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September 8, 2008

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

Re: Securities and Exchange Commission File No. S7-16-08

Dear Ms. Harmon:

The Institute of International Bankers appreciates the opportunity to comment on the proposal by the Securities and Exchange Commission (the "Commission") to update and expand Rule 15a-6 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to reflect the increasing internationalization in securities markets and advancements in technology and communication services (the "Proposal").[1] The Institute's members are internationally headquartered banking/financial institutions, many of which engage outside the United States in the types of activities addressed by Rule 15a-6 and therefore have a direct interest in the Proposal.

The Institute supports the Proposal in general and applauds the Commission for its initiative in undertaking to implement a balanced regulatory approach that enables expanded contacts between non-U.S. broker-dealers and U.S. investors, and increases the availability of information to U.S. investors regarding cross-border investment opportunities, while preserving the key investor protections accorded under the Exchange Act. In addition to facilitating U.S. investors' access to international securities markets and decreasing regulatory burden, the Proposal constitutes an important step in the direction of implementing the concept of mutual recognition for regulatory regimes in other jurisdictions, an approach the Institute strongly favors as a means to enhance the international competitiveness of U.S. financial markets.

The Institute strongly supports in particular the Commission's proposals to (i) expand the category of U.S. investors with which non-U.S. broker-dealers would be permitted to interact by permitting solicitation of U.S. persons that are "qualified

[1] *See* Release No. 34-58047, 73 Fed. Reg. 39181 (July 8, 2008) (the "Proposing Release").

investors" (as defined in Section 3(a)(54) of the Exchange Act; (ii) permit qualifying non-U.S. broker-dealers to effect all aspects of a transaction with qualified investors, including maintaining custody of funds and assets, subject to prescribed disclosure requirements; (iii) permit qualifying non-U.S. broker-dealers to maintain the books and records relating to their transactions with qualified investors in the form, manner and for the periods of time prescribed by the foreign securities authority regulating the non-U.S. broker-dealer; (iv) eliminate the "chaperoning" requirement; and (v) codify staff interpretations issued under current Rule 15a-6, including with respect to transactions by non-U.S. broker-dealers with U.S. persons acting in a fiduciary capacity on behalf of non-U.S. resident clients.

There are several aspects of the proposed revisions that we believe should be clarified in finalizing the Proposal. As discussed below, these relate to the definitions of "foreign broker or dealer" and "foreign business"; the role and responsibilities of a registered broker or dealer in connection with transactions conducted by a foreign broker or dealer in reliance on proposed paragraph (a)(3)(iii)(A)(1) ("Exemption (A)(1)"); and the number of days that can be spent in the United States on an "unchaperoned" basis by representatives of a foreign broker or dealer.

Definition of "Foreign Broker or Dealer"

The Proposal would revise the definition of "foreign broker or dealer" to provide that, in order to qualify for the key provisions of paragraph (a)(3) of the rule, a non-U.S. broker-dealer must be "regulated for conducting securities activities, including the specific activities in which the foreign broker or dealer engages with the qualified investor, in a foreign country by a foreign securities authority."[2] 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.[3]

For the avoidance of doubt, it would be helpful in finalizing the Proposal to confirm that applicable law of a foreign country is controlling for purposes of determining whether or not a foreign authority is a "foreign securities authority" – *i.e.*, the Commission would not seek to prescribe any separate condition or requirement on the authority's qualification as a "foreign securities authority" for purposes of Rule 15a-6.

Similarly, the Institute requests confirmation that the Commission would look only at applicable foreign law and would not seek to prescribe any separate condition or requirement for purposes of determining whether a transaction effected by a foreign broker or dealer under paragraph (a)(3) is regulated by a foreign securities authority.

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[2] Proposed Rule 15a-6(b)(2)(i).

[3] *See* Proposing Release, 73 Fed. Reg. at 39189.

In addition, the Institute requests clarification of the degree to which a transaction effected by a foreign broker or dealer under paragraph (a)(3) must be regulated by a foreign securities authority in order to qualify for the exemption from registration under the Exchange Act. In particular, the Proposal does not indicate whether the exemption under paragraph (a)(3) would apply in the situation where a foreign broker or dealer whose securities activities generally are regulated by a foreign securities authority engages in a transaction with a qualified investor that is treated in some manner as an exempt transaction under applicable foreign law (for example, because of the degree of investment experience/sophistication of the investor). In such circumstances, the foreign broker or dealer presumably is responsible under applicable foreign law to the foreign securities authority for complying with the requirements of the exemption. Accordingly, we believe it would be appropriate to view the foreign broker or dealer as being regulated by the foreign securities authority with respect to the transaction for purposes of paragraph (a)(3).

