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Current Practices and Issues for Foreign Broker-Dealers Under Rule 15a-6 in 2017

Tuesday, March 28, 2017

1:00 PM – 2:00 PM EDT

Teleconference

Presenters:

Hillel T. Cohn, Senior Of Counsel, Morrison & Foerster LLP
Francois Cooke, Managing Director, ACA Compliance Group

1. **Presentation**
2. **SEC Administrative Proceedings against Bank Leumi**
3. **SEC Administrative Proceedings against Credit Suisse Group AG**
4. **SEC Letter to Roland Berger Strategy Consultants**
5. **SEC Letter to Ernst & Young Corporate Finance (Canada) Inc.**
6. **SEC – Frequently Asked Questions regarding Rule 15a-6 and Foreign Broker-Dealers**
7. **Morrison & Foerster – Frequently Asked Questions about Rule 15a-6**

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Rule 15a-6: Current Issues

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Francois Cooke, ACA Compliance Group

March 28, 2017

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Basics of Rule 15a-6

- Rule 15a-6 permits non-U.S. broker-dealers to effect transactions with any person if the transaction was not solicited by the broker-dealer
- Research reports may be provided to Major Institutional Investors (certain financial institutions and other entities with at least $100 million of financial assets) subject to limitations on follow up
- Transactions with U.S. Institutional Investors may be solicited, subject to limitations on conduct in U.S. (limitations on effecting trades; chaperoning requirements)
- Rule 15a-6 places no limits on transactions with U.S. brokers, banks, bona fide foreign branches of U.S. companies, U.S. persons resident outside the U.S. and non-U.S nationals temporarily in the U.S.

Unsolicited Accounts

- SEC broadly interprets "solicitation"
  - Includes any affirmative effort to establish a business relationship or induce a trade
  - SEC Release No. 25801
  - Website implications
- Permitted communications with unsolicited customers
  - Confirmations, account statements, issuer announcements
  - Important not to include any advertising inserts
  - See FAQs issued by SEC Staff in March 2013 and updated April 2014
- Practicality of conducting on-going business with unsolicited account
  - SEC skepticism in FAQs
  - But should be doable with appropriate precautions

Rule 15a-6: Research Reports

- Rule 15a-6 permits provision of research reports to Major Institutional Investors, subject to certain limitations on follow up
  - May be disseminated directly by the non-U.S. broker to the MIIs or disseminated through a U.S. affiliate

- Review requirements for U.S. broker-dealer who disseminates
  - Regulation AC applies
  - Exception if U.S. broker is not affiliated with the non-U.S. broker and the report only address non-U.S. securities
  - Distinguish third party research vs. research for which the U.S. broker takes responsibility by publishing under own name or by disseminating to non-MIIs
  - See SEC FAQ dated April 26, 2005

- Required legends
  - May be limited to third party research report disclosures
    - If clearly labeled as product of third party
    - If U.S. broker-dealer did not participate in preparation of the report
  - Third party disclosures include:
    - Public offering/investment banking services
    - Market-making
    - Ownership of 1% or more of equity (equity research only)
    - Other material conflicts
    - See FINRA Rules 2241(h)(4) and 2242(g)(3)
- Potential benefits of globalized legend protocol

Rule 15a-6: Research Reports, cont'd.

Solicited Trades with Institutional Investors

- Non-U.S. broker-dealers may solicit transactions with U.S. Institutional Investors and Major U.S. Institutional Investors (MIIs)
  - Institutional Investors includes banks, insurance companies, registered investment companies, SBICs and BDCs, as well as pension funds, trusts and non-profits with at least $5 million in assets
  - Major Institutional Investors includes any Institutional Investor or other company with at least $100 million in financial assets
    - Note: financial assets includes securities of unaffiliated issuers, cash, money market instruments and certain other financial instruments

- Communications/Solicitation
  - U.S. Broker-dealer must chaperone
    - Exceptions for MIIs
      - 30 days per year
      - Don't accept orders
  - Responsibility for communications of non-U.S. broker
    - Need to implement procedures which enable the U.S. broker to effectively monitor communications of non-U.S. broker
- Execution
  - Trades must be "effected" through U.S. broker
    - Direct settlement permitted in non-U.S. securities and U.S. Government securities
    - Otherwise settlement must be through U.S. broker
  - General requirements applicable to any account will apply
    - KYC, AML, reasonable-basis suitability, customer-specific suitability

Solicited Trades with Institutional Investors, cont'd.

Responsibilities of Chaperoning Broker - 2

- Documentation
  - Confirmations, account statements, etc.
    - May delegate to non-U.S. broker, but U.S. broker still responsible
  - Non-U.S. broker consent to service of process, etc
- Benefit of a written agreement between U.S. broker and non-U.S. broker
  - Specify arrangements for monitoring communications
  - Allocate responsibility for gathering required documentation for 15a-6 compliance
  - Provide U.S. broker with opportunity to clear suitability issues on the product
  - Set forth arrangements for acquiring necessary information on investor
    - MII status
    - AML, KYC
    - Institutional account for suitability purposes

Rule 15a-6 in the M&A Context

- Starting point:
  - Rule 15a-6 applies to M&A transactions
  - Non-U.S. broker may need a U.S. correspondent to solicit U.S. counterparties
  - Possible alternative: limit solicitation to offices of U.S. counterparties located outside the U.S.
- SEC relaxation of Rule 15a-6 requirements in M&A context
  - Expansion of definition of major institutional investors to include companies with at least $100 million in total assets (excluding cash) vs. $100 million in financial assets
  - *Ernst & Young Global* no-action letter (July 12, 2012)
  - Permit a non-U.S. broker or adviser representing a non-U.S. party to contact potential U.S. counterparties who are represented by a U.S. investment banker or who have an internal M&A team
  - *Roland Berger Strategy Consultants* no-action letter (May 28, 2013)

Transactions with Special Categories of Customers

- May freely transact with U.S. broker-dealers and U.S. banks acting in a broker-dealer capacity
  - Doesn't matter if the U.S. broker/bank is acting for its own account or as an agent for a customer
- May conduct business with a U.S. resident fiduciary acting on behalf of one or more non-U.S. customers
  - Limited to transactions in non-U.S. securities only
- May conduct business with offshore branches and offices of U.S. companies
  - Offshore branch/office must be established for bona fide business reasons
  - Transactions must be effected outside the U.S.

- May conduct business with expatriates resident in the United States
  - Must have established relationship with the expatriate before he/she moved to U.S.
  - Applies to all expatriates resident in the U.S. unless they hold a green card or U.S. citizenship

- May conduct business with U.S. nationals resident outside the United States
  - Transactions must be effected outside the U.S.

Transactions with Special Categories of Customers, cont'd.

Recent Enforcement Cases

- Bank Leumi, Exchange Act Rel. No. 79113 (October 18, 2016)
  - Solicited over 200 persons resident in the U.S. over a 10-year period
  - $1.5 million fine (also covered failure to register as an investment adviser)
- Credit Suisse Group AG, Exchange Act Rel. No. 71593 (February 21, 2014)
  - Private banking for U.S. clients run out of Switzerland
  - Training and internal compliance ineffective to stop wrongful conduct
  - Approx. $196 million in disgorgement, interest and fines
- HSBC Private Bank (Suisse), SA, Exchange Act Rel. No. 73681 (November 25, 2014)
  - Similar to CS, but on a smaller scale
- UBS Securities LLC, AWC No. 2012033156201 (September 9, 2013)
  - FINRA case involving failure to ensure proper confirmations delivered by foreign affiliate under Rule 15a-6
  - $575,000 fine

Recent Consultation Topics

- Research reports
  - Third party research vs. globally-branded research
  - Nature of the "responsibility" to be taken by a U.S firm distributing foreign research
  - Issues related to co-branded research reports
- Cross-border M&A
  - Potential complications in representing the U.S. party in cross-border M&A vs. representation of a foreign party
  - Reliance on private company M&A brokers no-action letter?
- Transactions with global fund managers
  - What are the implications under Rule 15a-6 if the foreign broker has communications with portfolio managers in the U.S. which lead to an order generated outside the U.S directly to the foreign bank?
- Rule 144A transactions
  - Allocation of responsibilities between the foreign bank and the U.S. broker-dealer where sales efforts are made directly by foreign bank to U.S. QIBs

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79113 / October 18, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4555 / October 18, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17631

In the Matter of **Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b)(6) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND (k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. (collectively, "Respondents"); and also pursuant to Sections 203(e) and (k) of the Investment Advisers Act of 1940 ("Advisers Act") against Leumi Private Bank.

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. Respondents admit the facts set forth in Section III.B. through E. below, acknowledge that their conduct violated the federal securities laws, admit the Commission's jurisdiction over them and the subject matter of these proceedings, and consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b)(6) and 21C of the Exchange Act for Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A., and Sections 203(e) and

(k) of the Advisers Act for Leumi Private Bank, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds[1] that:

A. Summary

1. From at least 2002 through 2013, Respondents violated certain provisions of the federal securities laws by providing cross-border brokerage services to customers in the U.S. ("U.S. customers") without registering with the Commission as broker-dealers. During that time, Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. held securities assets for U.S. customers with an aggregate peak value of approximately $537 million. From 2009 to 2013, Respondents had at least 711 unique customer accounts that held securities and were beneficially owned by U.S. customers. From at least 2008, Respondents were aware that, in certain instances, if their employees were to provide such services in the U.S. or otherwise by use of the mails or other modes of interstate commerce, Respondents would be required to register in the U.S. as broker-dealers, absent an available exemption from registration. None of the Respondents were registered as broker-dealers with the Commission.

2. With limited exceptions not applicable here, Section 15(a)(1) of the Exchange Act requires anyone who makes use of the mails or any other means or instrumentality of interstate commerce, to engage in the business of effecting transactions in securities for the account of others, or to engage in a regular business of buying and selling securities for the person's own account, to register with the Commission as a broker-dealer.

3. Among other actions, prior to April 2009 certain of Respondents' Relationship Managers ("RMs") traveled to the U.S. to solicit new and/or service existing U.S. customers, in part by soliciting or attempting to solicit securities transactions. These activities required Respondents to register with the Commission as broker-dealers, which they did not.

4. From at least 2008, Respondents understood that there was a risk of violating the federal securities laws by providing broker-dealer services to U.S. customers without being registered with the Commission, and they took certain measures to manage and mitigate the risk that such services might be provided to U.S. customers, including issuing internal policies aimed at complying with U.S. securities laws. In 2009, Respondents prohibited RM travel to the U.S., prohibited the provision of securities services to U.S. customers, and began working to exit securities accounts of existing U.S. customers. However, while Respondents were coming into compliance with these new policies, violations of their policies and the federal securities laws continued.

[1] The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

5. It was not until 2011 that the vast majority of U.S. customer securities accounts that had been serviced in violation of U.S. federal securities laws were exited.

6. Because certain of their RMs provided broker-dealer services in the U.S. at a time when Respondents were not registered with the Commission as broker-dealers, Respondents willfully[2] violated Exchange Act Section 15(a).

7. In addition to the broker-dealer violations described above, from at least 2002 through at least 2009, Leumi Private Bank violated certain provisions of the federal securities laws by providing cross-border investment advisory services to clients in the U.S. ("U.S. clients") without registering with the Commission as an investment adviser. Beginning in at least 2008, Leumi Private Bank became aware that, in certain instances, if its employees were to provide advisory services in the U.S. or otherwise by use of the mails or other modes of interstate commerce, Leumi Private Bank would be required to register in the U.S. as an investment adviser, absent an available exemption from registration. Leumi Private Bank was not registered with the Commission as an investment adviser.

8. Under Section 202(a)(11) of the Advisers Act, an investment adviser is a person who, for compensation, is in the business of providing investment advice with respect to securities, unless the person falls within one of the exclusions from the definition of investment adviser. Per Section 203(a) of the Advisers Act, an investment adviser whose principal offices or places of business are outside of the U.S. who makes use of the mails or any means or instrumentality of interstate commerce in doing business with U.S. clients is required to register with the Commission unless an exemption from registration is available.

9. Among other actions, prior to 2009 certain Leumi Private Bank RMs traveled to the U.S. to solicit new and/or service existing U.S. clients through the provision of investment advice for compensation. These activities required Leumi Private Bank to register with the Commission as an investment adviser, which it did not.

10. Beginning in 2009, Leumi Private Bank began taking certain measures to manage and mitigate the risk that investment advisory services might be provided to U.S. clients. Leumi Private Bank prohibited RM travel to the U.S., prohibited the provision of securities investment advice to existing U.S. clients, and began working to exit securities accounts of existing U.S. clients. However, while Leumi Private Bank was coming into compliance with these new policies, violations of its policies and the federal securities laws continued.

11. Because certain of its RMs provided advisory services in the U.S. at a time when Leumi Private Bank was not registered with the Commission as an investment adviser, Leumi Private Bank willfully[3] violated Advisers Act Section 203(a).

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[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

12. From 2002 to 2013, Respondents' U.S. cross-border securities business generated a pre-tax income amount of approximately $3.37 million.

B. Respondents

13. Bank Leumi le-Israel B.M. is a corporation founded in 1902, and incorporated and domiciled in Tel Aviv, Israel. Bank Leumi le-Israel B.M. holds a banking license from the Bank of Israel and is registered with the Registrar of Companies in Israel. It is defined as a banking corporation in accordance with the Israeli Banking (Licensing) Law 1981. The Bank's shares are traded on the Tel Aviv Stock Exchange and it is therefore subject to directives of that Stock Exchange and also the Israel Securities Authority.

14. Leumi Private Bank, a wholly owned subsidiary of Bank Leumi le-Israel B.M., was founded in 1953 and is headquartered in Zurich, Switzerland. It was primarily active in providing private banking services to international high net worth individuals. In March 2015, Julius Baer Ltd. AG ("Julius Baer"), a Swiss independent private banking group, purchased Leumi Private Bank's client-related assets.

15. Bank Leumi (Luxembourg) S.A., a wholly owned subsidiary of Bank Leumi le-Israel B.M., was founded in 1994 and is located in Senningerberg, Luxembourg. Its purpose was to serve as a marketing arm for private banking services for wealthy clients worldwide. In March 2015, Julius Baer also purchased Bank Leumi (Luxembourg) S.A.'s client-related assets.

C. Respondents' U.S. Cross-Border Securities Business

16. From at least 2002 through 2013, Respondents, through actions of certain of their RMs, engaged in broker-dealer activities with U.S. customers. Among other actions, RMs solicited, established, and maintained brokerage accounts for certain U.S. customers; accepted and executed orders for securities transactions; actively solicited securities transactions; handled certain U.S. customers' funds and securities; and provided account statements and other account information. Certain of these activities required registration under the federal securities laws. For these and other services provided to U.S. clients, Respondents received compensation related to the securities transactions.

17. In addition to the broker-dealer activities, from at least 2002 through at least 2009, Leumi Private Bank, through actions of certain of its RMs, provided investment advice to U.S. clients using U.S. jurisdictional means. Leumi Private Bank received compensation related to the provision of these advisory services.

18. From 2002 through 2009, at which time the Respondents ceased travel to the U.S., RMs repeatedly traveled to the U.S. to meet with existing or prospective U.S. customers and clients to provide investment advice or solicit securities transactions. At least 11 different RMs traveled to the U.S. on a minimum of 65 occasions for such meetings. During these trips, RMs engaged in at least 245 individual meetings with both existing and potential customers and clients, and generated significant revenue through commissions and fees.

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[3] *See* fn.2.

a. For example, one RM made three trips to New York from 2002 to 2003, during which time he had at least 35 meetings with existing and prospective customers and clients. According to the trip report by the RM, one of those trips alone resulted in approximately 15 new accounts and $4.5 million in revenue.

b. In 2007, an RM traveled to Los Angeles for 76 meetings with existing and potential customers and clients, which resulted in $1.15 million in structured deposits, and instructions to purchase $6.3 million in bonds and $140,000 in mutual funds. Additionally, at a customer's instruction, the RM transferred $21.2 million from short-term deposits to annual deposits. The RM also opened eight new accounts with total potential of $3.3 million in assets or more. Additional 2007 RM travel to New York and Miami generated new assets estimated at $8.89 million.

c. In 2008, an RM visited Miami and New York for 66 meetings with existing and potential customers and clients. As a result of the meetings, Respondents purchased $11.7 million in securities on behalf of customers and clients, and the RM estimated that Respondents would accrue approximately $8.5 million in assets from existing customers and clients. The RM estimated that new customer and client meetings from this trip would generate approximately $5 million in new assets. Also in 2008, another RM visited New York for 25 meetings, from which he expected to generate $5 million in assets.

d. RMs took at least two additional trips to the U.S. in 2008.

e. An additional trip to the U.S. occurred in February 2009 in which RMs met with approximately 18 customers and clients and took instructions as to securities transactions to execute.

19. Shortly thereafter, in about April 2009, Respondents discontinued RM travel to the U.S.

20. In addition to traveling to the U.S., RMs with U.S. customers and clients communicated securities-related information to them by means of interstate commerce, including mail and e-mail, while the customers and clients were present in the U.S. Respondents' RMs provided broker-dealer services to these U.S. customers using U.S. jurisdictional means. In addition, prior to September 2009, Leumi Private Bank RMs provided investment advisory services for fees to their U.S. clients and made recommendations as to the merits of various types of investments using U.S. jurisdictional means.

D. Respondents Were Not Registered with the Commission to Provide Broker-Dealer or Investment Advisory Services to U.S. Customers or Clients

21. Respondents engaged in the above-referenced broker-dealer activities with U.S. customers at a time during which they were not registered as broker-dealers under Exchange Act Section 15(a). Leumi Private Bank also provided investment advisory services to U.S. clients at a time during which it was not registered as an investment adviser under Advisers Act Section 203(a). Respondents were not exempted from registration as broker-dealers, and Leumi Private Bank was not exempted from registration as an investment adviser.

E. Respondents' Efforts to Address the U.S. Cross-Border Securities Business

22. In late February 2008, Respondents' Head of International Private Banking ("IPB") contacted U.S. counsel about permissible activities for RMs who periodically traveled to the U.S. In May 2008, in consultation with counsel, management determined that "[a]dvisors who travel to the U.S. are prohibited from giving securities advice."

23. UBS, a large Switzerland-based multinational financial services company, publicly announced that it was being investigated by the U.S. government in early May 2008 for activities arising from UBS's provision of cross-border banking, broker-dealer, and investment adviser services to U.S. customers and clients. Two months later, in July 2008, UBS formally announced that it would cease providing banking services to U.S. customers and clients through its non-U.S. regulated entities.

24. On July 9, 2008, Bank Leumi le-Israel B.M. issued a policy containing a list of permitted and prohibited activities for RMs in the U.S. ("2008 List"). The 2008 List, which reflected U.S. counsel's advice, stated that RMs may not engage in securities transactions on behalf of U.S. customers or open or manage any securities deposits. In addition, the 2008 List stated that RMs should not provide advisory services in the U.S., with advisory services defined as "any oral or written method of informing others about the value of securities or the advisability of investing in securities or publishing reports about securities." While management and RMs discussed these changes at meetings, Respondents implemented no procedures at the time to ensure compliance with the 2008 List.

