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September 8, 2008

Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-1090

Re: Exemption of Certain Broker-Dealers;
Release No. 34-58047; File No. S7-16-08

Dear Sir or Madam Secretary:

This is to respond to the request for comments by the Securities and Exchange Commission (the "SEC") in its above-referenced release dated June 27, 2008 (the "Release").

In the Release, the SEC sets forth proposed amendments (the "Proposed Amendments") to Securities Exchange Act Rule 15a-6 which sets forth an exemption from SEC registration for certain non-U.S. broker-dealers. At the outset, this is to commend the SEC for its exacting reassessment of Rule 15a-6. The Proposed Amendments address both U.S. investor needs, in light of their current abilities to access the global securities markets, and the SEC's investor protection mandate under the federal securities laws.

It is always necessary or appropriate for the SEC to reassess its rules in light of new developments, but it has become an imperative for Rule 15a-6 to be updated. As the SEC is aware, since Rule 15a-6 was originally adopted in1989, we have witnessed explosive, global growth in the securities industry, including the development of strong and competitive market centers outside the U.S. More specifically, Rule 15a-6 has became sorely out of date because many U.S. investors, particularly investors whose assets are managed professionally by other financial intermediaries, such as investment advisers (SEC-registered or otherwise), have long had the sophistication and ability to access non-U.S. market centers through non-U.S. broker-dealers for implementation of their global investment strategies. In this connection, the SEC made an appropriate decision to separate its review of Rule 15a-6 from a larger-scale, more complicated, and therefore longer-term "mutual recognition" approach for cross-border transactions that was the subject of an SEC Roundtable in 2007. Mutual recognition, of course, remains an important endeavor.

Over time, the current rule has created impractical, out-of-date and unnecessary compliance challenges for non-U.S. broker-dealers, as well as for U.S. broker-dealers that intermediate transactions as required under the rule. In addition, operational risks have arisen under the rule in that it requires "double bookings" of a single trade by two-broker-dealers, instead of a single booking of the trade by a single broker-dealer. This, in turn, has impeded the efficient execution of transactions. The Proposed Amendments would address these concerns. The Proposed Amendments are consistent with the public policy need to ensure that investor protection rules are modified to reflect basic industry growth and provide for clear and practical routes for compliance. This update process, in turn, fosters a strong regulatory system that is integral to the integrity of our markets.

The Proposed Amendments address the most significantly outdated requirements of Rule 15a-6, namely, the requirement that discussions with non-U.S. broker-dealers be "chaperoned" by a representative of a U.S. broker-dealer; the U.S. broker-dealer "intermediation" requirements; and the requirement that non-U.S. broker-dealers only deal with certain, very limited investors. The comments below, therefore, are designed to respond to certain of the SEC's questions set forth in the Release, and to refine certain of the language of the Proposed Amendments. Some refinement would be appropriate to ensure that the text of a revised Rule 15a-6 is itself as clear as possible, aside from an accompanying adopting release.

Proposed Rule 15a-6(a)(3)/ Solicited Trades: Proposed Rule 15a-6(a)(3) would permit "qualified investors" to deal directly with non-U.S. broker-dealers that comply with certain reasonable and understandable conditions, such as those relating to recordkeeping and investor disclosures. Set forth below are some additional suggestions for investor types that could also be deemed to be eligible under the rule; a proposed refinement of the investor disclosure requirement, in light of certain practical considerations; and some comments on the definitions of "foreign brokers" and "foreign securities."

"Qualified Investor": This is to provide strong support for the incorporation of the Securities Exchange Act section 3(a)(54) definition of "qualified investor" with whom non-U.S. broker-dealers may deal under Rule 15a-6. The Proposed Amendments include the types of investors that can make their own decisions as to how, and in what, to invest, as compared to the extremely narrow list of eligible investors in the current rule. The definition includes institutional investors that are in the business of investing (e.g., registered, unregistered and small business investment companies; banks; employee retirement plans whose assets are managed by a plan fiduciary under section 3(21) of ERISA that are certain types of entities) and other investors that Congress has determined are similarly situated, namely, companies , partnerships and natural persons with $25 million in investments (which is higher than a net worth test); and governmental institutions that own or invest $50 million).

An eligible investor for purposes of the rule, however, could also include employee benefit plans that are managed by in-house fiduciaries as defined in Section 3(21) of ERISA, and not just those plans that have "outside" fiduciaries that are certain types of entities. To align with the spirit of the section 3(a)(54) "qualified investor" definition, perhaps only those that own or invest $50 million to equate with the governmental entities' investment amount requirement, should be included as an eligible investor. In addition, the definition could also well include IRAs that have $25 million in investments, again to equate with the natural person's investment amount requirement in section 3(a)(54).

