

**By Courier**

Secretary  
 Securities and Exchange Commission  
 100 F Street, N. E.  
 Washington, D.C. 20549-1090  
 U.S.A.

**Executive Board**

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9 September 2008

Re.: Securities and Exchange Commission file number S7-16-08; "Exemption of Certain Foreign Brokers or Dealers"

Dear Secretary:

The Securities and Exchange Commission ("the Commission") is requesting comment on the proposed amendments to Rule 15a-6 [17 CFR 240.15a-6] under the Securities Exchange Act of 1934. Deutsche Börse AG ("Deutsche Börse") welcomes this opportunity to comment on the Commission's proposed changes to Rule 15a-6. Once adopted, the proposed changes will contribute to improving the efficiency of cross-border investing. The changes will benefit U.S. investors by facilitating their access to foreign securities markets and reducing their costs of transacting on foreign markets. We compliment the Commission on this initiative and look forward to its final adoption. Among the changes to Rule 15a-6 proposed by the Commission, Deutsche Börse strongly supports

- the change to Qualified Investors as counterparties for foreign brokers and dealers,
- including natural persons as investors that may be contacted by a foreign broker or dealer,
- elimination of many of the administrative burdens on U.S. and foreign brokers and dealers when foreign brokers and dealers seek to do business with U.S. counterparties,

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Aktiengesellschaft  
 mit Sitz in  
 Frankfurt/Main  
 HRB Nr. 32232  
 Amtsgericht  
 Frankfurt/Main

- codification of the standards for options markets to familiarize U.S. persons with their products and services, and
- permission for exchanges and foreign brokers and dealers to provide U.S. persons access to their OTC options processing facilities.

In this comment letter we describe some of the pertinent aspects of Deutsche Börse's businesses, respond to several of the questions raised by the Commission and, finally, request clarifications of two issues regarding back office outsourcing and the permissible activities of U.S. broker-dealers.

### **Deutsche Börse and its exchanges**

Headquartered in Frankfurt, Germany, Deutsche Börse is a publicly listed provider of financial market services. Its market capitalization of more than \$18 billion places it at the top of the ranks of financial market operators.<sup>1</sup> Deutsche Börse operates the Frankfurt Stock Exchange ("FSE") and is a 50 percent owner of the operating company of Eurex Deutschland, the futures and options exchange.<sup>2,3</sup>

FSE operates, among other things, the all-electronic Xetra® trading system, which has been designed not just for speed and reliability but also to facilitate international participation. FSE currently has more than 260 total members in 19 countries. More than 150 FSE members trade from outside Germany.<sup>4</sup> FSE has authorized 6,700 traders on behalf of its members. In addition to the more than 11,000 listed common stocks, 330,000 structured products, 300 ETFs, 100 Exchange Traded Commodities, 3,200 mutual funds and 19,000 bonds are listed on FSE.

Eurex Deutschland operates an electronic trading system for derivative instruments. This exchange operates independently of a member's location, permitting international participation.

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<sup>1</sup> Deutsche Börse's market capitalization was measured as €12.4 billion on August 28, 2008.

<sup>2</sup> Besides exchange operations, Deutsche Börse and its subsidiaries provide technology services, securities settlement services and market data products to customers worldwide. For example, Clearstream Banking S.A., a 100%-owned subsidiary of Clearstream International S.A., is the international central securities depository linked to markets in 45 countries. Clearstream International S.A. is a 100%-owned subsidiary of Deutsche Börse.

<sup>3</sup> Eurex Deutschland is operated by Eurex Frankfurt AG, which is a fully owned subsidiary of Eurex Zurich AG (any one and together, hereinafter, "Eurex"). Eurex Zurich AG is equally and jointly owned by Deutsche Börse and SWX Swiss Exchange AG.

<sup>4</sup> FSE has no U.S. persons as members. Several FSE members are affiliated with U.S. broker-dealers or other financial institutions.