Definition of "Foreign Business"

The Proposal would permit a foreign broker or dealer itself to maintain all books and records relating to transactions it effects with a qualified investor under paragraph (a)(3), including confirmations and statements issued by the foreign broker or dealer to the qualified investor, provided that, among other conditions, the foreign broker or dealer conducts a foreign business.[4] The proposed "foreign business" test would require in general that at least 85 percent of the aggregate value of the securities purchased or sold in transactions conducted pursuant to paragraphs (a)(3) and (a)(4)(vi) by the foreign broker or dealer, calculated on a rolling two-year basis, is derived from transactions in "foreign securities" (as defined in proposed paragraph (b)(5)).[5] The Proposal helpfully explains that a foreign broker or dealer can elect to apply the test on the basis of either a calendar year or its fiscal year.[6]

Given its centrality to the proposed expansion of the Rule 15a-6 "solicited trades" exemption provided for in proposed paragraph (a)(3), as well as being a precondition for

[4] Proposed Rule 15a-6(b)(2)(ii). Where the foreign broker or dealer maintains the books and records of its transactions with qualified investors, the Proposal would require the foreign broker or dealer to make certain disclosures to the qualified investor. We believe this approach is reasonable, and do not object to the required disclosure, but we think it would be helpful to prescribe in either the final rule or the accompanying supplemental information a sample form of disclosure that would satisfy the rule's requirements. In our view, such disclosure would simply restate what is provided for in proposed paragraph (a)(3)(i)(D).

[5] Proposed Rule 15a-6(b)(3). The Proposal would permit a foreign broker or dealer to rely on the calculation of the foreign business test made for a prior year for the first 60 days of a new year. While we have certain questions regarding the calculation of the foreign business test, we believe the 60-day "grace period" is reasonable, as is the proposal to calculate the test on a rolling two-year basis.

[6] *See* Proposing Release, 73 Fed. Reg. at 39191.

reliance on the exemption provided in paragraph (a)(4)(vi) (the "U.S. Fiduciary Transactions Exemption"), it is important to clarify how the foreign business test would be calculated. We understand the Proposal to contemplate that a foreign broker or dealer would make the calculation within the first 60 days after the end of a year (in order to benefit from the "grace period", if need be) looking back at the results for the past two years (measured on a calendar or fiscal year basis at the election of the foreign broker or dealer). In connection with finalizing the Proposal, it would be helpful to clarify the conditions under which a foreign broker or dealer could elect to change from a calendar to a fiscal year basis, or vice versa as the case may be.

In addition, and of considerably greater practical significance, it would be helpful to clarify how the foreign business test would be implemented during the first two years following the effective date of the final rule. For example, to what extent would a foreign broker or dealer be permitted to include transactions effected in reliance on the current provisions of Rule 15a-6(a)(3) with respect to solicited trades and the terms of the applicable staff no-action letters with respect to U.S. fiduciary transactions for purposes of determining its compliance with the foreign business test (and hence its eligibility to utilize the provisions of Exemption (A)(1) and the U.S. Fiduciary Transactions Exemption)?[7]

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[7] Inasmuch as it is contemplated that the staff no action letters relating to U.S. fiduciary trades would be superseded upon finalizing the Proposal (*see* the Proposing Release, 73 Fed. Reg. at 39201), it would appear that without guidance as to how the foreign business test would be applied during the first two years following the final rule's effective date foreign broker or dealers would be effectively precluded from effecting trades with U.S. fiduciaries during that transitional period without thereby having to register as a broker-dealer under the Exchange Act since the U.S. Fiduciary Transactions Exemption would be the exclusive basis on which to conduct such trades without registration, and the exemption is conditioned on satisfying the test. Similarly, guidance on application of the foreign business test during the first two years following the effective date of the final rule would be essential to ensure that foreign brokers or dealers would be able to utilize the provisions of proposed Exemption (A)(1).

