SHEARMAN & STERLING LLP

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

WWW.SHEARMAN.COM | T +1.212.848.4000 | F +1.212.848.7179

September 12, 2008

Via Courier and by Email to rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attention: Ms. Florence E. Harmon
Acting Secretary

Proposed Rule Change
Exemption of Certain Foreign Brokers or Dealers
File Number S7-16-08

Ladies and Gentlemen:

This letter in response to the request for comments by the Commission in respect of the proposed modifications to Rule 15a-6 under the Securities Exchange Act of 1934, as amended (the "Rule" or "Rule 15a-6", and, as it is proposed to be amended, the "Proposed Rule"). We appreciate the opportunity to comment on the Proposed Rule, and the efforts of the Commission to amend and modernize the Rule.

In our experience, Rule 15a-6 has been particularly valuable because it has been able to be adapted by both affiliated and unaffiliated parties seeking to engage in a wide array of securities activities, including the dissemination of research, trading involving non-U.S. exchanges and quotation systems, and investment banking transactions such as mergers, acquisitions, and private placement of securities. We believe that changes to Rule 15a-6 should be made with a view to maintaining this flexibility so as to best promote access to non-U.S. securities and markets.

In this regard, we favor the Proposed Rule. We believe that the Proposed Rule if adopted will expand access to non-U.S. securities and markets, and will reduce certain of the administrative burdens associated with compliance with the existing Rule.

SHEARMAN & STERLING LLP IS A LIMITED LIABILITY PARTNERSHIP ORGANIZED IN THE UNITED STATES UNDER THE LAWS OF THE STATE OF DELAWARE, WHICH LAWS LIMIT THE PERSONAL LIABILITY OF PARTNERS.

I. COMMENTS RELATING TO THE PROPOSED DEFINITIONS OF "QUALIFIED INVESTOR", "FOREIGN BROKER OR DEALER", AND "FOREIGN BUSINESS"

Comments relating to the definition of "qualified investor".

The use of the qualified investor standard found at Section 3(a)(54) of the Securities Exchange Act of 1934, as amended (the "Act"), is an improvement of the Rule inasmuch as it broadens the category of persons that may deal directly with non-U.S. broker-dealers. Staff should consider a simpler and more definitive standard: defining a qualified investor to be any person, including any investment adviser (whether or not registered under the Investment Advisers Act of 1940), that owns or controls (or, in the case of an investment adviser, has under management) in excess of $25,000,000 in aggregate financial assets.

In the alternative, we believe, that the standard as proposed by the Commission requires clarification at certain points.

The Commission should clarify that a trust that owns or invests not less than $25,000,000 will be viewed as a qualified investor for purposes of the Rule.

Section 3(a)(54)(A)(vi) of the Act defines a qualified investor to include "any trust whose purchases of securities are directed by a person described in clauses (i) through (v) …." At Section 3(a)(54)(A)(xi) of the Act, the qualified investor standard is defined to include "any corporation, company or partnership that owns and invests on a discretionary basis not less than $25,000,000 …."

Nowhere in the Proposing Release is it stated that trusts owning and investing $25,000,000 or more on a discretionary basis are considered "companies", or are otherwise qualified investors for purposes of the Rule's proposed definition. We request that the Commission clarify that, for purposes of interpreting the qualified investor standard, a trust may be considered a "company".

In our view, there is no reason to distinguish between partnerships, limited liability corporations, corporations, natural persons, and trusts for purposes of the Rule.[1]

---

1 We note that the Commission has previously taken a broad reading of the term "company" in respect of this Section. In Release 46745, the Commission proposed the following interpretation of that term: "for the

The Commission should clarify that a fiduciary, managing investments of not less than $25,000,000, is a qualified investor for purposes of the Rule.