Eurex has 404 members with more than 9,000 registered traders in 21 countries, including 328 Eurex members from outside Germany, 76 of which are U.S. resident entities.<sup>5</sup> In addition to a full range of futures contracts on interest rates, stocks and stock indices, Eurex lists options on individual stocks and stock indices, albeit with no provision of access to these options for its U.S. members.

Eurex has also received a no-action letter from the Commission pursuant to which Eurex representatives and members may *familiarize* certain eligible investors located in the U.S. with certain of Eurex's stock and stock index options.

### **Comments on selected points in the release**

Qualified Investors. The Commission's proposed change to Qualified Investors as counterparties in lieu of qualified institutional buyers or major institutional investors is appropriate and welcome. It will mean that far more institutions and, prospectively, individuals will benefit from the other proposed streamlining of procedures in Rule 15a-6. The \$25 million threshold implied by the term provides a good indicator that the investors contacted by foreign brokers or dealers are sufficiently sophisticated to trade on a non-U.S. exchange without intermediation by a U.S. broker-dealer.

At the same time we note that \$25 million is still a very high threshold and will mean that investing or trading abroad will continue to be unduly costly and inefficient for many U.S. persons. We therefore ask the Commission as it works with other regulatory authorities to design a framework for mutual recognition that also addresses the legitimate investment interests of investors with fewer than \$25 million in assets. We believe, as noted in our letter to the Chairman of the Commission, the Honorable Mr. Christopher Cox, regarding mutual recognition dated November 6, 2007 that persons who can invest in hedge funds (currently, "accredited investors") should be permitted more direct access to trading foreign securities and derivatives on foreign regulated markets.

Unsolicited Trades. The Commission's proposal to retain the unsolicited trades exemption is appropriate. Deutsche Börse distributes its markets' quotation and price data decoupled from order routing or execution capability to market data vendors, members of FSE and Eurex, and end-users, and we endorse the view that such distribution does not constitute solicitation *per se*.

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<sup>5</sup> U.S. resident members of Eurex may enter trades in certain products directly into the Eurex trading system in accordance with no-action letters provided by the Commodity Futures Trading Commission. Provided they are qualified from a regulatory perspective to conduct customer business Eurex members, either based in the U.S. or abroad, may solicit U.S. persons to trade such permitted futures and futures options on Eurex.

We also agree that in view of the globalization of securities trading and investing, the distinction between domestic and foreign third-party quotation systems is no longer workable.

In its release, the Commission asks if there are other interpretive issues which it should address. We believe that it would be beneficial if the Commission would address data distribution through foreign exchanges' trading systems. In particular, at considerable cost to the exchange, Eurex suppresses the display to its (futures trading) members of certain market data for products not tradable by its U.S. members, like options on equity indices. Identical data, however, are available to them from market data vendors. We suggest that the Commission take this opportunity to endorse the view that distribution of market data where there is no associated trading or order routing capability by a foreign exchange's trading system does not constitute solicitation.

Research reports. Distribution of research to prospective customers is an effective means of communicating potential investment opportunities as well as the associated risks. No additional restrictions for qualified investors are needed, and such investors should not require additional or special protections.

Foreign securities exchanges do not generally provide research reports on specific listed instruments and we are not seeking permission to do so. However, in our experience, customers do value other more general types of information about exchange offerings, rules and procedures, administrative details, trading system details, etc. With the broadening of access to our markets, it is expected that many Qualified Investors in the U.S. will seek information from us. We respectfully request that the Commission confirm that foreign exchanges may communicate directly with U.S. Qualified Investors about foreign securities provided that they do not solicit trades.

Solicited trades: Exemption (A)(1). The Commission's proposal to exempt from registration foreign brokers or dealers which solicit in accordance with the proposed standards set forth sharply reduces the currently mandated role of U.S. broker-dealers. In the case of Exemption (A)(1), this will have the very welcome effects of fostering more direct communication between brokers and customers, limiting operational risks associated with transacting abroad, increased transparency in settling trades, and permitting more efficient transactions, all resulting in lower costs and better service for U.S. Qualified Investors.

