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Secretary,
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
USA

Dear Sirs,

File No. S7-16-08, Exemption of Certain Foreign Brokers or Dealers, Exchange Act Release 58047, 73 FR 39182

CompliGlobe Ltd. is please to provide the Commission and the Staff with its comments on the proposal to amend Rule 15a-6 under the Securities Exchange Act of 1934. Our comments focus on two aspects of the proposal and also the implications of the proposed amendments on the non-US Alternative Investment industry – hedge funds, funds of hedge funds, managed accounts and private equity vehicles ("AI products") – and those who manage them – investment managers.

Non-US AI products

A non-US investment manager offers its clients discretionary investment management and advisory services. It would manage assets directly, through managed accounts or via client participation in pooled investment vehicles. This is apart from private equity investment opportunities. Occasionally, as an accommodation for their non-US clients, a non-US money manager may execute a transaction. Also, from time to time, a non-US investment manager might solicit a US person to invest in a non-US AI product the manager advises. Many of the more than 10,000 hedge funds, FoHFs, managed accounts and private equity vehicles that exist are incorporated in non-US jurisdictions. US persons invest significant amounts of monies in such products.

Under the definition of the term "broker" in Section 3(a)(4) of the Exchange Act, the long-standing definition of the term "solicitation" articulated in the 1989 release adopting Rule 15a-6 and no-action letters dealing with the term "broker" (in particular, those holding that the receipt of transaction-based compensation is a key factor in determining whether a person is a broker), a non-US person that uses the means of interstate commerce to solicit a US person to purchase securities would be required, absent an exemption, to register as a broker-dealer under Section 15(b) of the Exchange Act. The activity contemplated by this is not money management, but the "sell side" activities of a broker. We agree that the current state of the law is correct, and support it. However, we are concerned about its strict application in the context of Rule 15a-6 as it is proposed to be amended to a non-US investment

manager that occasionally engages in the solicitation of a US person to buy non-US AI products or that might execute an order for such a client – these activities are incidental to its business, which is money management, not brokerage. Today, a non-US investment manager, whether or not it also is a foreign broker or dealer, may engage in certain activities directly with a US person that is a "major US institutional investor" or, through an SEC registered broker-dealer, a "US institutional investor". The proposed amendments would preclude this. We believe that this is an unintended, undesirable result.

The licensing requirements of many of the countries in which non-US investment managers are established and operate, in particular, the United Kingdom, provide for a single license under which a firm may engage in one or more registrable activities. This is opposed to the current set up in the United States where an investment manager registers under the Investment Advisers Act of 1940 and a broker-dealer registers under the Exchange Act (some do register under both). A non-US investment manager obtains its license for asset management, not brokerage. The smaller the non-US investment manager, the more the implications of a single license comes into play. Under the current interpretations of the terms "broker" and "solicitation" and if the proposed rule amendments are brought into force, a non-US investment manager would, if it wished to seek a US person to invest in a non-US AI product that it managed or execute an occasional order and avail itself of Rule 15a-6, be required to dual register as a broker-dealer in its home country and operate to the levels required in the amended rule. This would be extremely costly and carry with it increased compliance burdens. It might require it to cease to engage in any form of solicitation activity or occasional brokerage in favour of having US distributors solicit investors where the purchase of a security was involved, which is also a costly exercise.[1]

We do not believe that Rule 15a-6 or the broker-dealer registration provisions of the Exchange Act were intended to be applied so broadly so as to reach beyond the proper application of the definition of "broker" and sell side activities to a non-US investment manager engaged in money management that occasionally and as an accommodation to its clients executes orders or that engages in limited solicitation of a US person to purchase the securities of a non-US AI product it advises. These firms are money managers and not also "foreign brokers or dealers". We believe that the acts involved, the Exchange Act and the Advisers Act, have different purposes. The former regulates the markets and brokers and dealers in their sell side activities, whereas the latter contemplates a relationship with a client in which the goal is asset management based on fiduciary duties and the avoidance of conflicts of interest or, if conflicts are present, resolving them in the best interests of clients.

