American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

EXECUTIVE COUNCIL

JOHN J. SWEENEY, PRESIDENT
RICHARD L. TRUMKA, SECRETARY-TREASURER
ARLENE HOLT BAKER, EXECUTIVE VICE PRESIDENT

Gerald W. McEntee
Patricia Friend
Robert A. Scardelletti
Harold Schaitberger
Cecil Roberts
Edward J. McElroy Jr.
Baxter M. Atkinson
Vincent Giblin
Warren George
Robbie Sparks
Alan Rosenberg
Gene Upshaw
Michael Goodwin
R. Thomas Buffenbarger
Edwin D. Hill
Edward C. Sullivan
Ron Gettelfinger
John Gage
William Hite
Gregory J. Junemann
Nancy Wohlforth
Capt. John Prater
Michael Sacco
William Lucy
Elizabeth Bunn
Joseph J. Hunt
William Burrus
James Williams
William H. Young
Andrea E. Brooks
Laura Rico
Paul C. Thompson
Rose Ann DeMoro
Frank Hurt
Leon Lynch
Michael J. Sullivan
Clyde Rivers
Leo W. Gerard
John J. Flynn
Nat LaCour
Larry Cohen
Thomas C. Short
James C. Little

September 8, 2008

Via Electronic Mail

Ms. Florence E. Harmon, Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
rule-comments@sec.gov

Re: File No. S7-16-08 - Proposed Rules Regarding the Exemption of Certain Foreign Brokers or Dealers

Dear Ms. Harmon:

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has many concerns related to the increased exemptions granted to foreign brokers or dealers under proposed rule File No. S7-16-08. We believe that many of the proposed changes would remove important investor protections.

Effect on Small Employee Benefit Plan

Currently under Rule 15a-6, foreign brokers or dealers can solicit business from "U.S. institutional investors" and "major U.S. institutional investors" without registering with the SEC. The proposed rule would change the category of investors to which this exemption applies from "institutional investors" to the generally more expansive category of "qualified investors." As the proposing release indicates, for employee benefit plans this change amounts to extending the exemption to any plan that has a plan fiduciary and would no longer require the plan to have a minimum of $5 million in assets. The change is meant to "ensure a higher level of investing experience and sophistication than a $5 million asset threshold."[1]

We do not know how many employee benefit plans this will actually effect as we do not know how many plans have a plan fiduciary and less than $5 million in assets or, conversely and less likely, how many plans there are that do not have a plan fiduciary but do have more than $5 million in assets. But we do believe that the Commission's focus on the experience and sophistication of the investor in determining the scope of this exemption ignores an important consideration: resources at the disposal of a plan. Smaller plans may be run by experienced and sophisticated investment professionals who may be plan fiduciaries but these people will often not have the time to devote to screening and evaluating foreign brokers or dealers. An asset test is a way of limiting this exemption to plans that have the resources in addition to the competence. The $5 million asset requirement already in force is in fact very low when one considers the limited and often overstretched resources available to such small plans. We, therefore,

[1] See proposing release *Exemption of Certain Foreign Brokers or Dealers* at p. 39186

recommend that the Commission consider retaining an asset test with respect to employee benefit plans and re-evaluate what minimum asset level is likely to provide a plan with sufficient resources to do the additional due-diligence that becomes necessary.

Exemption (A)(1)

We are also concerned that the proposed changes cede too much oversight responsibility to foreign regulators. In particular, Exemption (A) (1) would rely on foreign regulators to ensure that the funds and securities entrusted to the foreign broker-dealers by qualified investors are sufficiently safeguarded. Under the current Rule 15a-6, U.S. registered broker-dealers maintain custody of these funds and securities. As a result, investors benefit from U.S. segregation requirements and bankruptcy protections. Under the proposed rule, foreign broker-dealers that are regulated by a foreign regulator and are deemed to conduct a "foreign business" would be permitted to take custody of funds and securities. Qualified investors would have to rely on the adequacy of these non-U.S. regulations. We believe that many qualified investors, especially those who work for smaller employee benefit plans, do not have the time to devote to examining the broker-dealer regulations in force outside the U.S.

We agree with the Commission that great care needs to be taken to avoid regulatory arbitrage by foreign broker-dealers. But we are not convinced that the 85 percent foreign business rule used to determine if a foreign broker-dealer can do business in the U.S. under Exemption (A) (1) will accomplish this. This rule is meant to allow foreign broker-dealers some access to U.S. investors without allowing all broker-dealers to migrate overseas to avoid SEC registration and oversight. It seems likely that insofar as there are real regulatory differences some broker-dealers will cobble together business portfolios that will give them access to U.S. investors with little regulation. We recommend that the Commission consider whether U.S. qualified investors will be more vulnerable to fraud if Exemption (A) (a) is adopted.

Disclosures

The proposing release describes the disclosures that foreign broker-dealers would be required to make to qualified investors. These include the disclosure that the foreign broker-dealer is regulated by a foreign securities authority and not by the Commission. Foreign broker-dealers relying on Exemption (A) (1) would also have to disclose:

> that U.S. segregation requirements (e.g., the requirements that customer funds and assets be segregated from the broker-dealer's own proprietary funds and assets), U.S. bankruptcy protections (e.g., preference to creditors in bankruptcy) and protections under the Securities Investor Protection Act ("SIPA") will not apply to any funds and securities of the qualified investor held by the foreign broker-dealer.[2]

We agree that these disclosures are necessary. Additional disclosures should also be required if these changes are implemented. In particular, qualified investors should be informed of the significant differences between the regulations governing the foreign broker-dealer and those governing U.S. registered broker-dealers. Secondly, it is important that foreign broker-dealers relying on Exemption (A) (1) disclose to qualified investors that the investment products and foreign-market insight that they offer can often be obtained without the need for the investor to give up the above-quoted investor protections. Some qualified investors may not be aware of

[2] See proposing release *Exemption of Certain Foreign Brokers or Dealers* at p. 39190

the differences between Exemption (A) (1) foreign broker-dealers and Exemption (A) (2) foreign broker-dealers. This disclosure would ensure that they are aware of them.

We agree with the Commission that the increasing internationalization in the securities markets may make significant changes in the regulation of foreign broker-dealers who do business with U.S. investors necessary. However, we believe many aspects of this proposing release will imprudently weaken the protections currently enjoyed by U.S. investors.

We appreciate the opportunity to comment on this proposal. If the AFL-CIO can be of further assistance, please do not hesitate to contact me at (202) 637-5379.

Sincerely,

Daniel F. Pedrotty
Director
Office of Investment

DFP/ms
opeiu #2, afl-cio

cc: Honorable Christopher Cox, Chairman
Honorable Kathleen L. Casey, Commissioner
Honorable Elisse B. Walter, Commissioner
Honorable Luis A. Aguilar, Commissioner
Honorable Troy A. Paredes, Commissioner
Andrew J. Donohue, Director, Division of Investment Management
Robert E. Plaze, Associate Director, Division of Investment Management
Erik R. Sirri, Director, Division of Market Regulation