

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-60194; International Series Release No. 1311)

June 30, 2009

Order under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption from Exchange Act Section 6(h)(1) for Certain Persons Effecting Transactions in Foreign Security Futures and under Exchange Act Section 15(a)(2) and Section 36 Granting Exemptions from Exchange Act Section 15(a)(1) and Certain Other Requirements

I. Introduction and Background

The Commodity Futures Modernization Act of 2000 (“CFMA”)¹ authorized the trading of futures on individual stocks and narrow-based stock indexes, *i.e.*, security futures.² The CFMA defined security futures products³ as “securities” under the Exchange Act,⁴ the Securities Act of 1933 (“Securities Act”),⁵ the Investment Company Act of 1940,⁶ and the Investment Advisers Act of 1940,⁷ and as contracts of sale for future delivery under the CEA.⁸ Accordingly, the regulatory framework established by the CFMA provides the Securities and Exchange Commission (“Commission”) and the Commodity Futures Trading Commission (“CFTC”) with joint jurisdiction over security futures products. Futures on broad-based security indexes

¹ Pub. L. No. 106-554, 114 Stat. 2763 (2000).

² A security future is defined in Section 3(a)(55)(A) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. 78c(a)(55)(A), and Section 1a(31) of the Commodity Exchange Act (“CEA”), 7 U.S.C. 1a(31).

³ A security futures product is defined as a security future or any put, call, straddle, option, or privilege on any security future. *See* Section 3(a)(56) of the Exchange Act, 15 U.S.C. 78c(a)(56), and Section 1a(32) of the CEA, 7 U.S.C. 1a(32).

⁴ Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10).

⁵ Section 2(a)(1) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. 77b(a)(1).

⁶ Section 2(a)(36) of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(36).

⁷ Section 202(a)(18) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(18).

⁸ Section 1a(31) of the CEA, 7 U.S.C. 1a(31).

(security indexes that are not narrow-based), and options on such futures, remain under the exclusive jurisdiction of the CFTC. To distinguish between futures on narrow-based security indexes and futures on broad-based security indexes, the CFMA also amended the CEA and the Exchange Act to add an objective definition of a narrow-based security index.⁹ This definition applies both to security indexes that underlie futures contracts listed and traded in the United States and those that underlie futures contracts traded on or subject to the rules of a foreign board of trade.¹⁰

The CFMA also added Section 6(h)(1) to the Exchange Act,¹¹ which makes it unlawful for any person to effect transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act.¹² Because of this prohibition, U.S. persons are currently unable to enter into

⁹ See Section 1a(25) of the CEA, 7 U.S.C. 1a(25), and Section 3(a)(55)(B) and (C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B) and (C). See also Rules 3a55-1 and 3a55-2 under the Exchange Act, 17 CFR 240.3a55-1 and 240.3a55-2; Rules 41.11, 41.12, and 41.13 under the CEA, 17 CFR 41.11, 41.12, and 41.13; and Securities Exchange Act Release No. 44724 (August 20, 2001), 66 FR 44490 (August 23, 2001).

¹⁰ See Rule 3a55-3 under the Exchange Act, 17 CFR 240.3a55-3; Rule 41.13 under the CEA, 17 CFR 41.13; and Securities Exchange Act Release No. 44724, supra note 9.

¹¹ 15 U.S.C. 78f(h)(1).

¹² 15 U.S.C.78o-3(a). The Exchange Act and the CEA also require that any security underlying a security future listed on a national securities exchange or national securities association, including each component security of a narrow-based security index, be registered under Section 12 of the Exchange Act. See Section 6(h)(3)(A) of the Exchange Act, 15 U.S.C. 78f(h)(3)(A), and Section 2(a)(1)(D)(i)(I) of the CEA, 7 U.S.C. 2(a)(1)(D)(i)(I). Accordingly, if the securities that compose foreign security indexes listed on or subject to the rules of a foreign board of trade are not registered under Section 12 of the Exchange Act, absent relief, a national securities exchange or national securities association would not be able to list and trade a security future based on such an index. The Exchange Act and CEA also require that securities underlying security futures be equity securities. Section 6(h)(3)(D) of the Exchange Act, 15 U.S.C. 78f(h)(3)(D), and Section 2(a)(1)(D)(i)(III) of the CEA, 7 U.S.C. 2(a)(1)(D)(i)(III). The Commission and the CFTC have exercised their authority pursuant to Sections 1a(25)(B)(vi) and 2(a)(1)(D) of the CEA and Sections 3(a)(55)(C)(vi), 3(b), 6(h), 23(a),

contracts for narrow-based index or single stock futures traded on or subject to the rules of a foreign board of trade.

The Food, Conservation and Energy Act of 2008 requires the Commission, the CFTC, or both, as appropriate, to take action under their existing authorities to permit, by June 30, 2009, the trading of futures on certain security indexes by resolving issues related to foreign security indexes.¹³ The exemption the Commission is issuing today fulfills this statutory directive on the part of the Commission.

The Commission understands that institutional investors could use futures on foreign securities and foreign security indexes for, among other things, risk management and asset allocation. In particular, in connection with the Commission's rulemaking in 2001 relating to the definition of narrow-based security index and exclusions from that definition,¹⁴ commenters expressed strong views that U.S. investors, particularly institutional investors, need to be able to trade in futures on foreign security indexes for risk management, asset allocation, and other purposes, and would suffer substantial adverse impact and competitive disadvantage with respect to non-U.S. investors if they could not trade such products.¹⁵

and 36 of the Exchange Act, to adopt rules to allow security futures on debt securities and debt securities indexes under certain conditions. 7 U.S.C. 1a(25)(B)(vi) and 2(a)(1)(D) and 15 U.S.C. 78c(a)(55)(C)(vi), 78c(b), 78f(h), 78w(a), and 78mm. See Securities Exchange Act Release No. 54106 (July 6, 2006), 71 FR 39534 (July 13, 2006).

¹³ Pub. L. No. 110-246, Sec. 13, 106, 122 Stat. 1651, 2197 (2008), reprinted in Notes to 7 U.S.C.A. Sec. 2.

¹⁴ See Securities Exchange Act Release Nos. 44288 (May 9, 2001), 66 FR 27560 (May 17, 2001), and 44724, supra note 9.

¹⁵ See e.g., Comment Letters from Barclay's Global Investors, N.A., dated July 17, 2001; Futures Industry Association, dated July 18, 2001; General Motors Investment Management Corporation, dated June 11, 2001; The Goldman Sachs Group and its subsidiaries, dated July 18, 2001; and The Montreal Exchange, dated June 14, 2001 (cited in Securities Exchange Act Release No. 44724, supra note 9).

