European Banking Federation
Secretary General

N° 0532

Mrs Florence E. Harmon
Acting Secretary
Securities & Exchange Commission
100 F Street, NE
Washington DC 20549-1090
United States of America

rule-comments@sec.gov

Brussels, 8 September 2008

Subject: **Exemption of Certain Foreign Brokers or Dealers (File Number S7–16–08)**

Dear Ms. Harmon,

The European Banking Federation (EBF)[1] appreciates the opportunity to comment on the proposal by the Securities and Exchange Commission (SEC) to amend Rule 15a-6. The **EBF welcomes the initiative to update and expand Rule 15a-6** as it represents an important step towards granting enhanced access to U.S. investors to European and other foreign broker-dealers. In particular, the EBF welcomes the SEC's proposal to substantially reduce the more burdensome areas from existing Rule 15a-6. The chaperoning requirement is eliminated and recordkeeping requirements are reduced and revised to track the realities of cross-border transactions. With regard to the latter, the EBF is particularly pleased that the SEC accepts that a non-U.S. broker – when availing of the full-service brokerage exemption – is allowed to maintain books and records in accordance to its local regulatory requirements.

The EBF is also very positive about the SEC's move to allow European foreign broker-dealers to interact directly with "qualified investors" instead of with the more restrictive category of U.S. institutional investors.

The EBF thinks, nonetheless, that **certain aspects of the proposed amendments need further refinement or clarification**. In this regard, please find herewith in Annex our detailed remarks.

From a broader perspective, the EBF concurs with the SEC's view, expressed in its 24 March 2008 announcement, that reform of **Rule 15a-6 is only one of the actions that need be taken to further the implementation of the concept of mutual recognition**. Going forward, the EBF would expect the conditions under which European broker-dealers have access to U.S. investors through a revised Rule 15a-6 to be significantly improved on through a bilateral EU-

[1] Set up in 1960, the European Banking Federation (EBF) is the voice of the European banking sector, with over 30 000 billion EUR assets and 2.4 million employees in 31 European countries. The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions.

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U.S. framework agreement for mutual recognition in securities business. Such an agreement could considerably increase investors' access to well-regulated transatlantic capital markets while safeguarding the common principles of investor protection and prudential supervision. Consequently, the **EBF urges the SEC to agree a framework for mutual recognition discussions with the European Commission** as soon as possible.

I remain at your disposal for any further information you may need.

Yours sincerely,

Guido RAVOET

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ANNEX

On the provision of research. Paragraph (a)(2)

The proposal would expand the permitted class of U.S. investors to whom non-U.S. broker-dealers may send research directly without the intermediation of a U.S. broker-dealer. The EBF suggest that the **SEC codifies an existing interpretative statement**[2] of current Rule 15a-6 **that currently permits U.S. broker-dealers to transmit foreign research to any U.S. person**.

The EBF also suggests that foreign broker-dealers should continue to be permitted to follow up on research reports that have been sent to qualified investors in order to further discuss potential transactions provided that the contact is initiated and transactions are undertaken in compliance with the other provisions of Rule 15a-6.

On the "qualified investor test". Paragraphs (a)(2) and (a)(3)

The proposal will significantly increase the number of potential customers under Rule 15a-6 by reducing the threshold asset level for investors from the current $100 million to qualified investors with over $25 million. The EBF strongly supports this proposed expansion of the category of eligible investors and recommends that possible future amendments to a reformed Rule 15-6 grandfather existing client relationships.

At the same time, **we suggest to further clarify the definition of "qualified investors"** so as to ensure that investors managing portfolios which individually are smaller than USD 25 million each, but add up to trespass that threshold, are recognised to meet that criterion.

In addition, we suggest that the amended rule should clarify the status of "investment advisors" as eligible qualified investors, even though they typically do not own but only manage assets, and may therefore not be eligible in a strict reading of the definition of qualified investors. Similarly, it should be ensured that the widest possible range of business entities can count as qualified investors under the proposed new rule, including corporations, companies or partnerships.

Finally, the EBF would also recommend the SEC to introduce enough flexibility in the proposed rule as to sustain any future international harmonisation in the definition of institutional investors.

