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September 8, 2008

Via E-Mail: rule-comments@sec.gov

Florence E. Harmon,
Acting Secretary,
Securities and Exchange Commission,
100 F Street, NE,
Washington, D.C. 20549-1090.

Re: File Number S7-16-08

Dear Ms. Harmon:

We are pleased to submit this letter in response to the Commission's request for comments on its proposals to amend Rule 15a-6 (the "Proposals") under the Securities Exchange Act of 1934 (the "Exchange Act") as contained in Release No. 34-58047 (June 27, 2008) (the "Release").

We support the Commission's proposal to expand the ability of non-U.S. broker-dealers to interact with U.S. investors. However, we believe that further refinements to the Proposals are desirable in order to give proper effect to the increasing market globalization and to streamline the requirements of Rule 15a-6.

Foreign Business Test

The Foreign Business Test Should Reflect All the Non-U.S. Broker-Dealer's Business

The Proposals would define "foreign business" to mean the business of a non-U.S. broker-dealer with qualified investors and non-U.S. resident clients where at least 85% of the aggregate value of the securities purchased or sold in transactions conducted pursuant to paragraphs (a)(3) and (a)(4)(vi) of the proposed rule by the non-U.S. broker-dealer is derived from transactions in foreign securities. The Commission indicates that this

definition is intended to prevent a non-U.S. broker-dealer from conducting a significant U.S. securities business without being subject to the full scope of the Commission's regulatory framework for broker-dealers. We believe that the proposed definition is more restrictive than necessary to achieve the Commission's objective.

We suggest that the foreign business test should instead compare the value of the non-U.S. broker-dealer's transactions with qualified investors pursuant to Rule 15a-6 to the totality of the non-U.S. broker-dealer's business. In our view, so long as substantially all the business of the non-U.S. broker-dealer is conducted with non-U.S. persons, the transactions pursuant to Rule 15a-6 should not be properly construed as an attempt to engage in regulatory arbitrage. Any non-U.S. broker-dealer that conducts 85% or more of its business with non-U.S. persons and maintains all its offices outside the United States is clearly engaged in a bona fide non-U.S. business. As a result, we think it is appropriate to consider a non-U.S. broker-dealer's total business activities for purposes of the foreign business determination. Since we believe that the focus of the test should be on overall business activities, we also do not believe it is appropriate to distinguish between U.S. and non-U.S. securities for this purpose. Further, we believe that requiring firms to maintain records based on that distinction would be extremely burdensome.

The Valuation of All Derivatives Transactions Should Reflect Their Notional Amount

The Release provides guidance on how the calculations for the foreign business test would be performed. In the case of derivative instruments that are securities, the valuation will vary depending on the product. The value of options on a security would be the premium paid by the buyer, not the value of the underlying security, while the value of a security future would be the price times the number of securities to be delivered at the time the transaction is entered into.

We suggest that, for purposes of the foreign business test, the valuation of any type of derivative security should be consistent with the method set forth in the Release with respect to security futures: the value should be the notional amount of the underlying securities. The notional amount for transactions in derivatives, including options, would be equal to the number of underlying securities times the market price of those securities at the time of the transaction. Where a variable number of securities may be delivered, the calculation should be based on the maximum potential number of shares to be delivered. This methodology would, in our view, better reflect the non-U.S. broker-dealer's total market activity with a U.S. person, especially in the case of physically settled options, where our calculation would reflect the economic value of the potential delivery obligation. A calculation based on the notional amount would constitute a meaningful valuation of each transaction and enable consistent calculations for different types of derivative transactions. It would also resolve ambiguities in the Proposals with

respect to the calculation of transactions such as forwards with variable share delivery features, or cash-settled contracts such as equity swaps or contracts for differences.

The Valuation of Options Transactions Should Give Effect to NASD Rule 2860

For purposes of the foreign business test, we believe that in determining the number of securities underlying an option, non-U.S. broker-dealers should be permitted to net option positions as provided by Rule 2860 of the National Association of Securities Dealers. Thus, for example, a "collar," which involves the writing of a put option and the purchase of a call option with the same expiration date, would be counted as only one option. We believe that the application of Rule 2860 will ensure substance prevails over form with respect to the valuation of options.