Section 3(a)(54)(A)(xi) extends the definition of qualified investor to any corporation, company, or partnership that owns and invests on a discretionary basis not less than $25,000,000. As noted above, the Commission has, in the past, taken a broad reading of the word "company" for purposes of this Section. Consistent with past Staff guidance,[2] the Commission should clarify that any fiduciary managing $25,000,000 or more on a discretionary basis will be deemed to be a qualified investor for these purposes. We believe that if the Commission is willing to use the $25,000,000 threshold as an indicator of investment experience and sophistication for these purposes, then the Commission should similarly be willing to view a fiduciary – who is more likely to be a professional investor (or investment manager) than other entities – as a qualified investor for purposes of the Rule.

The Commission should work with State authorities to seek uniform exemption from State broker-dealer regulation for non-U.S. broker-dealers acting in reliance on the Rule.

---

purposes of the GLBA provisions in the Exchange Act, we interpret the term 'company' as used in the definition of 'qualified investor' in subsection (xi) of Section 3(a)(54) to have a broad meaning that encompasses any other type of entity not otherwise specifically listed in Section 3(a)(54). We believe that interpreting the definition of qualified investor in this way is an appropriate way to enhance legal certainty for entities that are not as precisely described as others in the list of entities expressly listed as 'qualified investors.'" *See* Commission Release 46745, "Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934" (October 30, 2002), at text accompanying footnote 70. The Commission adopted this broad view at Release 47634, "Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934" (February 13, 2003) at the text accompanying footnotes 62 through 71.

[2] *See* Letter re: Securities Activities of U.S.-Affiliated Foreign Dealers (April 9, 1997) (commonly known as the "Nine Firms' Letter"), which established as a major U.S. institutional investor any 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 financial assets.

The definition of qualified investor encompasses both institutions and natural persons. Consequently, one significant effect of the Proposed Rule will be the ability of non-U.S. broker-dealers to deal with very high net worth individuals in reliance on the Rule. While the laws of the various U.S. States (such term including for this purpose territories and the District of Columbia) generally exempt from broker-dealer registration any person without a place of business in the jurisdiction if its only transactions effected within the jurisdiction are with institutional investors, such an exemption is generally not available for non-U.S. broker-dealers dealing with very high net worth individuals. Consequently, the application of many States' laws following the adoption of the Proposed Rule will frustrate the purpose of the Commission in that adoption.

In this regard, we also note that the definition of "institutional investor" found in the Uniform Securities Act of 2002 (the "2002 Act") specifically includes any "major U.S. institutional investor", as that term is defined for purposes of the Rule. The adoption of the Proposed Rule will therefore create a situation where the statutes of those States that have adopted that provision of the 2002 Act will, until amended, contain a reference to the Rule's superseded definition.

We therefore believe that the adoption of the Proposed Rule does not end the Commission's task in seeking to achieve the purposes underlying liberalization of the Rule. Consequently, we recommend that the Commission expressly state an intention to continue working with State authorities, and with the North American Securities Administrators Association ("NASAA"), to achieve a consistent, uniform exemption from broker-dealer registration for non-U.S. broker-dealers. In this regard, we also believe that, in the absence of cooperation from State authorities and NASAA, the purposes of the Rule and the needs and opportunities of U.S. investors in a rapidly expanding global marketplace warrant consideration of some form of preemption.

Definition of "foreign broker or dealer".

The Commission should clarify that a non-U.S. bank may rely on the Rule notwithstanding that it has a branch or agency in the United States.

The Proposing Release notes (at footnote 50) that the definition of qualified investor includes any non-U.S. bank. The Proposing Release does not, however, clarify that a non-U.S. bank that has a permanent presence in the United States through a branch, agency or representative office will qualify as a foreign broker-dealer for purposes of the Rule.

We believe that it would defeat the purpose of the Rule to disqualify any non-U.S. bank with a U.S. branch, agency or representative office from the definition of "foreign broker or dealer". It is consistent with other aspects of U.S. regulation, and with the statement of the Commission found at footnote 50 of the Proposing Release, to treat branches, agencies and representative offices of a non-U.S. bank as separate entities for certain purposes, and we believe that the Commission should clarify on adoption that any non-U.S. branch or agency of a non-U.S. bank is not a person resident in the United States for purposes of the Proposed Rule.

