SIFMA
Securities Industry and
Financial Markets Association

September 8, 2008

Submitted Electronically via www.regulations.gov

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

Re: Proposed Rule for Exemption of Certain Foreign Brokers or Dealers (Release No. 34-58047; File No. S7-16-08)

Dear Ms. Harmon,

The Securities Industry and Financial Markets Association ("SIFMA")[1] welcomes the opportunity to comment on the proposed amendments to Rule 15a-6 under the Securities Exchange Act of 1934 ("Exchange Act").[2] As an initial matter, SIFMA would like to applaud the decision of the Securities and Exchange Commission (the "Commission") to propose amendments to this rule that are designed to offer U.S. qualified investors more efficient access to foreign securities markets.

SIFMA appreciates the effort involved in the Commission's comprehensive review of Rule 15a-6 and the related guidance. As the Commission noted in its release, there has been increasing internationalization in the securities markets and rapid advancement in technology and communications in the nearly two decades since the rule was adopted. SIFMA is extremely pleased that the Commission has taken steps to modernize this rule while preserving U.S. jurisdiction over U.S. investors and market access consistent with the Commission's obligations to protect investors.

SIFMA supports the Commission's efforts and the many aspects of the Commission's proposed amendments to modernize Rule 15a-6 that are designed to eliminate regulatory obstacles to the efficient delivery of cross-border services by foreign securities firms to U.S. qualified investors. For example, the

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1 SIFMA brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington DC, and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA is available on its website at *www.sifma.org*.

2 SEC Release No. 34-58047 (Jun. 27, 2008), 73 Fed. Reg. 39182 (Jul. 8, 2008) (the "Proposing Release").

qualified investor definition provides a meaningful reduction from $100 million to $25 million in the asset threshold for eligible investors. Reducing the intermediation requirements for solicited transactions will enable firms to streamline operations to meet customer demands and business needs in non-U.S. markets. Allowing foreign broker-dealers to handle orders in both U.S. and foreign securities will make it possible for customers to pursue global trading strategies seamlessly, without unnecessary costs and delays.

As described more fully below, however, we are concerned that some of the new requirements proposed in the release are likely to undermine the full benefit of the proposed amendments. Provisions such as those imposing a "foreign business test" to qualify for Exemption (A)(1), custody requirements under Exemption (A)(2) even with respect to non-U.S. securities, and the requirement that a non-U.S. firm be regulated with respect to the proposed activities with U.S. qualified investors in their home market introduce a level of complexity and confusion that we believe is unnecessary and unwarranted. In addition, the final rule amendments should confirm that activities currently permitted under Rule 15a-6 will continue to qualify for the exemption so that any withdrawal of existing guidance does not unintentionally narrow the scope of the rule.

We appreciate the opportunity to provide our views on the proposed amendments and would be pleased to discuss them with you in greater detail at your convenience. While these comments are fairly detailed and extensive, they are designed to assist the Commission in formulating a more flexible and practical rule that will provide immediate practical benefits to investors. We urge the Commission to treat amending Rule 15a-6 as a high priority and also to continue its important work on a range of longer-term initiatives designed to update regulatory structures for increasingly global financial markets.

I. Solicited Trades

SIFMA welcomes the Commission's proposal to provide an updated framework for solicited transactions under "Exemption (A)(1)" and "Exemption (A)(2)," particularly the expansion of the categories of eligible U.S. investors and the elimination of chaperoning and other numerous inflexible and duplicative intermediation requirements.[3] At the same time, however, we are concerned by the introduction of new restrictions that could limit the full benefits of the proposed amendments.

A. Exemption (A)(1) Foreign Business Requirement

The Commission has proposed a new "foreign business" requirement that would limit the availability of Exemption (A)(1) and the exemption for certain transactions with U.S. fiduciaries to a foreign broker-dealer engaged in a "foreign business."[4] The "foreign business" test would be met only if at least eighty-five percent of the aggregate value of the securities purchased or sold by the foreign broker-dealer in transactions conducted pursuant to Proposed Rule 15a-6(a)(3) (i.e., solicited transactions) and

[3] SIFMA considers it important that the Commission confirm and clarify that a U.S. broker-dealer would be permitted to perform more than the minimum responsibilities imposed under Exemptions (A)(1) and (A)(2) without thereby triggering the full panoply of requirements applicable in a transaction "effected" by the U.S. broker-dealer under the provisions of existing Rule 15a-6(a)(3).

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

Proposed Rule 15a-6(a)(4)(vi) (i.e., transactions with U.S. fiduciaries) were derived from transactions in "foreign securities" as defined in the proposal.[5]

SIFMA strongly opposes the adoption of this new requirement. In our view, this eligibility requirement serves no clear investor protection purpose, is disproportionate to any regulatory interests it might advance, and would impose significant burdens on foreign broker-dealers operating under Exemption (A)(1). In the event that the Commission considers it essential to include such a requirement to address potential concerns regarding regulatory arbitrage, we recommend significant modifications in Part I.A.3 below that would reduce the unnecessary burden on foreign broker-dealers and increase their practical ability to use the exemption.

1. The Proposed Requirement Serves No Clear Investor Protection Purpose

In SIFMA's view, the availability of a Rule 15a-6 exemption should not turn on whether a transaction or business involves U.S. or foreign securities unless the distinction would serve to enhance the protection of U.S. investors. Notably, the current rule contains no such distinctions, although they have appeared on some occasions in no-action letters.

From a policy perspective, customers engaging in transactions with a foreign broker-dealer do not require greater protection simply because the securities involved are U.S. securities rather than foreign securities or because the foreign broker-dealer's business predominantly involves the former rather than the latter. It also is becoming more and more difficult to draw distinctions between U.S. and foreign securities in today's global securities market. This is particularly true for securities of multinational corporations, which may both issue and list securities in multiple markets.

As the Proposing Release describes, Exemption (A)(1) protects U.S. qualified investors, with the requisite skills and experience to deal with foreign broker-dealers, by addressing their contacts with foreign associated persons with a disciplinary history and ensuring that books and records related to their transactions are available to the Commission.[6] These customers might also benefit from clarification of the role of the foreign broker-dealer and, therefore, Exemption (A)(1) also requires extensive disclosures to U.S. qualified investors about the risks of dealing with a foreign broker-dealer not subject to the Commission's oversight.[7] Moreover, as noted in the Proposing Release, transactions by a foreign broker-dealer effected through U.S. markets would involve a U.S. registered broker-dealer that must comply with the U.S. rules governing execution of securities transactions.[8] Requiring a foreign broker-dealer to maintain a certain ratio of foreign to U.S. securities transactions does not enhance these protections.

Rather, from a practical perspective, imposing distinctions between U.S. and foreign securities limits investor choice and is likely to interfere with effective portfolio management. U.S. investors

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5 Proposed Rule 15a-6(b)(3) and Proposed Rule 15a-6(b)(5). The foreign broker-dealer would make this calculation on a rolling two-year basis, and could rely on the calculation made for the prior year for the first 60 days of a new year.

6 Proposing Release at 39188.

7 Proposed Rule 15a-6(a)(3)(i)(D).

8 Proposing Release at 39189.

generally enter into cross-border transactions in the context of broader investment and trading strategies that do not recognize such distinctions and, as the Proposing Release notes, these distinctions can frustrate both reasonable investor expectations (e.g., foreign broker-dealers accommodating transactions in U.S. securities) and common trading strategies (e.g., program trading).[9] As financial markets continue to expand across borders and increase in sophistication, the efficient delivery of services to U.S. investors will demand that broker-dealers execute greater numbers of transactions involving both U.S. and foreign securities.