Rule 15a-6 as it is in force permits a non-US investment manager to rely on the exemption contained in this rule for contacts with a US person that is a "major US institutional investor" or to reach a "US institutional investor" via a registered broker-dealer acting as a chaperone. The proposed amendments to Rule 15a-6, as we read them, would effectively reduce the ability to have contact with any US person with respect to having such person purchase (or, in certain instances, sell) the securities of a non-US AI product. The proposed amendments restrict the ability of a non-US investment manager to effect transactions with or for a US person in its capacity as a fiduciary to an account of a foreign resident client. Whereas today a non-US investment manager may reach certain US person investors, the proposed amendments effectively bar any non-US investment manager that is also not a "foreign broker or dealer" from engaging in any activity with a US person beyond discretionary investment management or pure advisory. Few non-US investment managers would wish to become dual registered and carry the increased financial expenses and compliance burdens that this would have. It might also result in US persons that wished to purchase the securities of non-US AI products seeking such investments through non-traditional means.

[1] A more complete treatment of the implications of this is contained in the article "When is an Investment Adviser a Broker-Dealer?" (*Insights*, Vol. 21 No. 12, December 2007).

To this end, we ask that the Commission include in amended Rule 15a-6 a limited purpose exemption for a non-US investment manager that is not also a "foreign broker or dealer" to be able, and not as a regular part of its business, to solicit a "qualified investor" to buy the securities of a non-US AI product that the non-US investment manager manages or execute an unsolicited order for a US client, subject to conditions. These conditions might include having such activity being regulated by the home country regulator or precluding the non-US investment manager from being able to receive transaction-based compensation.

We would also ask that the Commission revise proposed Rule 15a-6(a)(4)(vi)(A) to permit the solicitation by a regulated non-US investment manager of a US person that is a fiduciary not only for a foreign resident client, but also a US person that is a "qualified investor".[2]

An alternative would be to adopt a rule under the Advisers Act providing that self-directed brokerage or certain limited solicitations for investments in managed pooled investment vehicles fell within the ambit of investment adviser registration and regulation. A variation of this option would be to exempt from the definition of "broker" a home country authorised and regulated non-US investment manager that provided self-directed brokerage not as its primary activity and that did not receive transaction-based compensation.

Conforming amendments

We believe that a reference to the definition of "qualified investor" in Exchange Act Section 3(a)(54) should be added to Rule 15a-6(b) as amended.

We believe that amended Rule 15a-6 must provide that a "qualified investor" includes the entity that is managing its portfolio(s), for example, the investment manager of a 1940 Act registered investment company (Section 3(a)(54)(A)(i)) or a 1940 Act Section 3(c)(7) exempt fund (Section 3(a)(54)(A)(ii)).

Conclusion

Proposing amendments to Rule 15a-6 to codify the outstanding no-action letters issued under this rule and reflect evolved market conditions is a welcomed development, particularly in the context of mutual recognition. However, we believe that the amendments should not have the unintended effect of precluding a non-US investment manager from soliciting a US person to have it purchase the securities of a non-US AI product that the manager advises, or bar it from the occasional executed transaction, activities incidental to their primary business of asset management. We believe that it is better to design a regulatory solution to the present and ever-evolving situation rather than letting investors pursue avenues to access the non-US markets and non-US products outside the regulatory system. The options above, in the context of mutual recognition, can be the vehicle for regulatory initiatives to avoid barriers that prevent non-US investment managers from accessing the US markets and protect the interests of US investors.

Mark Berman

Mark Berman
Principal

[2] An issue with proposed Rule 15a-6(b)(4)(i) and (ii) is whether the language "not engaged in a trade or business in the United States for federal income tax purposes" and "not a U.S. resident for federal income tax purposes" reaches certain non-AI products, advised by US fiduciaries, which products are incorporated in a non-US jurisdiction but opt to file US tax returns and be treated as partnerships for US federal income tax purposes.