The Foreign Business Test Should Initially Be Calculated on an Annual Basis

Under the foreign business test, the percentage of a non-U.S. broker-dealer's business in foreign securities would be calculated on a rolling two-year basis. However, the Release does not address how the calculation will be made upon adoption of the amendments. Will non-U.S. broker-dealers be required to calculate their foreign business for 2007 and 2008, or will the foreign business test apply only to years after the adoption of the Proposals?

Requiring non-U.S. broker-dealers retrospectively to calculate the foreign business test with respect to previous years would be extremely costly and burdensome, as non-U.S. broker-dealers are unlikely to have maintained records permitting an efficient identification of previous transactions in accordance with the proposed definition of "foreign securities." We suggest that every non-U.S. broker-dealer that has a good faith belief that it may satisfy the foreign business test be deemed to satisfy the foreign business test until 60 days after the end of the first complete fiscal or calendar year (at such non-U.S. broker-dealer's discretion) in which such non-U.S. broker-dealer relies on Exemption (A)(1). During such non-U.S. broker-dealer's second complete year, it should be permitted to rely on the foreign business calculation with respect to its first year of reliance on Exemption (A)(1). As of 60 days after the beginning of the non-U.S. broker-dealer's third complete year relying on the exemption, the rolling two-year test, as set forth in the Proposals, would apply.

Clarify the Applicability of U.S. Securities Laws to Transactions Under Exemption (A)(1) or (A)(2)

According to the Release, an intermediating U.S. registered broker-dealer would no longer be required to comply with the provisions of the federal securities laws, the rules thereunder or the rules of any self-regulatory organization ("SRO") applicable to it

in effecting a securities transaction under Exemption (A)(1) or (A)(2) unless the broker-dealer were otherwise involved in effecting the transaction. However, the Release notes that, with respect to transactions effected by a non-U.S. broker-dealer on a U.S. national securities exchange, through a U.S. alternative trading system ("ATS"), or with a market maker or an over-the-counter ("OTC") dealer in the United States, a U.S. registered broker-dealer would be involved in effecting the transaction and thus would be required to comply with the federal securities laws, the rules thereunder and SRO rules. In other words, the Release appears to provide that these laws and rules would apply with respect to all transactions in U.S. securities under Exemption (A)(1) or (A)(2) other than certain OTC transactions that a non-U.S. broker-dealer does not effect by or through a U.S. registered broker-dealer. We do not believe that the Commission meant to sweep this broadly.

We believe, and ask the Commission to confirm, that these statements merely clarify that when a transaction under Exemption (A)(1) or (A)(2) is effected on a U.S. exchange, through an ATS or with a market maker or OTC dealer, any U.S. broker-dealer that actually effects the transaction on the exchange or through the ATS, or that acts as the market maker or OTC dealer, must comply with any applicable federal securities laws and SRO rules, just as it would if the transaction were not effected pursuant to Exemption (A)(1) or (A)(2). However, if a U.S. broker-dealer performs only the intermediary role required by Exemption (A)(1) or (A)(2) and another broker-dealer actually effects the transaction on the exchange or through the ATS, or acts as the market maker or OTC dealer, only the other broker-dealer must comply with those rules and laws. Put another way, as long as a U.S. broker-dealer serves as the required intermediary but does not itself effect the transaction on the exchange or through the ATS, or act as the market maker or OTC dealer, the fact that the transaction is so effected by another broker-dealer does not mean that the intermediating broker-dealer must comply with the laws and SRO rules applicable to the execution of the transaction as if it were the executing broker, or must ensure that the executing broker complies with them. Absent this clarification, we are concerned that the Proposals can be misread to mean that if any transaction under Exemption (A)(1) or (A)(2) is effected on an exchange, through an ATS or by a market-maker or OTC dealer, then any U.S. broker-dealer whose sole role is as an intermediary under the exemption would be required to comply with all laws and SRO rules applicable to the execution of the transaction as if it were the executing broker, or would be required to cause the executing broker-dealer to comply with those laws and rules. If the Release is interpreted in this way, we believe that the utility of the proposed Exemptions (A)(1) and (A)(2) would be substantially vitiated.