25. Management determined to stop RM travel to the U.S. for the purpose of servicing U.S. customers and clients in April 2009, and a prohibition on travel to the U.S. was included in Respondents' June 2009 guidelines regarding the handling of accounts of U.S. customers and clients ("2009 Guidelines"). Respondents disseminated the 2009 Guidelines to all relevant Bank units. In addition to prohibiting travel to the U.S., the 2009 Guidelines prohibited direct communications with U.S. customers and clients, emphasizing that no securities investment advice or securities transactional services should be provided to U.S. customers or clients, regardless of the location from which the advice was given or the type of transactions conducted.

26. Respondents issued clarifying rules on July 1, 2009 ("2009 Clarification"). The 2009 Clarification was more detailed, stating that for new U.S. customers and clients, no contact via any U.S. jurisdictional means of communication may be made, and defined "means" to include "mail, telephone, cell phone, fax, internet or anything similar." In addition, for existing U.S. customers and clients holding securities, it was forbidden for Respondents to give them investment advice or carry out for them any purchase of securities. The 2009 Clarification also instructed employees to contact existing U.S. customers and clients and tell them to transfer or sell their Bank-held securities as soon as possible. In August 2009, employees were provided with draft letters to send to existing U.S. customers and clients regarding termination of their securities accounts.

27. Leumi Private Bank issued a bank manual regarding the provision of securities services to U.S. customers ("Bank Manual") in September 2009. The Bank Manual, which was

specific to Leumi Private Bank, prohibited the provision of brokerage and investment advisory services to existing U.S. customers and clients and reiterated the prohibition on business trips to the U.S. For new U.S. customers and clients, Leumi Private Bank prohibited brokerage and investment advisory services except where managed via a discretionary investment management account or a third-party independent portfolio manager compliant with U.S. securities laws.

28. Respondents faced resistance from customers with regard to Respondents' efforts to close customers' securities accounts. Beginning in 2011, Respondents increased pressure on customers to close their securities accounts, including by forced sales.

29. In February 2011, Respondents reviewed their U.S. securities accounts for potential noncompliance with the above-described policies. Despite multiple policies dating back to 2008, Respondents' progress in following the policies and exiting their U.S. cross-border securities business was slow. The 2011 review flagged the following issues:

a) ongoing communication "with the United States" by fax and phone,

b) transactions in "tainted" accounts of U.S. customers and clients, with tainted accounts being defined as those U.S. customer and client accounts with securities-related activity in the 12 months preceding September 2009,

c) lack of clarity by employees as to what constituted a tainted account,

d) twenty offshore company accounts beneficially owned by U.S. persons still open, and

e) approximately one hundred tainted accounts for U.S. customers and clients still open.

30. On May 5, 2011, Respondents issued a supplement to the 2009 Guidelines titled "Supplemental Rules for Securities and Banking Services for Existing US Persons" ("2011 Supplemental Rules"). The 2011 Supplemental Rules focused on continuing the exit of U.S. customers' and clients' tainted securities accounts, which was still not complete, and directed that all remaining such accounts should be closed by force by June 30, 2011. By the end of 2011, Respondents had exited nearly all of the tainted accounts. The last of the accounts was closed in 2015.

31. On September 8, 2013, Respondents implemented a new, centralized procedure on the subject of securities transactions and investment advice for U.S. customers and clients ("Centralized Procedure"), over four years after implementing their first policy on the same subject. The Centralized Procedure, like prior guidelines, emphasized that Respondents were prohibited from providing investment advice or brokerage services to U.S. customers and clients with the exception of one division of the Bank – Global Private Banking ("GPB"). GPB could provide such services under very limited circumstances that comported with U.S. securities laws.

32. In 2014, Respondents carried out an internal audit focused on their U.S. cross-border securities business. The 2014 audit looked at the period between July 2011 and October 2013, and identified two securities accounts that had been re-opened for U.S. customers despite being previously closed in 2011. Respondents had closed the accounts in 2011 in accordance with Bank directives because they were tainted due to securities-related activity that took place. In violation of their policies, Respondents re-opened securities accounts for these customers in 2012 and 2013 and conducted securities-related activities.

33. In total, from 2002 through 2013, Respondents generated a pre-tax income amount of $3.37 million from their U.S. cross-border securities business.

34. In July 2014, Leumi Private Bank announced that it had sold the majority of its private banking business and client assets to Julius Baer. The transfer was completed on March 16, 2015. Similarly, in March 2015, Julius Baer purchased Bank Leumi (Luxembourg) S.A.'s client assets.

F. Violations

35. As a result of the conduct described above, Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. willfully violated Exchange Act 15(a), and Leumi Private Bank also willfully violated Advisers Act Section 203(a).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Sections 15(b)(6) and 21C of the Exchange Act and Sections 203(e) and (k) of the Advisers Act, it is hereby ORDERED that:

A. Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. are censured;

B. Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act;

C. Leumi Private Bank cease and desist from committing or causing any violations and any future violations of Section 203(a) of the Advisers Act; and

D. Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. shall, within ninety (90) days of the entry of this Order, pay disgorgement of $65,700, which represents the outstanding unpaid balance from a total disgorgement figure of $3,372,700, less $3,307,000 already disgorged to the U.S. Department of Justice ("DOJ") for related conduct as part

of a Deferred Prosecution Agreement ("DPA") in December 2014[4]; prejudgment interest of $8,713.20; and a civil money penalty in the amount of $1,517,715 to the Securities and Exchange Commission. If timely payment of disgorgement and prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and if timely payment of a civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Bank Leumi le-Israel B.M., Leumi Private Bank, and Bank Leumi (Luxembourg) S.A. as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Scott W. Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5012.

By the Commission.

Brent J. Fields
Secretary

[4] On December 22, 2014, various Bank Leumi entities, including Bank Leumi le-Israel, Bank Leumi Luxembourg, and Leumi Private Bank, signed a DPA with the DOJ waiving charges that the Bank voluntarily, intentionally, and knowingly sought to willfully aid and assist in the preparation and presentation of false income tax returns and other documents to the Internal Revenue Service of the Treasury Department in violation of Title 26, United States Code, Section 7206 (2), all in violation of 18 U.S.C. § 371. Under the DPA, the Bank paid approximately $270 million, which included approximately $72 million in restitution from Bank Leumi le-Israel and Bank Leumi Luxembourg (and other subsidiaries), and $157 million in lieu of restitution from Leumi Private Bank consistent with the Swiss Program for Non-Prosecution Agreement or Non-Target Letters for Swiss Banks. The DPA focused on violative conduct between 2002 and 2010. The amount paid by the Bank under the terms of the DPA included income generated from U.S. securities accounts.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71593 / February 21, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3782 / February 21, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15763

In the Matter of **CREDIT SUISSE GROUP AG** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND (k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (the "Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 (the "Exchange Act") and Sections 203(e) and (k) of the Investment Advisers Act of 1940 (the "Advisers Act") against Credit Suisse Group AG ("CSAG" or the "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Respondent admits the facts set forth in Section III.B. through F. below, acknowledges that its conduct violated the federal securities laws, admits the Commission's jurisdiction over it and the subject matter of these proceedings and consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 and Sections 203(e) and (k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

A. Summary

1. From at least 2002 until its exit from its business of providing broker-dealer and investment adviser services to certain U.S. clients (the "U.S. cross-border securities business"), which CSAG began in 2008, CSAG, through actions of certain of its relationship managers ("RMs") violated the federal securities laws by providing certain cross-border brokerage and investment advisory services to U.S. clients. During that time, CSAG had as many as 8,500 client accounts that held securities and were beneficially owned by U.S. residents. CSAG RMs solicited and provided broker-dealer and advisory services to some of these clients. CSAG was aware that in certain instances, if its representatives provided such services in the United States or by use of the mails or through interstate commerce, this would have required U.S. broker-dealer and investment adviser registration and that CSAG was not registered. CSAG realized approximately $82 million in pre-tax income through the unlawful aspects of the U.S. cross-border securities business.

2. With limited exceptions, any person who operates in the United States, or who makes use of the mails or any other means or instrumentality of interstate commerce, to engage in the business of effecting transactions in securities for the account of others, or to engage in a regular business of buying and selling securities for the person's own account, must register with the Commission as a broker-dealer. Similarly, unless there is an applicable exemption, any person who for compensation engages in the business of advising others about the advisability of investment in securities must be registered as an investment adviser.

3. Certain CSAG representatives, among other things, traveled to the United States to solicit new clients and service existing clients by providing investment advice and by inducing and attempting to induce securities transactions. In connection with these activities, certain CSAG representatives met with existing and prospective clients and communicated with them through email and the mails. CSAG received transaction-based compensation and advisory fees for these services. These activities required registration.

4. CSAG understood that there was risk of violating the federal securities laws by providing broker-dealer and investment adviser services to U.S. clients. To manage and mitigate the risk that prohibited broker-dealer and investment adviser services might be provided to U.S. clients, beginning in 2002, CSAG enacted directives and policies which prohibited its representatives from engaging in the improper conduct described in the Order. These directives and policies were designed to allow the U.S. clients to be serviced in a manner consistent with the federal securities laws. Beginning in 2002, CSAG also arranged for certain of its legal and compliance staff and RMs in Switzerland with at least one U.S. client to be trained on the

[1] The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

directives and policies. CSAG did not expand this training to all RMs worldwide with U.S. clients until 2008. CSAG did not effectively implement these policies and did not sufficiently monitor the U.S. cross-border securities business. As a result, violations of CSAG's policies and the federal securities laws occurred.

5. CSAG undertook initiatives that could have lessened the risk of violating the federal securities laws but they were not effectively implemented or monitored. In 2002, CSAG created a new Swiss-based legal entity with broker-dealer and investment adviser registrations. CSAG attempted to transfer U.S. clients that had submitted W-9 forms to CSAG to support 1099 reporting to the Internal Revenue Service (the "IRS") to the new registered entity starting in 2002 (the "W9 U.S. clients"), but those transfers were not complete until 2008, six years after they were first begun. CSAG also engaged in efforts from 2000 to 2006 to centralize the remainder of the U.S. cross-border securities business at a single desk. These efforts met with resistance both from clients and from certain RMs, who were not sufficiently incentivized to, or sanctioned for failing to transfer the accounts. CSAG's internal audit division audited the desk primarily responsible for servicing U.S. clients on four occasions during the relevant period to determine whether the U.S. clients were being serviced in a compliant manner. Several travel reports provided to internal audit suggest that RMs provided broker-dealer and investment adviser services to U.S. clients while on travel to the United States. However, several other travel reports were edited, before they were provided to internal audit, by RMs who serviced U.S. clients on CSAG's Switzerland-based North America International desk, internally referred to as "SALN," to omit any mention of conduct that violated the federal securities laws that was disclosed in the original versions of these reports. Although the preliminary findings of at least one audit indicated issues with compliance with CSAG's policies and directives for servicing U.S. clients at that desk, after discussions between internal audit and the head of that desk, the final internal audit report of the U.S. cross-border securities business found no significant issues despite the fact that some of the travel reports provided to internal audit reflected visits with prospective U.S. clients and the receipt of new money from those clients was estimated to have a potential value of millions of U.S. dollars.

6. Beginning in October 2008, following the well-publicized civil and criminal investigation of UBS AG ("UBS"), another large Switzerland-based multinational financial services company, arising from UBS's provision of cross-border banking, broker-dealer and investment adviser services to U.S. clients, CSAG determined to exit from the U.S. cross-border securities business. CSAG initially focused on exiting non-U.S. domiciliary entities with U.S. beneficial owners. In April 2009, the exit process expanded to U.S. resident account holders and CSAG ceased taking new U.S. client accounts outside a U.S. registered CSAG entity. As a result of these actions, the number of U.S. client accounts decreased from 2009 forward and the majority of U.S. client accounts were closed or transferred by 2010. Nonetheless, it took CSAG almost five years – from 2009 to mid-2013 – to decrease the average securities assets under management in U.S. client accounts from, in the aggregate, approximately $5.75 billion in 2008 to approximately $34 million by mid-2013. CSAG continued to collect some broker-dealer and investment adviser fees on certain accounts of U.S. clients that held securities until the relevant account was terminated.

7. Because certain of its representatives provided broker-dealer and investment adviser services in the United States at a time when CSAG was not registered with the

Commission as a broker-dealer or investment adviser, CSAG willfully[2] violated Exchange Act Section 15(a) and Advisers Act Section 203(a).

B. Respondent

8. **Credit Suisse Group AG ("CSAG")** is a corporation incorporated and domiciled in Switzerland. It is a multinational financial services holding company that provides a broad range of services to individual and corporate clients. CSAG is headquartered in Zurich, Switzerland, and its registered shares are listed in Switzerland on the SIX Swiss Exchange, and in the United States, in the form of American Depositary Shares, on the New York Stock Exchange. CSAG's operating subsidiaries include Credit Suisse Securities (USA) LLC ("CSSU"), which was formerly known as Credit Suisse First Boston Corporation. CSSU is headquartered in New York, is a member of FINRA, and is registered with the Commission as a broker-dealer and investment adviser. None of the conduct described in this Order is attributed to CSSU. Clariden Leu was another of CSAG's subsidiaries which was integrated into CSAG and ceased to exist as a distinct legal entity with effect from January 1, 2012. Clariden Leu had been formed by the merger of five predecessor subsidiary banks in 2007, and was a wholly-owned subsidiary of CSAG since that time.

C. CSAG's U.S. Cross-Border Securities Business

9. During the period from at least 2002 through 2008, CSAG, through actions of certain of its RMs, engaged in broker-dealer and investment adviser activities with U.S. clients. Among other things, CSAG RMs solicited, established, and maintained brokerage and investment advisory accounts for certain U.S. clients; accepted and executed orders for securities transactions; actively solicited securities transactions; handled certain U.S. clients' funds and securities; provided account statements and other account information; and provided investment advice. Certain of these activities required registration under the federal securities laws. For these and other services provided to certain U.S. clients, CSAG received transaction-based compensation or investment adviser fees.

10. Approximately 20 SALN RMs serviced the accounts of U.S. clients on desks physically located in Zurich and Geneva, Switzerland. Between 2002 and 2003, SALN had up to approximately 4,300 U.S. client accounts consisting of up to approximately $1.6 billion in securities assets under management.

11. Approximately 430 CSAG RMs employed on other desks or at other Swiss-based offices of CSAG which were not focused on U.S. clients also serviced the accounts of U.S. clients.

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[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id*. (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

From at least 2002 through 2008, CSAG RMs outside of SALN had up to 4,800 U.S. client accounts consisting of up to approximately $3 billion in securities assets under management.

12. In addition, Clariden Leu also employed approximately 240 RMs who provided broker-dealer and investment adviser services to U.S. clients and were not part of a dedicated U.S. desk. Prior to the merger of Clariden Leu into CSAG, Clariden Leu RMs had up to approximately 1,500 U.S. client accounts consisting of up to approximately $2 billion in securities assets under management. At the time of the merger, Clariden Leu had approximately 133 U.S. client accounts consisting of approximately $52.6 million in securities assets under management.

13. The assets under management associated with, and pre-tax income generated from, the U.S. clients and U.S. client accounts referred to in Paragraphs 10 through 12 were booked in Switzerland.

14. With respect to certain of these accounts, certain RMs used a variety of U.S. jurisdictional means to engage unlawfully in the U.S. cross-border securities business without appropriate registration. For example, certain RMs traveled to the United States to meet with existing and prospective clients to provide investment advice and/or solicit securities transactions. SALN's management encouraged that travel; minutes from an SALN meeting that occurred on January 1, 2003 stated SALN management's view that "business trips will no longer be allowed if no prospecting is included. *Every trip will involve at least one prospect per day (travelling days included).*"

15. From 2001 through 2008, certain SALN RMs made approximately 107 trips to the United States. Certain of these trips involved visits with dozens of U.S. clients and prospective U.S. clients, and the provision or solicitation of broker-dealer and/or investment adviser services.

a. For example, between April 29 and May 4, 2003, the head of SALN traveled to New York in order to visit with 32 U.S. clients with assets under management in the amount of approximately $129 million. He also visited with 5 prospective U.S. clients; one of the 5 prospective U.S. clients opened an account with CSAG valued at approximately $744,000. The head of SALN submitted a travel report that stated that retention of existing clients and prevention of account closings as one of the reasons for the trip.

b. In 2004, the deputy head of SALN traveled to New York, Washington, D.C., and Florida in order to visit with 39 U.S. clients with assets under management in the amount of approximately $111 million. She also visited with 2 prospective U.S. clients; the prospects opened accounts with CSAG which were estimated to have a potential value of approximately $2 million.

c. In April 2005, the head of SALN traveled to the United States and Canada, in order to visit with 30 current U.S. clients with assets under management in the amount of approximately $67 million. He also visited with 2 prospective U.S. clients; the prospects opened accounts with CSAG collectively valued at approximately $4 million. In October 2005, an SALN RM traveled to California in order to visit with 30 U.S. clients with assets under management in the amount of approximately $39 million. The RM also visited with 2 prospective U.S. clients; the

prospects opened accounts with CSAG which were estimated to have a potential value of approximately $3 million. The RM noted that "[r]etention [m]anagement," "[i]ncreas[ing] asset base from existing clients," and "[a]ccount openings with new clients (prospects)" were among the goals of the trip.

d. In 2006, SALN personnel traveled to Florida, New York, and two locations in Canada, in order to visit with up to 336 U.S. clients with assets under management valued at up to approximately $865 million. They also visited with up to 51 prospective U.S. clients; 21 prospects were expected to potentially open accounts with CSAG which were estimated to have a potential value of approximately $41 million.

e. As late as June 2007, another SALN RM traveled to California in order to visit with 40 U.S. clients with assets under management valued at approximately $88 million. One purpose of the SALN RM's visits with the U.S. clients was to provide broker-dealer and investment adviser services. The RM also discussed with some of the existing U.S. clients the possibility that they might deposit additional assets with CSAG which were estimated to have a potential value of at least approximately $29 million.

16. In addition to traveling to the United States, certain RMs with U.S. clients also communicated securities-related information to their U.S. clients by means of interstate commerce while the clients were present in the United States, including through mails, telephone and e-mail. Certain RMs provided investment adviser and broker-dealer services to these U.S. clients and made recommendations as to what types of accounts would be most appropriate for them, as well as advice as to the merits of various types of investments.

D. CSAG Charged Certain U.S. Clients Broker-Dealer and Investment Adviser Fees

17. From 2002 through 2008, CSAG had as many as 8,500 U.S. client accounts which held securities. During that time period, the total securities assets under management across all of the U.S. client accounts that held securities averaged approximately $5.6 billion. In 2008, CSAG commenced the process of exiting from the U.S. cross-border securities business. In 2009, the securities assets under management had declined to under $4 billion, and in 2010 to under $2 billion. CSAG's securities assets under management across U.S. client accounts continued to decline in 2011 and 2012 and, by mid-2013, had decreased to approximately $34 million. During this time period, CSAG continued to collect some broker-dealer and investment adviser fees on certain U.S. client accounts.