Under the federal securities laws, a primary mandate of the Commission is investor protection. In the Commission's view, the federal securities laws are intended to protect U.S. investors and capital markets (including purchasers in those markets, whether U.S. or foreign).¹⁶ For instance, in protecting the U.S. capital markets and investors purchasing in those markets, Congress and the Commission have recognized that the ongoing dissemination of accurate information by issuers about themselves and their securities is essential to the effective operation of the trading markets. The Exchange Act and underlying rules have established a system of ongoing disclosure about issuers that have offered securities to the public, or that have securities that are listed on a national securities exchange or are broadly held by the public.¹⁷ A public issuer's Exchange Act record provides the basic source of information to the market and to potential purchasers regarding the issuer and its management, business, financial condition, and prospects.¹⁸

¹⁶ For example, under the "territorial approach" to Section 5 of the Securities Act, the registration of securities under the Securities Act is intended to provide that protection to U.S. markets and U.S. investors. Further, in order to "protect investors and securities markets," under the Commission's territorial approach to Section 15 of the Exchange Act, absent an exemption, broker-dealer registration is generally required by "foreign broker-dealers that, from outside the United States, induce or attempt to induce trades by any person in the United States." See Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013 (July 18, 1989) at 30017.

¹⁷ The Exchange Act rules require public issuers to make periodic disclosures at annual and quarterly intervals, with other important information reported on a more current basis. Because of the enactment of the Sarbanes-Oxley Act, 15 U.S.C. 7201 et seq., and the Commission's subsequent rulemaking and interpretive actions, the disclosure included in issuers' Exchange Act filings has been enhanced significantly. See, e.g., Securities Act Release Nos. 8124 (August 28, 2002), 67 FR 57276 (September 9, 2002); 8220 (April 9, 2003), 68 FR 18788 (April 16, 2003); 8238 (June 5, 2003), 68 FR 36636 (June 18, 2003); and 8400 (March 16, 2004), 69 FR 15594 (March 25, 2004). See also Foreign Issuer Reporting Enhancements, Securities Exchange Act Release No. 58620 (September 23, 2008), 73 FR 58300 (October 6, 2008).

¹⁸ Because an issuer's Exchange Act reports and other publicly available information form the basis for the market's evaluation of the issuer and the pricing of its securities,

In many circumstances, however, the reasonable expectation of participants in the global markets justifies reliance on laws applicable in jurisdictions outside the U.S. to establish requirements for transactions effected offshore. In this context, this “territorial approach” generally recognizes the primacy of the laws in which a market is located.¹⁹ Thus, the Exchange Act periodic reporting requirements for issuers, including foreign issuers, with securities traded in U.S. markets, do not extend to securities of foreign issuers traded only in foreign markets if such issuers are not otherwise subject to Exchange Act reporting requirements. The Commission historically has sought to balance the information needs of investors with the public interest served by opportunities to invest in a variety of securities, including foreign securities, and believes that such an approach is appropriate in the context of permitting certain persons to engage in security futures transactions involving foreign securities.

Generally, Section 36 of the Exchange Act²⁰ authorizes the Commission – by rule, regulation, or order – to conditionally or unconditionally exempt any person, security, transaction (or any class or classes of persons, securities, or transactions) from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest and is consistent with the protection

investors in the secondary market use that information in making their investment decisions.

¹⁹ See Securities Act Release No. 6863 (April 24, 1990), 55 FR 18306 (May 2, 1990) (“Regulation S Adopting Release”). This territorial approach to the application of the registration provisions, however, does not affect the broad reach of the antifraud provisions of the federal securities laws. As the Commission noted in the Regulation S Adopting Release, “[t]he antifraud provisions have been broadly applied by the courts to protect U.S. investors and investors in U.S. markets where either significant conduct occurs within the United States ... or the conduct occurs outside the United States but has a significant effect within the United States or on the interests of U.S. investors....” *Id.* at 18308-18309.

²⁰ 15 U.S.C. 78mm.

of investors. As discussed more fully below, pursuant to Section 36 the Commission is exempting, under certain conditions, from Section 6(h)(1) of the Exchange Act certain persons that effect transactions in security futures overlying foreign securities traded on or subject to the rules of a foreign board of trade. All other applicable provisions of the federal securities laws, including the antifraud provisions, will continue to apply to such transactions.

In addition, as discussed more fully below, the Commission is exempting certain foreign brokers or dealers from the registration requirements of Section 15(a)(1) of the Exchange Act and certain other requirements. Such foreign brokers or dealers remain subject to all other applicable provisions of the federal securities laws, including, without limitation, Section 10(b) of the Exchange Act²¹ and Rule 10b-5 thereunder.²² The Commission is granting the exemption pursuant to Section 15(a)(2) of the Exchange Act (which authorizes the Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, to conditionally or unconditionally exempt from Section 15(a)(1) of the Exchange Act any broker or dealer or class of brokers or dealers specified in such rule or order) and Section 36 of the Exchange Act, in order to facilitate transactions contemplated by the exemption from Section 6(h)(1) of the Exchange Act.

II. Exemption from Section 6(h)(1) of the Exchange Act

The Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant an exemption from Section 6(h)(1) of the Exchange Act to permit certain persons to effect transactions in certain foreign security futures on foreign boards of trade. Specifically, the exemption permits, under certain conditions specified below, the following persons to effect transactions in security futures that are traded on or subject to the

²¹ 15 U.S.C. 78j(b).

²² 17 CFR 240.10b-5.

rules of a foreign board of trade: (1) qualified institutional buyers (“QIBs”) as defined in Rule 144A under the Securities Act;²³ (2) persons that are not U.S. persons under Rule 902 of Regulation S of the Securities Act (“non-U.S. persons”);²⁴ (3) registered brokers or dealers that effect transactions on behalf of QIBs or non-U.S. persons; and (4) banks, as defined in Section 3(a)(6) of the Exchange Act,²⁵ acting pursuant to an exception or exemption from the definition of “broker” or “dealer” in Sections 3(a)(4)(B), 3(a)(4)(E), or 3(a)(5)(C) of the Exchange Act or the rules thereunder (“Eligible Bank”),²⁶ to effect transactions on behalf of QIBs or non-U.S. persons.

As described more fully below, the exemption permits such persons to effect transactions in security futures that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act, under the following conditions:

Types of Security Futures.

- If the security future is on a single security:
 - The underlying security must be (1) issued by a foreign private issuer and have its primary trading market outside the U.S., or (2) a note, bond, debenture, or evidence of indebtedness (“debt”) security issued or guaranteed by a foreign government that is eligible to be registered with the Commission under Schedule B of the Securities Act.²⁷

²³ See Rule 144A(a)(1), 17 CFR 230.144A(a)(1).

²⁴ See Rule 902(k) of Regulation S, 17 CFR 230.902(k).

²⁵ 15 U.S.C. 78c(a)(6).

