September 8, 2008

United States Securities and Exchange Commission
100 F Street, NE,
Washington, DC 20549-1090
Attention: Ms. Florence E. Harmon, Acting Secretary

Re: Exemption of Certain Foreign Brokers and Dealers, SEC Release No. 58047 (June 27, 2008), File No. S7-16-08

Ladies and Gentlemen:

Bloomberg Tradebook and its affiliates appreciate this opportunity to comment on the Commission's proposal to amend Rule 15a-6 ("Rule") under the Securities Exchange Act of 1934 ("Exchange Act").[1] We believe that the proposed amendments are a timely recognition of the increasingly global nature of the securities markets, and potentially would increase opportunities and reduce costs for U.S. persons to trade in foreign securities. We comment below on some issues and concerns raised by the proposals.

A. "Foreign business" test

A foreign broker-dealer would be able to use the exemption in proposed Rule 15a-6(a)(3)(iii)(A)(*1*) (the "(A)(*1*) exemption") if it conducted a "foreign business" as proposed to be defined in Rule 15a-6(b)(3). To qualify for paragraph (b)(3), a foreign broker-dealer's business with qualified investors and foreign resident clients[2] would have to be such that "at least 85% of the aggregate value of the securities purchased or sold in transactions conducted pursuant to both paragraphs (a)(3) and (a)(4)(vi)[3] … by the foreign broker or dealer, calculated on a two-

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1 SEC Release No. 34-58047 (June 27, 2008), 73 Fed. Reg. 39182 ("Release").

2 "Foreign resident client" is defined in proposed paragraph (b)(4) generally to mean fiduciary clients of a U.S. person, where such clients are: (1) natural persons not resident in the U.S.; (2) entities organized and operating outside the U.S.; and (3) entities not organized in the U.S. and at least 85% of whose voting securities are beneficially owned by the foregoing persons and entities.

3 It is unclear why the Rule and Release state that the transaction must be conducted pursuant to *both* paragraphs (a)(3) and (a)(4)(vi). They are independent exemptions. We suggest that the provision be changed to read: "pursuant to paragraphs (a)(3) or (a)(4)(vi)."

year rolling basis[4] is derived from transactions in foreign securities." The definition of "foreign security," in turn, would incorporate the definitions of "foreign private issuer" and "equity security," in Rule 405 under the Securities Act of 1933 ("Securities Act"), and "debt security" as defined in Rule 902 of Regulation S under the Securities Act.

The Release states that the purpose of the calculation of "foreign business" is "to determine the percentage of foreign securities bought from, or sold to, U.S. investors,"[5] and that the goal of the 85% test is to "allow foreign broker-dealers to continue to do a limited amount of business [pursuant to Rule 15a-6(a)(3)] in U.S. securities."[6] The objective appears to be to allow foreign broker-dealers to engage in a securities business with U.S. qualified investors in both foreign and U.S. securities as long as the value of such business relating to transactions in foreign securities is at least 85% of the total value of the foreign broker-dealer's securities transactions with U.S. qualified investors.

As proposed, however, the method of calculation is unclear and impracticable. We suggest below several areas where the Rule should be clarified to provide adequate guidance and eliminate unnecessary ambiguity:

1. The calculation focuses on the business of a foreign broker-dealer with "qualified investors" and "foreign resident clients." The intent is to assess the foreign broker-dealer's business with U.S. qualified investors. However, the definition of "qualified investor" in Exchange Act Section 3(a)(54) is *not* limited to U.S. persons that satisfy the criteria in the statute. For example, paragraphs 3(a)(54)(A)(xi) and (xii) refer to "any corporation, company or partnership" and "any natural person," respectively. Therefore, the calculation for determining "foreign business" should refer to "qualified investors resident in the United States,"[7] or "U.S. qualified investors."[8]

2. To qualify for the (A)(*1*) exemption, the value of a foreign broker-dealer's business with U.S. qualified investors in foreign securities would have to be equal to or greater than 85% of the total value of its securities business with U.S. qualified investors. "Foreign

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4 We request that the Commission specifically explain and provide examples of how a foreign broker-dealer would determine its "foreign business" status on "day one," *i.e.*, when the proposed amendments are adopted and before it has two years of data to make the calculation.

5 73 Fed. Reg. at 39191.

6 Id. at 39192.

7 Transactions with foreign persons temporarily present in the U.S., however, can be excluded under certain circumstances. *See* proposed Rule 15a-6(a)(4)(iii).