The Commission should consider relaxing the proposal that a non-U.S. broker-dealer must be regulated for conducting securities activities, including the specific activities for which the Rule is relied on.

Under the Proposed Rule, a non-U.S. broker-dealer will, in order to conduct business in accordance with paragraph (a)(3) of the Rule, be required to be regulated for conducting securities activities, including the specific activities in which the foreign broker or dealer engages with the qualified investor. Such regulation must occur outside the United States by a foreign securities authority.

We believe that whether a person is specifically regulated for certain activities by a foreign securities authority is a consideration that will be subjective. For example, a non-U.S. securities authority may not specifically regulate certain non-securities products (swaps, for example), but may require that all of its members maintain written policies and procedures with respect to each business that they conduct, which policies and procedures form part of that authority's examination program. Though we believe that this may rightly constitute specific regulation, only through detailed examination will the Commission be able to make that determination. We are therefore concerned that the standard will give rise to a patchwork of views and practices as to what is considered regulation for this purpose. Interpretive questions will place the Commission and its Staff in the awkward position of evaluating the sufficiency of the actions (or lack thereof) of non-U.S. authorities.

Finally, many entities seek to rely on Rule 15a-6 notwithstanding the fact that their activities do not rise to the level of "broker" or "dealer" in their home countries, and notwithstanding the fact that their activities, if conducted in the United States, might or might not require registration under Section 15 of the Act. A non-U.S. communications network, for example, may conduct a business that bears virtually none of the attributes of broker-dealer activity, but may seek to receive transaction-based compensation. Such an entity may as a matter of caution seek to conduct activities under Rule 15a-6, notwithstanding that it is unregulated by a foreign securities authority for the activities that it seeks to conduct in the United States or with U.S. persons.

Consequently, we believe that, when seeking to conduct business under Rule 15a-6(a)(3), a non-U.S. broker-dealer should be a person that lawfully conducts the businesses that it seeks to conduct in accordance with the Rule.

Definition of "foreign business" and "foreign securities".

Under the Proposed Rule, reliance on Sections (a)(3)(iii)(A)(1) and (a)(4)(vi) requires that the non-U.S. broker-dealer conduct a "foreign business". The Proposed Rule defines that term to mean the business of a foreign broker-dealer where at least 85% of the aggregate value of the securities purchased or sold in transactions conducted pursuant to both paragraphs (a)(3) and (a)(4)(vi) of the Proposed Rule is derived from transactions in "foreign securities". The term "foreign security" is, for this purpose, defined with reference to the status of the issuer of the security as a foreign private issuer.

<u>The use of the "foreign private issuer" definition will require ongoing monitoring and analysis that is unworkable</u>.

We believe that the "foreign business" test established by the Proposed Rule may be impossible to administer. Specifically, the reference to the definition of "foreign private issuer" creates a circumstance where, in order to be in compliance with the Proposed Rule, a non-U.S. broker-dealer will need to monitor each issuer whose the securities it has sold in this connection in order to ensure: (a) that 50% or less of the outstanding voting securities of such issuer are not directly *or indirectly* owned of record by residents of the United States, (b) that the majority of executive officers and directors are not U.S. residents or citizens, (c) that 50% or fewer of the assets of the issuer are in the United States, and (d) that the business of the issuer is not principally administered in the United States.

Each of these standards relies on maintaining current information that may only be available with the cooperation of the issuer, and requires analysis and interpretation that will lead to inadvertent noncompliance. Further, even assuming that the monitoring of these data can be automated, such automation would be an enormous task, and would be enormously costly to develop and maintain.