2. The Proposed Requirement Would Impose Extensive Burdens on Foreign Broker-Dealers

The foreign business requirement would impose extensive burdens on foreign broker-dealers seeking to operate under Exemption (A)(1).[10] To comply with the requirement, foreign broker-dealers would need to identify, capture, track, and analyze large quantities of data that, in many cases, are not and would not be used for any other purpose. In particular, for each of its U.S. clients or accounts on an annual basis,[11] a foreign broker-dealer would be required to:

- *Identify and track which transactions are entered into pursuant to Proposed Rule 15a-6(a)(3) or Proposed Rule 15a-6(a)(4)(vi), as opposed to other provisions of Proposed Rule 15a-6.* This separation could not be made on a client-by-client or account-by-account basis, as different transactions for the same client or account may rely on different exemptions. In effect, each transaction would need to be marked with the specific exemption under which it was executed, a significant operational burden that is not present in existing Rule 15a-6.

- *Identify and track which of those exempted transactions involve "securities" for purposes of U.S. laws and regulations.* While it is relatively easy to track the cash equities business, it is significantly more complex for other businesses, since the determination of whether an instrument is a "security" is less clear and may depend heavily on applicable law (e.g., certain derivatives). In most cases, because it is not subject to U.S. regulation, a foreign broker-dealer would have no reason outside the foreign business calculation to incur the

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9 Proposing Release at 39192.

10 The cost analysis in the Proposing Release does not appear to take into account the costs associated with implementing and maintaining compliance with the foreign business requirement. Proposing Release at 39207-08. Although some have noted that the foreign business test would require computations similar to those already required under Regulation R, there are some significant differences. For example, Regulation R does not require firms to distinguish between U.S. and foreign securities. Additionally, in contrast to the rigid transaction-by-transaction calculation that would be required under the proposed foreign business test, Regulation R provides two alternatives: an account-by-account "chiefly compensated" test and an aggregate "relationship-total" compensation computation.

11 It is unclear from the definition of "foreign business" how often the calculation would be performed, but the provision for the 60-day grace period implies it would be annually. See Proposed Rule 15a-6(b)(3) ("[T]he foreign broker or dealer may rely on the calculation made for the prior year for the first 60 days of a new year."). The Proposing Release also seems to indicate that the calculation would be performed annually. See Proposing Release at 39191 ("The proposed rule would require the foreign broker-dealer to compute the absolute value of all transactions … each year to determine the aggregate amount for the previous two years."). If there is a foreign business requirement in the final rule adopted, SIFMA requests that the Commission clarify that the test must only be performed annually.

compliance and legal costs of determining whether a particular instrument is a "security" under U.S. laws and regulations. Under existing Rule 15a-6, in notable contrast, the foreign broker-dealer may simply take a conservative approach of treating any derivative as a security and comply with Rule 15a-6 with respect to those instruments when trading with U.S. counterparties.

- *Compute the "absolute value" of each "securities" transaction.* As a practical matter, valuing a transaction would raise complex issues outside of traditional cash securities businesses.[12] For example, the Proposing Release states that the value of options on a security (or a group or index of securities) would be the premium paid by the buyer. How should a foreign broker-dealer value a derivative with an embedded option, but no premium? How should costless collars be valued? In light of the rapid innovation in derivatives markets, it is unlikely that these and similar interpretative questions could be fully anticipated and addressed, even if the Commission were to provide additional examples.[13]

- *Identify and track which of those exempted transactions in "securities" involve a "foreign security" as defined in the proposed amendments.* Foreign broker-dealers do not currently need to capture and identify foreign private issuers and foreign securities based on this definition (or a similar one). Moreover, existing systems could not be readily adapted and transactions would again need to be specially marked for no other purpose than compliance with the proposed foreign business test.[14] Finally, many transactions would raise difficult classification questions – for example, how should an option on a mixed basket of U.S. and foreign securities be treated?

The implementation and use of the foreign business test would be further complicated by the need to perform a separate calculation for each foreign affiliate engaged in transactions under Exemption (A)(1). In addition, while the proposed amendments appear to contemplate a once-a-year calculation, ongoing interpretative questions, the complexity of the determination (e.g., identifying "securities," "foreign securities" and which exemption of Rule 15a-6 applies), and shifts in customer demand and the markets generally would tend to cause foreign broker-dealers to perform the calculation several times a year to monitor compliance.

Moreover, foreign broker-dealers may have little margin for error in performing their foreign business calculations. The Proposing Release suggests that the eighty-five percent threshold was chosen to "accommodate existing business models,"[15] but it does not address whether this threshold would

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12 Since the calculation would be made based on two years of data, new guidance or interpretations from the Commission could significantly affect the foreign business calculation and would need to address how previously collected data should be treated.

13 Proposing Release at 39192.

14 SIFMA also believes that the proposed foreign security definition is too narrow and cumbersome for the Rule 15a-6 context, since it is limited to foreign private issuers and unnecessarily requires multiple layers of analysis to implement.

15 Proposing Release at 39192.

effectively accommodate ordinary business fluctuations or the approximations inherent in calculations of this potential complexity and magnitude. Even if it did, it does not provide foreign broker-dealers sufficient flexibility in light of the numerous variables and interpretative questions involved in the proposed calculation, and accordingly will limit their reliance on Exemption (A)(1).

We are also concerned that the binary nature of the requirement will make a failure to satisfy the test highly disruptive to investors and firms. Once the eighty-five percent threshold is reached, the foreign broker-dealer would have to promptly conform all of its transactions with existing and future U.S. customers to Exemption (A)(2), potentially triggering wholesale shifts in how U.S. customer funds and securities are held. In addition, U.S. qualified investors who may have no desire or need to deal with a U.S. broker-dealer could find themselves in the position of having to enter into a client agreement with a U.S. broker-dealer (even one with whom they have no prior relationship) in order to be able to continue to conduct business without interruption. In our view, the short time permitted by the exemption – the 60-day grace period – is insufficient to address the potential ramifications for failure to meet the foreign business test, and the Commission should provide at least a six-month grace period if a test is adopted.[16]

3. Elimination or Modification of the Proposed Requirement

For the reasons described above, SIFMA believes that the foreign business requirement is unworkable in practice and unnecessary from a customer protection standpoint, and should be removed from the amended Rule 15a-6. In our view, most foreign broker-dealers will be unable to take advantage of Exemption (A)(1) as proposed and, as a result, the benefits from the Commission's commendable efforts to provide intermediation alternatives will be wholly vitiated. The complexity of the test, its attendant costs and the consequences of failing to satisfy it will make compliance with Exemption (A)(1) extremely problematic.

At the same time, as noted above, SIFMA strongly supports Proposed Rule 15a-6 and Exemption (A)(1) as practical solutions to the challenges currently faced by U.S. investors engaging in cross-border transactions. We believe, however, that the efficacy of these solutions depends on clear rules with which market participants can simply and effectively comply. Accordingly, if a foreign business requirement is considered critical, we urge the Commission to amend proposed Exemption (A)(1) by significantly modifying the requirement.

While the Proposing Release indicates that the foreign business requirement is intended to address concerns about "creating opportunities for regulatory arbitrage vis-à-vis U.S. securities markets,"[17] it does not cite an investor protection rationale or specifically identify the nature of this regulatory arbitrage. However, we understand from informal discussions that the principal concern is that U.S. securities activities – in particular market-making activities in U.S.-listed equities securities – may move to foreign

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[16] We also note that the significant time necessary to establish mechanisms to comply with the foreign business requirement will raise a host of additional practical issues. As noted above, foreign broker-dealers do not currently have systems to track such compliance, and would need substantial time to design and implement such systems. In addition, the requirement requires a foreign broker-dealer to "look back" on its prior transactions, which may be virtually impossible to do for transactions that were effected prior to the implementation of proper tracking systems. Thus, absent significant grace periods or other modifications, the imposition of the foreign business requirement could effectively delay the availability of Exemption A(1) for several years.