Solicited trades: Exemption (A)(2). Alternative Exemption (A)(2) maintains an active role for the U.S. broker-dealer in transactions with U.S. Qualified Investors solicited by foreign brokers and dealers. The proposal would reduce the

requirements from the current provisions of Rule 15a-6 and seems likely to be used in instances where the foreign broker or dealer is not affiliated with a U.S. broker-dealer. It can be presumed that this alternative will help ensure access on a relatively competitive basis for all foreign brokers and dealers while providing reasonable regulatory safeguards to U.S. Qualified Investors.

Definition of foreign securities. The Commission has asked for comment on the proposed definition of foreign securities. The proposed definition is appropriately broad and includes derivatives. This will benefit U.S. Qualified Investors by streamlining their ability to take advantage of opportunities on foreign exchanges. On the other hand, the proposed rule at 15 a-6(a)(5) for options transactions means that the streamlining that would be provided everywhere else for transacting foreign securities is not extended to foreign options.

Familiarization with options exchanges. Proposed Rule 15a-6(a)(5) in part codifies existing practices that are permitted on an exchange-by-exchange basis today in accordance with no-action letters except that it expands the class of investors to Qualified Investors. As mentioned, Eurex has received such a letter. The proposal is beneficial because it will greatly expand the number of investors that the exchange and its members may contact and familiarize about options.

Rule 15a-6(a)(5), as proposed, only permits foreign brokers or dealers which are members of a foreign exchange to familiarize U.S. Qualified Investors with foreign options. This stipulation does not seem to envision routing of orders between foreign brokers and either third parties or affiliates when the *familiarizing* and executing brokers or dealers are not the same. The proposed requirement that a familiarizing foreign broker or dealer be a member of the options exchange is needlessly restrictive and we believe the Commission should not include it.

Proposed Rule 15a-6(a)(5)(ii) will newly permit foreign brokers and dealers as well as foreign options exchanges to provide OTC options processing facilities to qualified investors. We welcome this proposal and believe that U.S. Qualified Investors will find it provides an attractive vehicle for doing foreign options business.

We would like to draw the Commission's attention to the continued prohibition on solicitation of options business by a foreign broker or dealer. This prohibition appears particularly anachronistic in light of the streamlining of requirements for trading other foreign securities and especially as the Commission proposes to permit foreign options exchanges and their members who are foreign brokers or dealers to provide U.S. Qualified Investors access to foreign options exchanges'

OTC processing facilities. Furthermore, in view of the booming volumes on U.S. domestic options exchanges and the ever increasing institutional involvement in those markets, it seems hard to posit that options trading by U.S. Qualified Investors on regulated foreign markets would raise such concerns for the Commission as would warrant continuing to prohibit solicitation.<sup>6</sup> We ask the Commission to act expeditiously to provide foreign options exchanges and foreign brokers and dealers such exemptions as it deems necessary to put options trading on foreign exchanges on the same regulatory footing as other foreign securities.

Operation of automated trading systems. The Commission has asked whether foreign brokers and dealers should be permitted to operate an alternative trading system (“ATS”) without registration as a U.S. broker-dealer although complying in full with such requirements for U.S. broker-dealers. We believe that it would be inappropriate for the Commission to permit a foreign broker or dealer to operate such a system to trade foreign securities with U.S. Qualified Investors in ostensible competition with regulated markets in the home countries for those foreign securities. If adopted, this could compromise regulatory standards which are crucial for investor protection. On the other hand, if the ATS is provided to trade securities registered in the U.S., we defer to the Commission’s judgment on whether this provides adequate and appropriate safeguards for U.S. market participants.

### **Requests for clarification**

In response to the Commission’s general request for comment we would like to draw the Commission’s attention to two points.