We have had the opportunity to review the comment of Mr. Howard Meyerson, General Counsel of Liquidnet. Mr. Meyerson suggests that a security be deemed to be a "foreign security" for purposes of the Proposed Rule on the basis of where the security trades and where the security settles. While we generally support this view in respect of transactions taking place on an

exchange or through the facilities of a quotation medium, we believe that the definition of "foreign security" should also take into account off-exchange transactions, such as private placements of securities. In respect of these transactions, we propose that a foreign security should be a security of an issuer with its principal place of business outside the United States, which is not a reporting company under the Act.

We believe that this proposed standard is efficient and appropriate. We believe that it is efficient because it is based on criteria that are relatively easy to assess in comparison to the analysis of whether an issuer is a foreign private issuer. We believe it is appropriate because, in the case of an exchange transaction, a transaction that takes place and settles outside the United States is presumptively a non-U.S. transaction. In the case of transactions taking place on other than an exchange, the non-U.S. character of the issuer and its securities should be sufficient to establish the basis of a foreign business for purposes of the Rule.

The Commission should clarify that a GDR, ADR or other participatory receipt representing an interest in a non-U.S. security is a "foreign security".

The definition of "foreign security" for purposes of the Proposed Rule includes any derivative instrument on another of the enumerated categories of "foreign security". We believe that on adoption, the Commission should clarify that a global depositary receipt ("GDR"), American depositary receipt ("ADR"), or other participatory receipt representing an interest in a non-U.S. security is included in the definition of "foreign security" for these purposes.

In general, we take this view because it improves the flexibility of the Rule as regards the participation of non-U.S. broker-dealers in global distributions of securities. Many global capital markets transactions are conducted on behalf of non-U.S. issuers by a global syndicate comprised of U.S. and non-U.S. managers. Such offerings are regularly "lead managed" in accordance with the laws of the issuer's home jurisdiction by one or more financial institutions form that jurisdiction. That the offering is one of ADRs or GDRs should not cause these transactions to be in other than a "foreign security" for purposes of the Rule.

II. COMMENTS RELATING TO PROPOSED RULES 15a-6(a)(2) AND 15a-6(a)(3)

Rule 15a-6(a)(2) should not be limited to transactions in securities covered by the distributed research.

Proposed Rule 15a-6(a)(2) would specifically state (like the Rule) that a non-U.S. broker-dealer that has a relationship with a registered broker or dealer that satisfies the requirements of paragraph (a)(3) must effect "any transactions in securities discussed in the research" reports apursuant to the provisions of paragraph (a)(3).

We are concerned that the structure of paragraph (a)(2) may suggest that, where a non-U.S. broker-dealer distributes research into the United States, it may only effect transactions in the securities discussed in such research. We believe that the Commission should clarify that a non-U.S. broker-dealer that distributes research into the United States may effect transactions in any security in reliance on (and in compliance with) Rule 15a-6(a)(3).

Further, where a non-U.S. broker-dealer distributes research into the United States in accordance with Rule 15a-6(a)(2), that broker-dealer, if contacted by a qualified investor, should not be prohibited from effecting transactions in any security. Given that Rule 15a-6(a)(2) does not permit the non-U.S. broker-dealer to follow up in respect of research distributed into the United States, and given that Rule 15a-6(a)(2) does not permit the non-U.S. broker-dealer to recommend its own services to effect trades in any security, any contact between a non-U.S. broker-dealer and a qualified investor will have most of the indications of an unsolicited transaction.

The Commission should clarify that Rule 15a-6(a)(3) may be used to effect "soft dollar" and other directed commission arrangements.

Pursuant to Rule 15a-6(a)(2)(iv), Rule 15a-6(a)(2) may not be used to provide research to U.S. persons pursuant to any express or implied understanding that those U.S. persons will direct commission income to the foreign broker or dealer. However, as noted above, the distribution of research by a non-U.S. broker-dealer may occur pursuant to either Section (a)(2) or (a)(3) of the Rule. Section (a)(3) of the Rule has no similar prohibition on the establishment of directed commission agreements, and we recommend that the Commission clarify on adoption that the Proposed Rule does not prohibit the establishment of such arrangements.

