DEPARTMENT OF THE TREASURY
FINANCIAL CRIMES ENFORCEMENT NETWORK

September 8, 2008

VIA ELECTRONIC MAIL TO: RULE-COMMENTS@SEC.GOV

Florence E. Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number S7-16-08; Securities Exchange Act Release No. 34-58047; Exemption of Certain Foreign Brokers or Dealers

Dear Ms. Harmon:

As the administrator of the Bank Secrecy Act, the Financial Crimes Enforcement Network ("FinCEN") thanks the Securities and Exchange Commission (the "Commission") for its efforts in ensuring that U.S. broker-dealers comply with the Bank Secrecy Act and its implementing regulations, which safeguard the U.S. financial system from the abuses of financial crime, including money laundering, terrorist financing, and other illicit activity.[1] FinCEN appreciates the opportunity to comment on the recent proposal by the Commission to amend its Rule 15a-6, exempting from broker-dealer registration foreign entities that are engaged in certain activities with certain U.S. investors.[2] The Commission has requested comment on whether certain aspects of its proposed amendment, particularly its proposal to permit a foreign broker-dealer to effect securities transactions that have been solicited from certain U.S. persons, would present any Bank Secrecy Act concerns that should be addressed by the Commission.[3] Our comments specifically are focused on that issue.

Rule 15a-6 exempts a foreign broker-dealer from the registration requirements of the Securities Exchange Act when the foreign broker-dealer engages in certain limited

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[1] FinCEN is the administrator of the Bank Secrecy Act under a delegation of authority from the Secretary of the Treasury. The Commission has been delegated the authority to examine broker-dealers for compliance with the Bank Secrecy Act and its implementing regulations. 31 C.F.R. § 103.56(a)(6). The Commission exercises its delegated examination authority through its Rule 17a-8, which requires a registered broker-dealer that is subject to the Bank Secrecy Act and its implementing regulations to comply with Bank Secrecy Act reporting, recordkeeping, and record retention requirements. 17 C.F.R. § 240.17a-8. See also *Recordkeeping by Brokers and Dealers*, 46 Fed. Reg. 61454 (Dec. 17, 1981).

[2] *Exemption of Certain Foreign Brokers or Dealers*, 73 Fed Reg. 39181 (July 8, 2008) ("Proposed Rule").

[3] Id. at 39189-90.

activities within the United States.[4] Paragraph (a)(3) of Rule 15a-6 presently includes an exemption for a foreign broker-dealer that solicits securities transactions in U.S. or foreign securities from certain U.S. investors,[5] provided that any resulting transactions are effected by the foreign broker-dealer through a registered broker-dealer.[6] The Commission has proposed to amend the exemption from registration contained in paragraph (a)(3) by expanding under it the types of U.S. investors that may be solicited by a foreign broker-dealer.[7] Additionally, the Commission has proposed, under proposed paragraph (a)(3)(iii)(A)(1), to permit a foreign broker-dealer that conducts a "foreign business" to effect transactions resulting from the solicitation of these U.S. investors and to maintain custody of funds and securities,[8] in a manner that a foreign broker-dealer operating under the exemption from registration in paragraph (a)(1) presently is permitted to do.[9]

A broker-dealer that is registered or required to be registered with the Commission under the Securities Exchange Act, except for a broker-dealer that is notice-registered with the SEC to conduct business in security futures, is obligated to comply with the Bank Secrecy Act and its implementing regulations.[10] These regulations obligate a registered broker-dealer, among other things, to establish and implement an

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[4] 17 C.F.R. § 240.15a-6.

[5] 17 C.F.R. § 240.15a-6(a)(3) (the exemption provided in paragraph (a)(3) presently applies to transactions solicited from a "U.S. institutional investor" or a "major U.S. institutional investor" as those terms are defined at § 240.15a-6(b)(4) and (7)).