8 *See* 73 Fed. Reg. at 39194 n.108: "The proposed rule …would substitute 'qualified investor' for 'U.S. institutional investor or major U.S. institutional investor'…." Therefore, the Rule's focus is intended to continue to be on U.S. investors. Our comments in this letter incorporate that conclusion.

security" includes equity and debt securities of a "foreign private issuer."[9] The determination of whether a foreign issuer is a foreign private issuer, however, turns on facts pertaining to the issuer, such as the proportion of voting securities held by U.S. residents,[10] that are likely to be known only to the issuer itself and may often be impracticable or impossible for an entity other than the issuer or its registrar or transfer agent to ascertain. If the Commission determines to retain the foreign private investor element in the Rule, we recommend that a foreign broker-dealer should be able to rely on the fact that an issuer files reports with the Commission as a foreign private issuer, or has availed itself of the exemption from registration in Exchange Act Rule 12g3-2(b), as conclusive of that issuer's foreign private issuer status.[11] Of course, many issuers that do not file reports with the Commission or claim a Rule 12g3-2(b) exemption also may qualify as foreign private issuers, and foreign broker-dealers will need "bright line tests" that are not unduly burdensome to administer to determine the status of those issuers.

3. The Commission also should discuss the "foreign security" status of securities that are traded on a U.S. market and on one or more non-U.S. markets, as is the case with an increasing number of stocks of U.S. and non-U.S. large-capitalization issuers. For example, a foreign private issuer may have securities that are listed on the New York Stock Exchange or quoted on the OTC Bulletin Board, and therefore are subject to registration under Exchange Act Section 12, as well as being listed on one or more foreign exchanges. The securities of foreign private issuers also may be quoted in the U.S. over-the-counter market, such as the Pink Sheets, as well as on non-U.S. markets. Are transactions in such securities effected in the United States nevertheless transactions in "foreign securities"?[12] Foreign broker-dealers need clear tests for determining "foreign security" status in such situations.[13]

4. The proposed Rule permits a foreign broker-dealer to consider "a debt security … issued by [a U.S. company] in connection with a distribution conducted solely outside the United States pursuant to Regulation S" under the Securities Act to be a "foreign security."[14] However, a foreign broker-dealer engaged in secondary market transactions may have great difficulty in ascertaining whether a debt security of a U.S. issuer satisfied these

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9 "Foreign security" also would include "a derivative instrument on a security" otherwise identified in this definition. Although the Release asserts that this definition "would not include derivative instruments that are not themselves securities," 73 Fed. Reg. at 39191, the rule text is not so limited.

10 *See* Securities Act Rule 405 regarding exclusions of foreign issuers from the definition of foreign private issuer; 73 Fed. Reg. 39191 n.92.

11 *See, e.g.*, Forms 20-F and 40-F under the Exchange Act. Form 20-F may be filed by a "foreign private issuer" as defined in Exchange Act Rule 3b-4. The definition in that rule is identical to the definition in Securities Act Rule 405. Therefore, we recommend that the definition of foreign private issuer in Rule 15a-6 incorporate the definition in Rule 3b-4 to support the ability of a foreign broker-dealer to rely on the filing of Form 20-F as conclusive evidence of foreign private issuer status.

12 Such transactions may be effected through U.S. broker-dealers, alternative trading systems, and exchanges.

13 Please see our discussion below concerning "foreign business" and transaction locus.

14 *See* proposed Rule 15a-6(b)(5)(iii).

conditions. This part of the definition also has a considerable amount of internal complexity. For example, does a "distribution conducted solely outside the United States pursuant to Regulation S" encompass a public offering outside the United States if it is accompanied by a contemporaneous private placement in the United States? How would a broker-dealer that is not involved in the offering know whether the issuer and its distributors had complied with Regulation S if "pursuant to Regulation S" means that the issuer and the distributors in fact fulfilled the requirements of that regulation? Indeed, how would such a broker-dealer know whether the issuer availed itself of Regulation S at all?

5. As reflected in the proposal, the Commission accepts that transactions in the debt securities of a U.S. issuer that occur offshore in compliance with Regulation S may be included as a "foreign security" in calculating a foreign broker-dealer's "foreign business."[15] Presumably, the context is a transaction in such a security for a U.S. qualified investor. We believe that this reflects an assumption that it is the *locus* of a transaction by a foreign broker-dealer, rather than the characteristics of the issuer, that will indicate to a U.S. qualified investor whether the protections of the U.S. securities laws will apply. We recommend that the Commission clarify this.

We believe that this suggests an alternative way to determine "foreign business," namely, that whether a transaction is "foreign" should not turn on the characteristics of the issuer, but on the locus of the transaction. Transactions for U.S. qualified investors executed on markets in the United States would be U.S. transactions, and transactions executed for U.S. qualified investors on markets offshore would be foreign transactions. Accordingly, a foreign broker-dealer would be deemed to be engaged in a foreign business for purposes of Rule 15a-6 if at least 85% of the value of its transactions for U.S. qualified investors was derived from foreign transactions. Offshore organized markets that qualified as the locus of foreign transactions could be limited to physical trading floors of established foreign securities exchanges,[16] or the facilities of "designated offshore securities markets."[17] For transactions in over-the-counter markets, a transaction would be deemed a foreign transaction if the entity executing the trade is not registered and not required to be registered in the United States as a broker, dealer, or market.