The Commission should indicate that relief provided in the LiquidityHub Letter applies to the Proposed Rule.

Staff of the Commission has indicated that the adoption of the Proposed Rule will supersede prior interpretive and "no action" guidance. Given this position, we believe that certain relief

provided by Commission Staff in its November 2007 letter regarding LiquidityHub Limited[3] should be adopted by the Commission as applicable to the Proposed Rule. Specifically, that letter stated that Staff would not recommend enforcement action if LiquidityHub Limited, a non-U.S. entity, in reliance on Rule 15a-6(a)(3), entered into agreements seeking to ensure compliance with multiple financial institutions, some of which were themselves non-U.S. broker-dealers effecting transactions in accordance with Rule 15a-6(a)(3). In granting this relief, Staff's letter stated:

> "[w]e note in particular your representation that, where the Participating Dealer is a Registered Broker-Dealer, it will serve as LiquidityHub's effecting broker-dealer for purposes of Rule 15a-6(a)(3). We also note your representation that, where the Participating Dealer is a Foreign Broker-Dealer, LiquidityHub will confirm that such Foreign Broker-Dealer has made arrangements with its effecting broker-dealer to also serve as the effecting broker-dealer for LiquidityHub for purposes of Rule 15a-6(a)(3)."

We believe that the relief granted in the LiquidityHub Letter remains a prudent and conservative interpretation of the Rule, and we encourage the Commission to adopt this position on approval of the Proposed Rule.

The Commission should clarify that settlement of transactions under Rule 15a-6(a)(3) may occur through the facilities of the non-U.S. broker-dealer.

We believe that, as part of the adoption of the Proposed Rule, the Commission should clarify that the settlement of transactions taking place under paragraph (a)(3) of the Rule may occur directly between the non-U.S. broker-dealer and the qualified investor, as is currently permitted for major U.S. institutional investors under the Nine Firms' Letter. We believe that this is an important aspect of promoting efficient cross-border securities business. In our experience, institutional customers customarily settle and arrange custody through their custodial banks.

A person visiting the United States under Rule 15a-6(a)(3) for more than 180 days in any given year should be able to do so with the chaperoning of a U.S.-registered broker-dealer.

Generally, we favor the elimination of the "chaperoning" requirement, and we similarly concur with the action to define "visit" as one or more trips to the United States over a calendar year that

---

[3] *See* Staff letter to Charles S. Gittleman and Russell D. Sacks (November 28, 2007) (the "LiquidityHub Letter").

do not last more than 180 days in the aggregate. However, we believe that there may be circumstances, particularly in the investment banking context, in which a non-U.S. broker-dealer may seek to visit the United States for more than 180 days in a particular year. We believe that such a person should be able to do so with the chaperoning of a U.S.-registered broker-dealer, provided that such U.S.-registered broker-dealer intermediates any resulting transaction in accordance with paragraph (a)(3) of the Proposed Rule. In general, we believe that this proposal maintains the Rule's flexibility across the different kinds of securities activities that may form the basis of cross-border business.

III. CONCLUSION

As noted above, we appreciate the opportunity to comment on the Proposed Rule, and the efforts of the Commission to amend and modernize the Rule. We similarly approve of and favor the direction that the Commission has taken in the Proposed Rule. We hope that the comments provided will assist the Commission in its consideration and in the adoption of the Proposed Rule, and we encourage the Commission to continue to work to improve the flexibility of the Rule, and thereby to improve the access of qualified investors to non-U.S. investment opportunities.

As always, we are available to discuss the Proposed Rule, or any issue raised in this letter, at any time. In that respect, the undersigned can be reached at (212) 848-4000.

Sincerely,

Charles S. Gittleman

Russell D. Sacks