[17] Proposing Release at 39191.

broker-dealers operating in jurisdictions that impose less onerous reporting and other regulatory requirements, including those designed to maintain "fair, orderly and efficient markets."[18]

In practice, SIFMA considers it unlikely that significant U.S.-listed securities activities will shift to foreign broker-dealers, especially those involving market-making and similar activities closely tied to deeper liquidity, better access to local market information, faster execution capability, and U.S. securities expertise.[19] Furthermore, many other countries provide some form of regulatory exemption from local regulations for firms engaging in cross-border securities activities and no such movement or comparable "regulatory arbitrage" has emerged with regard to those jurisdictions.[20] Similarly, there has been no apparent wholesale operational shift in equity trading operations among jurisdictions after the European Union's adoption of the Market in Financial Instruments Directive.

If, nevertheless, the Commission determines that the potential for regulatory arbitrage presents a serious risk to U.S. markets, SIFMA favors a more direct and less complex and intrusive approach to addressing this concern. In our view, the approach should focus on fostering safeguards that will stop abuse, should it ever occur, rather than on imposing burdensome ex ante tests that diminish market access and efficiency without regard to actual arbitrage.

Specifically, rather than imposing a rigid test that must be calculated by every foreign broker-dealer regularly based on a strict formula unrelated to any existing business or reporting requirement, SIFMA recommends that the Commission reserve to itself the authority to disqualify a foreign broker-dealer from relying on the exemption if its U.S. securities activities rise to a level that merits registration of the broker-dealer.[21] Notably, the Commission has used this type of approach in the past, most importantly in Regulation ATS, which permits the Commission to remove the benefits of an exemption

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18 Proposing Release at 39192. See Exchange Act § 2.

19 Even if a foreign broker-dealer were to "execute" a transaction in a U.S.-listed security, for example, the foreign broker-dealer is likely to direct that trade for execution in the United States through its affiliated U.S. broker-dealer.

20 For example, in the U.K., certain Canadian provinces, and Hong Kong, exemptions provide access to investors at much lower levels than proposed in the amendments to Rule 15a-6. See Article 72 of the U.K. Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001 /544), which exempts a foreign securities dealer from U.K. licensing requirements if it provides cross-border services to investment professionals, including corporations, trusts or funds with approximately $10 million net assets or more; Section 2.3 of Canadian National Instrument 45-106, which provides an exemption from dealer registration for transactions with accredited investors including institutions with net assets of at least $5,000,000 and individuals with financial assets in excess of $1,000,000, net assets of at least $5,000,000, or net income above $200,000; and Schedule 1 to the Securities and Futures Ordinance, Chapter 571 of the laws of Hong Kong, which exempts a foreign securities dealer from local licensing requirements for certain services provided cross-border to professional investors, including individuals, corporations, and partnerships that have a securities portfolio of at least approximately $1,000,000 or other corporations and partnerships that have more than approximately $5,000,000 total assets.

21 For example, the amendments to Rule 15a-6 could include a restriction substantially similar to the following: "A foreign broker-dealer shall not be exempt under Exemption (A)(1) if the Commission determines, after notice to the foreign broker-dealer and an opportunity for the foreign broker-dealer to respond, that, with respect to such foreign broker-dealer, the application of the exemption would not be necessary or appropriate in the public interest or consistent with the protection of investors taking into account the requirements for broker-dealer registration under section 15 of the Exchange Act and the objectives of the national market system under section 11A of the Exchange Act."

where it does not serve the public interest and the objective of investor protection.[22] We also recommend that the Commission provide guidance in the adopting release for the proposed amendments that would set forth factors that would raise concerns with the Commission that the level, extent or type of activities with U.S. qualified investors was abusive in light of the spirit and purpose of Rule 15a-6.[23]

In our view, this alternative approach would better address the Commission's concerns about potential regulatory arbitrage without imposing high costs and complicated requirements on foreign broker-dealers that risk undermining the Commission's principal goals in modernizing Rule 15a-6. At the same time, foreign broker-dealers would know that their activities would be expressly subject to Commission intervention if they were to act in an abusive manner.

If, notwithstanding the practical and policy concerns described above, the Commission nonetheless believes it essential to have a foreign business requirement, SIFMA strongly urges the Commission to revise substantially the test in the Proposing Release to make it simpler, more flexible and more readily implemented in practice. At a minimum, the test should permit a foreign broker-dealer to rely on the proposed exemption so long as (i) it does not hold itself out to customers in the United States as a market-maker in U.S. listed equity securities (i.e., NMS stocks) and (ii) it can demonstrate, using any reasonable methodology suited to its business and consistently applied over time, that the preponderance of its securities transactions with U.S. investors pursuant to the exemption are not in U.S.-listed equity securities.[24]

This approach would reduce the practical burdens and costs associated with the test by permitting firms to develop their own reasonable methodology, rather than compelling them to develop a host of new systems to capture the data and perform the calculations associated with a "one-size-fits-all" requirement of the type set out in the Proposing Release. In addition, the test avoids setting an arbitrarily low threshold of U.S. activity (fifteen percent in the Commission's proposal), but rather would look to the predominant character of the foreign broker-dealer's activities. Further, by focusing generally on U.S.-listed equity securities (and specifically prohibiting market-making in those securities pursuant to the exemption), it would provide more than sufficient assurance that the Commission will retain broad oversight over the securities as to which it has the greatest interest in maintaining "fair, orderly and efficient markets."[25]

If the Commission were to adopt a flexible approach along these lines, it would also be helpful for it to supplement the principles-based requirement in clause (ii) above with more detailed "safe harbors" under which foreign broker-dealers could satisfy the requirement. These safe harbors should permit

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22 See Rule 3a1-1(b)(2) under the Exchange Act.

23 For example, the Commission could consider providing guidance similar to the approach currently taken with respect to certain guidance as to who is a "broker." See http://www.sec.gov/divisions/marketreg/bdguide.htm. See also infra notes 21-22.

24 In any event, to reduce the burdens on foreign broker-dealers that engage in only limited activities under Exemption (A)(1) – and who pose no systemic threat to U.S. securities markets by way of regulatory arbitrage or otherwise – the Commission should also provide a de minimis exception from any requirements it ultimately adopts.

25 See, e.g., Commission Release adopting Regulation NMS to further the objectives of efficient, competitive, fair and orderly markets for stocks traded in the National Market System, 70 Fed. Reg. 37496, 37496-97 and passim (June 29, 2005).

foreign broker-dealers to calculate the predominant nature of their business based on information that they already capture in their current activities – rather than require a calculation based on artificial regulatory categories (e.g., the subparagraph of Rule 15a-6 under which a transaction was effected) that would require significant new systems and impose additional costs to capture the relevant data and assess compliance. These safe harbors should be based on several different alternative measures, such as the aggregate value of gross proceeds from, or gross revenues from, or gross commissions from U.S.-listed equity securities,[26] or could be tied to categories of information compiled in the regular course of business (e.g., the number of active accounts of, or the amount of, U.S. qualified investors). A broker-dealer meeting any one of the alternative safe harbors should be able to rely on Exemption (A)(1).

B. Exemption (A)(2) Custody Requirement

SIFMA welcomes the Commission's efforts to provide additional flexibility to firms through the Exemption (A)(2) alternative, but we are concerned about the requirement that a U.S. registered broker-dealer must always "receive, deliver and safeguard" customer funds and securities under that exemption.[27] As proposed, this requirement would impose unnecessary costs on foreign broker-dealers, increase the potential for operational errors, and seemingly prohibit transactions that are currently permissible under existing Commission guidance, particularly with respect to foreign securities.