18. Beginning in 2008, following the much-publicized civil and criminal tax investigation of UBS arising from its provision of cross-border banking, broker-dealer and investment adviser services to certain of its U.S. clients, CSAG took steps to completely close the U.S. cross-border securities business beginning in 2008 and took additional measures designed to ensure that it was not providing investment advice or broker-dealer services to these clients in violation of the federal securities laws, which are described below in Paragraphs 41 through 44 of this Order. However, during this time, CSAG continued to collect a fee for broker-dealer services from certain U.S. clients until the relevant U.S. client account was terminated.

E. CSAG Was Not Registered with the Commission to Provide Broker-Dealer or Investment Adviser Services to U.S. Clients

19. The above-referenced activities were engaged in at a time during which CSAG was not registered as a broker-dealer under Exchange Act Section 15(a) or as an investment adviser under Advisers Act Section 203(a), and CSAG was not exempted from registration as a broker-dealer or investment adviser.

F. CSAG's Efforts to Address the U.S. Cross-Border Securities Business

20. Throughout the period in question, CSAG was aware of the broker-dealer and investment adviser registration requirements related to the provision of certain cross-border broker-dealer and investment adviser services to U.S. clients.

1. "Project OldCo/NewCo" – The Creation of a Switzerland-Based Registered Broker-Dealer and Investment Adviser

21. At least as early as November 6, 2000, U.S. cross-border issues rose to the attention of the executive board of CSAG's private banking unit (the "PBEB") during a PBEB meeting where the board discussed "the business case for a new model servicing offshore US clients." The participants in the meeting – which included several of the most senior executives of CSAG's private banking unit – were advised that the federal securities laws did not allow entities – like CSAG – that were not registered with the Commission to actively engage in certain marketing activities and provide investment advice to U.S. clients using the means and instrumentalities of interstate commerce. The PBEB agreed to "create a Swiss-based SEC registered vehicle with unrestricted access to the US market" to service W-9 U.S. clients.

22. At a subsequent PBEB meeting on April 24, 2001, the PBEB was provided with more details of what was then called "Project OldCo/NewCo" – the new registered broker-dealer and investment adviser. The PBEB was informed that the new legal entity arising from Project OldCo/NewCo would be named Credit Suisse Private Advisors ("CSPA"). Clients who had submitted W9 forms were expected to be transferred to CSPA. Separately, approximately 6,000 non-W-9 U.S. clients were expected to be centralized at the SALN desk.

23. Although CSAG created CSPA in mid-2002, the transfer and centralization exercise proposed in 2000 and 2001 did not occur as originally scheduled. In fact, it took over six years to complete. By September 2006, less than 20% of the W-9 U.S. clients had agreed to be transferred. In some cases, certain RMs did not want to give up their clients to RMs in the new entity. CSAG did not offer incentives for RMs to transfer their W-9 U.S. clients to CSPA or impose sanctions on RMs if they did not. In other cases, clients resisted the transfer.

2. U.S. Persons and Cross-Border Directives and Policies

24. During the time that the PBEB was considering the establishment of CSPA, on November 26, 2002, CSAG enacted a directive governing relationships with U.S. clients (the "U.S. persons directive"). The U.S. persons directive included restrictions governing communications with U.S. persons and travel to the U.S. and also included a prohibition on providing investment

advice in the United States. Thereafter, on January 24, 2004, CSAG enacted a directive governing foreign travel by RMs in CSAG's private banking unit (the "cross-border directive"). The purposes of the U.S. persons and cross-border directives were to provide guidelines to RMs for conducting the U.S. cross-border securities business according to the federal securities laws, to ensure that traveling RMs complied with local laws governing the cross-border provision of financial services, and "to avoid regulatory and reputational risk," "to ensure uniform adherence to the restrictions applicable under US law to bank relationships with US Persons and US Taxpayers," and "to ensure the bank does not trigger the US licensing requirements." CSAG periodically updated these directives.

25. CSAG provided training to SALN RMs with U.S. clients on these directives, in addition to hundreds of other RMs outside of SALN as well as at Clariden Leu. Training was required for RMs in Switzerland with at least one U.S. client. Trainings occurred periodically during the period from 2002 through 2008. Among other things, the training presentations specifically advised the RMs that CSAG was not a broker-dealer or investment adviser registered with the Commission and, as such, the RMs could not solicit any transaction related to securities or travel to the United States to conduct any business that would be deemed solicitation or investment advice. The presentations also warned RMs that violations of the directives potentially could cause CSAG to face "reputational risks" such as "negative publicity," a decline in CSAG's stock price, customer base, revenues, costly litigation, and "'soft costs' (change in business practices, etc.)." CSAG management expected RMs to comply with the various restrictions associated with U.S. clients. However, CSAG did not require RMs to certify that they had completed country-specific cross-border training before they were allowed to travel until a new initiative was implemented in 2008. No such certificates had previously been required.

26. Notwithstanding the enactment of these directives and policies and the training provided, certain RMs continued to engage in behavior that violated not only CSAG's directives and policies, but also the federal securities laws through providing broker-dealer and investment adviser services to U.S. clients and prospective U.S. clients while on travel in the United States and through securities-related communications to U.S. clients, as described in Paragraphs 9 through 16 of this Order.

3. Internal Audits of SALN

27. In addition to enacting the directives and policies described in Paragraphs 24 through 26 of this Order, CSAG also conducted internal audits of SALN to ensure compliance with the directives and policies regarding U.S. clients. In 2006, certain RMs outside of SALN had up to approximately 6,200 U.S. client accounts consisting of up to approximately $4.6 billion in securities assets under management. CSAG did not conduct any internal audits specifically focused on the U.S. cross-border securities business outside of SALN.

28. CSAG conducted internal audits of SALN in 2001, 2003, 2006 and 2009. The 2001, 2003 and 2009 audits either found "no issues" or "minor issues," despite the fact that some of the travel reports provided to internal audit reflected visits with prospective U.S. clients and the receipt of new money from those clients was estimated to have a potential value of millions of U.S. dollars.

29. During the 2006 internal audit of SALN, CSAG's internal auditors were provided with travel reports that were edited by SALN employees to omit any mention of conduct that violated the federal securities laws. The original versions of the edited reports suggested that RMs provided broker-dealer and investment adviser services to U.S. clients while on travel to the United States. Internal audit also received reports that reflected that certain SALN RMs had met with prospective U.S. clients and had obtained new assets. CSAG's 2006 audit of SALN preliminarily raised concerns that certain SALN RMs may have violated the U.S. persons directive during business trips to the United States. However, following meetings between members of CSAG's internal auditors and the head of SALN, these preliminary findings were excluded from the final audit report.

4. "Project W9"

30. By 2006, CSAG had made little progress in the transfer of the W-9 U.S. clients to CSPA or the centralization of non-W-9 U.S. clients with SALN; in fact, only approximately $500 million in assets under management belonging to U.S. clients had been transferred to CSPA, which was less than 20% of the population of W-9 U.S. clients. Furthermore, the transfer and consolidation exercise discussed in executive board meetings in 2000 and 2001, described in more detail above in Paragraphs 21 and 22 of this Order, also was behind plan; only 60% of assets under management belonging to non-W-9 U.S. clients had been transferred. Again, management had not offered sufficient incentives to RMs to effect transfers or imposed penalties for not effecting transfers.

31. As a result, in September 2006, CSAG's management initiated "Project W9." The purpose of Project W9 was to execute the executive board decision of 2000 in two phases: the first phase, dubbed "QuickWin," involved identifying all W-9 U.S. clients throughout CSAG and asking them to agree to a move to CSPA. W-9 U.S. clients that were not willing to move their accounts to CSPA would be required to close their accounts. The second phase, dubbed "Phase 2," involved transferring the non-W-9 U.S. clients to SALN and to provide specialized training for certain of the SALN RMs on what they could – and could not – do with respect to such accounts.

32. CSAG anticipated completing the QuickWin phase of Project W9 by the end of October 2007 and the Phase 2 phase of Project W9 by the end of December 2007.

33. As with the efforts in 2000, the 2006 Project W9 proved difficult. At the outset of Project W9, the head of SALN wrote an e-mail to his immediate supervisor on September 12, 2006, stating: "The 'Centralization of W9 in CSPA' exercise is becoming a real struggle. If clients are to be centralized in the intended manner, it needs to be clear from the outset that the transferring area will be compensated/who has to bear the expected losses."

34. By March 2007, ten months before the anticipated completion of the QuickWin phase of Project W9, the head of Project W9 reported to CSAG's Private Banking Management Committee that the transfer of the W-9 U.S. clients was behind schedule. Part of the delay was attributed to the fact that certain of the RMs had sought exceptions to the directive to move their W-9 U.S. client accounts to CSPA or close them. Although the vast majority of the exceptions

was denied, it took management several months to complete the process of receiving and reviewing exceptions.

35. While there was slow progress on the QuickWin phase of Project W9 during this period, there was no discernible progress on the Phase 2 migration of non-W-9 U.S. clients to SALN.

36. Moreover, at the same time that CSAG was working on Project W9, SALN faced internal pressures to continue to grow the U.S. cross-border securities business. For example, in November 8, 2007, an SALN presentation regarding collaboration between SALN and a Miami-based group of RMs responsible for Latin-American clients highlighted the following three "project goals," each of which contemplates expanding the U.S. cross-border securities business:

a. "Each team-member acquires one client with AuM > USD 5 mn [sic] within the next 12 months[;]"

b. "Each team introduces at least one existing client to the other team (US -> offshore and Offshore -> US) until the next workshop[;]" and

c. "Each team has met at least one project-relevant new prospect until the next workshop[.]"

37. From 2005 through 2007, CSAG did, in fact, grow its business with U.S. clients: In 2005, CSAG acquired net new assets of approximately $296 million; in 2006, approximately $714 million; and in 2007, approximately $177 million.

5. The "Cross-Border+ (Plus) Project"

38. In 2006, CSAG initiated another project – the "Cross-Border+ (Plus) Project" (the "CB+ Project"). An impetus for the CB+ Project was the March 2006 arrest of several CSAG bankers in Brazil, including the head of CSAG's private banking unit in Brazil, for conducting business in violation of Brazil's laws. The CB+ Project is an ongoing global initiative covering over 80 countries, including the United States, and was described internally as an effort to "set out how CS and its business units should conduct cross-border business going forward with clear guidance on acceptable business activities," and it was divided into various "workstreams" to cover all of the regions where CSAG did business. The end deliverables were "country manuals" designed to provide RMs with guidance on how to conduct business in all of the countries where CSAG had a presence, as well as training modules and revisions to existing cross-border policies.

39. The CB+ Project included a review of CSAG's policies regarding the U.S. cross-border securities business. As a result of the CB+ Project, CSAG's U.S. persons policy was revised to provide that "RMs may travel to the US to visit existing clients only if the visit is initiated by the client is for a purely and exclusively social nature and no discussion is had relating to securities or investments. As a prerequisite for such travel, the RM must complete a US Cross-Border training session and follow the procedures for obtaining the relevant travel approval. Visits to prospective clients are not permitted."

40. During the CB+ Project, in September 2007, the then-head of SALN complained to his direct superior that "the altered parameters the bank wants to do business on, not only is the scope of action getting very constrained, but people have no air left to breathe. . . . The latest changes will make this business impossible."

6. CSAG's Closure of its U.S. Cross-Border Securities Business

41. In January 2008, UBS publicly announced that it would no longer allow new U.S. clients seeking securities-related services; rather, it would only allow U.S. clients seeking banking services to open accounts. Following a much-publicized U.S. Department of Justice criminal tax investigation, in July 2008, UBS formally announced that it would cease providing banking services to U.S. clients through its non-U.S. regulated entities.

42. Following UBS's July 2008 announcement, CSAG circulated a legal and compliance alert that prohibited inflows of funds into existing or newly opened accounts from UBS and another Swiss bank that had come under fire for helping U.S. citizens shelter assets from the IRS and evade taxes. The alert also required accounts for non-U.S. domiciled companies with a U.S. taxpayer beneficial owner to demonstrate U.S. tax compliance and be opened with a U.S.-licensed arm of CSAG.

43. During this time period, in the wake of the news regarding UBS, CSAG's management began an examination of CSAG's U.S. cross-border securities business. The examination was internally referred to as the "US Project." As a result of this analysis, in late 2008 CSAG's management decided to only retain those non-U.S. domiciliary companies with U.S. beneficial owners who could prove tax compliance. In Spring 2009, CSAG stopped opening new U.S. client accounts for U.S. residents and existing U.S. resident clients were offered a choice: transfer to CSPA and become tax compliant (if they had not done so already) or leave the bank.

44. By 2010, CSAG had either transferred or terminated the vast majority of its relationships with U.S. clients. Until the termination of the accounts, CSAG continued to collect some broker-dealer and investment adviser fees from certain U.S. clients through at least June 2013. However, during this period, CSAG took certain measures designed to prevent violations of the federal securities laws, including, but not limited to, not charging, or limiting the collection of, fees or commissions for certain U.S. client accounts, corresponding with the U.S. clients and suggesting that they take action to close or transfer their accounts, and placing a "no service" flag on certain U.S. client accounts that blocked broker-dealer transactions with respect to the account. From 2002 to 2010, CSAG realized pre-tax income of approximately $82 million from the U.S. cross-border securities business. From January 2011 onwards, CSAG realized pre-tax income of less than $409,000.

G. Violations

45. As a result of the conduct described above, CSAG willfully violated Exchange Act Section 15(a) and Advisers Act Section 203(a).

H. Undertakings

46. Respondent CSAG undertakes to take the following actions set forth below in Paragraphs 47 and 48 of this Order:

47. Within sixty (60) days of entry of this Order, Respondent shall retain an independent consultant (the "Independent Consultant"), not unacceptable to the Commission staff, to conduct an examination of the broker-dealer and investment adviser activities of Respondent to:

a. Verify that Respondent has completed the termination of the business described in this Order; and

b. Evaluate Respondent's existing policies and procedures, to ensure that they are reasonably capable of detecting and preventing any similar violative activity in the future.

48. In retaining the Independent Consultant, Respondent shall:

a. Require the Independent Consultant and any qualified persons working for the Independent Consultant (the "Qualified Persons") to have or to acquire within a reasonable period of time adequate knowledge and understanding of the relevant broker-dealer and investment adviser activities of Respondent and to possess sufficient competence and resources necessary to assess Respondent's termination of the business described in this Order;

b. Require the Independent Consultant to develop a written plan of sufficient scope and detail to enable the Independent Consultant to achieve the examination objectives described in this Order;

c. Require the Independent Consultant and any Qualified Persons to exercise due professional care and independence;

d. Cooperate fully with the Independent Consultant and any Qualified Persons and provide the Independent Consultant and Qualified Persons with access to files, books, records, and staff as requested for the Independent Consultant's examination;

e. Bear the full expense of the Independent Consultant's examination;

f. Require the Independent Consultant to complete its examination within one hundred twenty (120) days following retention by Respondent;

g. Require that, within thirty (30) days of completion of the examination, the Independent Consultant shall provide a final report as to whether Respondent fully has terminated the business described in this Order; and further require that the final report shall be provided to designated persons in the Division of Enforcement of the Commission;

h. Require the Independent Consultant and any Qualified Persons to provide the Commission staff with any documents or other information that the Commission requests regarding the Independent Consultant's work; provided that Respondent shall not assert, and shall

require the Independent Consultant and Qualified Persons not to assert, any privilege or work product claims in response to any of the Commission staff's requests; and provided further, that, in responding to requests from the Commission staff pursuant to this Paragraph of the Order, the Independent Consultant and Qualified Persons shall not be required to provide any information that they are prohibited from providing under the laws or regulations of Switzerland or other applicable foreign law; and

i. Require the Independent Consultant and any Qualified Persons to enter into an agreement that provides that:

1. For the period of the engagement and for a period of two (2) years from completion of the engagement, the Independent Consultant and any Qualified Persons shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondent, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity; and

2. The Independent Consultant and any Qualified Persons will require that any firm with which he/she/they is or are affiliated or of which he/she/they is or are a member shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondent, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

49. Respondent shall complete the undertakings specified in Paragraphs 47 and 48 of this Order within the time period specified herein unless, upon written request, and for good cause shown by Respondent, the Commission staff grants Respondent such additional time as the Commission staff deems reasonable and necessary to implement the undertakings.

50. In determining whether to accept Respondent's Offer, the Commission has considered the undertakings described in Paragraphs 47 and 48 of this Order.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 15(b)(4) and 21C of the Exchange Act and Sections 203(e) and (k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent CSAG is censured;

B. Respondent CSAG cease-and-desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act or Section 203(a) of the Advisers Act; and

C. Respondent shall, within ninety (90) days of the entry of this Order, pay disgorgement of $82,170,990, prejudgment interest of $64,340,024, and a civil money penalty in

the amount of $50,000,000 to the Securities and Exchange Commission for remission to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying CSAG as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Scott W. Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-5010.

D. Respondent shall comply with the undertakings enumerated in Paragraphs 47 and 48 of this Order.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

DIVISION OF
TRADING AND MARKETS

May 28, 2013

Amy Natterson Kroll, Esq.
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806

Re: **Roland Berger Strategy Consultants**

Dear Ms. Kroll:

In your letter dated May 28, 2013, on behalf of your client, Roland Berger Strategy Consultants ("Roland Berger"), you request assurances from the staff of the Division of Trading and Markets ("Staff") that it would not recommend enforcement action to the Securities and Exchange Commission ("Commission") under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if Roland Berger were to engage in the activities described in your letter without registering as a broker-dealer under Section 15(b) of the Exchange Act.

Based on your letter, I understand the facts to be as follows.

Roland Berger is an independent strategy consultancy firm based in Germany, the ultimate parent company of which is Roland Berger Strategy Consultants Holding GmbH, a limited liability company registered in Munich.[1] Roland Berger provides certain strategy consultancy services on behalf of non-U.S. clients including: (1) corporate and other entities domiciled outside the United States and (2) agencies or branches of U.S. entities permanently located outside the United States ("Non-U.S. Clients").[2]

In certain situations, Roland Berger may be retained outside the United States by Non-U.S. Clients in connection with either buy-side or sell-side merger and acquisition ("M&A") transactions. These transactions may involve the proposed acquisition or disposal of operations of a company or division of a company (*e.g.*, an asset sale), the proposed acquisition or sale of a company or division through an equity securities transaction, or the proposed acquisition or sale of a company or division through a combination asset and securities transaction.

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1 You note that while Roland Berger does not have an office in the United States, it has an affiliate, Roland Berger Strategy Consultants LLC ("U.S. affiliate"), that is located in the United States. The U.S. affiliate provides many of the same consultancy services that Roland Berger provides. You acknowledge in your letter that if the U.S. affiliate or its personnel provided the services described in your letter, the U.S. affiliate could become subject to U.S. broker-dealer regulation. Roland Berger has not requested, and we are not providing in this letter, any relief with respect to the activities of the U.S. affiliate.