Therefore, we recommend that the Commission provide for alternative and perhaps non-exclusive means for a foreign broker-dealer to satisfy the "foreign business" requirement in the (A)(*1*) exemption.

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15 The rationale for limiting this provision to debt securities (as defined in Rule 902 of Regulation S, which does not include convertible debt) is not clear. Rule 904 of Regulation S permits offshore offers and sales if the conditions of that rule are satisfied, but it is not limited to debt securities.

16 *See* Rule 902(h)(1)(ii)(B)(*1*) of Regulation S.

17 *See* Rule 902(b) of Regulation S.

B. Structure of the Rule

We respectfully suggest that the Rule's "plumbing" is too complicated to be understood easily. For example, to comprehend how the (A)(*1*) exemption works, the reader must:

(w) look to the definition of "foreign broker or dealer" in paragraph (b)(2), as well as the definition of "qualified investor"; and then,

(x) within the (b)(2) definition of "foreign broker or dealer" look to the term "foreign business" in subpart (ii); and then,

(y) look to the definition of "foreign business" in (b)(3), which refers to "qualified investors" and "foreign resident clients"; and then,

(z) look to the definitions of "qualified investor" and "foreign resident client".

Note that "qualified investor" is not defined in the Rule but, as Release states, is defined in Exchange Act Section 3(a)(54); we suggest that the Rule should itself alert readers to that fact since not everyone in future will know to read the Rule next to a copy of the Release. "Foreign resident client" is defined in paragraph (b)(4), but the reader must know to look at subparagraph (a)(4)(vi) to discover that the term "foreign resident client" means not simply non-U.S. residents, but non-U.S. residents that have a U.S. fiduciary managing their accounts. For purposes of the 85% test, trades for non-U.S. residents that have a U.S. fiduciary managing their accounts count toward the numerator and thus help the foreign broker or dealer qualify for the exception, but trades for non-U.S. residents that do *not* have a U.S. fiduciary do not count. One might have thought from the term itself that "foreign resident client" would have included all non-U.S. resident clients rather than a subset of all such clients, but that is of course wrong.

This complexity may well confuse and mislead many readers of the Rule. We recommend that the Commission consider reorganizing the Rule to make it more readily understandable.

C. Disclosure Requirement

Proposed paragraph (a)(3)(i)(D) requires a foreign broker-dealer availing itself of the exemption to conduct solicited trades with U.S. qualified investors to make certain disclosures to the qualified investors.[18] The purpose of the disclosure is to alert the investors that foreign regulatory provisions will govern the investor's relationship with the foreign broker-dealer and the foreign broker-dealer's conduct. Neither the Rule nor the Release, however, discusses how these disclosures may be made.

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[18] We note that it should be made clear that the disclosure requirement applies only to qualified investors in the United States.

We suggest that the Commission allow foreign broker-dealers to use a variety of methods to make the required disclosure. One vehicle for disclosure would be a foreign broker-dealer's account opening agreement with a U.S. qualified investor. However, foreign broker-dealers are likely to have many existing qualified investor customers when the amendments are adopted, and executing a new or amended customer agreement would be very costly and time-consuming. We believe that, where a foreign broker-dealer communicates with its customers electronically, such as through a website or through a proprietary system, the disclosure requirement should be deemed satisfied by a communication from the foreign broker-dealer to its customers through the mode of communication to which the customer has consented, such as a posting on the foreign broker-dealer's website or proprietary system.[19] In response to a question in the Release, we believe that it would be useful information for investors if the disclosure included the identity of the foreign securities authority that regulates the foreign broker-dealer.

C. Recordkeeping

A foreign broker-dealer operating under the (A)(*2*) exemption may have multiple relationships with other broker-dealers, such as where the foreign broker-dealer transmits orders for securities trades for qualified investors to various executing broker-dealers.[20] The executing broker-dealers may or may not be U.S.-registered broker-dealers. The executing broker-dealers that are foreign broker-dealers may have relationships with various intermediating U.S. broker-dealers to fulfill the requirements of Rule 15a-6(a)(3).[21]

Proposed paragraph (a)(3)(iii)(A) would require a U.S.-registered broker-dealer to maintain copies of all books and records relating to transactions with U.S. qualified investors that were solicited by the foreign broker-dealer ("transaction records").[22] Proposed paragraphs (a)(3)(iii)(B)-(D) would require a U.S.-registered broker-dealer to obtain and maintain certain records, including: (1) written consents to service of process from the foreign broker-dealer and each foreign associated person that deals with U.S. qualified investors; and (2) records of a representation that the foreign broker-dealer has determined that none of its foreign associated

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[19] These approaches would be consistent with the Commission's encouragement of using electronic means to make effective disclosures in a variety of contexts. *See, e.g.,* SEC Release No. 34-58288 (August 1, 2008), 73 FR 45862, 45864-45865 nn.25-27. If the Commission deemed it necessary, this disclosure could be supplemented by disclosure on transaction confirmations sent by or on behalf of the foreign broker-dealer to U.S. qualified investors. The confirmations could direct the investors to the disclosure on the foreign broker-dealer's website or proprietary system used by the investors. Although such supplemental disclosure would be made after transactions had been executed, the frequency of the disclosure would track the investor's trading activity with the foreign broker-dealer.