1. Custody by Foreign Broker-Dealers of Foreign Securities and U.S. Government Securities

Interposing a U.S. broker-dealer to "receive, deliver and safeguard funds and securities" could necessitate significant duplication of functions by the U.S. and foreign broker-dealer. In the case of foreign securities, this burden would arise in virtually every transaction. Clearance, settlement and custody of foreign securities generally occurs through systems located outside the United States. U.S. broker-dealers typically are not direct participants in such systems and therefore must rely on a non-U.S. broker-dealer for access. The burden of this duplication can add unnecessary cost and complexity to transactions in those securities by qualified U.S investors, as has been recognized in the past.[28] Further, the involvement of a U.S. broker-dealer could also increase the risk of operational errors and settlement failure by effectively requiring twice the number of bookkeeping entries and transfers.

Accordingly, SIFMA strongly recommends that the Commission exclude foreign securities from the requirement under proposed Exemption (A)(2) that a U.S. broker-dealer "receive, deliver and safeguard funds and securities" under proposed Exemption (A)(2).[29] In addition, consistent with past

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[26] For the reasons discussed above, other instruments are extremely difficult to track.

[27] In this connection, we think it is important that the Commission clarify that exemption (A)(2) would allow delivery of any securities to non-affiliated custodians acting on behalf of a customer.

[28] See Cleary, Gottlieb, Steen & Hamilton (avail. Apr. 9, 1997) ("Nine Firm 1997 Letter"). These inefficiencies may be exacerbated in some cases where a jurisdiction requires certain foreign securities to be held outside the United States. See Morgan Stanley & Co., Inc. (avail. December 29, 1996).

[29] We further note that, to the extent the proposed requirement is intended to address the regulatory arbitrage concerns discussed above in Part I.A.3, there is no reason to believe that permitting foreign broker-dealers to receive, deliver and safeguard foreign securities would raise such concerns, which we understand to be focused on transactions in U.S. securities.

guidance in this area, SIFMA requests that the Commission exclude U.S. government securities from this requirement as well.[30]

2. Use of Multiple Registered Broker-Dealers to Satisfy Exemption (A)(2) Requirements

SIFMA also asks that the Commission clarify that more than one registered broker-dealer may be involved in the provision of services to a foreign broker-dealer under Exemption (A)(2). For example, a foreign broker-dealer could use one registered broker-dealer (e.g., a prime broker) to receive, deliver and safeguard funds and securities while also using another registered broker-dealer (e.g., an executing broker) to maintain certain books and records, including the foreign broker-dealer's consent to service of process. SIFMA envisions that some registered broker-dealers may be willing effectively to act as clearinghouses or repositories for consents to service of process and/or other information required under the rule. Indeed, such "clearinghouse" registered broker-dealers may also prove to be useful to foreign broker-dealers relying on Exemption (A)(1).

C. Requirement for Home Country Regulation for Specific Securities Activities

SIFMA is concerned that the proposed rule introduces a wholly new requirement that the foreign broker-dealer be regulated in a foreign country by a foreign securities authority for the specific securities activities in which the foreign broker-dealer engages with U.S. qualified investors. We find this new requirement contrary to the spirit of modernizing Rule 15a-6 since it complicates, rather than streamlines, regulatory requirements applicable to transacting business with U.S. qualified investors. Instead, SIFMA proposes that the foreign broker-dealer's home country regulatory status be included in required disclosures made to investors.

The proposed new requirement fails to recognize that other jurisdictions can and do take a variety of approaches when regulating entities, activities, and/or products. Existing Rule 15a-6 is a unilateral exemption that provides only eligible U.S. investors with access to foreign broker-dealer services for a specified range of activities, and it should continue to operate in this manner after amendment. The new provision would require firms to perform an additional and needlessly complex analysis of every transaction to determine its regulatory status. The provision also implicitly adds a comparability analysis that, in our view, is more appropriate in mutual recognition discussions, in which like-minded regulators compare the scope and quality of their respective regulatory frameworks in order to decide whether and to what extent they defer to oversight in other jurisdictions.

SIFMA believes that the more important factor from an investor standpoint is whether there is any regulatory oversight in the foreign broker-dealer's home country. Accordingly, a more appropriate way for the amended rule to address this issue is to require foreign broker-dealers soliciting trades with eligible

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[30] See Nine Firm 1997 Letter. We note that, while the Proposing Release states a foreign broker-dealer would be permitted to clear and settle transactions on behalf of a U.S. registered broker-dealer, it does not make clear that such activities could be undertaken on behalf of customers. Proposing Release at 39193 n. 103. Thus, regardless of whether our recommendation is accepted, we request that the Commission clarify that the proposed requirement would not prevent foreign broker-dealers from clearing and settling transactions involving foreign securities and U.S. government securities as they may today under existing guidance.

U.S. investors to disclose whether there is a securities regulatory authority in the foreign broker-dealer's home country, whether they are regulated by a foreign securities authority and, if so, to specify which authority or authorities have jurisdiction over them. Investors can then decide whether this information is relevant to the contemplated transactions and their decision to do business with foreign broker-dealers.

In the alternative, the final rule should address the issues discussed above by changing the relevant language of the foreign broker-dealer definition so it reads "is regulated or otherwise exempt for conducting securities activities in a foreign country by a foreign financial services authority." This language would better reflect the reality that regulatory frameworks differ among countries.

D. Other Issues Related to Solicited Trades

1. Chaperoning Requirement

SIFMA welcomes the Commission's proposal to eliminate the "chaperone" requirement so that persons associated with a U.S. broker-dealer would no longer have to participate in communications between a foreign broker-dealer and U.S. qualified investors. The "chaperone" requirement has been consistently criticized as burdensome and awkward to implement, especially with regard to market interactions separated by a large number of time zones, and its removal is a critical part of modernizing Rule 15a-6.

2. Guidance on Visits

The Commission has provided new guidance on what constitutes a "visit" for purposes of the proposed rule, indicating that a "visit" would be "one or more trips to the United States over a calendar year that do not last more than 180 days in the aggregate."[31] This proposed guidance on visits acknowledges that the financial services business is relationship-driven and often involves face-to-face meetings. Yet the Commission has also incorporated a tax law standard in its guidance in an attempt to balance the industry's need for flexibility in maintaining relationships with U.S. investors against the regulatory need to ensure that foreign broker-dealers do not essentially set up an unlicensed permanent sales force in the United States. SIFMA agrees that this balance is an appropriate one.

SIFMA does, however, request that the final rule release confirm our understanding that the determination as to what qualifies as a visit is done at the associated person level rather than at the firm level. This interpretation appears to be consistent with the intent of the guidance, since it focuses on "[w]hether a foreign associated person's stay in the United States would qualify as a 'visit' for purposes of the proposed rule…."[32]

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31 Proposing Release at 39194.

32 Ibid.

3. Books and Records Requirement

SIFMA appreciates that Exemption (A)(1) would permit the intermediating U.S. broker-dealer to maintain books and records in accordance with the local regulatory requirements applicable to the foreign broker-dealer.[33] We support this recognition of local recordkeeping requirements.

This alternative would also allow the intermediating U.S. broker-dealer to maintain the related books and records with the foreign broker-dealer, but only if the U.S. broker-dealer "makes a reasonable determination that copies of any or all of such books and records can be furnished promptly to the Commission" pursuant to Proposed Rule 15a-6(a)(3)(iii)(A)(1)(ii). While it makes sense that the intermediating U.S. broker-dealer should have an information-sharing agreement in place with the foreign broker-dealer addressing the logistics involved in document production in response to a regulatory request, such an agreement will necessarily be subject to any limitations in local law of the foreign broker-dealer's home country.