²⁶ 15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78c(a)(4)(E), or 15 U.S.C. 78c(a)(5)(C).

²⁷ See Schedule B, 15 U.S.C. 77aa.

- If the security future is on a narrow-based security index:
 - At least 90 percent of the underlying securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, must be (1) issued by foreign private issuers where the primary trading market of each such underlying security is outside the U.S., or (2) debt securities issued or guaranteed by a foreign government that are eligible to be registered with the Commission under Schedule B of the Securities Act;²⁸ and
 - No more than 10 percent of the number and weighting of securities in the index at the time of the transaction can fail to meet the above criteria, and the issuers of such securities must be required to file reports with the Commission pursuant to Section 13 or Section 15(d) of the Exchange Act.²⁹

Foreign Exchange.

- The transaction must be effected on, or be subject to the rules of, an exchange or contract market that is not required to register with the Commission under Section 5 of the Exchange Act.³⁰

Clearance and Settlement Outside the U.S.

- The security future must not result in physical delivery in the U.S. of the securities underlying the contract and must be cleared and settled outside the U.S.; and
- A position in the security future must not be able to be closed or liquidated by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or 15A of the Exchange Act, respectively.

²⁸ Id. See also infra notes 46-51 and accompanying text.

²⁹ 15 U.S.C. 78m and 78o(d).

³⁰ See infra notes 52-53 and accompanying text.

A. Types of Persons Covered by the Exemption

The Commission believes that it is necessary and appropriate in the public interest and for the protection of investors to limit the persons who may rely on this exemption because it is possible that the securities underlying a foreign security future may not be registered under Section 12 of the Exchange Act. For this reason, only the following persons are exempt from Section 6(h)(1) of the Exchange Act:

- QIBs;
- Non-U.S. persons;
- Brokers or dealers registered under Section 15(b) of the Exchange Act³¹ to the extent that they effect transactions on behalf of QIBs or non-U.S. persons; and
- Eligible Banks³² to the extent that they effect transactions on behalf of QIBs or non-U.S. persons.³³

For purposes of this exemption, a broker or dealer or Eligible Bank that effects transactions on behalf of a QIB or a non-U.S. person engaged in trading security futures must reasonably believe that such person is a QIB or a non-U.S. person.³⁴

³¹ A broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act may rely on this exemption to engage in transactions in foreign security futures to the same extent as a broker or dealer registered with the Commission pursuant to Section 15(b)(1) of the Exchange Act. See infra notes 57-68 and accompanying text.

³² See supra note 26 and accompanying text.

³³ A broker or dealer or Eligible Bank acting for its own account would not be able to rely on the exemption in this order unless such broker, dealer, or Eligible Bank is a QIB in its own right.

³⁴ See Rule 144A under the Securities Act, 17 CFR 230.144A, for certain non-exclusive means to satisfy this condition for QIBs.

As discussed above,³⁵ the registration requirements under Section 12 of the Exchange Act, together with the reporting requirements under Section 13 of the Exchange Act, underlie the full disclosure regime administered by the Commission. These registration and reporting requirements are intended to benefit and protect all investors, both institutions and individual investors.

The Commission nevertheless believes that subject to certain conditions, it is appropriate to permit certain sophisticated investors to trade security futures based on securities of foreign private issuers that are not subject to the reporting requirements of the Exchange Act. In particular, the Commission believes that, with regard to transactions in security futures based on foreign security indexes that may include unregistered securities of foreign private issuers, some of which may be non-reporting issuers, QIBs are sufficiently sophisticated and have enough resources to identify the information that they require to make their investment decisions and to obtain that information, and to engage in transactions not subject to the registration requirements of the U.S. securities laws.³⁶ The Commission also believes it is appropriate to exempt non-U.S. persons from Section 6(h)(1) of the Exchange Act because such persons do not have the expectation that the U.S. securities laws would apply to their transactions in such security futures traded on non-U.S. boards of trade.

The Commission reminds market participants that, absent registration under the Securities Act, when a QIB or non-U.S. person engages in a transaction pursuant to this

³⁵ See supra notes 16-19 and accompanying text.

³⁶ For certain purposes, QIBs have been deemed to be within the classes of persons that have such knowledge and experience that they are capable of fending for themselves and thus do not need the full protections of the registration provisions of the Securities Act nor the benefits of the full issuer reporting provisions of the Exchange Act. See Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145, Securities Act Release No. 6862 (April 23, 1990), 55 FR 17933 (April 30, 1990) (“Rule 144A Adopting Release”). See also infra note 39.

exemption, the offer and sale of the security future must be exempt from such registration.³⁷ The statutory exemption from registration in Section 3(a)(14) of the Securities Act is unavailable for offers and sales of security futures that are not cleared by a registered clearing agency or listed on a registered national securities exchange.³⁸ The offer and sale of the security future must, therefore, be made in reliance on another exemption from registration, such as the exemption in Section 4(2) of the Securities Act for offerings not involving public offerings³⁹ or the safe harbor provisions of Regulation D or Regulation S, provided the conditions of those safe harbors, including the restrictions on general solicitation and general advertising, are satisfied.⁴⁰

³⁷ In addition, if the offer or sale of a security future is by or on behalf of the issuer of the underlying security, an affiliate of the issuer of the underlying security, or an underwriter, the offer or sale of the security future would be an offer or sale of the underlying security as well, as to which the registration provisions of the Securities Act would apply, unless an available exemption existed. See Section 2(a)(3) and Section 5 of the Securities Act, 15 U.S.C. 77b(a)(3) and 77e. See also Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Securities Act Release No. 8107 (June 21, 2002), 67 FR 43234 (June 27, 2002).

³⁸ 15 U.S.C. 77c(a)(14).

³⁹ Transactions that do not involve any public offering are exempt from federal registration under Section 4(2) of the Securities Act. The Securities Act does not define these transactions. The U.S. Supreme Court, however, set the basic criteria for the Section 4(2) exemption in SEC v. Ralston Purina Co., 346 U.S. 119 (1953). The Court indicated that the application of the non-public offering exemption depended on whether the offerees were able to fend for themselves and had access to the same kind of information that would be disclosed in registration. The Court noted that such persons, by virtue of their knowledge, would not need to rely on the protections afforded by registration. See Securities Act Release No. 8041 (December 19, 2001), 66 FR 66839 (December 29, 2001) at text accompanying note 22. In adopting Rule 144A (which is a resale exemption from registration) in 1990, the Commission determined that QIBs were in the category of persons able to fend for themselves and had access to the same kind of information that would be disclosed in registration. See Rule 144A Adopting Release, supra note 36.