We note further that transactions with banks acting in a fiduciary capacity are excluded from proposed paragraph (a)(4)(vi), presumably because transactions with banks are otherwise addressed in paragraph (a)(4)(i), which was modified in connection with adoption of the "push out" rules and would not be affected by the Proposal. However, this latter exemption provides that the bank is "acting pursuant to an exception or exemption from the definition of 'broker' or 'dealer'" set forth in the "push out" provisions of the Exchange Act and the rules thereunder and thus appears to condition the availability of the foreign broker or dealer's exemption on whether or not the bank itself is in compliance with the requirements of an applicable exception or exemption from the "push out" provisions. Where the bank is acting as a fiduciary in an agency capacity (and is not an affiliate of the foreign broker or dealer), this would include its compliance with the "chiefly compensated" standard prescribed by Section 3(a)(4)(B)(iii) of the Exchange Act and implemented by Rules 721 and 722 under the Exchange Act. Such compliance is a function of, among other things, the bank's "relationship-total compensation percentage", a factor that is beyond the control or knowledge of the foreign broker or dealer, and we believe the foreign broker or dealer's ability to conduct transactions in securities with the bank as fiduciary without thereby having to register under the Exchange Act therefore should not be dependent on it. Accordingly, we respectfully request that the final rule permit foreign brokers or dealers the option to rely on either paragraph (a)(4)(i) or paragraph (a)(4)(vi) in connection with their transactions with banks acting as agent in a fiduciary capacity. Alternatively, the Commission should clarify that a foreign broker or dealer's reliance on the exemption provided for in Rule

As described in the Proposal, the foreign business test is designed to "provide U.S. investors increased access to foreign securities and markets without creating opportunities for regulatory arbitrage vis-à-vis U.S. securities markets."[8] We believe it would be consistent with this purpose to limit calculation of the foreign business test to transactions that are entered into for an investment/trading purpose and thus to exclude securities repurchase transactions and securities lending transactions, and we respectfully request that the Proposal be revised accordingly. More generally, we believe it would be helpful in connection with finalizing the Proposal to include additional examples of how the foreign business test would be calculated.

Role/Responsibility of the Registered Broker-Dealer

Where the books and records relating to transactions by a foreign broker or dealer with qualified investors are maintained with the foreign broker or dealer pursuant to proposed Exemption (A)(1), the Proposal would require a registered broker or dealer to (i) retain responsibility for such books and records, (ii) make a "reasonable determination" that copies of any or all of such books and records can be furnished "promptly" to the Commission and (ii) "promptly" provide the Commission any such books and records, upon request. We have two comments on this requirement:

- First, we request clarification of the term "promptly" as used in this context, especially in light of the fact that foreign broker-dealers in many cases operate in time zones distant from the United States.[9] Consideration also should be given to delays in making books and records available that may result from the manner or form in which those books and records are maintained as prescribed by the relevant foreign securities authority.

- Second, we request clarification regarding the nature of the obligation imposed on the registered broker or dealer to make a "reasonable determination" as to the prompt availability of copies of such books and records and the consequences of a registered broker or dealer failing to satisfy this obligation. For example, it would be appropriate to qualify this requirement by recognizing that situations may arise in which applicable law in the foreign broker or dealer's country prohibits delivery of books and records maintained by the foreign broker or dealer to the

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15a-6(a)(4)(i) is not dependent on whether or not the counterparty bank is in technical compliance with all of the requirements of any exception or exemption under the Exchange Act's applicable to its involvement in the transaction. We note in this regard the Commission's previous conclusion that the amendment to Rule 15a-6(a)(4)(i) adopted in connection with the final "push out" rules "does not change the substance of rule 15a-6." *See* 72 Fed. Reg. 56562, 56565 (Oct. 3, 2007).

[8] Proposing Release, 73 Fed. Reg. at 39191.

[9] The Proposing Release suggests that "promptly" may contemplate as short a period as on the day a request is made (*see* 73 Fed. Reg. at 39189 n.75).

Commission, or to any other person in the United States. Indeed, proposed paragraph (a)(3)(i)(A) takes into account exactly this possibility from the perspective of the foreign broker or dealer, and proposed paragraph (c) specifies the potential consequences to the foreign broker or dealer in such a situation. We believe it would be appropriate to account for such a circumstance in connection with prescribing the obligations of a registered broker or dealer under proposed Exemption (A)(1).

We also believe consideration should be given to the necessity of the other obligations imposed on a registered broker or dealer in connection with transactions effected by a foreign broker or dealer pursuant to proposed Exemption (A)(1) and whether alternative arrangements could be made that would reduce the regulatory burden on the registered broker or dealer without diminishing the Commission's oversight of the foreign broker or dealer's transactions with qualified investors. For example, in our view it would be appropriate to permit a foreign broker or dealer operating pursuant to proposed Exemption (A)(1) to appoint a person in the United States other than a registered broker or dealer as its agent for service of process for any civil action brought by or proceeding before the Commission or a self-regulatory organization.