Accordingly, SIFMA requests that the Commission clarify its guidance in the final rule release to confirm that the U.S. broker-dealer's obligation would be subject to the same standard in the existing rule, which requires the "exercise of best efforts" to provide information except when prohibited by applicable foreign law.[34] In contrast, the proposed guidance would require the U.S. broker-dealer to consider "legal limitations in the foreign jurisdiction" that might limit information disclosure in making its reasonable determination about whether books and records can be furnished. Retaining this proposed guidance would be contrary to the effort to modernize the rule. It would also be inappropriate to require firms to potentially violate foreign blocking statutes, secrecy laws, and privacy laws that may require customer consent. Moreover, the Commission could seek the information directly from foreign securities authorities[35] or exercise its existing authority under Rule 15a-6(c) to withdraw the exemption for certain foreign broker-dealers if it finds that the laws in their home country prohibit providing information in response to regulatory requests. Therefore, the final rule should retain the existing standard.

In addition, SIFMA requests that the final rule release confirm that it will be the ordinary case that "promptly" producing books and records from a foreign location will require more than a single business day. The Commission notes in the release that books and records requests generally should be "filled on the day the request is made," but also notes that unusually large or complex requests may require a longer time-frame for production.[36] Although recent technological advances have vastly improved both the speed and quality of international communications, time zone and language differences, as well as geographic distance, still necessarily make such communications more complicated.[37]

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[33] We note that to the extent Exemption (A)(2) entails retention of records, e.g., confirmations generated by a foreign broker-dealer, issues similar to those described in this section would also need to be addressed.

[34] Rule 15a-6 (a)(3)(i)(b). See also SEC Release No. 34-27017 (Jul. 11, 1989), 54 Fed. Reg. 30013, 30027-28 (Jul. 18, 1989) (the "Original Adopting Release").

[35] See Original Adopting Release at 30028.

[36] Proposing Release at 39189 n. 75.

[37] For example, due to time zone differences, often the only action that might be possible on the first business day the information request is received is to forward it to the non-U.S. office that will be considering that request upon

Lastly, SIFMA requests that the Commission clarify that Exemption (A)(2) allows a U.S. broker-dealer who is not providing custody for a customer's funds or securities (i.e., trading on a DVP/RVP basis) to comply with the books and records provisions of Exemption (A)(1).

4. Establishment of Associated Person Qualification Standards

The proposed amendments would shift the burden from the U.S. broker-dealer to the foreign broker-dealer for: (1) determining that an associated person of the foreign broker-dealer is not subject to statutory disqualification; and (2) obtaining and maintaining certain other information about such associated persons. Although likely an unintended consequence, this might result in the need for the foreign broker-dealer to reexamine the qualification determinations and documentation that have already been made in accordance with the existing rule. As such, SIFMA believes that it should be left to the foreign broker-dealer and the intermediating U.S. broker-dealer to agree between themselves which one will be responsible for performing these functions. This solution would provide the firms with flexibility to apportion responsibility, as appropriate, based on their business relationship.

5. Disclosure Requirements

SIFMA also requests that the final rule release include guidance that provides firms with flexibility in determining what constitutes good delivery of the required disclosures. For example, consistent with the advancements in technology and communications services cited in support of the amendments, the Commission should specify that the disclosures may be provided electronically (including through website posting). Since broker-dealers often interact with customers through other regulated market participants such as investment advisers, the Commission should include guidance allowing foreign broker-dealers to either provide the required disclosures directly to the client or to the regulated market participant who can assume responsibility for delivering it to the ultimate client.

6. Alternative Trading Systems

The Commission (i) postulates that a foreign broker-dealer must be registered to avail itself of the exemption from exchange registration under Regulation ATS and (ii) asks for comment on whether it should consider amending Regulation ATS to allow an exempt foreign broker-dealer relying on Rule 15a-6 to operate an alternative trading system if it otherwise complies with the terms of Regulation ATS.

SIFMA is pleased that the Commission has raised this important question and recommends that Regulation ATS be amended to allow a foreign broker-dealer relying on the exemption provided under Rule 15a-6 to operate an alternative trading system in the United States, without having to register as a broker-dealer or an exchange, so long as it otherwise complies with the terms of Regulation ATS and its U.S. activities comply with Rule 15a-6. SIFMA believes that there is no policy reason to require the foreign broker-dealer to register with the Commission (as a broker-dealer or an exchange) if it is complying with the requirements set out in Rule 15a-6. Expanding the relief under Regulation ATS would also facilitate access for U.S. qualified investors to the most technologically advanced trading

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opening the following morning. This would not leave sufficient time to respond to a request under the proposed guidance.

systems, including alternative trading systems, that could provide more efficient execution capabilities compared with traditional trading platforms. In addition, this model facilitates a forward-looking approach to technology that can flexibly accommodate advances over the coming years rather than "locking in" current business models.

II. Expansion of Rule 15a-6 to Qualified Investors

SIFMA strongly supports the Commission's proposal to expand the category of U.S. investors with whom foreign broker-dealers may interact to investors that meet the "qualified investor" definition in Exchange Act Section 3(a)(54). As the Proposing Release notes, existing categories of eligible U.S. investors do not reflect the impact of evolving communications technology or "accurately encompass persons that have prior experience in foreign markets and an appropriate level of investment experience and sophistication overall."[38]

Many U.S. investors with significant investment assets – including those with $25 million or more in assets that would satisfy the "qualified investor" criteria – have an interest in diversifying their portfolios or looking to strategies that involve investments in both U.S. and non-U.S. markets. As a policy matter, there is no reason to deny these investors the same cross-border investment opportunities and services that are available to those satisfying the current thresholds (generally set at $100 million).[39] By enabling this expanded category of U.S. investors to participate more effectively and efficiently in international securities transactions, the Commission's proposal would take a significant step in modernizing U.S. regulation to address the needs of increasingly global markets.

SIFMA also appreciates the Commission's efforts to use an existing securities law definition in establishing eligibility for U.S. investors. SIFMA recognizes the substantial policy logic and efficiencies in the selection of an existing definition – particularly a statutory definition that reflects a Congressional policy determination regarding investor qualifications. Although no definition can perfectly capture the precise categories of investors that should fall within the exemption, the "qualified investor" definition offers a conservative and balanced approach.

There are important clarifications, however, that the Commission needs to incorporate to ensure that the qualified investor definition does not exclude important categories of investors. As described more fully below, SIFMA recommends the Commission clarify the scope of the "qualified investor" definition includes investment advisers and business entities that are not corporations, companies, or partnerships.[40] In addition, in practice, there may be additional categories of investors that reasonably should have comparable access to foreign broker-dealer's services, even though they do not meet the

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38 Proposing Release at 39186.

39 Although SIFMA is supportive of the proposal to use the qualified investor definition, it should be noted that firms will have to do significant work to reprogram their compliance and operating systems in order to incorporate the change.

40 Although SIFMA believes the guidance it requests is critical for preserving the immediate practical utility of the proposed amendments, we note that the interpretive questions arise from ambiguity in the statutory definition of "qualified investor." We therefore also urge the Commission to work with Congress to amend the definition so that this issue will not arise again in other contexts.

proposed definition, and SIFMA encourages the Commission to maintain flexibility to address such investors through the exemptive or no-action process (particularly as to investors whose lack of qualification reflects purely technical aspects of the definition).