⁴⁰ See Regulation D, 17 CFR 230.501 et seq., and Regulation S, 17 CFR 230.901 et seq. While the exemption in this order applies to transactions in foreign security futures by QIBs, as defined in Rule 144A, as well as non-U.S. persons, as defined in Regulation S, the exemption or safe harbor relied on in offering or selling a foreign security future to such persons may, but need not, be Regulation S. Rule 144A would not apply to the offer

B. Types of Security Futures in Which Transactions May Be Effected

The exemption is conditioned on the type of security or securities underlying the security futures. In particular, the security future must overlie a single security of, or security index predominantly composed of securities of, foreign private issuers where the securities' primary trading market is outside the U.S., or debt securities of a government or political subdivision of a foreign country. This condition is intended to exclude from the exemption security futures based on unregistered securities that are more appropriately considered under the federal securities laws as securities of U.S. companies that should be registered under the federal securities laws. Moreover, the Commission intends this condition, which requires the security or securities underlying the security future to be foreign securities, to prevent this exemption from being used to avoid U.S. federal securities laws or facilitating a secondary market in the U.S. in securities that may not have been registered under the Securities Act or the Exchange Act.⁴¹

and sale of a security future because Rule 144A only applies to resale transactions (see 17 CFR 230.144A), whereas, the offer or sale of a security future is an offering by the clearing agency on or through the facilities of the exchange, not a resale transaction.

In analyzing the availability of an exemption or safe harbor from such registration requirements, the Commission provided some guidance in the General Statement in Regulation S by providing that any offer, offer to sell, sale, or offer to buy that occurs within the United States is subject to Section 5 of the Securities Act, while any such offer or sale that occurs outside the United States is not subject to Section 5. The determination as to whether a transaction is outside the United States will be based on the facts and circumstances of each case. As the Commission stated in adopting Regulation S, “[i]f it can be demonstrated that an offer or sale of securities occurs ‘outside the United States,’ the registration provisions of the Securities Act will not apply, regardless of whether the conditions of [Regulation S] are met. For a transaction to qualify ... both the sale and the offer pursuant to which it was made must be outside the United States.” See Regulation S Adopting Release, supra note 19. Regulation S also contains restrictions on, among other matters, directed selling efforts into the U.S. – those activities that could reasonably be expected, or are intended, to condition the market with respect to the securities being offered in reliance on Regulation S. Id.

⁴¹ See supra notes 37-40 and accompanying text.

1. Futures on Single Securities

There are two types of foreign securities that may underlie a future on a single security within the terms of this exemption. First, a security future may overlie a security of a “foreign private issuer,” as defined under the Commission’s rules,⁴² where such security’s primary trading market is outside the U.S.⁴³ These security futures are based on the securities of companies that are not considered under the federal securities laws as U.S. companies and that may not be reporting under the Exchange Act. Second, a security future may overlie a debt security issued or guaranteed by a foreign government⁴⁴ that is eligible to be registered with the Commission under Schedule B of the Securities Act.⁴⁵

2. Futures on Indexes

If a foreign security future is based on a security index, the exemption is conditioned on at least 90 percent of the securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, being (1) securities issued by foreign private issuers, where each such security’s primary trading market is outside the

⁴² See Securities Act Rule 405, 17 CFR 230.405, and Exchange Act Rule 3b-4, 17 CFR 240.3b-4.

⁴³ See infra notes 50-51 and accompanying text.

⁴⁴ Rule 405 under the Securities Act defines “foreign government” as the government of a foreign country or political subdivision of a foreign country. 17 CFR 230.405.

⁴⁵ See Schedule B, 15 U.S.C. 77aa. Existing exemptions for futures on foreign government debt do not cover all foreign governments. See Rule 3a12-8, 17 CFR 240.3a12-8. Under Section 7 of the Securities Act, Schedule B may be used by foreign governments and political subdivisions to register securities under the Securities Act. Certain entities that are closely associated with foreign governments may also be eligible to use Schedule B. The Commission intends that the exemption be available for all security futures on foreign government debt. As a result, for foreign government debt securities, the Commission has included the condition that the security be eligible to be registered pursuant to Schedule B so that security futures on foreign government debt that may be acquired pursuant to this exemption include all foreign government securities that are eligible to be registered with the Commission pursuant to Schedule B.

U.S.,⁴⁶ or (2) debt securities issued or guaranteed by a foreign government that are eligible to be registered with the Commission under Schedule B of the Securities Act.⁴⁷ The exemption permits up to 10 percent of the number and weighting of securities in the index to be securities of issuers that do not meet the above conditions⁴⁸ – i.e., the issuers either are not foreign private issuers or are foreign private issuers but the securities’ primary trading market is in the U.S. – if such securities are issued by companies that are required to file reports pursuant to Section 13 or 15(d) of the Exchange Act.⁴⁹ The Commission believes that 10 percent is an appropriate portion of an index that will allow an index to be considered “foreign” notwithstanding that a small proportion of securities of issuers in the index do not satisfy the criteria to be considered foreign under this exemption.⁵⁰

The Commission’s intent is for the exemption to permit transactions in security futures trading on foreign markets that overlie securities of foreign issuers that, in many cases, are not subject to the Exchange Act reporting provisions. The exemption, however, does allow transactions in foreign security futures on foreign security indexes that contain a limited number and weighting of securities of issuers that either are not foreign private issuers or that do not have their primary trading market outside the U.S, provided such issuers are subject to the

⁴⁶ See infra notes 50-51 and accompanying text for a discussion of “primary trading market.”

⁴⁷ 15 U.S.C. 77aa.

⁴⁸ For other contexts in which a 10 percent threshold exists under the federal securities laws see, e.g., Exchange Act Section 16(a)(1), 15 U.S.C. 78p(a)(1), and Regulation AB (Rule 1101(k), 17 CFR 229.1101(k)).

⁴⁹ 15 U.S.C. 78m and 78o(d).

⁵⁰ For example, if the foreign index contains 30 securities, up to three securities could be the securities of an issuer that is not a foreign private issuer or that does not meet the primary market trading test (as discussed below), as long as the aggregate weighting of those securities also is no more than 10 percent of the index.

reporting requirements of the Exchange Act. Allowing a limited number and weighting of securities that do not satisfy the foreign private issuer or primary trading market condition will not result in a distribution of unregistered securities in the U.S. of non-reporting issuers.