Similarly, we do not believe it should be necessary for a registered broker or dealer to obtain from the foreign broker or dealer the representations called for in proposed paragraph (a)(3)(iii)(C) and to maintain the records regarding these representations called for in proposed paragraph (a)(3)(iii)(D). The foreign broker or dealer's ability to utilize the exemption provided for in proposed Exemption (A)(1) is in any event conditioned on its compliance with the requirements of proposed paragraphs (a)(3)(i)(B) and (C), and we do not see that there is any regulatory advantage in requiring a registered broker or dealer to obtain and maintain records of representations from the foreign broker or dealer regarding its compliance with those provisions.

In our view, it would be equally effective, and less burdensome, to incorporate into the rule a provision to the effect that by conducting transactions in reliance on Exemption (A)(1) a foreign broker or dealer would be deemed to have made such representations directly to the Commission. Alternatively, the rule could require the foreign broker or dealer to submit such a written representation directly to the Commission (or a self-regulatory organization). In either case, we see no need for involvement by a registered broker-dealer in this aspect of the regulation.

Unchaperoned Visitations

The Proposal would eliminate the requirement that contacts by representatives of a foreign broker-dealer with U.S. investors be chaperoned by a person registered with a U.S. broker-dealer. As stated above, the Institute strongly supports the proposal to expand the ability of foreign broker-dealers to have unchaperoned contacts with qualified investors.

The Proposal raises the question of what should constitute a "visit" to the United States by representatives of a foreign broker-dealer for purposes of the rule, and the Commission proposes to interpret a "visit" as "one or more trips to the United States over a calendar year that do not last more than 180 days in the aggregate."[10] We believe this approach is reasonable, but request confirmation that days spent in the United States by a representative of a foreign broker-dealer on exclusively personal matters (such as while on vacation) would not count toward the 180-day limit. In addition, we request clarification of whether the 180-day standard is intended to be applied in the aggregate – *i.e.*, as a limit to the total number of days all representatives of a foreign broker-dealer can spend on business in the United States in a calendar year – or on an individual-by-individual basis.

A Note on Global Custody Activities

The Commission requests comment on whether proposed paragraph (a)(3)(iii)(A)(2) ("Exemption (A)(2)")should be available when a U.S. registered broker-dealer does not maintain custody of the qualified investor's funds and securities (for example, when a U.S. or foreign affiliate of the U.S. registered broker-dealer custodies the funds and securities otherwise than pursuant to Rule 15c3-3 under the Exchange Act).[11] We understand such activities to include the situation in which a qualified investor has retained the services of a global custodian to be responsible for the movement of its securities and funds in connection with purchases and sales the qualified investor effects through a foreign broker or dealer that relies on proposed Exemption (A)(2).

We believe such arrangements should be permissible under proposed Exemption (A)(2) where the affiliate's custody activities are appropriately regulated. Such regulation certainly exists with respect to U.S. custodian banks (including U.S. branches and agencies of internationally headquartered banks). We note in this connection that internationally headquartered banking organizations actively compete with their U.S. counterparts in the global custody business and that such activities are functionally the same as the activities that are covered by the "safekeeping and custody activities" provisions of Section 3(a)(4)(B)(viii) of the Exchange Act and Rule 760 thereunder, which exempt U.S. custodian banks from the Exchange Act's broker-dealer registration requirements with respect to such activities. The rationale for the exemption is that such activities are fundamentally banking in nature and do not require regulation under the Exchange Act.

The Institute has separately requested the Commission to issue an exemptive order under the Exchange Act with respect to internationally headquartered banks' global

[10] *See* Proposing Release, 73 Fed. Reg. at 39194.

[11] *See* Proposing Release, 73 Fed. Reg. at 39193.

custody activities and looks forward to an early resolution of this issue. The Institute's request relates specifically to the application of the Exchange Act's broker-dealer registration requirements to internationally headquartered banks' global custody businesses outside the United States and is based on the view that, as is the case with respect to U.S. custodian banks, such activities are fundamentally banking in nature and as such need not be regulated under the Exchange Act. In our view, this supports the conclusion that a foreign broker or dealer should not be treated differently under proposed Exemption (A)(2) simply because its customer has decided not to retain the services of a U.S. custodian bank.

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We would be pleased to discuss any of the comments in this letter with the Commission or its staff. If we can be of further assistance to the Commission in this regard, please do not hesitate to contact the undersigned or the Institute's General Counsel Richard Coffman. We both can be reached at 212-421-1611.

Very truly yours,

Lawrence R. Uhlick

Lawrence R. Uhlick
Chief Executive Officer