[6] 17 C.F.R. § 240.15a-6(a)(3). To qualify for this exemption, a registered broker-dealer is needed to effect any transactions resulting from the foreign broker-dealer's solicitation, except for negotiating their terms; to issue confirmations and statements; to extend or arrange for the extension of any credit to the U.S. investors in connection with the transactions; to maintain required books and records related to the transactions; and to comply with the Commission's net capital and customer protection rules. 17 C.F.R. § 240.15a-6(a)(3)(i)(A). See also 17 C.F.R. § 240.15a-6(a)(2) (a foreign broker-dealer shall be exempt from registration when it effects transactions in securities discussed in research reports it furnishes to major U.S. institutional investors, as long as the transactions are unsolicited and are effected according to the provisions of paragraph (a)(3)).

[7] See *Proposed Rule*, 73 Fed. Reg. at 39185 (proposing to expand Rule 15a-6 to "qualified investors" as that term is defined in Section 3(a)(54) of the Securities Exchange Act).

[8] See id. at 39190-91 (discussing proposed paragraph (a)(3)(iii)(A)(1), which would be applicable to a foreign broker-dealer conducting a "foreign business," as that term is defined at paragraph (b)(3) in the proposed rule). A registered broker-dealer no longer would be needed to effect resulting transactions; no longer would be responsible for complying with the federal securities laws and regulations and SRO rules applicable to effecting a transaction in securities, unless the registered broker-dealer is involved in effecting the transaction; no longer would be required to issue confirmations and statements or extend or arrange for the extension of credit; and no longer would be responsible for complying with the Commission's net capital and customer protection rules. Id. at 39189-90.

[9] See 17 C.F.R. § 240.15a-6(a)(1) (exemption for foreign broker-dealers that effect unsolicited securities transactions for U.S. persons).

[10] 31 C.F.R. §§ 103.11(f) and 103.122(a)(2).

anti-money laundering program that is reasonably designed to guard against money laundering;[11] to establish and maintain a customer identification program;[12] to apply special due diligence to an account that is established, maintained, administered or managed for a foreign financial institution, including a foreign broker-dealer;[13] to report certain transactions in currency;[14] to detect and report suspicious transactions that are conducted by, at, or through the broker-dealer;[15] and to retain certain records.[16]

Presently, when a registered broker-dealer establishes and maintains a relationship with a foreign broker-dealer to effect securities transactions solicited by the foreign broker-dealer under the exemption from registration in paragraph (a)(3), the registered broker-dealer is establishing and maintaining a "formal relationship" with the foreign broker-dealer for purposes of complying with the Bank Secrecy Act and its implementing regulations.[17] In consequence, the registered broker-dealer is obligated to comply not only with Bank Secrecy Act regulations that apply to transactions, such as the currency

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[11] 31 C.F.R. § 103.120(c). See also 31 U.S.C. 5318(h).

[12] 31 C.F.R. § 103.122 (the "customer identification program rule," obligating a registered broker-dealer to verify the identity of a customer, to the extent reasonable and practicable, when it opens an account).

[13] 31 C.F.R. § 103.176 (the "correspondent account rule," obligating a registered broker-dealer to apply special due diligence to a correspondent account that is established or maintained for a foreign financial institution including, among other institutions, a foreign bank, broker-dealer, futures commission merchant, currency dealer or exchanger, or money transmitter and to apply enhanced due diligence to accounts that are established or maintained for certain foreign banks, including risk-based policies, procedures and controls that are reasonably designed to detect and report known or suspected money laundering activity).

[14] 31 C.F.R. § 103.22 (the "currency transaction reporting rule," obligating a registered broker-dealer to file a report of certain deposits, withdrawals, exchanges of currency or other payments or transfers, by, through, or to the financial institution involving a transaction in currency of more than $10,000).

[15] 31 C.F.R. § 103.19 (the "suspicious activity reporting rule," obligating a registered broker-dealer to report certain transactions that a registered broker-dealer knows, suspects, or has reason to suspect that the transaction (1) involves funds derived from illegal activity or is intended to disguise funds or assets derived from illegal activity; (2) is designed to evade the requirements of the Bank Secrecy Act and its implementing regulations; (3) serves no business or apparent lawful purpose or is not the sort in which the customer normally would be expected to engage; and (4) involves use of the broker-dealer to facilitate criminal activity).