Settlement of Transactions Under Exemption (A)(2)

Non-U.S. Broker-Dealers Should Be Permitted to Clear and Settle Transactions in Foreign Securities

Under the Proposals, non-U.S. broker-dealers that satisfy the conditions of Exemption (A)(1) would be permitted to provide full-service brokerage, including effecting securities transactions and maintaining custody of investor funds and securities, for all qualified investors. In any such transactions, an intermediating U.S. registered broker-dealer would not be required to assume responsibility for receiving, delivering or safeguarding funds. We agree with this change, which expands upon previous no-action relief granted by the SEC staff permitting non-U.S. broker-dealers to clear and settle transactions in non-U.S. securities, so long as the non-U.S. broker-dealers did not act as custodian of the funds or securities of the U.S. investor.[1]

In contrast, under Exemption (A)(2), a U.S. broker-dealer would be required to receive, deliver and safeguard funds and securities. A non-U.S. broker-dealer would not be permitted to receive funds or securities directly from, or deliver them directly to, the qualified investor, as permitted under the 1997 Letter. We suggest that the relief granted in the 1997 Letter should extend to non-U.S. broker-dealers relying on Exemption (A)(2). As is currently the practice, clearance and settlement of transactions in foreign securities should be permitted through the direct transfer of funds and securities between a U.S. investor and a non-U.S. broker-dealer where the non-U.S. broker-dealer is not acting as custodian of the funds or securities.

Qualified Investors Should Be Permitted to Maintain Custody of Funds and Securities at Banks

The proposed amendments would prohibit a non-U.S. broker-dealer from effecting transactions under Exemption (A)(2) with a qualified investor that maintains custody of its funds and securities at a bank, rather than at a U.S. registered broker-dealer, since Exemption (A)(2) requires that a U.S. registered broker-dealer maintain custody of the investor's funds and securities. As a result, non-U.S. broker-dealers wishing to effect transactions with qualified investors that maintain custody of their funds and securities at a bank would be able to do so only in reliance upon Exemption (A)(1).[2]

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[1] Bear Stearns & Co. Inc. et al., SEC No-Action Letter, 1997 WL 177550 (April 9, 1997) (the "1997 Letter").

[2] If our recommendation with respect to direct settlement of transactions in non-U.S. securities is adopted, this concern would be limited to transactions in U.S. securities under Exemption (A)(2).

As the Commission is aware, many large institutions maintain custody of their funds and securities at banks and engage in securities transactions on a delivery versus payment basis. We believe that non-U.S. broker-dealers relying upon Exemption (A)(2) should not be precluded from transacting with such institutions and, conversely, that qualified investors should not be denied the potential benefit of access to certain non-U.S. broker-dealers simply because they maintain custody of their funds and securities at banks.

The Definition of Qualified Investor Should Include All U.S. Institutional Investors That Invest More Than $25 Million

The Release notes that, in certain instances, the definition of qualified investor would exclude persons included in the current definition of U.S. institutional investor. For example, the definition of qualified investor includes only those employee benefit plans for which investment decisions are made by certain plan fiduciaries, while the existing definition of U.S. institutional investor also includes any employee benefit plan that has assets over $5 million and any self-directed plan for which investment decisions are made solely by accredited investors. Similarly, a trust with over $5 million in assets is a U.S. institutional investor if its investments are directed by a sophisticated person (which may include a natural person), while a trust whose investments are directed by a sophisticated person is a qualified investor without reference to a minimum asset threshold, but only if its purchases of securities are directed by specified institutions.

We suggest that the qualified investor definition, as applied in Rule 15a-6, should not reduce the scope of the staff's existing no-action relief under the 1997 Letter. We recommend that, where the qualified investor definition would be narrower than the relief under the 1997 Letter, a simple $25 million minimum investment requirement should apply. In particular, this would apply to trusts and state-sponsored or other employee benefit plans.

Maintenance of Books and Records Under Exemption (A)(1)

Provide Guidance as to the Availability of Non-U.S. Broker-Dealers' Books and Records

Exemption (A)(1) would allow a U.S. registered broker-dealer to maintain customer books and records with a non-U.S. broker-dealer, provided that the U.S. registered broker-dealer "makes a reasonable determination that copies of any or all of such books and records can be furnished promptly to the Commission, and promptly provides to the Commission any such books and records, upon request." The Release states that, in making such a determination, the U.S. registered broker-dealer would need to consider, among other things, the existence of any legal constraints in the non-U.S. jurisdiction that might limit the ability of the non-U.S. broker-dealer to disclose

information to the U.S. registered broker-dealer relating to transactions effected pursuant to Exemption (A)(1).