2 For the limited purpose of this letter, an agency or branch of a U.S. entity includes a bona fide division of a U.S. operating company.

During the course of developing a proposed transaction, Roland Berger, on behalf of its Non-U.S. Client, typically will identify potential target buyers or sellers and make an initial contact with the targets to assess interest in a proposed transaction. These contacts would include, for example, telephone calls, emails, and related mailings of general pitch materials regarding the proposed transaction.

Roland Berger, as part of its process of contacting potential target buyers or sellers in connection with M&A transactions, may contact one or more U.S.-based entities or non-U.S.-based entities that have U.S.-based parents involved in investment decisions of the non-U.S. entity (each such U.S.-based entity and each U.S.-based parent, a "U.S. Target"). You represent that any U.S. Target approached by Roland Berger on behalf of its Non-U.S. Client would fall within the meaning of the term "Major U.S. Institutional Investor" as defined in Rule 15a-6(b)(4) under the Exchange Act and further developed in subsequent no-action letters.[3]

You state that if a potential buyer or seller becomes interested in a transaction with a Non-U.S. Client, Roland Berger will, among other things, develop and manage the data room and the information process, conduct negotiations on behalf of the Non-U.S. Client and advise the Non-U.S. Client on the terms of the transaction.

You request assurances that the Staff would not recommend enforcement action to the Commission if Roland Berger were to initiate contact directly with potential U.S. Targets in the manner described above. You further request assurances that the Staff would not recommend enforcement action to the Commission if Roland Berger, after making initial contact with one or more potential U.S. Targets, were to engage in the additional activities described above in connection with U.S. Targets in situations where it interacts with either:

(1) a U.S. Target that is using internal or group level personnel with relevant M&A experience[4] (via in-person meetings or through other direct contacts) to negotiate a transaction, if the internal or group level personnel described above are not associated with a U.S.-registered broker-dealer, provided that Roland Berger personnel engaged in any contacts with U.S. Targets in the United States are limited to persons whom Roland Berger would have determined satisfy the requirements for "foreign associated persons" in Rule 15a-6(a)(3)(ii)(B); or

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[3] *See* Letter from Richard R. Lindsey, Director, Division of Market Regulation, SEC, to Giovanni P. Prezioso, Esq., Cleary, Gottlieb, Steen & Hamilton, Re: Securities Activities of U.S.-Affiliated Foreign Dealers (April 9, 1997), as supplemented by Letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, to Giovanni P. Prezioso, Esq., Cleary, Gottlieb, Steen & Hamilton, Re: Securities Activities of U.S.-Affiliated Foreign Dealers (April 28, 1997). *See also*, Letter from David W. Blass, Chief Counsel, Division of Trading and Markets, SEC, to D. Grant Vingoe, Esq., Arnold & Porter LLP, Re: Merger and Acquisition Activities of Foreign Firms in Reliance on Rule 15a-6 (July 12, 2012).

[4] You explain in your letter that many companies and corporate families in the United States meeting the Major U.S. Institutional Investor threshold have established internal or group corporate investment banking groups or experts who handle many transactions for the companies and their affiliates.

(2) a U.S. Target that is using the services of an external advisor, such as a broker-dealer, attorney or other professional with relevant experience.[5]

In furtherance of this request, Roland Berger states that: (1) it would not receive, acquire or hold funds or securities in connection with any transaction it engages in with a U.S. Target in reliance on the requested no-action relief; (2) it would not represent or advise the U.S. Target in any regard with respect to the proposed transactions; and (3) the granting of the requested no-action relief would not relieve Roland Berger of any obligations it has to comply with the antifraud provisions of the U.S. securities laws.

Response:

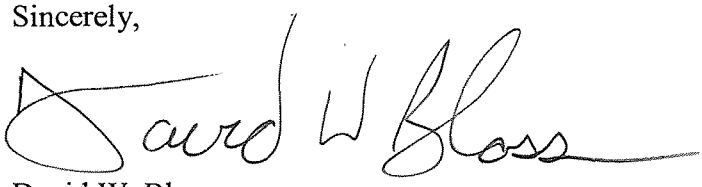
Based on the facts and representations contained in your letter, the Staff will not recommend enforcement action to the Commission under Section 15(a)(1) of the Exchange Act against Roland Berger for engaging in the M&A activities described in your letter without registering as a broker-dealer in accordance with Section 15(b) of the Exchange Act.

In taking this position, we note in particular that, for any transaction with a U.S. Target in reliance on this relief, Roland Berger will not represent or advise any U.S. Target and will not receive, acquire or hold funds or securities.

This position is based strictly on the facts and representations you have made in your letter and any different facts and circumstances may require a different response. This response, furthermore, expresses the Staff position regarding enforcement action only and does not purport to express any legal conclusions on the question presented. The Staff expresses no view with respect to any other questions that the proposed activities may raise, including the applicability of any other federal or state laws, or self-regulatory organization rules.

If you have any questions regarding this letter, please call Joseph Furey, Assistant Chief Counsel, Andrew Bernstein, Branch Chief, or me at (202) 551-5550.

Sincerely,



David W. Blass
Chief Counsel

cc: Margaret R. Blake, Esq., Bingham McCutchen LLP

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[5] Any person representing a U.S. Target would have its own independent obligation to determine whether it must register with the Commission as a broker-dealer in accordance with Section 15(b) of the Exchange Act.

BINGHAM

Amy Natterson Kroll
Direct Phone: +1.202.373.6118
Direct Fax: +1.202.373.6001
amy.kroll@bingham.com

May 28, 2013

David W. Blass
Chief Counsel
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington DC 20549

Re: Roland Berger Strategy Consultants: Request for No-Action Relief

Dear Mr. Blass:

On behalf of our client, Roland Berger Strategy Consultants ("Roland Berger" or "Firm"), we respectfully request your assurance that the staff of the Division of Trading and Markets (the "Staff") of the U.S. Securities and Exchange Commission (the "SEC" or "Commission") would not recommend enforcement action under Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") against Roland Berger if Roland Berger were to engage in the activities described below without registering as a broker or dealer under Section 15 of the Exchange Act.

Description of Roland Berger and its Activities

Roland Berger is an independent strategy consultancy firm based in Germany, the ultimate parent company of which is Roland Berger Strategy Consultants Holding GmbH, a limited liability company registered in Munich. Roland Berger has offices or affiliates in 36 countries.[1] Roland Berger engages in a wide range of strategy consultancy services on behalf of non-U.S. clients including: (1) corporate and other entities domiciled outside the United States, and (2) agencies or branches of U.S. entities permanently located outside the United States ("Non-U.S. Clients").[2] The majority of strategy consulting services Roland Berger provides do not qualify as "broker" activities, however, the consulting services provided by the Firm, from time to time, include advice in connection

[1] While Roland Berger does not have an office in the United States it has an affiliate, Roland Berger Strategy Consultants LLC ("U.S. affiliate"), that is located in the United States and that provides many of the same consultancy services that Roland Berger provides. The Firm and its U.S. affiliate are aware that if the U.S. affiliate or its personnel provided the services described in this letter, the U.S. affiliate could become subject to U.S. broker-dealer regulation. The Firm is not requesting any relief with respect to the activities of the Firm's U.S. affiliate.

[2] For the limited purpose of this letter, an agency or branch could include a bona fide division of a U.S. operating company.

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

with cross border merger and acquisition ("M&A") activities that, depending on how and where they are provided, might be viewed as activities of a "broker" as that term is defined in section 3(a)(4) of the Exchange Act.

In the scenarios for which the Firm seeks no-action relief, Roland Berger is retained outside the United States by Non-U.S. Clients in connection with either buy-side or sell-side M&A transactions. For purposes of the activities described in this letter, Roland Berger's Non-U.S. Clients are limited to foreign private issuers that may or may not have a listing in the United States, non-U.S. companies owned by private equity firms based outside the United States that are managed by advisers also outside the United States, and other similarly situated issuers. The transactions on which Roland Berger is retained may involve the proposed acquisition or disposal of operations of a company or division of a company (*e.g.*, asset sale), the proposed acquisition or sale of a company or division through an equity securities transaction, or the proposed acquisition or sale of a company or division through a combination asset and securities transaction.

During the course of developing a proposed transaction, Roland Berger, on behalf of its Non-U.S. Client, will identify potential target buyers or sellers and make an initial contact with such targets to assess interest in the proposed transaction. These contacts would include, for example, telephone calls, email correspondence, and related mailings of general pitch materials regarding the proposed transaction. Roland Berger requests no-action relief for those situations when these target buyers or sellers include, in addition to non-U.S. entities, one or more U.S.-based entities, or non-U.S.-based entities that have U.S.-based parents involved in investment decisions of the non-US subsidiary (both U.S.-based entities and the U.S. parents of non-U.S.-based entities referred to herein individually as "U.S. Target" or collectively as "U.S. Targets").

U.S. Targets approached by Roland Berger on behalf of its client(s) would be limited to Major U.S. Institutional Investors as defined in Rule 15a-6(b)(4) under the Exchange Act of 1934 ("Exchange Act") and further developed in subsequent no-action letters.[3] Once a U.S. Target is approached about a proposed transaction and indicates an interest, it may retain its own broker-dealer or other advisor (*i.e.*, law firm or other professional) to represent it in the potential transaction. Alternatively, the U.S. Target, in some instances,

[3] *See* Letter from Richard R. Lindsey, Director, Division of Market Regulation, SEC, to Giovanni P. Prezioso, Esq., Cleary, Gottlieb, Steen & Hamilton, Re: Securities Activities of U.S.-Affiliated Foreign Dealers (April 9, 1997) ("Nine-Firms Letter"), as supplemented by Letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, to Giovanni P. Prezioso, Esq., Cleary, Gottlieb, Steen & Hamilton, Re: Securities Activities of U.S.-Affiliated Foreign Dealers (April 28, 1997). *See also*, Letter from David W. Blass, Chief Counsel, Division of Trading and Markets, SEC, to D. Grant Vingoe, Esq., Arnold & Porter LLP, Re: Merger and Acquisition Activities of Foreign Firms in Reliance on Rule 15a-6 (July 12, 2012).

may not use an external advisor, but rather may choose or be required by internal policy to manage the transaction internally.[4]

If a potential buyer or seller becomes interested in a transaction with a Non-U.S. Client of Roland Berger, the Firm will, among other things, develop and manage the data room and the information process, conduct negotiations on behalf of the Non-U.S. Client and advise the Non-U.S. Client on the terms of the transaction.

Roland Berger's compensation in M&A engagements usually is based on a monthly retainer fee, and in the case of a successful transaction, an additional flat fee agreed upon at the beginning of the transaction, or a variable fee based on the ultimate size of the deal.

Potential Issues Under the Exchange Act

Section 15(a) of the Exchange Act generally provides that persons that satisfy the definition of "broker" or "dealer" in Sections 3(a)(4) and (5) of the Exchange Act are required to register with the Commission if they make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security.[5] Pursuant to SEC guidance, communications aimed at inducing sales, coupled with other "badges" of broker-dealer activity, such as receipt of transaction-based compensation, are indicative that a person is acting as a broker-dealer. Generally, M&A engagements that will result in a transfer of ownership of securities, or a financing of a transaction using debt securities, are considered the activities of a "broker" or "dealer" as well.[6] If an entity engages in

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[4] Many companies and corporate families in the United States meeting the Major U.S. Institutional Investor threshold have established internal or group corporate investment banking groups or experts who handle many transactions for the companies and their affiliates, in lieu of external investment bankers. These personnel often have previously worked at a registered broker-dealer, and/or are experienced members of the companies' financial and business development groups.

[5] The SEC stated in the Adopting Release for Rule 15a-6 that it:

> [G]enerally views "solicitation" in the context of broker-dealer regulation as including any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer…Solicitation includes efforts to induce a single transaction…Conduct deemed to be solicitation includes telephone calls to a customer encouraging use of the broker-dealer to effect transactions, as well as advertising one's function as a broker [or dealer] in [media] in the United States…or directed into the United States. A broker-dealer also would solicit…by, among other things, recommending the purchase or sale of particular securities, with the anticipation that the customer will execute the recommended trade through the broker-dealer.

Registration Requirements for Foreign Broker-Dealers, 54 Fed. Reg. 30013, notes 53-56 (July 13, 1989) (the "Adopting Release").

[6] Sections 3(a)(4) and 3(a)(5) of the Exchange Act. *See also Landreth Timber Co. v. Landreth,* 471 U.S. 681 (1985), where the U.S. Supreme Court held that, among other things, a purchaser may reasonably conclude that the federal securities laws apply to the purchase of an instrument in

broker-dealer activity described above involving a U.S. Target, it must either register as a U.S. broker-dealer or limit its activities to remain within an exemption or safe harbor from registration. The entity also may seek to obtain no-action relief or may rely on no-action relief previously issued to another entity, as allowable.

The SEC, in 1989, adopted Rule 15a-6 under the Exchange Act, in order to permit non-U.S. broker-dealers engaging in activities that might otherwise require registration in the United States to conduct such activities under limited exemptions from broker-dealer registration and regulation. M&A activities are not expressly addressed in Rule 15a-6 or in the SEC's accompanying Adopting Release, and the application of Rule 15a-6 to M&A advisory activity has proven difficult for many non-U.S. firms because Rule 15a-6 was drafted to apply to more "traditional" brokerage activity. However, non-U.S. firms providing M&A advisory services in the United States, or through U.S. jurisdictional means, generally understand that it is necessary to conform their activities to the exemptions provided in Rule 15a-6 (or another available exemption, if applicable), regardless of how difficult it is to fit squarely therein.

Based on the Adopting Release and guidance thereunder, we understand that U.S. broker-dealer regulation could apply when a non-U.S. entity provides certain M&A advisory services to Non-U.S. Clients, such as contacting one or more U.S. Targets in order to propose a transaction with a Non-U.S. Client or managing certain aspects of the proposed M&A transaction with the U.S. Target on behalf of the Non-U.S. Client. This appears to be the view, even though the non-U.S. advisor is not seeking to advise the U.S. Target at any point in the transaction.

It also is possible that U.S. broker-dealer regulation could apply to a non-U.S. entity, such as Roland Berger, if it participates in negotiations on behalf of its Non-U.S. Client where the counterparty in the transaction is a U.S. Target that is not advised by a registered U.S. broker-dealer.

In order to be certain that an exemption is available under Rule 15a-6, Roland Berger would have to either (1) deal only with a registered broker-dealer (or U.S. bank acting in a broker-dealer capacity) acting on behalf of a U.S. Target pursuant to Rule 15a-6(a)(4)(i), or (2) enter into an agreement with a U.S. registered broker-dealer pursuant to Rule 15a-6(a)(3) under which the U.S. registered broker-dealer would assume certain responsibilities for the transaction, to the extent a U.S. Target is involved or U.S. jurisdictional means are used, even though Roland Berger would not be representing a U.S. Target.

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the sale of a business, where the instrument is called a "stock" and has the characteristics typically associated with a security. Therefore, *Landreth* leads to the conclusion that an intermediary assisting in the sale of a business structured as a sale of securities would have to be a registered broker-dealer (or operating pursuant to an exemption from registration) if it uses U.S. jurisdictional means when engaging in such activity, absent an available exemption.

With respect to Rule 15a-6(a)(4)(i), in many instances, a U.S. Target might not retain a registered broker-dealer for M&A transactions until the U.S. Target is seriously considering entering into a proposed transaction. Alternatively, the U.S. Target may, as described above, use internal or group-level personnel, or an external advisor, not limited to a broker-dealer, for some or all of its M&A transactions.

When a U.S. Target has experienced internal or group level personnel, as discussed above, the practical result is equivalent to retaining a registered broker-dealer. Rule 15a-6(a)(4)(i), however, only provides an exemption from registration if a non-U.S. broker-dealer interacts with registered broker-dealers, or banks acting in a broker-dealer capacity. Therefore, reliance on Rule 15a-6(a)(4)(i) may not be possible for Roland Berger if it wishes to contact and interact directly with U.S. Targets as prospective buyers or sellers in transactions with its Non-U.S. Clients.

In Rule 15a-6(a)(3) and the Adopting Release, the SEC (and its Staff later in the Nine Firms Letter), expressly acknowledged - in the context of secondary market trading - that Major U.S. Institutional Investors could choose to interact directly with non-U.S. broker-dealers under certain circumstances, either chaperoned or unchaperoned, provided that the resulting transactions ultimately were "booked" by a registered broker-dealer and certain other conditions were satisfied. Some non-U.S. M&A advisors have sought to fit their activities on behalf of non-U.S. Clients within the requirements of the Rule 15a-6(a)(3) exemption when a U.S. Target is under consideration. Industry experience suggests that the results of such a scenario can be cumbersome and difficult to administer.[7]

Requested Relief

Roland Berger requests that the Staff grant no-action relief to permit the Firm to act on behalf of its Non-U.S. Clients in M&A transactions with U.S. Targets without requiring the Firm to register as a broker-dealer pursuant to Section 15 of the Exchange Act as follows.

Roland Berger first requests no-action relief to allow the Firm, on behalf of its Non-U.S. Clients, to initiate contact directly with potential U.S. Targets to introduce a proposed M&A transaction, to assess the U.S. Targets' interest in the transaction and to identify the U.S. Targets' investment bankers, or expert personnel if the U.S. Target expresses interest in the proposed transaction. Such contacts would include, but not be limited to, telephone calls, email correspondence, and related mailings (either of hard copy or by

[7] If Roland Berger anticipated representing U.S. Targets as clients, it would enter into an agreement with a U.S. registered broker-dealer (either by registering an affiliate, or identifying an unrelated third party willing to enter into such an agreement) to satisfy the requirements of the exemption provided in Rule 15a-6(a)(3).

email) of general pitch materials, regarding the proposed transaction and the Non-U.S. Client involved.

In addition, Roland Berger requests that the Staff grant no-action relief to the Firm when **either** (1) it interacts with a U.S. Target that is using internal or group level personnel with relevant M&A experience (via in-person meetings or through other direct contacts) to negotiate a transaction, if the internal or group level personnel described above are not associated with a U.S.-registered broker-dealer, provided that Roland Berger personnel engaged in any contacts with U.S. Targets in the United States are limited to persons whom Roland Berger would have determined satisfy the requirements for "foreign associated persons" in Rule 15a-6(a)(3)(ii)(B); **or** (2) it interacts with a U.S. Target that is using the services of an external advisor, such as a broker-dealer, attorney or other professional with relevant experience.

Finally, in connection with the receipt of the requested no-action relief, Roland Berger acknowledges (1) that it would not receive, acquire or hold funds or securities in connection with any transaction it engages in with a U.S. Target in reliance on the requested no-action relief, (2) that it would not represent or advise the U.S. Targets in any regard with respect to the proposed transactions, and (3) that the granting of the requested no-action relief would not relieve Roland Berger of any obligations it has to comply with the antifraud provisions of the U.S. securities laws (including, but not limited to, the Exchange Act).