3. Primary Trading Market

The exemption also is conditioned on the primary trading market of any foreign private issuer's security being outside the U.S. For purposes of this condition, a security's primary trading market will be deemed to be outside the U.S. if at least 55 percent of the worldwide trading volume in the security took place in, on, or through the facilities of a securities market or markets located either (i) in a single foreign jurisdiction, or (ii) in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If the trading in the foreign private issuer's security is in two foreign jurisdictions, the trading for the issuer's security in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer's securities in order for such security's primary trading market to be considered outside the U.S.⁵¹ Where a security's primary trading market is in the U.S., the Commission believes it is more appropriate, for these purposes, to require that the issuer of such security be subject to the reporting requirements under the Exchange Act. If 55 percent or more

⁵¹ Security futures can be surrogates for the underlying security. Thus, for purposes of the exemption, the 55-percent test is important to ensure that the majority of trading in the foreign private issuer's securities occurs offshore. Under this exemption, for purposes of determining whether the 55-percent test is met, trading volume is measured by the foreign private issuer's most recently completed fiscal year. The Commission uses this same test to assess U.S. market interest in a foreign private issuer's securities. See Foreign Private Issuer's Exemption from Registration, Securities Exchange Act Release No. 58465 (September 5, 2008), 73 FR 52752 (September 10, 2008) ("Release No. 34-58465"). The Commission has previously adopted similar tests to assess U.S. market interest in a foreign private issuer's securities in other contexts. See Regulation S, Rule 902(j)(1)(ii), 17 CFR 230.902(j)(1)(ii), and Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d), Securities Exchange Act Release No. 55540 (March 27, 2007), 72 FR 16934 (April 5, 2007).

of the trading volume in a foreign private issuer's securities occurs through the facilities of a securities market or markets located outside the U.S., there is a greater likelihood that the foreign private issuer will be subject to a body of reporting and other securities regulatory requirements in a foreign jurisdiction and that the principal pricing determinants for the issuer's securities will be on a market within the jurisdiction of such other regulator.⁵²

4. Closing Transactions Only

A security or securities underlying a security future may satisfy the conditions in this exemption described above at the time a transaction is effected, but may cease to satisfy such conditions while a security future position remains open. The exemption would allow persons who entered into positions in foreign security futures in compliance with this exemption to close such positions. For example, a person that opened a position in a foreign security future in compliance with the exemption could close such position even if the underlying index, because of changes in the value of the securities that compose the index, is now less than 90 percent composed of foreign private issues.

C. Exchange Registration

The Commission is not granting an exemption from Section 5 of the Exchange Act for transactions pursuant to this exemption. To the extent exchanges are required to register in the U.S., the listing standards in Section 6(h) of the Exchange Act would apply to any security future trading on that exchange. This exemption is not intended to exempt a U.S. exchange from having to satisfy these listing standards. As a result, the only exchanges that can trade security futures that do not meet these listing standards are those not registered, or required to register, in the U.S.

⁵² See Release No. 34-58465, supra note 51.

Accordingly, this exemption is conditioned on any transaction effected pursuant to this exemption being on an exchange that is not required to register with the Commission under Section 5 of the Exchange Act.⁵³ Specifically, for purposes of this exemption, a transaction must be effected on, or subject to the rules of, an exchange or contract market that has its principal place of business outside the U.S. and that is regulated as an exchange or contract market in a country other than the U.S. The Commission believes that an exchange or contract market would be required to register under Section 5 of the Exchange Act if it provides direct electronic access to persons located in the U.S.⁵⁴

D. Issuance, Clearance and Settlement Outside the United States

A clearing agency is the issuer of the security future.⁵⁵ Any offer or sale by the clearing agency would have to be registered or exempt under the Securities Act. The purpose of the exemption from Section 6(h)(1) of the Exchange Act is to allow certain persons to effect transactions in security futures overlying securities traded outside the U.S. Therefore, as a condition to this exemption, any transaction in a security future must be cleared and settled on a foreign exchange or contract market located outside the U.S., or, if transactions on such foreign exchange or contract market are cleared and settled through a separate clearing entity, the transaction must be cleared and settled with the clearing entity, which must be located outside the U.S.

⁵³ 15 U.S.C. 78e.

⁵⁴ Activities of a foreign exchange or contract market in the U.S. relating to security futures also will be subject to applicable Securities Act provisions regarding the offer or sale of securities. See supra notes 37-40 and accompanying text.

⁵⁵ A clearing organization interposes itself in each transaction and adopts the position of buyer to every seller and seller to every buyer. Robert W. Kolb, Futures, Options, & Swaps, 16 (3d ed. 2000).

In addition, as a condition to the exemption, it must not be possible to close or liquidate a position in the foreign security future entered into on an exchange or contract market located outside the U.S. by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or 15A of the Exchange Act, respectively.⁵⁶

To limit the potential for an indirect distribution and development of a secondary market in the U.S. in securities that have not been registered under the Securities Act or the Exchange Act, this exemption is also conditioned on persons not taking delivery in the U.S. of the security or securities underlying the foreign security future in connection with settlement. Positions in foreign security futures cannot be transferred to another investor in the same manner as the underlying security, but can be disposed of only in an offsetting transaction on an exchange or contract market outside the U.S. This fact, together with the restriction on physical delivery in the U.S., is intended to help safeguard against development of a public market in the U.S. with respect to unregistered securities as a result of the ability to effect transactions in foreign security futures pursuant to this exemption.

III. Exemptions from Section 15(a)(1) of the Exchange Act and Certain Other Requirements

A foreign broker or dealer effecting transactions in foreign security futures with persons exempt from Section 6(h)(1) of the Exchange Act under this order will need to determine whether it is required to register as a broker or dealer in the U.S. Such foreign broker or dealer can rely on any of the exemptions from U.S. broker-dealer registration provided by Rule 15a-6 under the Exchange Act.⁵⁷ The Commission is today also issuing alternative exemptions, on

⁵⁶ 15 U.S.C. 78f and 15 U.S.C. 78o-3.

⁵⁷ 17 CFR 240.15a-6. By way of background, Rule 15a-6 provides conditional exemptions from U.S. broker-dealer registration requirements for foreign brokers or dealers that: (1) effect unsolicited transactions; (2) provide research reports to certain institutional

which a foreign broker or dealer can rely, from Section 15(a)(1) of the Exchange Act and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),⁵⁸ and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission, as discussed below.⁵⁹

investors; (3) effect transactions for certain institutional investors through a U.S. registered broker or dealer; and (4) execute transactions directly with registered brokers or dealers and certain specified other persons. Because the Commission construes solicitation broadly, it would expect few transactions effected in reliance on this exemptive order to qualify for the unsolicited exemption. See Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013 (July 18, 1989). See also Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, Securities Exchange Act Release No. 39779 (March 23, 1998), 63 FR 14806 (March 27, 1998) at 14813 (“Foreign broker-dealers that have Internet Web sites and that intend to rely on Rule 15a-6’s ‘unsolicited’ exemption should ensure that the ‘unsolicited’ customer’s transactions are not in fact solicited, either directly or indirectly, through customers accessing their Web sites.”). Foreign brokers or dealers relying on the other exemptions in Rule 15a-6 should take care to ensure that they meet all of the related conditions. In addition, foreign brokers or dealers should be aware of potential Securities Act implications arising from the distribution of research reports pursuant to Rule 15a-6(a)(2). Specifically, in connection with the distribution of the research report in the U.S., it is important to evaluate whether such distribution may affect the availability of an exemption from registration for the offer or sale of a foreign security future to a QIB or non-U.S. person pursuant to the terms of this order. For example, the research report may be an offer of the securities discussed in the report, a general solicitation of investors, or a directed selling effort for such securities for purposes of the Securities Act. A research report on the underlying security of a foreign security future can be distributed under the Securities Act without being considered a directed selling effort (for Regulation S purposes) or a general solicitation (for Rule 144A purposes) if the conditions of Rule 138 or Rule 139 under the Securities Act, 17 CFR 230.138 and 17 CFR 230.139, are satisfied. Distributing a research report on the foreign security future itself in the U.S. would not, however, satisfy the conditions of those safe harbors.