A. Qualified Investor Status of Investment Advisers

SIFMA requests that the definition of "qualified investor" be clarified to ensure investment advisers that have under management at least $25 million in aggregate assets are included, whether acting on their own behalf or on behalf of their advisory clients. In particular, the statutory definition of "qualified investor" could be interpreted to exclude an investment adviser unless it both owns and invests on a discretionary basis not less than $25 million in investments. Since investment advisers typically do not own their investments, but instead manage investments owned by others, the requirement to "own and invest" could be interpreted to exclude most investment advisers as qualified investors, including advisers with whom foreign broker-dealers may deal today as "major U.S. institutional investors."[41] This clarification would reflect the apparent intent of the Proposing Release, confirming the Commission's conclusion that the "primary distinction between a major U.S. institutional investor and a qualified investor is the threshold value of assets or investments owned or invested."[42]

We note that this substantive clarification could be accomplished in two different ways. First, if the Commission considers it within the scope of the statutory definition of "qualified investor," it could adopt interpretative guidance regarding Section 3(a)(54)(A)(xi) and (xii) expressly stating that such provisions cover investment advisers. Alternatively, in the adopted rule, the Commission could provide an addition to the "qualified investor" definition separately addressing investment advisers.[43] In both approaches, the benefits of using an existing securities definition would be preserved without excluding a key category of U.S. investors.[44]

B. Qualified Investor Status of Business Entities

SIFMA further requests that the Commission clarify the category of business entities that would meet the investment threshold set forth in Section 3(a)(54)(A)(xi) of the Exchange Act. In particular, SIFMA considers it important for the Commission to confirm that the phrase "corporation, company, or partnership" is intended to encompass the full range of entities through which financial market participants engage in business and investment activities (e.g., business trusts). Business forms are constantly evolving, as demonstrated by the proliferation of the LLC, and the multiplicity of jurisdictions in the United States increases the risk that a rigid or narrow interpretation might inappropriately exclude U.S. investors who otherwise possess the requisite qualifications under the statutory definition. As with

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41 See Nine Firm 1997 Letter.

42 Proposing Release at 39186. The Proposing Release also consistently refers to "own or invest" in discussing the relevant provisions of the "qualified investor" definition, which suggests the inclusion of investment advisers.

43 For example, the Commission could include as a "qualified investor" for purpose of Rule 15a-6 "any investment adviser (whether or not registered under the Investment Advisers Act) that owns or controls or has under management $25 million or more in aggregate assets."

44 Under either approach, the Commission should clarify that the category of eligible investors would include trusts managed by an investment adviser that meets the $25 million threshold for assets under management.

the potential exclusion of investment advisers, this result could be avoided by interpretative guidance or an amendment to the proposed rule.

III. Provision of Research Reports

SIFMA supports the Commission's proposal to preserve the existing exemption for the provision of research reports and extend it to U.S. qualified investors. Rule 15a-6(a)(2) continues to play an important role in facilitating the free flow of financial information critical to the efficient functioning of international markets. In particular, it enables foreign firms with high levels of expertise in their respective markets to share their views with U.S. investors, aiding those investors in developing their experience with foreign securities.

We are concerned, however, that this flow of information has been unduly limited by the application of certain U.S. research requirements to foreign broker-dealers, including foreign broker-dealers that use their U.S. broker-dealer affiliates to facilitate the distribution of foreign-prepared research to U.S. qualified investors. As part of its comprehensive evaluation of the regulation of cross-border transactions, and in light of the extensive investor protections provided by the requirements of Rule 15a-6, the Commission should modify or clarify these research requirements to encourage the transmission of foreign market information to U.S. qualified investors.

In particular, foreign broker-dealers providing research directly or indirectly to U.S. investors as permitted by Rule 15a-6(a)(2) are nonetheless required to comply with Regulation AC in respect of such research unless (i) the foreign broker-dealer is not associated with a registered broker-dealer; and (ii) the research relates to a "foreign security" as defined in Regulation AC.[45] These conditions restrict the efficacy of the Rule 15a-6(a)(2) exemption and should be eliminated in the interest of making a broader range of information available to U.S. qualified investors active in foreign markets. Moreover, applying the Regulation AC requirements in this context is inconsistent with the Commission's conclusion in the Proposing Release that an expanded exemptive scope for rules and regulations applicable to a foreign broker-dealer solely by virtue of its status as a broker-dealer is in the public interest.

In addition, U.S. self-regulatory organization ("SRO") research rules appear to impose certain requirements on a U.S. broker-dealer participating in the distribution of foreign research under Rule 15a-6(a)(2), even if the broker-dealer makes such research available solely to U.S. qualified investors.[46] In our view, there is no reason why research reports prepared by a foreign broker-dealer and distributed to U.S. persons in accordance with Rule 15a-6(a)(2) should be required to comply with U.S. SRO rules simply because the preparer is affiliated with a U.S. broker-dealer or a U.S. broker-dealer facilitates the distribution of the research to U.S. investors, provided the U.S. broker-dealer makes appropriate disclosure regarding the source of the research.[47] U.S. qualified investors want access to diverse

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45 Rule 503 under the Exchange Act.

46 See, e.g., NASD Rule 2711(h)(13).

47 Consistent with this view, the Proposing Release notes that the U.S. broker-dealer involved in solicited transactions would not have to comply with SRO rules. Proposing Release at 39189 ("Thus, with respect to transactions effected pursuant to Exemption (A)(1), the intermediating U.S. registered broker-dealer would no longer be required to comply with the provisions of the federal securities laws, the rules thereunder and SRO rule applicable to a broker-dealer effecting a transaction in securities, unless it were otherwise involved in effecting the transaction.") and Proposing Release at 39193 ("Thus, with respect to transactions effected pursuant to Exemption (A)(2), the intermediating U.S.

information from the most expert providers, whether or not the source is located in the United States. This information flow should be encouraged, not unnecessarily constrained by the imposition of U.S.-centric research requirements on foreign broker-dealers. Accordingly, SIFMA urges the Commission to work with the SROs to ensure that a U.S. broker-dealer facilitating the distribution of foreign research reports under Rule 15a-6(a)(2) would not be required to comply with U.S. SRO rules regarding the preparation and dissemination of research with respect to such reports.

SIFMA also requests that the Commission clarify the proposed exemption in two technical respects. First, the Commission should affirm the continued applicability of its long-standing interpretative guidance that permits an unregistered foreign broker-dealer to distribute research reports to any U.S. investor (whether or not "qualified") through a registered U.S. broker-dealer, subject to certain conditions.[48] Second, the Commission should clarify the language of Section 15a-6(a)(2)(ii) or otherwise confirm that foreign broker-dealers would continue to be permitted to initiate contact or enter into transactions with a U.S. investor after providing research to that investor under Rule 15a-6(a)(2) so long as the contact is initiated or the transactions are undertaken in compliance with other provisions of Rule 15a-6.[49]

IV. Counterparties and Specific Customers

We welcome the addition of transactions with U.S. fiduciaries to Rule 15a-6(a)(4), although as discussed below we are concerned about certain aspects of its implementation. As it has done with U.S. fiduciaries, we urge the Commission to continue to evaluate and adopt new categories of investors and transactions that are appropriately included in Rule 15a-6, including large institutional investors, transactions incident to employee benefit plans, and transactions with existing shareholders.

A. Transactions with U.S. Fiduciaries

SIFMA supports the Commission's proposal to provide foreign broker-dealers with an additional exemption for certain transactions with U.S. resident fiduciaries of accounts for foreign resident clients.[50] However, as with Exemption (A)(1), we believe the "foreign business" requirement risks vitiating the benefits of the proposed exemption and we urge the Commission to eliminate or modify it.[51] In our view, the distinction between U.S. and foreign securities bears even less relation to investor protections and practical needs in the fiduciary context. U.S. fiduciaries typically have high levels of investment skills and experience and foreign investors often engage them precisely because of their expertise in U.S. securities.

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registered broker-dealer would no longer be required to comply with the provisions of the federal securities laws, the rules thereunder and SRO rules applicable to a broker-dealer effecting a transaction in securities, unless it were otherwise involved in effecting the transaction.").