* * *

If you have any questions regarding this request, please do not hesitate to contact me (202-373-6118) or Peggy Blake (202-373-6296).

Best regards,



Amy Natterson Kroll

cc: Matthias Rueckriegel, Principal
Roland Berger Strategy Consultants GmbH

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

July 12, 2012

D. Grant Vingoe, Esq.
Arnold & Porter LLP
399 Park Avenue
New York. NY 10022-4690

Re: Merger and Acquisition Activities of Foreign Firms in Reliance on Rule 15a-6

Dear Mr. Vingoe:

In your letter dated July 10, 2012, on behalf of your client, Ernst & Young Corporate Finance (Canada) Inc. ("EYCF(C)") and certain other members of Ernst & Young Global Limited ("E&Y"), you request assurances from the staff of the Division of Trading and Markets ("Staff") that it would not recommend enforcement action to the Securities and Exchange Commission ("Commission") under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if certain non-U.S. resident E&Y member firms (the "Foreign E&Y Member Firms") engage in the activities described in your letter with EYCF(C) without registering as broker-dealers under Section 15(b) of the Exchange Act.

EYCF(C) is a broker-dealer registered with the Commission and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"). EYCF(C) is a member of E&Y, as is each Foreign E&Y Member Firm. As part of their accounting, advisory, and consulting services, the Foreign E&Y Member Firms advise companies with respect to merger and acquisition transactions, and provide advice regarding changes in control, expansion of business lines, acquisition of "hard" facilities, geographic expansion, taxation, and other matters ("M&A Activities").

In some instances, the M&A Activities conducted by a Foreign E&Y Member Firm are cross-border arrangements that, absent an exemption, would require the Foreign E&Y Member Firm to register with the Commission as a broker-dealer under Section 15(b) of the Exchange Act. In these situations, the Foreign E&Y Member Firm relies on the exemption from broker-dealer registration in Rule 15a-6(a)(3) of the Exchange Act (and related no-action letters) by employing the services of EYCF(C), which acts as a "chaperone" to the Foreign E&Y Member Firm. EYCF(C)'s Rule 15a-6(a)(3) arrangements have been limited to situations in which the U.S. person in the transaction comes within the meaning of the term "Major U.S. Institutional

Investor," as defined in Rule 15a-6, or is treated as such pursuant to no-action positions taken by the Staff in the 1997 "Nine-Firms Letter."[1]

Under Rule 15a-6(b)(4), a "Major U.S. Institutional Investor" is defined as an institutional investor that has, or has under management, total assets in excess of $100 million, or a registered investment adviser with total assets under management in excess of $100 million. Rule 15a-6(b)(7) defines the term "institutional investor" to include specified financial entities.[2] Among other things, the Nine-Firms Letter permits treatment of any entity that owns or controls (or in the case of an investment adviser, has under management) $100 million in aggregate financial assets as a Major U.S. Institutional Investor. In the Nine-Firms Letter, "financial" assets are limited to "cash, money-market instruments, securities of unaffiliated issuers, futures and options on futures and other derivative instruments."[3]

EYCF(C) proposes to act as a chaperone under Rule 15a-6(a)(3) in situations in which a U.S. person that is a potential party to a merger and acquisition does not meet the criteria to be a "Major U.S. Institutional Investor" under Rule 15a-6(b)(4) or the Nine-Firms Letter. You state that such a party is sophisticated with respect to its business and holds more than $100 million in total assets (excluding cash and cash equivalents) that include, but are not limited to: plant; equipment; real estate; intellectual property; and unimpaired goodwill arising from prior acquisitions, among other assets.

You request assurances that the Staff would not recommend enforcement action to the Commission if EYCF(C) and the Foreign E&Y Member Firms treat customers with $100 million in total assets, including assets that are not "financial" assets (but excluding cash and cash equivalents), as Major U.S. Institutional Investors solely in the context of a Foreign E&Y Members Firm's M&A Activities. You represent that total assets would be calculated before giving effect to a potential transaction in the manner described in the Nine-Firms Letter: "total assets calculated on a gross basis, without deduction for liabilities of the company, based on the balance sheet or comparable financial statements of the company prepared in the ordinary course of business."[4] You further represent that for purposes of the relief requested in your letter, the customer's balance sheet or comparable financial statement would be prepared by a certified public accountant ("CPA") (or the non-U.S. equivalent of a CPA if the customer is an entity whose balance sheet or financial statements are appropriately prepared under non-U.S. standards, such as a subsidiary of a non-U.S. entity that prepares its financial statements in accordance with the standards used by its parent), and prepared in accordance with applicable generally accepted

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1 *See* Letter re: *Securities Activities of U.S.-Affiliated Foreign Dealers* (April 9, 1997) ("Nine-Firms Letter"), *as supplemented by* Letter re: *Securities Activities of U.S.-Affiliated Foreign Dealers* (April 28, 1997).

2 These entities include registered investment companies, banks, savings and loan associations, insurance companies, business development companies, small business investment companies, certain employee benefit plans, private business development companies, and certain trusts and charitable organizations.

3 *See* Nine-Firms Letter.

4 *Id.*

accounting principles.[5] You represent that where goodwill and/or intangibles are relied upon to reach the $100 million threshold, the customer financial statements would be (a) audited and (b) prepared in accordance with, or reconciled to, U.S. Generally Accepted Accounting Principles (or International Financial Reporting Standards if the customer is an entity whose balance sheet or financial statements are appropriately prepared under non-U.S. standards, as described above).

You request relief only in the context of private placements of stock or other forms of equity securities, and only in the context of mergers or acquisitions that would result in the transfer of control of an entire company or business unit.[6] For these purposes, where a company is transferred, "control" would be measured by ownership of over 50% of its equity securities. Where a business unit is transferred in exchange for securities, the assets comprising an entire, distinct business unit would be owned outright by the selling entity and acquired outright by the purchasing entity. In all other respects, you represent that EYCF(C)'s activities would comport with the provisions of Rule 15a-6 and related no-action letters.

Response:

Based on the facts and representations contained in your letter, the Staff will not recommend enforcement action to the Commission under Section 15(a)(1) of the Exchange Act against a Foreign E&Y Member Firm for engaging in the M&A Activities described in your letter with EYCF(C) without registering as a broker-dealer in accordance with Section 15(b) of the Exchange Act, in reliance on the exemption from registration in Rule 15a-6(a)(3).

In taking this position, we note in particular your representation that a customer with $100 million in total assets, as calculated in the manner and under the conditions described in your letter, will be treated as a Major U.S. Institutional Investor solely in the limited situation where a Foreign E&Y Member Firm is engaged in M&A Activities with one of these customers. In addition, the relief you request would only be available in the context of a private placement and only in the context of a merger or acquisition that would result in the transfer of control of an entire company or business unit. As you represent in your letter, should a review of financial statements uncover that they were not prepared by a CPA (or non-U.S. equivalent as described

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5 You state that at the beginning stages of a transaction, EYCF(C) and the Foreign E&Y Firms do not know whether the asset threshold is met or if a business's financial statements are prepared by a CPA (or non-U.S. equivalent of a CPA if the customer is an entity whose balance sheet or financial records are appropriately prepared under non-U.S. standards, as described above). You state that financial statements would be reviewed and if the financial statements were not prepared by a CPA (or non-U.S. equivalent as described above), or the required assets thresholds are not met, then the transaction would not be eligible for the requested relief.

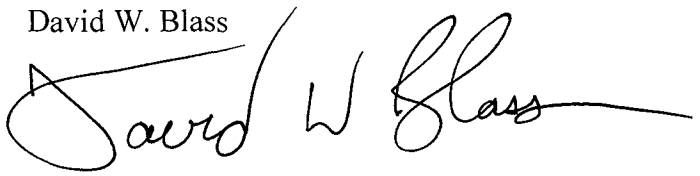
6 You represent that settlement in such transactions is effected on a delivery versus payment basis (generally in the offices of legal counsel), with funds transferred between accounts by banks. If a transaction were to arise where EYCF(C) were to participate in a transaction's settlement by handling funds or securities, you acknowledge that EYCF(C) would also be responsible for receiving, delivering, and safeguarding those funds and securities. You state that, in such a case, EYCF(C) would ensure that it has received all necessary approvals from FINRA and that it complies with all relevant provisions of the Exchange Act and the rules thereunder, including the Net Capital and Customer Protection Rules (17 CFR 240.15c3-1 and 240.15c3-3), as well as Rule 15a-6 (17 CFR 240.15a-6(b)(3)) and related interpretations.

above), or the required asset thresholds are not met, then a proposed transaction would not be eligible under the assurances provided by this letter. Finally, we note your representation that if transactions are not settled directly between the parties and if EYCF(C) participates in a transaction's settlement by handling funds or securities, EYCF(C) will be responsible for receiving, delivering, and safeguarding those funds and securities in accordance with the requirements of Rule 15a-6(a)(3) (and related no-action letters) and any other requirements imposed under the federal securities laws and by self-regulatory organization rules.

This position is based strictly on the facts and representations you have made in your letter and any different facts and circumstances may require a different response. This response, furthermore, expresses the Staff position regarding enforcement action only and does not purport to express any legal conclusions on the question presented. The Staff expresses no view with respect to any other questions that the proposed activities may raise, including the applicability of any other federal or state laws, or self-regulatory organization rules.

If you have any questions regarding this letter, please call Joseph Furey, Assistant Chief Counsel, Ignacio Sandoval, Special Counsel, or me at (202) 551-5550.

David W. Blass



Chief Counsel

cc: Andrew J. Shipe, Esq., Arnold & Porter LLP

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July 10, 2012

David W. Blass
Chief Counsel
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Ernst &Young Corporate Finance (Canada) Inc.: Request for No-Action Relief

Dear Mr. Blass:

On behalf of our client, Ernst & Young Corporate Finance (Canada) Inc. ("EYCF(C)"), and certain other member firms of Ernst & Young Global Limited ("E&Y"), we respectfully request your assurance that the staff of the Division of Trading and Markets of the Securities and Exchange Commission ("Commission") would not recommend enforcement action under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act")[1] against the E&Y Member Firms (as defined below) if the E&Y Member Firms were to engage in the activities discussed below without registering as broker-dealers under Section 15(a) of the Exchange Act provided that those activities are conducted with EYCF(C) in accordance with the exemption from broker-dealer registration in Rule 15a-6(a)(3)[2] under the Exchange Act, except as discussed below.

Description of EYCF(C) and Its Present Activities.

EYCF(C) is a securities broker-dealer registered as such with the Commission and a member of the Financial Industry Regulatory Authority ("FINRA"). Among other things, EYCF(C) engages in merger and acquisition activities, conducts due diligence and valuations, and is authorized by FINRA to act as a private placement agent.

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[1] 15U.S.C. 78a et seq.

[2] 17 CFR §240.15a-6.

EYCF(C) is a member of Ernst & Young Global Limited, a global accounting, advisory and consulting business with member firms located around the world. As part of their accounting, advisory and consulting services, various E&Y member firms ("E&Y Member Firms") advise companies with respect to merger and acquisition transactions. With respect to such transactions, the E&Y Member Firms provide advice regarding changes in control, expansion of business lines, acquisition of "hard" facilities, geographic expansion, taxation and other matters ("M&A Activities"). The E&Y Member Firms are not United States-resident persons.[3]

On various occasions, such merger and acquisition transactions are cross-border arrangements that, in the absence of an exemption, would require the E&Y Member Firms to register with the Commission as broker-dealers under Exchange Act Section 15(a)(1). In these transactions, the E&Y Member Firms may be retained by either the buyer or seller of such businesses. The seller may be selling stock of a company that it controls, and the buyer may be offering securities to acquire a business or business unit from another party. In cases where their advisory activities would cause these E&Y Member Firms to meet the definition of a "foreign broker-dealer" under Rule 15a-6(b)(3),[4] the E&Y Member Firms employ the services of EYCF(C) in order to avail themselves of the exemption from the broker-dealer registration requirement provided by Rule 15a-6(a)(3).

As noted above, EYCF(C) is a broker-dealer registered with the Commission and a member of FINRA. EYCF(C) acts as a "chaperone" pursuant to subparagraph (a)(3) of Rule 15a-6[5] (and related no-action letters) for the E&Y Member Firms when they participate in M&A Activities that would otherwise require them to register as broker-dealers with the Commission. Under these arrangements, EYCF(C) is responsible for, among other things, participating in communications, obtaining consents to service of process, and maintaining required books and records. The merger and acquisition transactions are invariably settled between the parties, without intermediation by EYCF(C).[6]

At present, EYCF(C)'s chaperoning activities are limited to transactions where the U.S. parties to any transaction are "Major U.S. Institutional Investors" as defined in Rule 15a-

[3] The E&Y Member Firms are not registered with the Commission as broker-dealers, or in any other capacity.

[4] 17 CFR §240.15a-6(b)(3).

[5] 17 CFR §240.15a-6(a)(3).

[6] Settlement in such transactions is effected on a delivery versus payment basis (generally in the offices of legal counsel), with funds transferred between accounts by banks. If a transaction were to arise where EYCF(C) were to participate in a transaction's settlement by handling funds or securities, EYCF(C) recognizes that it would also be responsible for receiving, delivering, and safeguarding those funds and securities. In such a case, EYCF(C) would ensure that it has received all necessary approvals from FINRA, and that it complies with all relevant provisions of the Exchange Act and the rules thereunder, including the Net Capital and Customer Protection Rules (17 CFR §§ 240.15c3-1 and 240.15c3-3), as well as Rule 15a-6 (17 CFR §240.15a-6(b)(3)) and related no-action letters.

6(b)(4),[7] or may be treated as "Major U.S. Institutional Investors" pursuant to no-action positions taken by the staff in 1997 ("the Nine Firms Letter").[8] Under Rule 15a-6(b)(4), a "Major U.S. Institutional Investor" is defined as an institutional investor that has, or has under management, total assets in excess of $100 million, or a registered investment adviser with total assets under management in excess of $100 million. However, under Rule 15a-6, "institutional investors" only include certain financial entities: registered investment companies, banks, savings and loan associations, insurance companies, business development companies, small business investment companies, certain employee benefit plans, private business development companies, and certain trusts and charitable organizations.[9]

The "Nine Firms Letter" permits treatment of any entity that owns or controls (or in the case of an investment adviser, has under management) in excess of $100 million in aggregate financial assets as a Major U.S. Institutional Investor. However, "financial" assets are limited to "cash, money-market instruments, securities of unaffiliated issuers, futures and options on futures and other derivative instruments."[10]

Nature of, and Representations Related to, the Request.

EYCF(C) proposes to act as a chaperone under Rule 15a-6(a)(3) where certain potential parties to mergers and acquisitions may not be deemed "Major U.S. Institutional Investors" under the above formulations, but are nonetheless sophisticated with respect to their businesses. These entities may not be treated as Major U.S. Institutional Investors under the Nine Firms Letter because their financial assets may not exceed $100 million. They may not meet the definition of a "Major U.S. Institutional Investor" under Rule 15a-6(b)(4) because they are not financial firms. However, these entities hold more than $100 million in total assets (excluding cash and cash equivalents), including assets that are not "financial" assets, including, but not limited to, plant, equipment, real estate and intellectual property, and unimpaired goodwill arising from prior acquisitions, among other assets.

Therefore, we request that the staff not recommend enforcement action to the Commission under Section 15(a)(1) of the Exchange Act if EYCF(C) treats customers with $100 million in total assets, including assets that are not "financial" assets (but excluding cash and cash equivalents), as Major U.S. Institutional Investors solely in the context of M&A Activities. Total assets would be calculated before giving effect to the potential transaction, and in the manner described in the Nine Firms Letter: "the asset test would be calculated on a gross basis, without deduction for liabilities of the institution, based on the balance sheet or comparable

[7] 17 CFR §240.15a-6(b)(4).

[8] 1997 SEC No-Act Lexis 525 (Apr. 9, 1997), *as supplemented* 1997 SEC No-Act Lexis 573 (Apr. 28, 1997).

[9] Rule 15a-6(b)(7); 17 CFR §240.15a-6(b)(7).

[10] 1997 SEC No-Act Lexis 525, *2 (Apr. 9, 1997).

financial statement of the institution prepared in the ordinary course of its business."[11] However, for purposes of the relief requested in this letter, the customer's balance sheet or comparable financial statement would be required to be prepared by a Certified Public Accountant (CPA) (or the non-U.S. equivalent of a CPA if the customer is an entity whose balance sheet or financial statements are appropriately prepared under non-U.S. standards, such as a subsidiary of a non-U.S. entity that prepares its financial statements in accordance with the standards used by its parent), and prepared in accordance with applicable generally accepted accounting principles.[12] In addition, where goodwill and intangibles are relied upon to reach the $100 million threshold, the customer financial statements would be required to be (a) audited and (b) either prepared in accordance with or reconciled to U.S. Generally Accepted Accounting Principles (U.S. GAAP) (or International Financial Reporting Standards (IFRS) if the customer is an entity whose balance sheet or financial statements are appropriately prepared under non-U.S. standards, as described above).

The requested relief would only apply in the context of private placements of stock or other forms of equity securities, and only in the context of mergers or acquisitions that would result in the transfer of control of an entire company or business unit. For these purposes, where a company is transferred, "control" would be measured by ownership of over 50% of its equity securities. Where a business unit is transferred in exchange for securities, the assets comprising an entire, distinct business unit would be owned outright by the selling entity and acquired outright by the purchasing entity. In all other respects, EYCF(C)'s activities would comport with the provisions of Rule 15a-6 and related interpretations.

In support of our request, we note that the Major U.S. Institutional Investor "financial asset" test in Rule 15a-6(b)(4) is intended to ensure a level of sophistication as to securities and related instruments. Defining a Major U.S. Institutional Investor by reference to a threshold level of financial assets in this manner is appropriate where there is trading in financial instruments.[13] However, the transfers of securities in the transactions that are the subject of this request are only the means to effect changes in ownership and control of a business, and the entities that EYCF(C) intends to treat as Major U.S. Institutional Investors are large entities that

[11] 1997 SEC No-Act Lexis 525, *4 n. 3 (Apr. 9, 1997).

[12] Where, such as in the beginning stages of a transaction, EYCF(C) and the Member Firms do not know, and could not reasonably know, whether the asset threshold is met or if a business's financial statements are prepared by a CPA (or the non-U.S. equivalent of a CPA if the customer is an entity whose balance sheet or financial statements are appropriately prepared under non-U.S. standards, as described above), financial statements would have to be reviewed, and if it is determined that they were not prepared by a CPA (or the non-U.S. equivalent as described above) or the required asset threshold was not met, then the transaction would not be eligible for the requested relief.

[13] Consistent with this policy, for purposes of transactions under SEC Rule 144A (17 CFR §230.144a), "Qualified Institutional Buyers" must own or invest on a discretionary basis, threshold amounts "in securities." Securities transferred pursuant to Rule 144A include not only equities, but bonds, notes, debentures, convertible securities and others.

are sophisticated with respect to their businesses, whether they are buyers or sellers of such businesses. In cases where E&Y is advising the seller in a sale of a business implemented as a stock sale, equity would be transferred so as to effect a change of control. In cases where E&Y is representing the buyer and securities form part of the consideration, the buyer is acquiring control of a business, either in a stock or asset transaction, in return for consideration that includes securities. These transactions constitute the sale or purchase of a business rather than investment activities for the buyer or seller.