⁵⁸ 15 U.S.C. 78o(b)(4) and 78o(b)(6).

⁵⁹ The Commission has issued a proposing release discussing possible amendments to Exchange Act Rule 15a-6. See Exchange Act Release No. 58047 (June 27, 2008), 73 FR 39182 (July 8, 2008). To date, the Commission has not taken final action with respect to the proposed amendments. Accordingly, the Commission is basing the exemption provided herein on the current requirements under Exchange Act Rule 15a-6.

A. Background

Paragraph (a)(3) of Rule 15a-6 permits a foreign broker or dealer to effect certain transactions for institutional investors through a registered broker or dealer. A “registered broker or dealer” is defined in the rule as “a person that is registered with the Commission under Sections 15(b), 15B(a)(2), or 15C(a)(2) of the [Exchange] Act.”⁶⁰ This term includes a broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act (“Notice BD”).⁶¹ Rule 15a-6(a)(3) sets forth conditions that the foreign broker or dealer and the registered broker or dealer must meet in order for the foreign broker or dealer to rely on the rule. Because a Notice BD is subject to a specialized regulatory scheme, however, a foreign broker or dealer may find it difficult to rely on the rule if the registered broker or dealer through which it effects transactions in accordance with Rule 15a-6(a)(3) is a Notice BD.

B. The Exemptions

The Commission finds that it is consistent with the public interest, the protection of investors, and the purposes of the Exchange Act to provide a conditional exemption for foreign brokers or dealers from the registration requirement of Section 15(a)(1) of the Exchange Act. The Commission also finds that it is necessary and appropriate, in the public interest, and is consistent with the protection of investors to provide conditional exemptions for foreign brokers or dealers from the reporting and other requirements of the Exchange Act (other than Sections

⁶⁰ Rule 15a-6(b)(5) under the Exchange Act, 17 CFR 240.15a-6(b)(5).

⁶¹ A “Notice BD” is a futures commission merchant or introducing broker that registers with the Commission as a broker or dealer pursuant to Section 15(b)(11) of the Exchange Act, 15 U.S.C. 78o(b)(11), and the rules adopted by the Commission. See Securities Exchange Act Release No. 44730 (August 21, 2001), 66 FR 45138 (August 27, 2001).

15(b)(4) and 15(b)(6)),⁶² and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission.

The conditional exemptions would be available to foreign brokers or dealers that induce or attempt to induce the purchase or sale of any foreign security futures by a QIB⁶³ that is exempt from Section 6(h)(1) of the Exchange Act under this order. The conditional exemptions also would extend exemptive relief to transactions that are intermediated by Notice BDs, recognizing the role that Notice BDs play with respect to security futures and the specialized regulatory scheme that applies to these particular brokers and dealers.

A foreign broker or dealer may rely on the conditional exemptions to induce or attempt to induce the purchase or sale of any foreign security future by a QIB exempt from Section 6(h)(1), so long as the foreign broker or dealer and the registered broker or dealer, through which any resulting transactions are effected, comply with the requirements of paragraphs (a)(3)(i) through

⁶² 15 U.S.C. 78o(b)(4) and 78o(b)(6).

⁶³ The conditional exemptions in this order from the registration requirements in Section 15(a)(1) of the Exchange Act and related requirements cover foreign brokers' or dealers' transactions with QIBs. The exemption in this order from Section 6(h)(1) of the Exchange Act is applicable to persons that are QIBs. The Rule 15a-6(a)(3) exemption applies to a foreign broker's or dealer's transactions with U.S. institutional investors (see Rule 15a-6(b)(7) under the Exchange Act, 17 CFR 240.15a-6(b)(7)) and major U.S. institutional investors (see Rule 15a-6(b)(4) under the Exchange Act, 17 CFR 240.15a-6(b)(4)). There is substantial overlap, however, between the definitions of major U.S. institutional investor and QIB. Therefore, the conditional exemptions in this order from the registration requirements in Section 15(a)(1) of the Exchange Act and related requirements should simplify the process for engaging in transactions in foreign security futures without substantially altering the class of persons with which foreign brokers or dealers (intermediated by registered brokers or dealers) may transact.

(iii)⁶⁴ of Rule 15a-6 under the Exchange Act, except as otherwise provided below.⁶⁵ If the registered broker or dealer through which any resulting transactions with QIBs are effected is a Notice BD, then the Notice BD must comply with the alternative requirements, discussed below, in lieu of the requirements of paragraphs (a)(3)(iii)(A)(5) and (a)(3)(iii)(A)(6) of Rule 15a-6.⁶⁶

Paragraphs (a)(3)(iii)(A)(5) and (a)(3)(iii)(A)(6) of Rule 15a-6 require the registered broker or dealer to be responsible for (1) complying with Rule 15c3-1 under the Exchange Act⁶⁷ with respect to the transaction, and (2) receiving, delivering, and safeguarding funds and securities in connection with the transaction in compliance with Rule 15c3-3 under the Exchange Act.⁶⁸ However, Section 15(b)(11)(B)(iii) of the Exchange Act, exempts Notice BDs from

⁶⁴ For purposes of this exemption, references in paragraphs (a)(3)(i) through (iii) and paragraph (b)(2) of Rule 15a-6 to major U.S. institutional investors shall be deemed to be references to QIBs. In addition, for purposes of this exemption, the reference in paragraph (a)(3)(iii)(D) to Form BD shall be deemed a reference to Form BD-N with respect to Notice BDs.

