¹ 17 CFR 240.12f-1 (1991).

⁴² 17 CFR 240.12f-2 (1991).

⁴³ 17 CFR 240.12f-3 (1991).

⁴⁴ 17 CFR 240.12f-6 (1991).

⁴⁵ 15 U.S.C. 78w(a)(2).