48 See, e.g., Original Adopting Release at 30021-22; Barclays PLC (avail. Feb. 14, 1991); Charterhouse Tilney (avail. Jul. 15, 1993).

49 See Nine Firm 1997 Letter at note 6.

50 As a technical change, we recommend in the definition of "foreign resident client" that the "and" after part (ii) of that definition be changed to "or."

51 See infra Part I.A.

If the Commission nonetheless deems it necessary to include a foreign business requirement in the final rule, we request that the proposed exemption preserve the transactions a foreign broker-dealer can enter into with U.S. resident fiduciaries today. In particular, the exemption should encompass all transactions involving foreign securities whether or not the broker-dealer meets for foreign business test. As noted in the no-action letter regarding fiduciaries,[52] foreign resident clients would not reasonably expect that the full range of U.S. laws and regulations governing broker-dealers should apply to their securities transactions with foreign broker-dealers. This reasonable expectation, which has been reinforced by the existing letter, would be upset if a foreign broker-dealer's failure to meet the foreign business test suddenly prevented it from effecting transactions in foreign securities (not just U.S. securities) for the U.S. fiduciary.

SIFMA also recommends that the Commission eliminate the exclusion of banks and broker-dealers as permissible U.S. fiduciaries. Under the proposed exemption, registered broker-dealers and banks acting under an applicable exception or exemption from the definitions of "broker" and "dealer" are excluded as permissible U.S. fiduciary counterparties. These exclusions appear to reflect a view that foreign broker-dealers could deal with the excluded parties directly under Rule 15a-6(a)(4)(i), making reliance on the proposed fiduciary exemption unnecessary.[53]

As a technical matter, potential gaps could arise between the two exemptions, particularly when a registered broker-dealer that is also a registered investment adviser is acting solely as an adviser to a client. If the broker-dealer has no brokerage account relationship with a client, but is acting in a fiduciary capacity as the client's adviser, it is unclear whether the foreign broker-dealer would still be able to deal directly with that client in reliance on Rule 15a-6(a)(4)(i). In our view, since no policy rationale justifies excluding broker-dealers and banks from acting as investment advisers, the Commission should eliminate this potential gap in the regulations.

B. New Category for Large U.S. Institutional Investors

While the proposed extension of Rule 15a-6 to U.S. qualified investors is a critical response to the increased participation in foreign securities markets by investors at lower asset thresholds (i.e., $25 million), the Commission's proposal should also reflect its experience with investors at very high thresholds (i.e., $100 million). The developments in communications and other technology that the Commission has identified in proposing the "qualified investor" definition are much more pronounced among these investors, who, in many ways, have been themselves a driving force behind the internationalization of financial markets. Close to twenty years of experience under Rule 15a-6 have demonstrated that these investors have the financial wherewithal and experience necessary to assess their dealings with foreign broker-dealers, often seeking out such broker-dealers for new markets or products.

Accordingly, SIFMA proposes that a new customer category be added to Rule 15a-6(a)(4) to reflect the Commission's experience with large U.S. institutional investors and their demonstrated ability to assess independently the integrity and competence of foreign broker-dealers. A foreign broker-dealer should be permitted to effect transactions in securities with or for, or induce or attempt to induce the purchase or sale of any security by:

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[52] Cleary, Gottlieb, Steen & Hamilton (avail. Jan. 30, 1996).

[53] Proposing Release at 39196 n.130.

any qualified institutional buyer (as defined in Rule 144A(a)(1) of the Securities Act of 1933) or any other entity, including any investment adviser (whether or not registered under the Investment Advisers Act), that owns or controls (or, in the case of an investment adviser, has under management) in excess of $100 million in aggregate assets.

This provision, which draws on existing definitions of large U.S. institutional investors, would significantly enhance the practical benefits of the Commission's proposal by eliminating unnecessary regulatory requirements for a group of U.S. investors with extensive experience in international markets and increasing the efficiency with which they can gain access to those markets.

C. Modification of Rule 15a-6(a)(4)(i)

Since Rule 15a-6(a)(4) was designed to permit cross-border transactions in situations that raise limited investor protections concerns, SIFMA requests the Commission consider specifically including in Rule 15a-6(a)(4)(i) "entities that are affiliates of a registered broker dealer." In our view, there is no investor protection rationale that is served by restricting a registered broker-dealer's foreign affiliate from dealing directly with an affiliated entity organized in the United States.

D. New Categories for Qualified Transactions

In SIFMA's view, foreign broker-dealers should also be permitted to deal directly with any U.S. qualified investor in connection with certain categories of transactions that provide significant benefits to the investor while raising minimal investor protection concerns. Imposing U.S. regulatory requirements for these types of transactions may actually deprive U.S. investors of benefits or opportunities available to comparable investors located in other jurisdictions. While it would be unduly complicated to include all such transactions in Rule 15a-6, certain transactions occur with such regularity in the course of market operations that the benefits to U.S. investors from streamlining the regulatory requirements outweigh the potential burdens of a somewhat more complex rule.

In particular, SIFMA proposes that a foreign broker-dealer be permitted to interact with any U.S. investor, whether or not a "qualified investor," with respect to the following types of transactions:

1. Transactions Incident to Employee Benefit Plans.

Non-U.S. issuers generally administer their employee benefit plans directly through foreign broker-dealers and participation of U.S. employees – if allowed at all – typically requires costly special arrangements interjected into the routine operation of the plan (such as engaging a second plan administrator or custodian in the United States). These special arrangements add unnecessary duplication and complexity with no discernable benefit or additional protection for U.S. employees.

At the same time, these U.S. employees, even those who would not typically meet the $25 million qualified investor threshold, are not the type of investors for whom the full regulatory protections are necessary or appropriate. First, the transactions are designed to provide a benefit to the employees, often by allowing employees an opportunity to become stakeholders in the employer, and thereby take a vested interest in its success, at a discounted price. Second, the employer has a strong interest in ensuring that promised benefits are delivered to employees, and the employer typically is the principal contact with its

employees concerning its plan and often generates or reviews and approves all communications relating to such plans. Accordingly, the nature of employee benefit plans, the employer-employee relationship, and the participation of the employer in plan-related communications serve to reduce the need for investor protections. In this context, there is no reason why U.S. employees should be foreclosed from a benefit that their non-U.S. counterparts enjoy and no reason why a non-U.S. issuer should be required to incur additional costs and administrative complexity in order to allow U.S. employees to participate.

For these reasons, SIFMA strongly recommends that foreign broker-dealers be permitted to communicate with, and provide securities-related services to, any U.S. employee of a non-U.S. issuer (or its subsidiaries) incident to the operation of such issuer's employee benefit plans (including, e.g., employee stock option plans, employee stock purchase programs, restricted stock units and stock grants) under Rule 15a-6(a)(4). Among other things, this proposed exemption would permit the foreign broker-dealer to manage an employee's subscription of shares, act as custodian for the shares issued, sell such shares on behalf of the employee, and engage in other transactions with the U.S. employees related to the administration of and the employee's participation in the plans.[54]

2. Transactions with Existing Shareholders

Under certain circumstances, a foreign broker-dealer may wish to conduct transactions with a U.S. investor which is an existing shareholder of a non-U.S. issuer, such as in connection with a tender offer or rights offerings by such issuer, or in those instances where the non-U.S. issuer provides existing shareholders the opportunity to sell into an existing offering. SIFMA believes that, by their nature, these transactions present a minimal risk that a U.S. investor will suffer a loss due to any inexperience in dealing with a foreign broker-dealer, given that such transactions involve existing shareholders that have experience with the securities and the issuer involved. In addition, such transactions generally provide investors with opportunities they might otherwise not have available to them were they not able to participate in such transactions.