⁶⁵ In view of the experience and capabilities QIBs are likely to possess, the chaperoning requirement under paragraph (a)(3)(ii)(A)(1) may provide only limited benefits with respect to QIBs. Therefore, notwithstanding paragraph (a)(3)(ii)(A)(1) of the rule, in this context, foreign broker-dealers may engage in unchaperoned contacts with QIBs to the same extent as described in a 1997 staff no-action letter. See Letter re: Certain Securities Activities of U.S. Affiliated Foreign Dealers, from Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton, to Richard R. Lindsey, Director, Division of Market Regulation, Securities and Exchange Commission (Apr. 9, 1997). Specifically, foreign associated persons of the foreign broker or dealer may have in-person contacts (without the participation of an associated person of a registered broker or dealer) during visits to the United States with QIBs, so long as the number of days on which such in-person contacts occur does not exceed 30 per year and the foreign associated persons engaged in such in-person contacts do not accept orders to effect securities transactions while in the United States.

⁶⁶ A Notice BD intermediating a foreign broker or dealer that is relying on the exemption under Exchange Act Rule 15a-6(a)(3) would need to comply with the requirements in paragraphs (a)(3)(iii)(A)(5) and (a)(3)(iii)(A)(6) in a similar manner as any other registered broker or dealer even if the requirements in such paragraphs would not otherwise be applicable.

⁶⁷ 17 CFR 240.15c3-1.

⁶⁸ 17 CFR 240.15c3-3.

Section 15(c)(3) of the Exchange Act and the rules thereunder. Instead, Notice BDs are subject to analogous requirements of the CEA. Accordingly, for purposes of this exemption, a Notice BD, in lieu of compliance with paragraphs (a)(3)(iii)(A)(5) and (a)(3)(iii)(A)(6) of Rule 15a-6, would need to comply with the analogous CEA requirements, including being responsible for receiving, delivering, and safeguarding funds and securities in connection with transactions on behalf of the QIB in compliance with the CEA segregation⁶⁹ and net capital requirements.⁷⁰ Consistent with the regulatory framework established by the CFMA, this relief will permit a foreign broker or dealer to be intermediated by a Notice BD without subjecting the Notice BD to duplicative regulatory requirements.

IV. Rule 15c6-1 under the Exchange Act (Settlement Cycle)

Rule 15c6-1 under the Exchange Act⁷¹ prohibits a broker or dealer from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract, unless otherwise expressly agreed to by the parties at the time of the transaction. The rule does not distinguish between U.S. securities and foreign securities. Thus, because security futures are considered securities under the Exchange

⁶⁹ For a discussion regarding analogous CEA provisions, see *Applicability of CFTC and SEC Customer Protection, Recordkeeping, Reporting, and Bankruptcy Rules and the Securities Investor Protection Act of 1970 to Accounts Holding Security Futures Products*, Joint Release by SEC and CFTC, Securities Exchange Act Release No. 46473 (September 9, 2002), 67 FR 58284 (September 13, 2002) (“Joint September 2002 Release”) (noting that transactions involving a futures account shall be subject to the segregation requirements of the CEA and that transactions involving a securities account shall be subject to Rule 15c3-3 under the Exchange Act and Securities Investor Protection Act of 1970).

⁷⁰ 17 CFR 1.17.

⁷¹ 17 CFR 240.15c6-1.

Act,⁷² this rule by its terms would apply to transactions in foreign security futures. The Commission has, however, previously exempted from the scope of Rule 15c6-1 under the Exchange Act all transactions that do not have transfer or delivery facilities in the U.S.⁷³ In addition, the Commission has granted an exemption to make it clear that Rule 15c6-1 does not apply to transactions that occur outside the U.S.⁷⁴ Therefore, transactions in foreign security futures pursuant to the exemption from Section 6(h)(1) of the Exchange Act in this order would fall within the scope of the Commission's prior exemption from Rule 15c6-1 under the Exchange Act.

V. Conditional Exemptions from Sections 6(h)(1) and 15(a)(1) of the Exchange Act and Certain Other Requirements

A. Conditional Exemption from Section 6(h)(1) of the Exchange Act

For these reasons stated in, and by, this order, the Commission is exempting from Section 6(h)(1) of the Exchange Act⁷⁵ any qualified institutional buyer (as defined in Rule 144A under the Securities Act) (“QIB”);⁷⁶ any person who is not a “U.S. person,” as the term is defined in Rule 902(k) of Regulation S under the Securities Act (“non-U.S. person”);⁷⁷ any

⁷² See the definition of “security” in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10).

⁷³ See Securities Exchange Act Release No. 35750 (May 22, 1995), 60 FR 27994 (May 26, 1995).

⁷⁴ Id. In particular, the Commission stated that if a U.S. broker-dealer were to execute a trade on a foreign exchange with a U.S. or foreign broker-dealer, the contract would not be subject to the rule. This exemption applies, however, only to the contract between the U.S. broker-dealer and the foreign broker-dealer. If the U.S. broker-dealer is executing the trade on a foreign exchange to satisfy its obligations to a U.S. customer, the contract with the U.S. customer is still subject to T+3 settlement unless that contract also is exempted. Id. At n. 9 and accompanying text.

⁷⁵ 15 U.S.C. 78f(h)(1).

⁷⁶ 17 CFR 230.144A.

⁷⁷ 17 CFR 230.902(k).

broker or dealer registered under Section 15(b) of the Exchange Act⁷⁸ to the extent such broker or dealer effects transactions on behalf of a QIB or a non-U.S. person; and any bank, as defined in Section 3(a)(6) of the Exchange Act,⁷⁹ acting pursuant to an exception or exemption from the definition of “broker” or “dealer” in sections 3(a)(4)(B), 3(a)(4)(E), or 3(a)(5)(C) of the Exchange Act⁸⁰ or the rules thereunder (“Eligible Bank”) to effect transactions on behalf of a QIB or a non-U.S. person; provided that any transaction effected:

(1)(a) Is for a contract of sale for future delivery of:

- (i) (A) a security issued by a foreign private issuer (as defined in Rule 3b-4(c) of the Exchange Act and Rule 405 under the Securities Act)⁸¹ for which at least 55 percent of the worldwide trading volume in the security took place in, on, or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer’s most recently completed fiscal year. If the trading in the foreign private issuer’s security is in two foreign jurisdictions, the trading for the issuer’s securities in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer’s securities in order for such security’s primary trading market to be considered outside the U.S.; or
- (B) a security that is a note, bond, debenture or evidence of indebtedness (“debt security”) issued or guaranteed by a foreign government as defined

⁷⁸ 15 U.S.C. 78o(b).

⁷⁹ 15 U.S.C. 78c(a)(6).

⁸⁰ 15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78c(a)(4)(E), or 15 U.S.C. 78c(a)(5)(C).