Furthermore, and for completeness, it would be appropriate to include any U.S. person, other than a registered broker-dealer or bank, that acts in a fiduciary capacity for an account of a "qualified investor" or for any expanded definition of an eligible investor under a revised Rule 15a-6. More often than not such investors are, by written agreement, represented by their appointed investment managers (registered with the SEC as an investment adviser or not) who, in turn, place orders with broker-dealers on behalf of their investor client base, as consistent with their clients' investment objectives. This inclusion would mirror the language in proposed Rule 15a-6(4)(vi) that would permit non-U.S broker-dealers to deal with any person that acts in a fiduciary capacity for the account of a foreign resident client. And as noted below, this fiduciary representation of investors also raises some practical considerations relating to the disclosure requirements in the Proposed Amendments.

There is a suggestion in the Release that a qualified investor definition needs to encompass investors that have had prior experience in foreign markets. This should not be the case. The important element is that the definition reflects an appropriate level of investment experience and sophistication, which would include the ability to decide if, and then how best, to access non-U.S. markets. In this same

vein, the Release asks whether the definition should be tailored to include only investors that have demonstrated an appropriate level of transactional activity with U.S. registered or foreign broker-dealers in foreign securities. Such a definition would unnecessarily narrow the scope of investors that can deal directly with non-U.S. broker-dealers. Furthermore, non-U.S. broker-dealers would either be dependent on a subjective test putting them at regulatory compliance/enforcement risk, or an objective test that would be difficult for the SEC to develop and would necessarily be an artificial test of what would constitute sufficient transactional activity in foreign securities. (In this connection, one question might be whether or not transactions in ADRs would qualify under such a test, and if not, why not?). As to U.S. investors previously dealing with non-U.S. broker-dealers in foreign securities transactions, such investors would constitute an unnecessarily small pool, given the current limitations of Rule 15a-6. Such a result would be at odds with the purposes of the Proposed Amendments,

Disclosure Requirements: Some clarification of the language of the disclosure requirement in paragraph 15a-6(a)(3)(i)(D) of the Proposed Amendments would be appropriate. This paragraph requires the foreign broker-dealer to disclose to the qualified investor that the broker-dealer is regulated by a foreign securities authority and not by [the "Commission"], and that, to the extent the foreign broker-dealer receives, delivers or safeguards funds and securities of the qualified investors, the investor is not protected by certain U.S. laws and rules. The rationale for this type of disclosure is clear and appropriate. The language of this section, however, should be revised to address the fact that qualified investors are either necessarily represented by, or may be represented by, fiduciary investment advisers. It would also be helpful if the SEC and its staff were to make clear in its adopting release that a foreign broker-dealer may also describe applicable non-U.S. law protections afforded to qualified investors beyond the required disclosures.

As the SEC and the staff are aware, registered investment companies in the qualified investor definition are necessarily represented by their SEC-registered investment advisers. Representatives of such investment advisers determine what securities to buy or sell and then directly place orders with a foreign broker-dealer for execution on behalf of their investment company clients. And, investment advisers (whether SEC-registered or not) advise and manage other investment companies or funds, such as hedge funds, that are exempt from investment company registration under the federal securities laws. Further, investment advisers also manage accounts of natural persons, ERISA plans and governmental entities. Investment advisers typically aggregate client purchase and sale orders for "bulk" executions, on behalf of various clients, and the underlying clients may differ from trade to trade.

The fiduciary nature of these relationships would require an informed understanding and agreement by the qualified investor as to how and where securities transactions would occur. As previously noted, this fiduciary relationship is appropriately recognized in the Proposed Amendments in proposed Rule 15(a)-6(4) which provides in subparagraph (vi) for the ability of a non-U.S. broker-dealer to deal with a U.S. person acting in a fiduciary capacity so long as the broker-dealer receives a representation that the fiduciary is acting only on behalf of a "foreign resident client." (As an aside, it is not clear if this representation in subparagraph (4)(vi) needs to be in writing. In addition, it is recommended that the phrase "non-U.S. resident client" be used instead of the term "foreign resident client;" the phrase "non-U.S. resident client" would be clearer from the perspective of a non-U.S. broker-dealer.)

Given the foregoing, a suggestion for revising the disclosure requirement is as follows:

> "(D) Discloses to the qualified investor, or to a person acting in a fiduciary capacity on behalf of a qualified investor, that the non-U.S. broker-dealer is regulated by a foreign securities authority and not by the U.S. Securities and Exchange Commission; and solely when the non-U.S. broker-dealer is relying on ….of this section,

> that [certain U.S. law provisions] will not apply to any funds or securities held by the non-U.S. broker-dealer; *or* obtains a representation from a person that acts in a fiduciary capacity on behalf of a qualified investor that it is acting only on behalf of such qualified investors [and that it understands which entity regulates the non-U.S. broker-dealer, and in that certain U.S law provisions do not apply to any funds or securities held]."

There would, of course, be numerous other ways to address the above concerns, so as to provide both more flexibility and compliance guidance towards ensuring that qualified investors, or the fiduciaries of such qualified investors, understand the consequences of dealing with a non-U.S. broker-dealer.