[20] *See, e.g.,* SEC Staff No-Action Letter regarding LiquidityHub Limited (November 28, 2007) ("LiquidityHub Letter").

[21] Relationships between a foreign broker-dealer and multiple intermediating U.S. broker-dealers were clearly contemplated from the inception of Rule 15a-6. SEC Release No. 34-27017 (July 11, 1989), 54 Fed. Reg. 30013, 30024 n.133.

[22] As a result, transaction records relating to the foreign broker-dealer's transactions with or for U.S. qualified investors may reside with more than one U.S. broker-dealer.

persons effecting transactions with U.S. qualified investors is subject to a statutory disqualification, and a representation that the foreign broker-dealer has in its files the types of information required by Exchange Act Rule 17a-3(a)(12) pertaining to the foreign associated persons ("consents and representations").[23]

We respectfully suggest that, to achieve the purposes of the Rule, it is not necessary that each U.S. registered broker-dealer that maintains transaction records for a foreign broker-dealer also be required to maintain the consents and representations for that foreign broker-dealer. Conversely, we do not believe that a registered broker-dealer that maintains the consents and representations for a foreign broker-dealer also must maintain transaction records for that foreign broker-dealer. We therefore request that the Commission confirm that the roles in (a)(3)(iii)(B)-(D) may be performed by one registered broker-dealer, and the roles in (a)(3)(iii)(A) may be performed by other registered broker-dealers.[24] The foreign broker-dealer may be required to provide each registered broker-dealer maintaining transaction records with the identity of the registered broker-dealer that is maintaining the consents and representations.

We appreciate this opportunity to provide comments on the Commission's proposal. If it would assist the Commission, we would be pleased to meet with Commissioners or the Staff to discuss our views.

Respectfully submitted,

/s/ Joseph Zangri

Joseph Zangri
Chief Compliance Officer

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[23] In connection with the request for relief in the LiquidityHub Letter, LiquidityHub, as a foreign broker-dealer operating an electronic messaging platform for participating dealers, represented that it would provide the information and consents required by Rule 15a-6(a)(iii)(C)-(E) [similar to the consents and representations required by the proposed amendments] to each participating dealer on the LiquidityHub platform. Where a participating dealer was a foreign broker-dealer, LiquidityHub would provide the information and consents to the foreign broker-dealer and confirm that the foreign broker-dealer provided the information to the U.S. broker-dealer that was the foreign broker-dealer's intermediating U.S. broker-dealer for Rule 15a-6 purposes.

[24] In the proposed Rule, the manner in which records may be maintained differs in the (A)(*1*) and (A)(*2*) exemptions. In the (A)(*1*) exemption, the foreign broker-dealer's records may be maintained in the form, manner, and for the periods prescribed by the foreign supervisory authority regulating the foreign broker-dealer. Moreover, the records may be maintained with the foreign broker-dealer provided that the U.S. broker-dealer has reasonably determined that copies of the records can be furnished promptly to the Commission and promptly furnishes them upon request. The (A)(*2*) exemption does not include this flexibility, but we see no reason why it should not be extended to a foreign broker-dealer that does not maintain customer funds or securities, but may effect other aspects of qualified investor transactions under the (A)(*2*) exemption, such as issuing confirmations and account statements, and extending credit. Indeed, the rationale for permitting the foreign broker-dealer's records to be maintained as in the (A)(*1*) exemption is stronger because the foreign broker-dealer using the (A)(*2*) exemption is involved in a narrower range of activity with the customer.

cc: The Hon. Christopher Cox, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
Dr. Erik R. Sirri, Director, Division of Trading and Markets
Robert L. D. Colby, Esq., Deputy Director, Division of Trading and Markets
Daniel A. Gallagher, Esq., Deputy Director, Division of Trading and Markets
Marlon Quintanilla Paz, Esq., Senior Counsel to the Director, Division of Trading and Markets
Brian A. Bussey, Esq., Assistant Chief Counsel, Division of Trading and Markets
Matthew A. Daigler, Esq., Special Counsel, Division of Trading and Markets
Max Welsh, Esq., Attorney, Office of the Chief Counsel, Division of Trading and Markets