⁸¹ 17 CFR 240.3b-4(c) and 17 CFR 230.405.

in Rule 405 of the Securities Act⁸² that is eligible to be registered with the Commission under Schedule B of the Securities Act,⁸³ or

(ii) a “narrow-based security index” of which:

(A) At least 90 percent of the underlying securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, are: (1) securities issued by a foreign private issuer for which at least 55 percent of the worldwide trading volume in the security took place in, on, or through the facilities of a securities market or markets located in a single foreign jurisdiction, or in no more than two foreign jurisdictions during the issuer’s most recently completed fiscal year. If the trading in the foreign private issuer’s security is in two foreign jurisdictions, the trading for the issuer’s security in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer’s securities in order for such security’s primary trading market to be considered outside the U.S.; or (2) debt securities issued or guaranteed by a foreign government as defined in Rule 405 of the Securities Act⁸⁴ that are eligible to be registered with the Commission under Schedule B of the Securities Act,⁸⁵ and

(B) no more than 10 percent of the underlying securities in the index, at the time of the transaction, both in terms of the number of underlying

⁸² 17 CFR 230.405. Rule 405 defines “foreign government” as the government of a foreign country or political subdivision of a foreign country.

⁸³ See Schedule B, 15 U.S.C. 77aa.

⁸⁴ 17 CFR 230.405.

⁸⁵ See Schedule B, 15 U.S.C. 77aa.

securities and their weighting in the index, do not meet the criteria in (1)(a)(ii)(A) above and, as to any such security, the issuer of such security is required to file reports with the Commission pursuant to Section 13 or Section 15(d) of the Exchange Act;⁸⁶

(b) Is a closing transaction to offset a position in a contract of sale for future delivery that satisfied the conditions in paragraph (1)(a) of this order at the time such position was opened.

(2) Is executed on, or subject to the rules of, an exchange or contract market that has its principal place of business outside the U.S., that is regulated as an exchange or contract market in a country other than the U.S., and that is not required to register with the Commission under Section 5 of the Exchange Act;⁸⁷

(3) Is cleared and settled on, and with respect to such clearance and settlement subject to the rules of, an exchange, contract market, or clearing entity that is regulated as an exchange, contract market, or clearing entity in a country other than the U.S. and that is not required to register with the Commission under Section 5 or Section 17A of the Exchange Act;⁸⁸

(4) Is for a security future, that cannot be closed or liquidated by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or Section 15A of the Exchange Act,⁸⁹ respectively; and

⁸⁶ 15 U.S.C. 78m and 78o(d).

⁸⁷ 15 U.S.C. 78e.

⁸⁸ 15 U.S.C. 78e and 78q-1.

⁸⁹ 15 U.S.C. 78f and 15 U.S.C. 78o-3.

- (5) Does not result in such person taking physical delivery of the underlying security in the U.S. in connection with settlement;

B. Conditional Exemptions from Section 15(a)(1) of the Exchange Act and Certain Other Requirements

For the reasons stated in, and by, this order, the Commission is exempting foreign brokers or dealers (as defined in Rule 15a-6(b)(3) under the Exchange Act)⁹⁰ that induce or attempt to induce the purchase or sale of any foreign security futures by a QIB that is subject to the exemption from Section 6(h)(1) of the Exchange Act, from the registration requirements of Section 15(a)(1) of the Exchange Act⁹¹ and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),⁹² and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission; provided that the foreign broker or dealer and the registered broker or dealer (as defined in Rule 15a-6(b)(5) under the Exchange Act), through which any resulting transactions with QIBs are effected, comply with the requirements of paragraphs (a)(3)(i) through (iii)⁹³ of Rule 15a-6 under the Exchange Act, except as otherwise provided below.⁹⁴ If the registered

⁹⁰ 17 CFR 240.15a-6(b)(3).

⁹¹ 15 U.S.C. 78o(a)(1).

⁹² 15 U.S.C. 78o(b)(4) and 78o(b)(6).

⁹³ For purposes of this exemption, references in paragraphs (a)(3)(i) through (iii) and paragraph (b)(2) of Rule 15a-6 to major U.S. institutional investors shall be deemed to be references to QIBs. In addition, for purposes of this exemption, the reference in paragraph (a)(3)(iii)(D) to Form BD shall be deemed a reference to Form BD-N with respect to Notice BDs.

⁹⁴ Notwithstanding paragraph (a)(3)(ii)(A)(1) of the rule, foreign associated persons of the foreign broker or dealer may have in-person contacts (without the participation of an associated person of a registered broker or dealer) during visits to the United States with QIBs, so long as the number of days on which such in-person contacts occur does not exceed 30 per year and the foreign associated persons engaged in such in-person contacts do not accept orders to effect securities transactions while in the United States. See supra note 65.

broker or dealer through which any resulting transactions with QIBs are effected is a broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act (“Notice BD”), then:

- (1) in lieu of the requirement in paragraph (a)(3)(iii)(A)(5) of Rule 15a-6, the Notice BD shall be responsible for complying with Rule 1.17 under the Commodity Exchange Act (“CEA”) (17 CFR 1.17) with respect to the transactions; and
- (2) in lieu of the requirement in paragraph (a)(3)(iii)(A)(6) of Rule 15a-6, the Notice BD shall be responsible for receiving, delivering, and safeguarding funds and securities in connection with transactions on behalf of the QIB in compliance with the segregation requirements of the CEA and the regulations thereunder.

Accordingly,

IT IS HEREBY ORDERED, pursuant to Section 36 of the Exchange Act,⁹⁵ that certain persons are exempt from the provisions of Section 6(h)(1) of the Exchange Act⁹⁶ that prohibit persons from effecting transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act,⁹⁷ subject to the conditions set forth above.

IT IS HEREBY FURTHER ORDERED, pursuant to Section 15(a)(2) of the Exchange Act,⁹⁸ that a foreign broker or dealer as defined in Rule 15a-6(b)(3)⁹⁹ is exempt, with respect only to the activities described above in Section V.B. of this order, from the registration

⁹⁵ 15 U.S.C. 78mm.

⁹⁶ 15 U.S.C. 78f(h)(1).

⁹⁷ 15 U.S.C.78o-3(a).

⁹⁸ 15 U.S.C. 78o(a)(2).

⁹⁹ 17 CFR 240.15a-6(b)(3).

requirements of Section 15(a)(1) of the Exchange Act, subject to the conditions set forth above.¹⁰⁰

IT IS HEREBY FURTHER ORDERED, pursuant to Section 36 of the Exchange Act,¹⁰¹ that a foreign broker or dealer as defined in Rule 15a-6(b)(3)¹⁰² is exempt, with respect only to the activities described above in Section V.B. of this order, from the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),¹⁰³ and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission, subject to the conditions set forth above.

By the Commission.

Elizabeth M. Murphy
Secretary

¹⁰⁰ 15 U.S.C. 78o(a)(1).

¹⁰¹ 15 U.S.C. 78mm.

¹⁰² 17 CFR 240.15a-6(b)(3).

¹⁰³ 15 U.S.C. 78o(b)(4) and 78o(b)(6).