Conclusion.

For the foregoing reasons, we respectfully request that the staff not recommend to the Commission that it take enforcement action against the E&Y Member Firms under Section 15(a) of the Exchange Act when the E&Y Member Firms engage in the M&A Activities described above in reliance on the exemption from broker-dealer registration in Exchange Act Rule 15a-6(a)(3).

If you have any questions regarding this request, please feel free to contact me (212) 715-1130 or Andrew Shipe at (202) 942-5049.

Sincerely,

D. Grant Vingoe

cc: Joseph Furey, Esq.
Ignacio Sandoval, Esq.

Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers

Division of Trading and Markets:

March 21, 2013 (Updated April 14, 2014)

The following answers to frequently asked questions were prepared by and represent the views of the staff of the SEC's Division of Trading and Markets ("staff"). They are not rules, regulations, or statements of the SEC, and do not have the approval or disapproval of the SEC.

The staff may update these questions and answers periodically. In each update, the questions added after publication of the last version will be marked with "MODIFIED" or "NEW" after the answer.

For Further Information Contact: David W. Blass, Chief Counsel, at (202) 551-5165, Paula R. Jenson, Deputy Chief Counsel, at (202) 551-5554, Joseph Furey, Assistant Chief Counsel, at (202) 551-5760, or Andrew R. Bernstein, Branch Chief, at (202) 551-5565, Office of Chief Counsel (with regard to broker-dealer registration requirements); Michael A. Macchiaroli, Associate Director, at (202) 551-5525, Thomas K. McGowan, Deputy Associate Director, at (202) 551-5521, Mark M. Attar, Branch Chief, at (202) 551-5889, or Carrie A. O'Brien, Special Counsel, at (202) 551-5640, Office of Financial Responsibility (with regard to financial responsibility requirements), Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

Background

Rule 15a-6 under the Securities Exchange Act of 1934 provides conditional exemptions from broker-dealer registration for foreign broker-dealers[1] that engage in certain specified activities involving U.S. investors. These activities include:

1. Effecting unsolicited securities transactions;

2. Providing research reports to major U.S. institutional investors, and effecting transactions in the subject securities with or for those investors;

3. Soliciting and effecting transactions with or for U.S. institutional investors or major U.S. institutional investors through a "chaperoning broker-dealer"[2]; and

4. Soliciting and effecting transactions with or for registered broker-dealers, banks[3] acting in a broker or dealer capacity, certain international organizations, foreign persons temporarily present in the U.S., U.S. citizens resident abroad, and foreign branches and agencies of U.S. persons.[4]

In adopting Rule 15a-6, the SEC sought "to facilitate access to foreign markets by U.S. institutional investors through foreign broker-dealers and the research that they provide, consistent with maintaining the safeguards afforded by broker-dealer registration," and "to provide clear guidance to foreign broker-dealers seeking to operate in compliance with U.S. broker-dealer registration requirements."[5]

Since that time, the staff has provided guidance on the operation of Rule 15a-6 in various no-action letters. For example, in a 1996 letter to counsel for seven registered broker-dealers, staff indicated that they would not recommend enforcement action to the SEC if a foreign broker-dealer affiliated with any of the firms named in the letter (each, a "U.S. Affiliated Foreign Broker-Dealer") effected transactions in Foreign Securities (as defined therein) with a U.S. Resident Fiduciary (as defined therein) for Offshore Clients (as defined therein) without the U.S. Affiliated Foreign Broker-Dealer either registering with the SEC or effecting the transactions in accordance with Rule 15a-6.[6] The following year, staff informed counsel to nine registered broker-dealers (including all of the firms party to the Seven Firms Letter) that they would not recommend enforcement action to the SEC if any U.S. Affiliated Foreign Broker-Dealer (as modified to reflect the addition of two

additional firms party to the letter) engaged in certain activities without the U.S. Affiliated Foreign Broker-Dealer either registering with the SEC as a broker-dealer or effecting the transactions in accordance with Rule 15a-6.[7] Among other things, the Nine Firms Letter:

1. Established an expanded interpretation of the definition of "major U.S. institutional investor" to include "any entity, including any investment adviser (whether or not registered under the Investment Advisers Act), that owns or controls (or, in the case of an investment adviser, has under management) in excess of $100 million in aggregate financial assets," subject to certain limitations set forth in the letter;

2. Permitted a foreign broker-dealer or its agent, in reliance on Rule 15a-6(a)(3), to transfer funds or securities directly to a U.S. institutional investor or its agent so long as: (i) the transactions involve Foreign Securities (as defined in the Seven Firms Letter) or U.S. government securities; (ii) the foreign broker-dealer agrees to make available to the chaperoning broker-dealer all clearance and settlement information related to such transfers; (iii) the foreign broker-dealer is not acting as a custodian of the funds or securities of the U.S. investor; and (iv) the foreign broker-dealer is not in default to any counterparty on any material financial market transaction; and

3. Permitted foreign associated persons of a foreign broker-dealer, without the participation of an associated person of a chaperoning broker-dealer, to (i) engage in oral communications from outside the U.S. with U.S institutional investors (that do not qualify as major U.S. institutional investors) where such communications take place outside of the trading hours of the New York Stock Exchange, so long as the foreign associated persons do not accept orders to effect transactions other than those involving Foreign Securities, and (ii) have in-person contacts during visits to the U.S. with major U.S. institutional investors (as such definition was expanded in the letter), so long as the number of days on which such in-person contacts occur does not exceed 30 per year and the foreign associated persons engaged in such in-person contacts do not accept orders to effect securities transactions while in the U.S.[8]

In addition, staff has provided responses to certain frequently asked questions regarding the application of Regulation AC

to research activities of foreign broker-dealers, including foreign broker-dealers that rely on the exemption from U.S. broker-dealer registration in Rule 15a-6(a)(2).[9] Notwithstanding this existing guidance, market participants have asked the staff to provide additional guidance with respect to the operation of the rule. Some of the more frequently asked questions are discussed below.

Answers to Frequently Asked Questions

Question 1: For purposes of Rule 15a-6(a)(4)(iii), would a foreign person be considered to be "temporarily present in the United States" if the person is in the U.S. for a finite period of time for employment, educational, or similar purposes and affirmatively acknowledges that he or she desires to maintain the existing relationship that had been established with the foreign broker-dealer prior to entering the U.S.?

Answer: The determination of whether a foreign person is temporarily present in the United States will ultimately depend on the specific facts and circumstances of each particular situation.[10] However, the SEC noted in the Rule 15a-6 Adopting Release that a foreign person not otherwise deemed a resident of the U.S. under applicable law would be presumed to be temporarily present in this country for purposes of Rule 15a-6(a)(4)(iii).[11]

The staff believes that the SEC, in adopting Rule 15a-6(a)(4)(iii), intended to permit a foreign broker-dealer, without registering with the SEC, to effect transactions with a foreign person located in the U.S. with whom the foreign broker-dealer had a bona fide, pre-existing relationship before the foreign person entered the U.S., so long as such person: (1) is not a U.S. citizen and (2) is not a lawful permanent resident of the U.S. (*i.e.*, a "Green Card holder").

Question 2: Could a foreign broker-dealer chosen by a foreign issuer to administer a global employee stock option plan ("ESOP") rely on Rule 15a-6(a)(1) to transmit communications regarding the ESOP to, and effect transactions in the foreign issuer's securities for, U.S. employees of the foreign issuer or its U.S. subsidiary?

Answer: A foreign broker-dealer that administers or seeks to administer an ESOP or other plan that is an "employee benefit plan" as defined in 17 C.F.R. § 230.405, and that is established and administered in accordance with foreign law for a foreign issuer that is organized outside the U.S. and whose principal office and place of business are located

outside of the U.S. would not, solely because of that activity, be considered to have solicited the U.S. employees or U.S. subsidiary, provided that the foreign broker-dealer:

- Deals exclusively with management and employee benefit representatives from the foreign issuer (so long as such persons are not located within the U.S.) in administering the plan; and

- Limits its activities with respect to U.S. persons to the following activities: (i) facilitating the transfer of the foreign issuer's securities to a U.S. person employed by the foreign issuer or its U.S. subsidiary; (ii) sending required plan documents, account statements, confirmations, privacy notices, prospectuses, proxy statements or other legally required documents to the employee; and (iii) selling, transferring, or otherwise disposing of the foreign issuer's securities, in each case so long as the activities described in (i) through (iii) relate solely to foreign securities acquired by U.S. persons pursuant to the applicable employee benefit plan.

As a general matter, the staff believes that U.S. employees should not be precluded from participating in an employee benefit plan where the employing entity is a foreign issuer or a U.S. subsidiary of a foreign issuer. In such circumstances, the staff generally would consider a foreign broker-dealer administering the plan to have an ongoing securities business relationship primarily with the foreign issuer, and any solicitation by the foreign broker-dealer in ordinary circumstances would be directed to the foreign issuer, rather than to employees who happen to be present in the U.S.

The staff would not consider such conduct to involve the solicitation of a U.S. person even if the foreign broker-dealer actively solicits the foreign issuer as part of its efforts to become a plan administrator, so long as the foreign broker-dealer's active solicitation is performed entirely outside the U.S. and does not involve employees of the company who are located within the U.S.

By contrast, the staff likely would consider a foreign broker-dealer that went beyond the circumstances described in this FAQ as having solicited a U.S. person. As the SEC explained when adopting Rule 15a-6, "the deliberate transmission of information, opinions, or recommendations to investors in the United States, whether directed at individuals or groups, could result in the conclusion that the foreign broker-dealer has solicited those investors."[12]

Finally, to the extent the foreign broker-dealer is unable to rely on Rule 15a-6(a)(1) for these purposes, it would not be precluded from relying on any other applicable exemption from broker-dealer registration, such as Rule 15a-6(a)(4)(iii), which permits foreign broker-dealers to effect transactions with a foreign person temporarily present in the U.S., with whom the foreign broker-dealer had a bona fide, pre-existing relationship before the foreign person entered the U.S.[13]

Question 2.1: Would the answer to question 2 be different if U.S. persons participating in a foreign issuer's employee benefit plan received, held or transferred their shares in the foreign issuer's securities pursuant to a sponsored American Depositary Receipt ("ADR") program?

Answer: No. Staff recognizes that many companies use ADRs to raise capital or to establish a trading presence in the U.S. for a variety of legal or operational reasons. As explained in the answer to question 2, staff generally believes that U.S. employees should not be precluded from participating in an employee benefit plan where the employing entity is a foreign issuer or a U.S. subsidiary of a foreign issuer. Accordingly, staff believes that a foreign broker-dealer administering a foreign issuer's employee benefit plan in accordance with the limitations set forth in the answer to question 2 would not be considered to have solicited a U.S. person to the extent that distributions or transfers of the foreign issuer's securities were made pursuant to a sponsored ADR program, as opposed to directly in shares of the issuer's securities.[14]

Question 2.2: In addition to the actions described in the answer to question 2, may a foreign broker-dealer, in its capacity as administrator of a foreign issuer's employee benefit plan and in accordance with the terms and conditions of the plan, send information and instructions from the issuer or a third party to a U.S. employee, collect appropriate responses from the U.S. employee, and transmit responses and other instructions to the issuer (or its designee/service provider)?

Answer: Yes. A foreign broker-dealer may engage in these activities in its capacity as administrator of a foreign issuer's employee benefit plan and in accordance with the terms and conditions of the plan.

For example, if a foreign issuer carries out a rights offering that is made available to all shareholders (including any employees holding shares pursuant to the terms and conditions of an employee benefit plan), the issuer (or its

designee/service provider) would likely send all documents and instructions related to the rights offering to the foreign broker-dealer in its capacity as administrator, particularly if the foreign broker-dealer holds securities as nominee for the employees. In that situation, the administrator may forward those materials to a U.S. employee participating in the benefit plan, receive responses from the U.S. employee, and transmit those responses back to the issuer (or its designee/service provider).

Similarly, a foreign broker-dealer serving as administrator to a foreign issuer's employee benefit plan that involves options may receive and pass along requests from U.S. employees to exercise their options. In addition, a foreign broker-dealer, as administrator of the plan and/or holder of record of the applicable security, may transmit proxy materials, voting instruction forms and any other similar documents and instructions to a U.S. plan participant. It also may receive instructions and responses back from the U.S. plan participant and act in accordance with those instructions.

It is important to emphasize, however, that under each of the examples described above (and any other scenarios that follow the same pattern), the foreign broker-dealer's actions must be passive in nature, involve no other indicia of solicitation and be taken only in accordance with the terms and conditions of the foreign issuer's employee benefit plan or supplemental plan (e.g., the rights offering).

Question 2.3: May a foreign broker-dealer, in its capacity as administrator of a foreign issuer's employee benefit plan, hold securities, as nominee, for: (1) the spouse or domestic partner of a participating U.S. employee in an account separate from the employee's account; or (2) a former U.S. employee or, if that employee is deceased, the employee's legal heir?

Answer: Yes, in each situation the foreign broker-dealer may hold securities as nominee so long as the securities are received and maintained accordance with the terms and conditions of the foreign issuer's employee benefit plan. For example, a foreign issuer's employee benefit plan may expressly permit employees to transfer securities received in connection with the plan to a spouse or domestic partner, such as through a gift or domestic relations order. Similarly, the employee benefit plan may specify the procedures to be used following the separation or death of an employee.

However, any such account may only contain securities (or rights thereto) received in connection with an employee's participation in the employee benefit plan while the

employee worked for the foreign issuer. Moreover, the foreign broker-dealer may not solicit or effect any additional securities transactions in those accounts, other than the activities contemplated in the response to questions 2 and 2.2 of these frequently asked questions.

Question 2.4: May a foreign broker-dealer, in its capacity as the administrator of a foreign issuer's employee benefit plan, make available to U.S. employees a password-protected website to manage their accounts?

Answer: Yes. Although a transaction conducted over a foreign broker-dealer's website ordinarily would be considered a solicited transaction for purposes of Rule 15a-6(a)(1),[15] the staff does not believe that it would be inconsistent with any prior SEC statement if, solely for the limited purpose of acting as the administrator of a foreign issuer's employee benefit plan, a foreign broker-dealer made available to all participating employees (including U.S. persons) a password-protected website to manage their accounts. This position is conditioned on (1) the foreign broker-dealer not otherwise using the website to solicit securities transactions from U.S. persons, or to effect transactions in any securities that were not received in connection with the U.S. employee's participation in the employee benefit plan; (2) the employee benefit plan website being wholly-separate from, and not accessible via a link contained on, the foreign broker-dealer's primary website; and (3) the plan website not linking or otherwise referring plan participants to the foreign broker-dealer's primary website.

Question 3: If a foreign broker-dealer effects an unsolicited transaction on behalf of a U.S. investor in reliance on Rule 15a-6(a)(1), may the foreign broker-dealer send confirmations and account statements to the U.S. investor in connection with such transaction?

Answer: Yes. Staff would not consider a foreign broker-dealer to have solicited a U.S. investor solely because the foreign broker-dealer, in connection with effecting an unsolicited transaction for a U.S. investor under Rule 15a-6(a)(1), provides the U.S. investor with a confirmation of the transaction and periodic account statements. Similarly, a foreign broker-dealer may provide a U.S. investor, with or for which the foreign broker-dealer effects an unsolicited transaction, documents related to the transaction that are required under foreign law, such as a prospectus, proxy statement or a privacy notice. A foreign broker-dealer seeking to rely on Rule 15a-6(a)(1) may not, however, provide a U.S. investor with any document that includes

advertising or other material intended to induce either a securities transaction or transactional business for the foreign broker-dealer or its affiliates.

Question 4: Rule 15a-6(a)(3)(iii)(A)(2) requires a chaperoning broker-dealer to issue "all required confirmations and statements to the U.S. institutional investor or the major U.S. institutional investor" with respect to transactions effected thereunder. If required under foreign law, may the foreign broker-dealer send confirmations and account statements directly to U.S. counterparties?

Answer: Yes. To the extent required by foreign law or as required by a firm's internal policies and procedures applicable to its global business operations, a foreign broker-dealer may send confirmations and account statements directly to U.S. counterparties. Notwithstanding the delivery of any document to the investor by the foreign broker-dealer, however, the chaperoning broker-dealer maintains an obligation to be sure that confirmations and account statements are sent to the investor that comply with all applicable U.S. requirements, including Rule 10b-10 under the Exchange Act and applicable self-regulatory organization rules. In addition, any confirmation or account statement sent to a U.S. counterparty by a foreign broker-dealer on behalf of a chaperoning broker-dealer must clearly identify the U.S. broker-dealer on whose behalf the document is sent.

Question 4.1: Does the response to question 4 mean that a chaperoning broker-dealer could satisfy its obligations under Rule 15a-6(a)(3)(iii)(A)(2) through the delivery of required confirmations and statements by the foreign broker-dealer?

Answer: Yes. A chaperoning broker-dealer may rely on a foreign broker-dealer to provide the U.S. institutional investor or major U.S. institutional investor (as applicable) with any required confirmations and statements in satisfaction of Rule 15a-6(a)(3)(iii)(A)(2) - without regard to whether foreign law affirmatively requires the foreign broker-dealer to provide these documents to U.S. counterparties.[16] In this regard, the staff views the preparation and delivery of the confirmation or statement as analogous to any situation in which a registered broker-dealer uses a third-party service provider to prepare and send these documents to customers.

As stated in the answer to question 4, however, the chaperoning broker-dealer always retains the obligation to be sure that any confirmation or account statement sent to a

U.S. institutional investor or major U.S. institutional investor complies with all applicable U.S. requirements, including Rule 10b-10 under the Exchange Act and applicable self-regulatory organization rules. Further, reliance on the foreign broker-dealer to prepare and send confirmations or account statements would not, under any circumstance, relieve the chaperoning broker-dealer of its ultimate responsibility for compliance with any statutory or other regulatory responsibilities under the federal securities laws.

Question 5: May a foreign broker-dealer distribute research directly to major U.S. institutional investors pursuant to Rule 15a-6(a)(2) without any intermediation or other involvement of a registered broker-dealer in connection with the distribution of the reports, such as review, approval, or retention of the research reports so distributed or the maintenance of records?

Answer: Yes. Rule 15a-6(a)(2) permits a foreign broker-dealer to furnish research reports to major U.S. institutional investors and to effect transactions in the securities discussed in the reports with or for those major U.S. institutional investors provided that certain conditions are satisfied.[17] The rule does not require that the distribution be made by a registered broker-dealer, even if the foreign broker-dealer has a chaperoning arrangement with a registered broker-dealer. Moreover, the chaperoning broker-dealer would not have any obligations with respect to a research report if the chaperoning broker-dealer was not involved in the distribution (*i.e.*, where the research was distributed directly by the foreign broker-dealer to major U.S. institutional investors) and it would not be required to retain a copy of a research report that it did not ever possess.