Global custody. Exemption (A)(2)

Under the proposal – exemption (A)(2) – a foreign broker-dealer could effect all aspects of a transaction in foreign securities with a qualified investor, but not take custody of the qualified investors' fund and securities. The EBF believes that the proposed requirement would be more restrictive than the SEC's existing guidance and that this **restriction would be**

[2] SEC Release No. 34-27017 (Jul. 11, 1989), 54 Fed. Reg. 30013, 30021-22 (Jul. 18, 1989) ("Adopting Release"); Barclays PLC (avail. Feb. 14, 1991); Charterhouse Tilney (avail. Jul. 15, 1993).

detrimental to the facilitation of global custody services by non-U.S. banks. The EBF thinks that the "where" and the "why" of an investor's decision to custody their property should be left to the investor's informed judgment and that the revised rule should permit foreign broker-dealers to custody customer funds and securities outside the U.S.

On the "foreign business test" - Paragraph (b)(3) - and the definition of foreign securities - Paragraph (b)(5) -.

a) Foreign business test

Under the proposal, a non-U.S. broker dealer would be deemed to conduct a "foreign business" if at least 85% of the aggregate value of "securities purchased or sold" by the non-U.S. broker-dealer in transactions with U.S. investors was derived from transactions in "foreign securities".

From our perspective, it is not entirely clear, which objective in terms of investor protection the eligibility requirement serves, and it would certainly impose significant burdens on foreign broker-dealers operating under Exemption (A)(1).

In the event that the SEC considers it essential to include such a requirement to address potential concerns regarding regulatory arbitrage, we propose that a foreign broker-dealer be deemed to conduct a "foreign business," and accordingly be eligible to enter into transactions under Exemption (A)(1), so long as both of the following conditions exist:

(a) The foreign broker-dealer does not hold itself out to customers as a market maker in any U.S.-listed equity securities, and

(b) The foreign broker-dealer meets certain requirements based on indicators which are easier to measure and generate, such as the revenues generated in U.S. securities or dealings with U.S. broker dealers, or the share of the credit exposure with U.S. broker-dealers.

Leaving such an alternative scenario aside, the EBF suggest to improve the approach specified in the proposal by clarifying that the **only transactions that count for this purpose are those that result in a change in beneficial and economic ownership of the relevant securities** and not others such as repurchase transactions, securities loans and financing transactions.

According to the proposal, foreign broker-dealers would be given a 60-day grace period in which to continue using exemption (A)(1) after falling below the 85% threshold. The EBF suggest that the **60-day grace period could be extended up until 90 days and it is clarified that this period can be used to remedy a situation of non-compliance with the 85% threshold** as from the date of the calculation.

b) Definition of foreign securities

The proposed provisions would define "foreign securities" by reference to Rule 405 under the Securities Act of 1933. Accordingly, the definition would include securities issued by any non-U.S. entity, unless 50% or more of the entity's voting securities are held of record

(directly or indirectly) by U.S. residents and either a) the majority of its executive officers or directors are U.S. citizens or residents; b) more than 50% of its assets are located in the United States; or c) its business is administered principally in the United States. The definition would also include derivative instruments on such foreign securities. The EBF believes that the proposed test would give rise to innumerable questions whether specific types of instruments should be classified as "securities" versus "non-securities" under U.S. Law and/or as "non-US securities" versus "U.S. securities", thus making extensive and ongoing interpretive guidance from the SEC imperative. As this definition includes subjective elements and there is no definitive list of foreign securities that can be relied upon for compliance purposes, the EBF suggest the **SEC to assess whether a simpler, objective standard such as jurisdiction of organization could be used instead**. Another alternative would be to distinguish between the markets where the securities are listed for trading. For these purposes, we would propose defining foreign securities as those: (1) not primarily listed for trading in the United States; and (2) for which the relevant foreign broker-dealer does not hold itself out as a market maker. U.S. securities would, therefore, include only securities primarily listed for trading in the United States.

Home country regulation. Paragraph (b)(2)(i)

Under the proposal, a non-US broker-dealer must be "regulated (…) in a foreign country by a foreign securities authority". For these purposes, the term "foreign securities authority" would have the same meaning as set forth in Section 3(a)(50) of the Exchange Act. As in some European jurisdictions (e.g. the United Kingdom, Germany or Switzerland), securities business is sometimes regulated by an authority which, strictly speaking, is a Central Bank or other unitary regulator, the EBF would appreciate confirmation that the SEC would not seek to prescribe any separate condition or requirements on the former authorities' qualifications as a "foreign securities authority" for the purposes of Rule 15a-6.