It is unclear whether the U.S. broker-dealer could make this determination where the non-U.S. broker-dealer is subject to customer privacy or similar laws in its home jurisdiction. We urge the Commission to clarify that the requirement promptly to furnish books and records is subject to, and thus the related determination can be made subject to, applicable local privacy or other laws restricting the provision or use of information. The Commission and its staff have long accepted this type of qualification on the books and records undertakings imposed on non-U.S. market participants in connection with exemptive and no-action relief granted to them under Regulation M. If such a qualification is not included in the amendments to Rule 15a-6, then the proposed relief from the requirement that the intermediating U.S. broker-dealer itself maintain the books and records would be of limited utility with regard to many non-U.S. jurisdictions, including a number as to which the Commission has previously granted similar relief.

Permit Any Type of Entity to Maintain the Books and Records Under Exemption (A)(1)

Under Exemption (A)(1), customer books and records would be required to be maintained either by a U.S. registered broker-dealer, or, if the U.S. broker-dealer determines that copies can be furnished promptly to the Commission and provides them promptly to the Commission upon request, with the non-U.S. broker-dealer. In either case, the rule would require the involvement of a U.S. registered broker-dealer. We suggest that, to the extent that a party's only function in respect of Exemption (A)(1) is this narrow recordkeeping and record-production role, any type of entity, not only a U.S. registered broker-dealer, should be permitted to maintain the required books and records. Any such recordkeeping entity could be required to give an undertaking to the Commission similar to the undertaking required by Rule 17a-4(i) under the Exchange Act:

> With respect to any books and records maintained or preserved on behalf of [BD], the undersigned hereby undertakes to permit examination of such books and records at any time or from time to time during business hours by representatives or designees of the Securities and Exchange Commission, and to promptly furnish to said Commission or its designee true, correct, complete and current hard copy of any or all or any part of such books and records.

Clarify That Communications by Telephone, E-mail and Facsimile Are Permitted

The Release states that the proposed rule would not limit a non-U.S. broker-dealer's ability to have unchaperoned communications, "both oral and electronic," with qualified investors in connection with transactions under Exemption (A)(1) or (A)(2).

We suggest clarifying that such communications may be in writing or by telephone, e-mail or facsimile.

Non-U.S. Regulations Should Not Be Required to Encompass the "Specific Activities" in Which a Non-U.S. Broker-Dealer Engages Under Proposed Rule 15a-6(a)(3)

The Proposals require that, for purposes of proposed Rule 15a-6(a)(3), the "specific activities" engaged in by the non-U.S. broker-dealer must be regulated by a non-U.S. securities authority. We believe that this restriction is unnecessary and will create confusion as to what level of regulation is required. For example, must the non-U.S. regulator have specific rules governing securities transactions effected on an agency basis, a riskless principal basis and a principal basis, and if so what level of rules are required — are specific commission or market up/market down rules necessary? We believe that Rule 15a-6 should not preclude a non-U.S. securities regulatory authority from adopting a principles-based method of regulation. Principles of comity weigh heavily against the Commission's proposal, which could be read as requiring non-U.S. securities authorities to implement rules-based regulations.

Transactions with U.S. Persons Acting in a Fiduciary Capacity

The Definition of "Foreign Resident Client" Should Not Be Based on the Client's Tax Status

Proposed Rule 15a-6(a)(4)(vi) would exempt a non-U.S. broker-dealer's securities transactions with certain U.S. persons acting in a fiduciary capacity for an account of a foreign resident client, provided that the non-U.S. broker-dealer obtains and maintains a representation from the U.S. person that the account is managed in a fiduciary capacity for a foreign resident client. "Foreign resident client" would be defined as (i) an entity not organized or incorporated under U.S. law and not engaged in a trade or business in the United States for federal income tax purposes, (ii) a natural person not a U.S. resident for federal income tax purposes; and (iii) an entity not organized or incorporated under U.S. law, at least 85% of whose voting securities are beneficially owned by such entities or persons.