Back office outsourcing. We have heard from a number of Eurex’s non-U.S. members (primarily based in Europe) that they would like to have the ability to

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<sup>6</sup> The release indicates that the Commission believes that options may be distinct because the options are themselves issued by the clearinghouse of the exchange on which they are traded. We note that in many cases, including Eurex’s, the exchange and the clearinghouse are legally separate entities. When representatives of an options exchange inform investors about options traded on the exchange, they are not acting as representatives of the clearinghouse and thus are not representing the issuer of the security. In any event, such a view of options issuance, while perhaps having merit as a legal concept, is irrelevant to business realities of exchange trading of options. Issuance of options cleared by a clearinghouse in fact has few operative parallels to stock issuance by companies seeking to raise capital and does not raise similar regulatory concerns. The Commission has taken a substantially similar view with regard to options traded on U.S. exchanges which are cleared by The Options Clearing Corporation. Furthermore, it is hard to reconcile the Commission’s proposed permission for providing OTC options processing facilities to Qualified Investors while denying them the opportunity to trade such options directly or have the same access to exchange market data as an exchange member, especially when the counterparty in the OTC trade likely is an exchange member.

use Eurex's infrastructure to outsource several post-trade back office functions to their affiliates in the U.S. for trades done both on their own and their customers' accounts. The purpose for this is to take advantage of scale efficiencies and the time zone difference and thus improve operations, limit operational risks and reduce costs by using personnel in the U.S. who are operating in their business day. Such personnel's activities would be supervised by the foreign broker or dealer and the accounts would remain in the foreign broker's or dealer's name. We suggest that the Commission adopt the view that such outsourcing would not require the foreign broker or dealer to register as a U.S. broker-dealer.

Direct market access. FSE has not permitted U.S. broker-dealers operating from locations in the U.S. nor any other person located in the U.S. (e.g. a foreign broker or dealer or an investment company) to become a member of FSE. FSE has been concerned that the Commission might deem such activity to be either operating an unregistered securities exchange or conducting a business in unregistered securities.

If adopted as proposed, 15a-6 would permit foreign brokers and dealers to solicit orders from U.S. Qualified Investors for foreign securities. The foreign broker or dealer would then enter the order into the relevant market's trading environment, in the case of FSE listed securities most likely into the Xetra trading system. This same transaction could not today, nor in the future under the proposed Rule 15a-6 – whose purpose admittedly is to address *foreign* brokers and dealers – be effected by a U.S. broker-dealer.

We believe that the Commission should use the occasion of amending its Rule 15a-6 to clarify that U.S. broker-dealers have equivalent opportunities to become members of foreign exchanges with the ability to access foreign markets directly from locations in the U.S. without such foreign exchange registering in the U.S. In our case, that would mean that FSE could admit U.S. broker-dealers as members, FSE could provide them direct trading access on the Xetra platform from locations in the U.S. and that U.S. broker-dealers could solicit U.S. Qualified Investors for transactions in foreign securities listed on FSE.

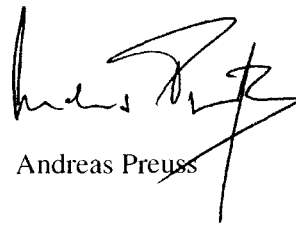
On behalf of Deutsche Börse, we would like to thank the Commission for considering our comments on the proposed changes to Rule 15a-6. We believe that the changes will benefit U.S. investors and contribute to increasing efficiency in cross-border investment. Viewed against the backdrop of the Commission's ongoing mutual recognition initiative, these changes are an important step in liberalizing access for U.S. persons to foreign markets. We look forward to the next steps in the process.

If you have any questions or if we can assist you in any way please do not hesitate to contact Mr. Rainer Riess, Managing Director, Cash Markets (+49-69-2111-4895); Mr. Michael Peters, Member of Eurex Executive Board (+49-69-2111-5649); Ms. Heike Eckert, Executive Vice President, U.S. Exchange Holdings, Inc. (312-544-1086) or either of us directly.<sup>7</sup>

Very truly yours.



Reto Francioni



Andreas Preuss

cc: Hon. Christopher Cox , Chairman  
Hon. Kathleen L. Casey, Commissioner  
Hon. Elisse B. Walter, Commissioner  
Hon. Luis A. Aguilar, Commissioner  
Hon. Troy A. Paredes, Commissioner

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<sup>7</sup> U.S. Exchange Holdings, Inc., a Delaware corporation, is a fully owned subsidiary of Eurex Frankfurt AG.