[16] See, e.g., 31 C.F.R. § 103.33 (the "joint recordkeeping rule and the travel rule," obligating a registered broker-dealer, among other things, to retain records related to certain transmittals of funds).

[17] See 31 C.F.R. § 103.122(a)(1)(i) (defining an "account" for the purposes of the customer identification program rule as a "formal relationship" established to effect transactions in securities) and 31 C.F.R. § 103.175(d)(2)(ii) (similarly defining the terms "correspondent account" and "account" as a "formal relationship"). See also *Bank Secrecy Act Obligations of a U.S. Clearing Broker-Dealer Establishing a Fully-Disclosed Clearing Relationship with a Foreign Financial Institution*, FIN-2008-R008 (June 3, 2008) (a registered broker-dealer is not subject to the due diligence requirements of the correspondent account rule respecting a solicited customer when a foreign broker-dealer and not the registered broker-dealer is responsible for receiving and accepting orders from the solicited customer, but is obligated to monitor transactions of that solicited customer for suspicious activity when the transactions are attempted or conducted by the foreign broker-dealer by, at, or through the registered broker-dealer).

transaction reporting and suspicious activity reporting rules; and with Bank Secrecy Act regulations that require certain recordkeeping, such as the joint recordkeeping rule and the travel rule; but also with Bank Secrecy Act regulations that apply to certain accounts, such as the customer identification program and the correspondent account rules.

If the Commission's proposed paragraph (a)(3)(iii)(A)(1) is adopted, the Bank Secrecy Act and its implementing regulations will apply to transactions that are solicited and effected by a foreign broker-dealer to the extent that a U.S. financial institution, as that term is defined in Bank Secrecy Act regulations,[18] is engaged by the foreign broker-dealer or a U.S. investor to transmit funds to the foreign broker-dealer for the purposes of settling an effected transaction, to maintain custody, or to effect any other aspect of the transaction. The Bank Secrecy Act and its implementing regulations will apply in the same manner as they presently apply to an unsolicited transaction that is effected by a foreign broker-dealer operating under the exemption contained in paragraph (a)(1),[19] and to any other transaction that a U.S. person may effect with a foreign financial institution without an intermediating financial institution that is subject to Bank Secrecy Act regulations.

Accordingly, the Commission's proposal to permit foreign broker-dealers to effect securities transactions that are solicited from certain U.S. investors does not appear to raise Bank Secrecy Act concerns that should cause the Commission to impose additional burdens on registered or foreign broker-dealers in proposed paragraph (a)(3)(iii)(A)(1) or to prohibit use of the proposed exemption. Moreover, as the Commission's Rule 17a-8 obligates registered broker-dealers to comply with certain Bank Secrecy Act regulations that have been implemented and are enforced by FinCEN,[20] the Commission's proposed paragraph (a)(3)(iii)(A)(1) should not raise concerns with respect to Rule 17a-8.

In the event that anti-money laundering concerns arise following the adoption of the Commission's proposal, FinCEN will consider whether and to what extent Bank Secrecy Act regulations should be amended to address the concerns in its capacity as administrator of the Bank Secrecy Act. We believe that any anti-money laundering concerns that may arise would be best addressed under anti-money laundering statutes as opposed to investor protection statutes, among other reasons, to ensure that the anti-money laundering principles are applied efficiently, effectively and, to the fullest extent possible, consistently across all of the industries that are subject to them.

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[18] 31 C.F.R. § 103.11(n) (defining "financial institution" to include, among others, a bank, a broker or dealer in securities, a money services business, and a futures commission merchant).

[19] See supra note 9 and accompanying text.

[20] See supra note 1.

We thank the Commission for the opportunity to comment on its proposal and for consideration of our comments. If you have any questions or would like to discuss these comments further, please contact me at (202) 354-6400.

Sincerely,

Susan D. Lang

Susan D. Lang
Assistant Director
Office of Regulatory Policy