It is important to keep in mind, however, that if the foreign broker-dealer has a chaperoning arrangement with a registered broker-dealer that satisfies the requirements of Rule 15a-6(a)(3), any transactions with the foreign broker-dealer in securities discussed in the research reports must be effected only through the chaperoning broker-dealer in compliance with the requirements of paragraph (a)(3). Among other things, Rule 15a-6(a)(3) requires the chaperoning broker-dealer to maintain all books and records relating to the transactions effected thereunder, including those required by Rules 17a-3 and 17a-4 under the Exchange Act. Accordingly, to the extent that a chaperoning broker-dealer obtains a copy of a research report distributed directly to major U.S. institutional investors by a foreign broker-dealer pursuant to Rule 15a-6(a)(2) (regardless of the source from which it was obtained), such research report should be retained by the chaperoning broker-dealer in light of its

obligation to effect transactions in the relevant securities as described above.

Question 6: Does the staff position in the Nine Firms Letter apply generally to foreign broker-dealers not affiliated with a registered broker-dealer?

Answer: Yes. Although the no-action position in the Nine Firms Letter was based on representations regarding particular facts and conditions that included affiliation between the nine registered broker-dealers named in the letter and their affiliated foreign broker-dealers, the staff considers the position taken in the letter to apply as well to a foreign broker-dealer that has a chaperoning arrangement with an unaffiliated registered broker-dealer.[18]

Question 7: Does the staff's expanded view of the term "major institutional investor" as set forth in the Nine Firms Letter apply to every provision of Rule 15a-6 in which that term is used?

Answer: Yes. The staff's expanded view of the term "major U.S. institutional investor" applies to all provisions of Rule 15a-6, including paragraphs (a)(2) and (a)(3) of the rule.[19]

Question 8: Does the staff position in the Seven Firms Letter apply generally to foreign broker-dealers not affiliated with a registered broker-dealer?

Answer: Yes. For reasons similar to those discussed in the response to question 6, the staff considers the position taken in the Seven Firms Letter to apply to a foreign broker-dealer whether or not the registered broker-dealer with which it has a chaperoning arrangement is an affiliate.

Question 8.1: Does the response in question 8 mean that a foreign broker-dealer would be required to have a chaperoning arrangement with a registered broker-dealer in order to rely on the Seven Firms Letter?

Answer: No. The staff's position in the Seven Firms Letter applies without regard to whether the foreign broker-dealer has a chaperoning arrangement with a registered broker-dealer.

Question 9: Is a foreign broker-dealer able to rely on the exemption in Rule 15a-6(a)(1) to effect more than one unsolicited securities transaction on behalf of a single U.S. investor?

Answer: Staff would not ordinarily view a single securities

transaction effected by a foreign broker-dealer on behalf of a U.S. investor in accordance with Rule 15a-6(a)(1) as precluding such foreign broker-dealer from relying on that same authority to effect one or more additional unsolicited securities transactions on behalf of the same U.S. investor, absent any other indicia of solicitation. This is largely due to the emphasis the SEC placed in the Rule 15a-6 Adopting Release on the importance of analyzing a foreign broker-dealer's efforts and activities to determine whether solicitation has occurred, as opposed to focusing merely on the number of securities transactions effected by a foreign broker-dealer.

Specifically, the SEC takes a broad view of what constitutes solicitation. In the context of broker-dealer registration, the SEC generally considers solicitation "as including any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer or its affiliates. Solicitation includes efforts to induce a single transaction or to develop an ongoing securities business relationship."[20]

In the Rule 15a-6 Adopting Release, the SEC provided examples of conduct that it would consider to be solicitation by a foreign broker-dealer, including:

- Telephone calls from a broker-dealer to a customer encouraging use of the broker-dealer to effect transactions;

- Advertising directed into the U.S. of one's function as a broker or a market maker; and

- Recommending the purchase or sale of particular securities, with the anticipation that the customer will execute the recommended trade through the broker-dealer.

At the same time, however, staff would view a series of frequent transactions or a significant number of transactions between a foreign broker-dealer and a U.S. investor as being indicative of solicitation through the establishment of an "ongoing securities business relationship."[21]

Finally, the SEC, in adopting Rule 15a-6, also explained that because of the "expansive, fact-specific, and variable nature" of the concept of solicitation, it believes that "the question of solicitation is best addressed by the staff on a case-by-case basis, consistent with the principles elucidated in the [Rule 15a-6 Adopting Release]."[22]

Question 10: What is the minimum net capital required

for a registered broker-dealer that has entered into a chaperoning arrangement with a foreign broker-dealer pursuant to Rule 15a-6(a)(3)?

Answer: A registered broker-dealer that enters into a chaperoning arrangement with a foreign broker-dealer under Rule 15a-6(a)(3) is subject to a minimum net capital requirement of at least $250,000, unless the chaperoning broker-dealer has entered into a fully disclosed carrying agreement with another registered broker-dealer that has agreed, in writing, to comply with the SEC's broker-dealer financial responsibility rules with respect to the chaperoning arrangement. A chaperoning broker-dealer that has entered into such a carrying agreement is subject to a minimum net capital requirement of $5,000 or such other greater amount as would be required under Rule 15c3-1 based on the broker-dealer's activities.

Question 11: What minimum net capital requirement applies to a registered broker dealer acting as a chaperone to a foreign broker-dealer if the foreign broker-dealer's business under Rule 15a-6 is limited to M&A advisory services to a U.S. counterparty or a non-U.S. counterparty contemplating the acquisition of a company?

Answer: If the foreign broker-dealer's business under Rule 15a-6 is limited to giving advice to a U.S. institutional investor or a major U.S. institutional investor contemplating an acquisition of a company, the chaperoning broker-dealer's minimum net capital requirement, by virtue of that activity, would be $5,000 or such other greater amount as would be required under Rule 15c3-1 based on the broker-dealer's activities.

Question 11.1: What minimum net capital requirement applies to a registered broker dealer acting as a chaperone to a foreign broker-dealer if the foreign broker-dealer's business under Rule 15a-6 is limited to providing private placement services in the U.S. to a U.S. institutional investor or a major U.S. institutional investor?

Answer: If the foreign broker-dealer's business under Rule 15a-6 is limited to giving advice on private placement services to a U.S. institutional investor or a major U.S. institutional investor, the chaperoning broker-dealer's minimum net capital requirement, by virtue of that activity, would be $5,000 or such other greater amount as would be required under Rule 15c3-1 based on the broker-dealer's

activities.

Question 12: Can a registered introducing broker-dealer act as chaperone for a foreign broker-dealer under Rule 15a-6(a)(3) and rely on all the terms of the Nine Firms Letter if the registered broker-dealer has in effect a fully disclosed carrying agreement with another registered broker-dealer that has agreed to comply with the financial responsibility rules?

Answer: Yes. The registered broker-dealer can act as a chaperone for a foreign broker-dealer under Rule 15a-6(a)(3) and rely on the Nine Firms Letter if it has in effect a fully disclosed carrying agreement with another registered broker-dealer that has agreed, in writing, to comply with the SEC's broker-dealer financial responsibility rules with respect to the chaperoning arrangement. In such an arrangement, the registered broker-dealer would be subject to a minimum net capital requirement of $5,000, or such greater amount as would be required under Rule 15c3-1 based on the broker-dealer's activities.

Question 13: Can a registered introducing broker-dealer act as chaperone for a foreign broker-dealer under Rule 15a-6(a)(3) and rely on all the terms of the Nine Firms Letter if the registered broker-dealer has a minimum net capital requirement of $100,000 in accordance with Rule 15c3-3(k)(2)(i)?

Answer: No. An introducing broker-dealer cannot rely on the Rule 15c3-3(k)(2)(i) exception and maintain net capital of $100,000 while acting as a chaperone for a foreign broker-dealer under Rule 15a-6(a)(3) and relying on the Nine Firms Letter. As stated in response to question 10, a registered broker-dealer that enters into a chaperoning arrangement with a foreign broker-dealer under Rule 15a-6(a)(3) is subject to a minimum net capital requirement of at least $250,000, unless the chaperoning broker-dealer has entered into a fully disclosed carrying agreement with another registered broker-dealer that has agreed, in writing, to comply with the SEC's broker-dealer financial responsibility rules with respect to the chaperoning arrangement.[23] A broker-dealer that maintains minimum net capital of at least $250,000 and relies on the Rule 15c3-3(k)(2)(i) exception or a broker-dealer that is fully computing under Rule 15c3-3 may operate under the Nine Firms Letter. This net capital requirement is based on the chaperone's responsibilities under Rule 15a-6(a)(3)(iii).

Question 14: What is the minimum net capital required for a registered broker-dealer that has entered into an

arrangement under Rule 15a-6(a)(3) with a foreign broker-dealer to act as a chaperone for DVP/RVP transactions with institutional investors?

Answer: A broker-dealer acting as a chaperone under Rule 15a-6(a)(3) for DVP/RVP transactions with institutional investors has a minimum net capital requirement of at least $250,000. The chaperoning broker-dealer cannot rely on the $100,000 minimum net capital requirement set forth in Rule 15c3-1(a)(2)(ii) that is available to broker-dealers exempt from Rule 15c3-3 under paragraph (k)(2)(i) of that rule. This net capital requirement is based on the chaperone's responsibilities under Rule 15a-6(a)(3)(iii).

Question 15: Is a registered broker-dealer that acts as a chaperone in connection with securities transactions with a U.S. institutional investor or a major U.S. institutional investor required to take a net capital charge for failed transactions, even if the foreign broker-dealer is required to take a fails charge under foreign law?

Answer: Yes, unless the chaperoning broker-dealer has entered into a fully disclosed carrying agreement with another registered broker-dealer as described in the response to question 10, in which case the carrying broker-dealer would be required to take the net capital charge for failed transactions. The existence of a carrying agreement does not relieve the chaperoning broker-dealer from maintaining books and records that identify open trades and failed transactions. The chaperoning broker-dealer can obtain this information directly from the foreign broker-dealer or another party but is responsible for ensuring that its books and records are accurate.

Question 16: What other recordkeeping obligations apply to a registered broker-dealer that has entered into a chaperoning agreement with a foreign broker-dealer pursuant to Rule 15a-6(a)(3)?

Answer: A registered broker-dealer acting as a chaperone for a foreign broker-dealer must comply with Rules 17a-3 and 17a-4. A chaperoning broker-dealer is required to make and keep current books and records that reflect trades between the U.S. customer and the foreign broker-dealer, including, but not limited to, transaction records and failed transaction records. The chaperoning broker-dealer may obtain this information from the foreign broker-dealer or another source; however, the chaperoning broker-dealer is responsible for the accuracy of its books and records. For example, a chaperoning broker-dealer may download information for its books and records, such as its ledger,

from the foreign broker-dealer provided that the chaperoning broker-dealer's books and records are kept current.

Question 17: Does the 30-day limit referred to in the Nine Firms letter that allows unchaperoned in-person contacts with major U.S. institutional investors during visits to the U.S apply to the foreign broker-dealer (the entity) or per associated person of a foreign broker-dealer?

Answer: The 30-day limit referred to in the Nine Firms Letter applies per foreign associated person. This means that the number of days each foreign associated person of a foreign broker-dealer could participate in unchaperoned meetings in the U.S. is limited to no more than 30 days per year.[24]

In other words, a foreign associated person of a foreign broker-dealer may, without the participation or physical presence of an associated person of the chaperoning broker-dealer, have in-person contacts during visits to the U.S. with major U.S. institutional investors so long as:

- the number of days on which such unchaperoned in-person contacts occur does not exceed 30 per year; and

- the foreign associated persons engaged in such in-person contacts do not accept orders while in the U.S. to effect securities transactions.

Question 18: Does the definition of "major U.S. institutional investor" include entities owned exclusively by other major U.S. institutional investors?

Answer: Yes. Staff interprets the definition of "major U.S. institutional investor", as expanded by the staff in the Nine Firms Letter, to include any entity, all of the equity owners of which are major U.S. institutional investors. In other words, any entity whose equity securities are held entirely by one or more entities, including any investment adviser (whether or not registered under the Investment Advisers Act), that *each individually* owns or controls (or, in the case of an investment adviser, has under management) in excess of $100 million in aggregate financial assets), would itself be a major U.S. institutional investor for purposes of Rule 15a-6. Staff believes that this position is consistent with prior Commission treatment of similar terms.[25]
(NEW 04/14/2014)

1 Rule 15a-6(b)(3) defines foreign broker-dealer to include "any non-U.S. resident person (including any U.S. person engaged in business as a broker or dealer entirely outside the United States, except as otherwise permitted by this rule) that is not an office or branch of, or a natural person associated with, a registered broker or dealer, whose securities activities, if conducted in the United States, would be described by the definition of 'broker' or 'dealer' in sections 3(a)(4) or 3(a)(5) of the [Exchange] Act."

2 For purposes of these FAQs, the term "chaperoning broker-dealer" means a registered broker-dealer that satisfies all of the requirements set forth in Rule 15a-6(a)(3)(iii) including, among other things, effecting transactions, issuing confirmations, maintaining books and records, participating in oral communications, and obtaining certain representations and consents.

3 As explained in the release adopting Rule 15a-6, the term "bank" is defined in section 3(a)(6) of the Exchange Act to mean a bank directly regulated by U.S. state or federal bank regulators. Accordingly, a foreign bank is excluded from this term except to the extent that the "foreign bank establishes a branch or agency in the United States that is supervised and examined by a federal or state banking authority and otherwise meets the requirements of section 3(a)(6)." *See Registration Requirements for Foreign Broker-Dealers*, Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, n.16 (July 18, 1989) ("Rule 15a-6 Adopting Release") (noting, however, that the determination whether any particular financial institution meets the requirements of section 3(a)(6) is the responsibility of the financial institution and its counsel) (internal citations omitted).

4 17 C.F.R. § 240.15a-6.

5 Rule 15a-6 Adopting Release at 54 FR 30013; *see also Registration Requirements for Foreign Broker-Dealers*, Exchange Act Release No. 25801 (June 14, 1988), 53 FR 23645 (June 23, 1988).

6 *See* Letter re: Transactions in Foreign Securities by Foreign Brokers or Dealers with Accounts of Certain Foreign Persons Managed or Advised by U.S. Resident Fiduciaries from Catherine McGuire, Chief Counsel, Division of Market Regulation to Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton, dated January 30, 1996 ("Seven Firms Letter").

7 *See* Letter re: Securities Activities of U.S.-Affiliated Foreign Dealers from Richard R. Lindsey, Director, Division

of Market Regulation to Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton, dated April 9, 1997 ("Nine Firms Letter"), available at http://www.sec.gov/divisions/marketreg/mr-noaction/cleary040997.pdf.

8 *See id.*

9 *See* Responses to Frequently Asked Questions Concerning Regulation Analyst Certification, available at http://www.sec.gov/divisions/marketreg/mregacfaq0803.htm.

10 In addition to requiring that the foreign customer be "temporarily present in the United States," Rule 15a-6(a)(4)(iii) also provides that the foreign broker-dealer must have had a bona fide, pre-existing relationship with the foreign customer before such person entered the U.S." *See* 17 C.F.R. § 240.15a-6(a)(4)(iii). While the rule does not expressly require the type of affirmative acknowledgement described in the question, such representation would likely be useful in determining whether a bona fide, pre-existing relationship exists.

11 *See* Rule 15a-6 Adopting Release at 54 FR 30030. This presumption would be subject to rebuttal in light of all of the facts and circumstances surrounding the foreign person's presence in the U.S.

12 Rule 15a-6 Adopting Release at 54 FR 30021.

13 *See* 17 C.F.R. § 240.15a-6(a)(4)(iii); and Rule 15a-6 Adopting Release at 54 FR 30030-31. *See also* question 1 and the accompanying response.

14 Staff notes, however, that the position set forth in this response is limited to the facts described in the question and does not otherwise modify any requirements or restrictions applicable to the trading of ADRs pursuant to any existing statute, regulation or legal interpretation, including the limitation to the definition of "Foreign Security" contained in the Seven Firms Letter. *See supra* note 6.

15 *See Interpretation Re: Use of Internet Web Sites To Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore*, Exchange Act Release No. 39779, (March 23, 1998), 63 FR 14806, 14813 (March 27, 1998) (explaining that "[b]ecause a securities firm's Web site itself typically is a solicitation, orders routed through the Web site would not be considered 'unsolicited'" for purposes of Rule 15a-6(a)(1)).

16 The Staff takes no position with respect to any requirements of, or restrictions contained in, non-U.S. law, including as it would relate to the delivery of confirmations and statements to any U.S. person.

17 *See* 17 C.F.R. § 240.15a-6(a)(2); Rule 15a-6 Adopting Release at 54 FR 30022-23. Specifically, the research reports must not recommend the use of the foreign broker-dealer to effect trades in any security, and the foreign broker-dealer may not initiate contact with the major U.S. institutional investor to follow-up on the research reports or otherwise induce or attempt to induce the purchase or sale of any security by the major U.S. institutional investor. Moreover, a foreign broker-dealer may not provide research to U.S. persons pursuant to any express or implied understanding that those U.S. persons will direct commission income to the foreign broker-dealer (*i.e.*, "soft-dollar" arrangements).

18 The staff believes that this view is consistent with the SEC's decision to adopt Rule 15a-6(a)(3) without, as initially proposed, requiring "any affiliation between the foreign broker-dealer and the registered broker-dealer through ownership or control." *See* Rule 15a-6 Adopting Release at 54 FR 30025 (noting that the rule, as proposed, would have required such affiliation). Notwithstanding this view, the U.S. and foreign broker-dealers would still have to meet the other conditions of the Nine Firms Letter.

19 *See* Letter re: Securities Activities of U.S.-Affiliated Foreign Dealers from Catherine McGuire, Chief Counsel, Division of Market Regulation to Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton, dated April 28, 1997 (clarifying the no-action position taken in Nine Firms Letter).

20 Rule 15a-6 Adopting Release at 54 FR 30017-30018 (footnote omitted).

21 *See id*. The SEC has previously indicated that the exception in Rule 15a-6(a)(1) for unsolicited trades was designed to reflect the view that "U.S. persons seeking out unregistered foreign broker-dealers outside the U.S. cannot expect the protection of U.S. broker-dealer standards." *See* Rule 15a-6 Adopting Release at 54 FR 30031. In this regard, staff believes that if a foreign broker-dealer regularly effects transactions directly with or for a U.S. investor, the investor might reasonably expect to be protected by U.S. laws, regulations and supervisory structures applicable to registered broker-dealers.

22 Rule 15a-6 Adopting Release at 54 FR 30021.

23 *See also* the exception in the response to question 11.

24 The staff, however, reminds firms that the ability to participate in unchaperoned meetings on a per foreign associated person basis should not be structured in such a way that the foreign broker-dealer uses a rotating series of individuals to create a de facto "office" or presence in the U.S. (*e.g.*, a presence that would constitute a "permanent establishment" of the foreign broker-dealer for U.S. tax purposes) or to offer a continuous U.S. presence to deal with a specific major U.S. institutional investor or group of major U.S. institutional investors. *See* Rule 15a-6(b)(3) (definition of "foreign broker or dealer").