For example, tender offers typically include a premium over the market price of the security. In a situation where U.S. shareholders of a global company wish to sell into an offshore offering, the U.S. shareholder would likely be able to sell his or her shares for a better price by selling into an offering than would occur if the shares were sold directly in the secondary market. Similarly, with rights offerings, existing shareholders are given the right to purchase a proportional number of additional securities at a price that is usually at a discount to the prevailing market price of the security.

There is no investor protection justification for requiring foreign broker-dealers to register if they wish to effect such transactions for U.S. investors falling below the "qualified investor" threshold. Conversely, as noted above, such transactions offer significant benefits to existing shareholders that would otherwise be unavailable to them should they be precluded from participating in such transactions. Accordingly, SIFMA strongly recommends that foreign broker-dealers be permitted to communicate with, and provide securities-related services to, any U.S. shareholder of a non-U.S. issuer (or its subsidiaries) in connection with tender offers or rights offerings by a non-U.S. issuer, or in those instances where US

[54] Although we recognize that the Rule 15a-6 exemption for "unsolicited" transactions may be appropriate on occasion, the ongoing nature of the plans and employee interaction makes reliance on it complex and unpredictable. Therefore, we believe an explicit exception related to employee benefit plan participation is appropriate and in the public interest.

shareholders are provided the opportunity to sell into a offshore offering, in each instance under Rule 15a-6(a)(4).

V. Unsolicited Trades

SIFMA agrees with the proposed change in guidance that would eliminate the requirement that third-party quotation systems distribute foreign broker-dealers' quotations primarily in foreign countries and believes the proposed guidance is generally more appropriate for current business operations.[55]

VI. Option for Voluntary Limited Registration with the Commission

As noted above, SIFMA strongly supports the Commission's determination to build upon the existing exemptive approach in Rule 15a-6, rather than create more complex or burdensome alternatives that would require limited registration of foreign broker-dealers. At the same time, there are a number of contexts in which, over time, SIFMA believes that it may be useful to afford foreign broker-dealers the option to register with the Commission and become subject to limited U.S. regulatory jurisdiction on a voluntary basis. Accordingly, we request that the Commission consider permitting foreign broker-dealers to submit to a voluntary limited registration process, under which they would be allowed to conduct transactions otherwise permissible under the rule for unregistered foreign broker-dealers, but would not be required to comply with the full panoply of U.S. regulatory requirements.

VII. Clarification in Scope of Proposed Exemption

SIFMA welcomes the Commission's proposed clarification of the underlying exemptive authority that enshrines the existing scope of Rule 15a-6. As noted in the Proposing Release, the Commission has been granted general exemptive authority under Section 36 of the Exchange Act in the intervening years since adoption of Rule 15a-6.[56] Using this authority, the Commission proposes to confirm that foreign broker-dealers relying on Rule 15a-6 will be exempt not only from Exchange Act registration requirements but also from reporting and all other Exchange Act and concomitant regulatory requirements (except for Exchange Act Sections 15(b)(4) and 15(b)(6)). This clarification is useful because the existing rule relies on the more limited exemptive authority that existed when the original rule was adopted, supplemented by a staff no-action position.[57]

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55 Proposing Release at 39187.

56 Proposing Release at 39199 (citing Exchange Act Section 36 authority to conditionally or unconditionally exempt any person, security, transaction, or class thereof from any Exchange Act provision or rule to the extent "necessary or appropriate in the public interest" consistent with the protection of investors).

57 Original Adopting Release at 30015 n. 22 (noting that Commission "staff would not recommend that the Commission take enforcement action against foreign broker-dealers for want of those provisions, with the exception of sections 15(b)(4) and 15(b)(6), if the foreign broker-dealers were exempt from broker-dealer registration under the Rule."). The no-action position included in the Original Adopting Release is important because many of the Exchange Act provisions and regulations thereunder apply to broker-dealers regardless of registration status.

VIII. Guidance to Address Currently Permitted Activities

As a final and important point, SIFMA seeks guidance in the Commission's adopting release confirming that activities currently permitted under Rule 15a-6 and related no-action and interpretative letters will continue to qualify for the exemption under the amended rule. Securities firms have invested substantial resources over many years to develop compliance policies and systems adapted to current regulations and the no-action letters thereunder. Permitting firms to continue activities that are currently exempt would conform with the Commission's objective of modernizing Rule 15a-6 by expanding U.S. investor access to the increasingly global securities markets. Given the significant complexity of many aspects of the Commission's proposal – and the potential addition of a number of new requirements, such as the foreign business test – there is a risk that the amended rule might, inadvertently or otherwise, prohibit longstanding and beneficial cross-border activities. Accordingly, we request that the Commission provide guidance "grandfathering" existing activities so that withdrawal of existing guidance does not leave unforeseen gaps in the scope of the exemption that could undermine the intended benefits of the proposed amendments.

Conclusion

Once again, SIFMA appreciates this opportunity to comment on the proposed amendments to Rule 15a-6, which take important steps toward modernizing the Rule and eliminating many of the current barriers to the efficient delivery of cross-border services by foreign securities firms. In particular, we commend the Commission for proposing substantial reductions in the intermediation requirements for solicited trades and an expansion in the category of U.S. investors eligible under the Rule. In many ways, the proposed amendments advance the Commission's stated goals of making Rule 15a-6 more workable and consistent with protecting investors and maintaining fair, orderly and efficient markets.

At the same time, as described in detail above, we are concerned that certain provisions of the proposed amendments may significantly limit these gains, particularly in the solicited trade context, and we urge the Commission to modify these provisions.[58] Most critically, the proposed foreign business test risks jeopardizing the practical ability of firms to rely on Exemption (A)(1); we strongly recommend the Commission reevaluate this requirement and, if it continues to believe such a test is required, modify it to make it simpler, more flexible and more readily implemented in practice. To avoid creating unnecessary and burdensome costs for market participants, we also recommend the Commission adopt key changes to the scope of both the proposed custody requirement in Exemption (A)(2) and the proposed requirement for home country regulation of a foreign broker-dealer. More broadly, we believe the Commission should clarify the scope of the "qualified investor" definition to ensure investment advisers and certain business entities are not unnecessarily excluded as eligible investors.

As a final matter, SIFMA notes that it not only looks forward to the Commission's adoption of final rules to implement Rule 15a-6 modernization, but also to working with the Commission on other essential steps for developing updated regulatory structures to address the increasingly global nature of

[58] Also as described above, SIFMA requests that the Commission confirm the continued applicability of existing guidance and consider expanding the proposed amendments in certain areas where the Commission has previous experience or the provisions of Rule 15a-6 may be unnecessary.

financial markets. SIFMA supports the Commission's broader pursuit of mutual recognition frameworks with other like-minded regulators in order to streamline access to the foreign securities markets for additional tiers of investors, as well as its efforts to address the cross-border activities of exchanges and alternative trading systems. Furthermore, we welcome opportunities to work with the Commission on targeted rules harmonization across jurisdictions in order to clarify and rationalize the overlapping laws and regulations currently applicable to firms engaging in cross-border securities activities. SIFMA believes that the near-term reforms to Rule 15a-6 and the longer-term efforts to implement mutual recognition and targeted rules harmonization will improve investor access to efficient cross-border financial services, promote efficient cross-border regulation and collaboration among like-minded regulators, and play an essential role in maintaining the competitiveness of the U.S. securities markets.

We appreciate your consideration of our comments. Please do not hesitate to contact Diana Preston at 202-962-7386 or David Strongin at 212-313-1213 if you have any questions or would like additional information.

Sincerely,

Diana L. Preston

Diana L. Preston
Managing Director and Associate General Counsel

David Strongin

David Strongin
Managing Director

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

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