Definitions of "Foreign Broker-Dealer" and "Foreign Securities": The Proposed Amendments modify the definition of a "foreign broker-dealer" for those wishing to take advantage of proposed rule 15a-6(a)(3)(A)(1). Most U.S. broker-dealers maintaining a "rule 15a-6 relationship" with a foreign broker-dealer would want to take advantage of the more practical recordkeeping requirements set forth in subparagraph (3)(A)(1). In such cases, the foreign broker-dealer must conduct a "foreign business," defined to mean the business with qualified investors and foreign resident clients where at least 85% of the aggregate value of the securities purchased or sold in transactions under the Proposed Amendments, calculated in a specific manner is derived from "foreign securities". "Foreign securities, in turn, are defined to include securities issued by a "foreign private issuer" or a foreign government.

It is understandable as a conceptual matter to want to limit U.S. investor trades with non-U.S. broker-dealers primarily to securities that trade outside the U.S. The practicality of performing the 85% calculation is left to other commentators, but I believe that the definitional reference to foreign private issuers may be problematic. That definition is of relevance to issuers in determining if they are subject to Securities Exchange Act periodic reporting requirements, and not to broker-dealers. The facts relevant to meeting the definition are typically only known by issuers. It is not apparent how non-U.S. broker-dealers would identify foreign private issuers, and how they would then run their systems for the 85% test against such a definition. Accordingly, the SEC may wish to reconsider this and reference a more practical definition of "foreign securities." Perhaps "foreign securities" should mean securities that trade, clear and settle outside the United States.

Proposed Rule 15a-6(a)(1)/Unsolicited Trades/Implications of Certain Technology Enhancements: As noted in the Release, non-U.S. broker-dealers would generally not rely on the current unsolicited trade exemption under Rule 15a-6, given the difficulty in monitoring telephone discussions and uncertainty in determining whether trades would, in hindsight, be deemed to be "unsolicited" or not. It may, however, be appropriate for the SEC to consider further this provision, by way of an interpretation or otherwise, to permit an expanded class of investors whose trades would not be solicited by a non-U.S. broker-dealer but who wish to access non-U.S. markets through the systems of such a non-U.S. broker-dealer. More specifically, given the advent of electronic access to markets on a global basis, there are investors who may or may not meet the standards of the "qualified investor" definition and who have an account at a U.S. broker-dealer, and wish only to speak with a representative of the U.S. broker-dealer. The U.S. broker-dealer could facilitate the U.S. investor client's direct access to the electronic systems or connectivity "pipes" that a non-U.S. broker-dealer has to its local markets. In this way, the U.S. broker-dealer would not need to utilize its systems or connectivity "pipes" that, in turn, merely connects to the non-U.S. broker-dealer systems for an electronic execution. With today's systems capabilities, a U.S. investor can be connected directly to systems of a non-U.S. broker-dealer for a fast, local market execution of trades, and not ever be solicited on any per trade basis by a representative of a non-U.S. broker-dealer. The investor would still maintain an account at the U.S. broker-dealer for safeguarding that investor's funds and securities. The SEC and its staff may wish to consider this further, but this should not delay the adoption of the Proposed Amendments, as they may be modified by the comment process, to address many of the current 15a-6 concerns.

Certain Drafting Suggestions: The following drafting suggestions are for various sections of the Proposed Amendments:

- The term "foreign broker-dealer" used throughout the Proposed Amendments should be replaced with the term "non-U.S. broker-dealer." The term "foreign broker-dealer" is not as globally "friendly" as the term "non-U.S broker-dealer." For example, a U.K. broker-dealer firm does not consider itself to be a "foreign" broker-dealer. (The same definition of "foreign broker-dealer" set forth in proposed rule 15a-6(b)(2) can be used for the term "non-U.S. broker-dealer.) The SEC may wish to adopt a similar approach in defining "foreign business" in the Proposed Amendments.

- The first section of proposed rule 15a-6(a)(3) regarding solicited trades should, again for clarity, not only address "inducements" and "attempts" to induce trades by the non-U.S. broker-dealer, but also address the effecting transactions as well. This would address the basic purpose of the rule and would mirror language used in proposed rule 15a-6(a)(1) and (2) concerning unsolicited trades, and research reports, respectively. Thus, the first section of amended Rule 15a-6(a)(3) should read: "The [non-U.S. broker-dealer] induces or attempts to induce *or effects* a purchase or sale of any security…."

- The reference to "has complied" should be changed to "shall comply" in proposed Rule 15a-6(a)(3)(iii)(C), as the SEC and its staff and the U.S. broker-dealer should be concerned about ongoing compliance by the non-U.S. registered broker-dealer.

I appreciate this opportunity to comment on the Proposed Amendments. The SEC and its Staff are to be congratulated on its thoughtful approach to updating Rule 15a-6 in a manner that better reflects U.S. investor needs, while maintaining appropriate investor protections.

If you wish to discuss any of these comments, please do not hesitate to call the undersigned at 646-229-0766.

Very truly yours,

/s/ Peggy C. Willenbucher

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