25 For example, Rule 144A under the Securities Act of 1933 defines the term “qualified institutional buyer” to include, among other things, “[a]ny entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers.” *See* 17 C.F.R. 230.144A(a)(1)(v).

http://www.sec.gov/divisions/marketreg/faq-15a-6-foreign-bd.htm

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FREQUENTLY ASKED QUESTIONS ABOUT RULE 15a-6

Understanding Rule 15a-6

What is Rule 15a-6?

Rule 15a-6 defines permissible activities that foreign broker-dealers may undertake in the United States without becoming subject to the broker-dealer registration requirements of the Securities Exchange Act of 1934 (the "Exchange Act"). The permitted activities fall into four basic areas: (i) effecting unsolicited transactions, (ii) distributing research reports to certain institutional investors, (iii) soliciting transactions with certain institutional investors which are then effected in coordination with U.S. broker-dealers and (iv) conducting unlimited business with certain categories of excluded customers, including U.S. broker-dealers, banks acting in a broker-dealer capacity and expatriates temporarily present in the United States.

Who is subject to the broker-dealer registration requirements of the Exchange Act?

The Exchange Act defines "broker" as any person who engages in the business of effecting securities transactions for the account of others. "Dealer" is defined as any person who engages in the business of effecting securities transactions for their own account. The U.S. Securities and Exchange Commission (the "SEC") has interpreted "effecting securities transactions" as involvement in any of the significant phases of a securities transaction, including solicitation, negotiation of the terms and execution of the trade. In general, any broker or dealer who uses U.S. mails, wires or other instrumentalities of interstate commerce may be required to register as a broker-dealer with the SEC.

To what extent are the U.S. broker-dealer requirements applicable to non-U.S. broker-dealers?

The SEC utilizes a territorial approach in determining if a broker-dealer must register under the Exchange Act. A foreign broker-dealer which has no offices in the United States and which conducts its broker-dealer business entirely outside the United States would not be subject to the Exchange Act registration requirements. However, any contacts with the United States could subject the foreign broker-dealer to an obligation to register under the Exchange Act unless such contacts are structured to comply with Rule 15a-6. Such prohibited contacts would include solicitation of investors in the United States by means of telephone, email or other methods of communication, even if the foreign broker-dealer is situated outside the United States when undertaking such solicitation efforts.[1]

[1] The SEC suggests that foreign broker-dealers who do not want to inadvertently run afoul of U.S. registration requirements include a legend on their websites stating that they will not open accounts or effect transactions for U.S. persons (except as permitted under Rule 15a-6).

Is it easy to register as a broker-dealer under the Exchange Act?

No. Broker-dealers must register with the SEC and become members of FINRA, a self-regulatory organization for the securities industry. In addition, they must register with certain states depending upon the scope and nature of their U.S. operations. The registration process can take six to nine months or longer. U.S. broker-dealers and their associated persons are also subject to comprehensive regulatory and capital requirements and associated persons must pass qualifying examinations.

As a result, many foreign financial institutions elect not to form a U.S. broker-dealer subsidiary, or restrict their U.S. broker-dealer subsidiary to a limited scope of business, and utilize Rule 15a-6 for many of their direct dealings with U.S. institutional customers.

What are the consequences of violating the broker-dealer registration requirements?

In recent years, the SEC has shown renewed interest in pursuing claims against both large and small foreign broker-dealers who conducted business in the United States without complying with Rule 15a-6. In a recent case brought by the SEC against a large European bank that failed to comply with Rule 15a-6, the foreign bank paid approximately $200 million in disgorgement, interest and penalties to settle the charges.

Transactions with Retail Customers Under Rule 15a-6

Does Rule 15a-6 permit a foreign broker-dealer to engage in transactions with retail customers in the United States?

Yes, but only under very limited circumstances. Under Rule 15a-6, a foreign broker-dealer may engage in unsolicited transactions with retail or institutional customers in the United States. In addition, a foreign broker-dealer may engage in transactions with certain expatriates who are present in the United States.

Who is an unsolicited customer?

An unsolicited customer is a U.S. investor who has sought out the foreign broker-dealer entirely of the investor's own accord and not as a result of any solicitation by the foreign broker-dealer. The SEC interprets "solicitation" very broadly to include any affirmative efforts to induce a transaction or to establish a business relationship which could lead to transactions. Any kind of advertising or other marketing efforts directed at U.S. persons will almost certainly be deemed solicitation.[2]

May a foreign broker-dealer maintain an account for a U.S. retail investor who has effected a transaction on an unsolicited basis?

Yes, but in order to transact future business with such investor, care must be taken not to solicit any additional transactions. The foreign broker-dealer may send the unsolicited U.S. account holder confirmations, account statements, company announcements and similar materials. It should not include any advertising inserts,

[2] Distribution in the United States of a foreign broker-dealer's quotes would not be deemed solicitation if the quotes are distributed by a foreign exchange or by a private vendor.

research reports or other materials which could reasonably be viewed as soliciting additional business. The SEC Staff has expressed some skepticism about whether as a practical matter a foreign broker-dealer can have an on-going relationship with a U.S. account holder where all transactions are unsolicited. However, if properly handled, this should be achievable.

What are the requirements for doing business with expatriates in the United States?

There are two basic requirements. First, the expatriate must be present in the United States on a "temporary basis." The SEC Staff recently took the position that any expatriate in the United States who has not obtained a permanent residence card (green card) would be deemed present on a "temporary basis." Thus, even an executive present in the United States on a business visa for a five-year assignment would be deemed present on a "temporary basis." Second, the foreign broker-dealer must have a pre-existing relationship with the expatriate which was established when the expatriate resided outside the United States.

Are there any limitations on the nature of broker-dealer business which may be conducted with expatriates?

No. The foreign broker-dealer may actively solicit expatriates who fit the above requirements and is not required to engage a chaperoning or correspondent U.S. broker-dealer to engage in business with qualifying expatriates.

Transactions with Institutional Investors Under Rule 15a-6

Does Rule 15a-6 permit a foreign broker-dealer to engage in transactions with institutional investors in the United States?

Yes. Subject to certain conditions, Rule 15a-6 permits foreign broker-dealers to solicit U.S. institutional investors and major U.S. institutional investors to engage in securities transactions. In addition, foreign broker-dealers are permitted to furnish research reports to major U.S. institutional investors.

What is a U.S. institutional investor?

"U.S. institutional investor" is defined to include (i) banks and savings and loan associations, (ii) insurance companies, (iii) investment companies registered with the SEC, (iv) small business investment companies licensed by the Small Business Administration, (v) business development companies as defined in the Investment Company Act of 1940, (vi) private business development companies as defined in the Investment Advisers Act of 1940 and (vii) pension funds, trusts and non-profit organizations, in each case with more than $5 million in assets.[3]

What is a major U.S. institutional investor?

A "major U.S. institutional investor" is a U.S. institutional investor or any other entity which owns or manages at least $100 million in financial assets. "Financial assets" include securities of unaffiliated issuers, cash, money market instruments, futures and other derivative instruments.

[3] Pension funds may also qualify based on the nature of their manager.

Is a major institutional investor the same as a qualified institutional buyer as defined in Rule 144A?

The definition of major institutional investor ("MII") is similar but not identical to the definition of a qualified institutional buyer ("QIB"). A QIB must own and invest on a discretionary basis at least $100 million in securities of unaffiliated issuers,[4] whereas an MII is allowed to include cash and other financial instruments when calculating if it has $100 million in financial assets. Therefore, all QIBs will be MIIs, but not all MIIs will be QIBs.

May a foreign broker-dealer initiate transactions or solicit business with U.S institutional investors or major U.S. institutional investors?

Yes. However, resulting transactions generally must be effected through a U.S. broker-dealer.

What forms of solicitation are permitted?

The foreign broker-dealer may solicit institutional investors by means of advertising, emails, phone calls and other communications originating outside the United States. In addition, the foreign broker-dealer may visit U.S. institutional investors in the United States. In the case of U.S. institutional investors which do not qualify as MIIs, the foreign broker-dealer must be accompanied on such visits by a representative of a U.S. broker-dealer. A representative of a U.S. broker-dealer must also participate in telephone conversations with U.S. institutional investors that do not qualify as MIIs. In the case of MIIs, there is no chaperoning requirement for oral conversations from outside the United States or in-person visits if (i) each representative of the foreign broker-dealer conducts such in-person visits on not more than 30 days in any one year period and (ii) no orders are accepted by the foreign broker-dealer during an unchaperoned visit.

What are the responsibilities of a U.S. broker-dealer that agrees to execute transactions originated by a foreign broker-dealer under Rule 15a-6?

The U.S. broker-dealer must take full responsibility for the executed trade. In that regard, the U.S. broker-dealer should treat the referred account in the same manner it would treat any other account, including obtaining all necessary information for "know your customer" purposes and obtaining all information or documentation required for the broker-dealer to discharge its suitability obligations. The broker-dealer's suitability obligations would include a review of the underlying security or instrument in order to determine if it would be suitable for at least some investors ("reasonable-basis suitability"), and a determination that the investment is suitable for this specific customer based on the customer's investment profile ("customer-specific suitability"). In addition, the U.S. broker-dealer should confirm that the transaction may be effected without violating the registration requirements of the Securities Act of 1933 governing the offer and sale of securities in the United States.

The U.S. broker-dealer is also responsible for ensuring that the customer receives confirmations and statements that comply with applicable requirements. The U.S. broker-dealer need not issue duplicate confirmations or statements if it determines that the foreign broker-dealer has timely issued proper confirmations and statements. The confirmations and statements must clearly indicate that the account is established at the U.S. broker-dealer. The U.S. broker-dealer must

[4] There are separate requirements for broker-dealers, banks and thrift institutions to qualify as QIBs.

maintain all required books and records relating to the customer's account.

Rule 15a-6 also imposes on the U.S. broker-dealer additional affirmative obligations. Such obligations include: (i) determining that the foreign broker-dealer and any of its associated persons involved in the trade are not subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act or any substantially equivalent foreign sanction, (ii) obtaining from the foreign broker-dealer the basic background information specified by Rule 17a-3(a)(12) under the Exchange Act with respect to each associated person of the foreign broker-dealer who is involved in the trade, (iii) obtaining from the foreign broker-dealer and each involved foreign associated person a written consent to service of process by the SEC or other securities regulators and (iv) making the information obtained in items (ii) and (iii) available to the SEC.

Must all transactions under Rule 15a-6 be settled through a U.S. broker-dealer?

No. While the chaperoning U.S. broker-dealer is generally responsible for effecting the transaction, the SEC Staff has taken the position that settlement and clearance of transactions in foreign securities or U.S. Government securities may occur directly between the institutional investor and the foreign broker-dealer. In such cases, the foreign broker-dealer must agree to make available to the U.S. broker-dealer all settlement and clearance information. If the transaction is in U.S. securities, then the chaperoning U.S. broker-dealer is responsible for receipt, delivery and safeguarding of customer funds and securities, although it may discharge this responsibility through a licensed clearing broker to the extent that the chaperoning broker-dealer does not clear its own trades.

Is the U.S. broker-dealer liable for misrepresentations made by the foreign broker-dealer during unchaperoned visits or conversations with the customer?

The U.S. broker-dealer may be liable for misrepresentations made by the foreign broker-dealer in soliciting the trade, even if the U.S. broker-dealer was not present when the misrepresentations were made. By taking responsibility for the trade, the U.S. broker-dealer assumes an obligation to implement reasonable steps to ensure that communications with the customer comply with applicable law and FINRA requirements. A U.S. broker-dealer which acts as an intermediary in Rule 15a-6 transactions should ensure that its policies and procedures adequately address its role in such transactions. In addition, the U.S. broker-dealer should include within its training element programs designed to apprise its personnel of the nature and risks of Rule 15a-6 transactions, as well as their role in implementing such transactions.

Should a U.S. broker-dealer which acts in a chaperoning or correspondent capacity enter into a written agreement with the foreign broker-dealer?

In most cases, it will be advisable for the U.S. broker-dealer and the foreign broker-dealer to enter into a written agreement, even if the foreign and U.S. broker-dealers are affiliates. The agreement should delineate their respective responsibilities and should set forth protocols designed to ensure that both firms are able to comply with applicable regulatory requirements. In this regard, the U.S. broker-dealer must bear in mind that it is responsible for the account, notwithstanding

the fact that the primary sales relationship with the customer may reside at the foreign broker-dealer.

How may a foreign broker-dealer furnish research reports to MIIs?

The foreign broker-dealer may furnish research reports directly to MIIs through email or other methods of communication. It may also furnish the reports indirectly through a U.S. correspondent broker-dealer. If the reports are furnished through a U.S. correspondent, that broker-dealer may treat the reports as "third-party research" for purposes of FINRA Rules 2241 and 2242 and the U.S. broker-dealer is not required to take responsibility for the contents of the report. If the U.S. broker-dealer chooses to disseminate the report to persons in the United States who are not MIIs, then it is in effect republishing the report and it must take full responsibility for the report. Whether or not the U.S. broker-dealer takes responsibility for the report, it should not distribute a research report if it has reason to believe that the report is not objective or reliable.

What disclaimers and disclosures are required in research reports furnished to MIIs under Rule 15a-6?

Research reports furnished to MIIs by foreign broker-dealers who have affiliated U.S. broker-dealers should include the following disclosures: a Regulation AC certification by the analyst who prepared the report, a statement that any resulting transactions should be effected through a U.S. broker-dealer and certain conflict of interest disclosures as required by FINRA Rule 2241(h)(4) for third-party research reports on equity securities and FINRA Rule 2242(g)(3) for third-party research reports on debt securities. For equity research reports, such conflict of interest disclosures include (i) ownership of 1% or more of a company covered by the report, (ii) acting as a market maker for a covered company, (iii) provision of investment banking services or managing a public offering for a covered company during the past 12 months, (iv) an expectation of providing investment banking services to the subject company in the next three months[5] or (v) any other actual, material conflicts of interest. For debt research reports, each of the foregoing disclosures is required, other than ownership of 1% or more of the issuer. A foreign broker-dealer may, for business reasons, decide to provide the full set of disclosures required by Rules 2241 or 2242.

If the report is "globally branded," then it should include all of the Rule 2241 or Rule 2242 disclosures and it should identify the foreign research analysts who prepared the report and advise that they may not be subject to all of the requirements applicable to U.S.-based analysts. A research report would be deemed globally branded if it is published under a marketing name that encompasses both the foreign broker-dealer and any U.S. affiliated broker-dealer.

Are there different requirements for research reports prepared by a foreign broker-dealer which is not affiliated with the U.S. broker-dealer disseminating the reports?

Yes. Such research reports are referred to in the FINRA rules as "independent third party research reports," and they need not contain the disclosures required by Rules 2241 and 2242 if the reports are made available by the U.S. broker-dealer solely (i) via its website, (ii) in response to unsolicited customer inquiries, or (iii) to a customer in connection with a solicited order if the

[5] Disclosure of pending or future investment banking engagements is not required if such disclosure would reveal material, non-public information.

customer, having been made aware of the report, requests a copy. In addition, independent third party research reports which only address foreign securities and are disseminated in the United States solely to MIIs in accordance with Rule 15a-6 are exempt from Regulation AC. Independent third party research reports should clearly be labeled as such and should include a notice that any resulting transactions should be executed through a U.S. broker-dealer.

Does Rule 15a-6 apply to M&A transactions?

Yes. Recent SEC no-action letters have facilitated the involvement of foreign broker-dealers in cross-border M&A transactions involving U.S. companies. Under Rule 15a-6 a foreign broker-dealer, acting on behalf of a foreign company, may directly solicit MIIs as potential counterparties in an M&A transaction. Thereafter, the foreign broker-dealer may conduct negotiations with a U.S. investment banker or other external adviser representing the MII or, as provided in a 2013 no-action letter, it may negotiate directly with an MII which has a seasoned, internal M&A staff. The SEC Staff took the position that the foreign broker-dealer would not need to involve a U.S. broker-dealer to act as a chaperone where the U.S. counterparty has seasoned, internal M&A staff.

A foreign broker-dealer wishing to advise a U.S. MII in an M&A transaction would need to work with a U.S. broker-dealer that would provide the intermediation required by Rule 15a-6. In a 2012 no-action letter, the SEC Staff took the position that, for purposes of providing advice on M&A matters, a foreign broker-dealer could treat as an MII a U.S. company with at least $100 million in total assets (excluding cash and cash equivalents), even if its aggregate financial assets were less than $100 million.

Additional Activity Permitted Under Rule 15a-6

May a foreign broker-dealer engage in transactions with U.S broker-dealers?

Yes. A foreign broker-dealer may freely engage in transactions with U.S. broker-dealers or with U.S. banks acting in a broker-dealer capacity. Such transactions may be actively solicited by the foreign broker-dealer. Transactions with U.S. broker-dealers are permitted whether the U.S. broker-dealer is acting in a principal or agency capacity.

May a foreign broker-dealer engage in transactions with a U.S. resident fiduciary which is acting on behalf of non-U.S. principals?

Yes. The SEC Staff has taken the position that a foreign broker-dealer should be free to conduct business with a U.S. resident fiduciary provided that the persons owning the beneficial interest in the fiduciary accounts are not U.S. persons and provided that the resulting transactions are in foreign securities.

May a foreign broker-dealer act as administrator of an employee stock option plan ("ESOP") that includes U.S. participants?

A foreign broker-dealer may act as administrator of an ESOP organized by a foreign company that includes U.S. employees of the foreign company or its subsidiaries as participants. However, the foreign broker-dealer must enter into the arrangement outside the United States and it must carry out its administrator duties from outside the United States. Communications

with U.S. participants are permitted; but the foreign broker-dealer should view the foreign company as its client and it must take any instructions from the foreign company.

May a foreign broker-dealer engage in business with foreign branch offices of a U.S. company?

Yes, provided that the foreign branch or agency office was established outside the United States for bona fide business purposes and not to circumvent the broker-dealer registration requirements. Transactions with a foreign branch office should be solicited, negotiated and executed entirely outside the United States. The foreign broker-dealer should be careful not to engage in communications with the "home office" in the United States regarding effectuation of securities transactions. The trading instructions should be issued to the foreign broker-dealer by the foreign branch office and confirmations and statements should be sent to the foreign branch.

May a foreign broker-dealer engage in transactions with U.S. citizens resident outside the United States?

Yes. As with foreign branch offices, transactions with expatriate U.S. citizens should be solicited, negotiated and executed entirely outside the United States. If the U.S. expatriate returns to the United States, the foreign broker-dealer must cease further business except for unsolicited transactions initiated by the former expatriate.

Are there other categories of investors in the United States with whom a foreign broker-dealer may conduct business?

Rule 15a-6 permits foreign broker-dealers to conduct unlimited business with the following multi-lateral financial institutions that are based in the United States: the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations and their respective agencies and pension funds.

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