We believe that it is highly impractical to require a U.S. fiduciary to determine the federal income tax status of each non-U.S. client for which it acts pursuant to this exemption. In many cases, investment managers may not know the federal income tax status of their non-U.S. clients, and the clients may not have determined their status or may have legitimate reasons for not disclosing it to their investment managers. Further, the determination of federal income tax status can be complex, requiring professional tax law advice, and can be subject to abrupt change. We urge the Commission to adopt a

workable definition of "foreign resident client" that can be applied in practice. We suggest that "foreign resident client" be defined as any individual or entity that is not a "U.S. person" as defined in Regulation S under the Securities Act of 1933. Many non-U.S. broker-dealers and U.S. fiduciaries are already familiar with the Regulation S definition and have adopted procedures to determine the status of their clients under that definition. Consistent with Regulation S, we also believe that a U.S. fiduciary should be permitted to make the required representation based on its reasonable belief (i.e., the U.S. fiduciary "reasonably believes that" its client is a foreign resident client).

We believe that the proposed new exemption in subsection (a)(4)(vi) is an important one because it has the potential to eliminate what has been a significant and vexing uncertainty in the current regulatory scheme, by making it clear that non-U.S. broker-dealers are not prohibited from effecting securities transactions for non-U.S. accounts just because the accounts have retained U.S. (rather than non-U.S.) fiduciaries to act on their behalf. However, if the definition of "foreign resident client" is adopted as currently proposed, we believe that the new exemption will be of little practical value and will not achieve its intended purpose.

Any Non-U.S. Broker-Dealer Should Be Permitted to Rely on Proposed Rule 15a-6(a)(4)(vi)

Pursuant to the proposed definition of "foreign broker or dealer," Rule 15a-6(a)(4)(vi) would be available only to non-U.S. broker-dealers that conduct a foreign business. We believe that this limitation is unnecessary to achieve the purpose of the exemption. We suggest that any non-U.S. broker-dealer, not only those conducting a foreign business, should be permitted to engage in securities transactions with a U.S. person acting in a fiduciary capacity for an account of a foreign resident client. The nature or mix of the non-U.S. broker-dealer's business would not appear to be relevant to the operation of the exemption.

Clarify That Exemption (A)(2) Does Not Require Compliance With All the Provisions of Rule 15c3-3

Exemption (A)(2) would require that funds and securities of qualified investors be maintained in compliance with Rule 15c3-3 under the Exchange Act. It is unclear in this context what provisions of Rule 15c3-3 are applicable. For example, are the securities held by the U.S. registered broker-dealer on behalf of the non-U.S. broker-dealer subject to the securities lending restrictions of Rule 15c3-3(b)(3)? How should the U.S. registered broker-dealer determine if the securities are "excess margin securities?" Do the restrictions on repurchase agreements in Rule 15c3-3(b)(4) apply to securities transactions under Exemption (A)(2)? We suggest that the Commission clarify that only

paragraphs (c) and (e) of Rule 15c3-3 should apply to funds and securities held on behalf of a non-U.S. broker-dealer.

Neither Non-U.S. Options Exchanges nor Related Non-U.S. Clearing Agencies Should Be Required to Register Under the Exchange Act

We strongly support the Commission's proposed interpretation that a non-U.S. options exchange that complies with the requirements of proposed Rule 15a-6(a)(5) should not be required to register as a national securities exchange under the Exchange Act. In our view, qualified investors have the capacity to assess the desirability of transacting in non-U.S. listed options and should not be precluded from doing so indirectly. Restricting access by qualified investors to non-U.S. listed options would, in our view, be inconsistent with the Commission's recognition of the globalization of the securities markets.

Likewise, we encourage the Commission to adopt interpretive guidance that a related non-U.S. clearing agency is not required to register as a clearing agency under the Exchange Act. To the extent that a non-U.S. options exchange is exempt from registration, the related clearing organization must also be exempt.

Technical Comment

The following is a technical comment on the Proposal.

Proposed Rule 15a-6(a). It is unclear to us what the phrase "that apply specifically to a broker or dealer that is not registered with the Commission solely by virtue of its status as a broker or dealer, with respect to a particular transaction or solicitation" is intended to accomplish. We suggest deleting this language for purposes of clarity.

* * *

We appreciate this opportunity to comment on the proposed amendments to Rule 15a-6, and we would be happy to discuss any questions the Commission or its staff may have with respect to this letter. Such questions may be directed to David B. Harms (212-558-3882), Robert W. Reeder III (212-558-3755) or Frederick Wertheim (212-558-4974).

Very truly yours,

SULLIVAN & CROMWELL LLP