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SEC Releases FAQs Regarding Rule 15a-6 and Foreign Broker-Dealers

WRITTEN BY

Thomas M. Rose | Shona Smith | Lisa R. Reidy

The SEC has released certain Frequently Asked Questions (FAQs) regarding Rule 15a-6 and foreign broker-dealers. Rule 15a-6 under the United States Securities Exchange Act of 1934, as amended (the "Exchange Act"), provides certain conditional exemptions from broker-dealer registration requirements under the Exchange Act for foreign broker-dealers engaging in specified activities involving U.S. investors, including:

- Effecting unsolicited securities transactions;
- Providing research reports to major U.S. institutional investors, and effecting transactions in the subject securities with or for those investors;
- Soliciting and effecting transactions with or for U.S. institutional investors or major U.S. institutional investors through a "chaperoning broker-dealer"; and,
- Soliciting and effecting transactions with or for registered broker-dealers, banks acting in a broker or dealer capacity, certain international organizations, foreign persons temporarily present in the United States, U.S. citizens resident abroad, and foreign branches and agencies of U.S. persons.

The Staff's guidance provided in response to a few of the FAQs follows below.

Unsolicited Transactions in Securities

Rule 15a-6(a)(1) exempts a foreign broker-dealer from registration to the extent that it effects unsolicited transactions in securities. A foreign broker-dealer may rely on such exemption to effect more than one unsolicited securities transaction on behalf of a single U.S. investor, absent any other indicia of solicitation. The SEC will analyze a foreign broker-dealer's efforts and activities to determine whether solicitation has occurred, as opposed to focusing merely on the number of securities transactions effected by a foreign broker-dealer.

The SEC generally considers solicitation "as including any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer or its affiliates. Solicitation includes efforts to induce a single transaction or to develop an ongoing securities business relationship." For example, the SEC would consider the following conduct to be solicitation by a foreign broker-dealer:

- Telephone calls from a broker-dealer to a customer encouraging use of the broker-dealer to effect transactions;
- Advertising directed into the United States of one's function as a broker or a market maker; and,
- Recommending the purchase or sale of particular securities, with the anticipation that the customer will execute the recommended trade through the broker-dealer.

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Nonetheless, the Staff would view a series of frequent transactions or a significant number of transactions between a foreign broker-dealer and a U.S. investor as being indicative of solicitation through the establishment of an “ongoing securities business relationship.”

The FAQs also clarify that a foreign broker-dealer relying on Rule 15a-6(a)(1) may send confirmations and account statements to the U.S. investor in connection with such transaction. A foreign broker-dealer may also provide the U.S. investor with documents related to the transaction that are required under foreign law, such as a prospectus, proxy statement or a privacy notice. The foreign broker-dealer, however, may not provide the U.S. investor with any document that includes advertising or other material intended to induce either a securities transaction or transactional business for the foreign broker-dealer or its affiliates.

Chaperoning Broker-Dealer

Rule 15a-6(a)(3) exempts a foreign broker-dealer from registration to the extent that it induces the purchase or sale of a security by a U.S. institutional investor or a major U.S. institutional investor, subject to certain conditions, including, without limitation, that the foreign broker-dealer effects any resulting transactions through a registered broker or dealer. The FAQs indicate that to the extent required by foreign law or as required by a firm’s internal policies and procedures applicable to its global business operations, a foreign broker-dealer may send confirmations and account statements directly to U.S. counterparties. Nonetheless, the chaperoning broker-dealer maintains an obligation to be sure that confirmations and account statements are sent to the investor that comply with all applicable U.S. requirements, including Rule 10b-10 under the Exchange Act and applicable self-regulatory organization rules. Also, any confirmation or account statement sent to a U.S. counterparty by a foreign broker-dealer on behalf of a chaperoning broker-dealer must clearly identify the U.S. broker-dealer on whose behalf the document is sent.

Furnishing Research Reports to Major U.S. Institutional Investors

Rule 15a-6(a)(2) permits a foreign broker-dealer to furnish research reports to major U.S. institutional investors and to effect transactions in the securities discussed in the reports with or for those major U.S. institutional investors provided that certain conditions are satisfied. The rule does not require that the distribution be made by a registered broker-dealer, even if the foreign broker-dealer has a chaperoning arrangement with a registered broker-dealer. Further, the chaperoning broker-dealer would not have any obligations with respect to a research report if the chaperoning broker-dealer was not involved in the distribution and it would not be required to retain a copy of a research report that it did not ever possess.

However, if the foreign broker?dealer has a chaperoning arrangement with a registered broker-dealer that satisfies the requirements of Rule 15a-6(a)(3), any transactions with the foreign broker-dealer in securities discussed in the research reports must be effected only through the chaperoning broker-dealer in compliance with the requirements of Rule 15a-6(a)(3). For example, Rule 15a-6(a)(3) requires the chaperoning broker-dealer to maintain all books and records relating to the transactions effected thereunder. As such, to the extent that a chaperoning broker-dealer obtains a copy of a research report distributed directly to major U.S. institutional investors by a foreign broker-dealer pursuant to Rule 15a-6(a)(2), such research report should be retained by the chaperoning broker-dealer in light of its obligation to effect transactions in the relevant securities as described above.

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This advisory does not discuss all of the FAQs, including FAQs relating to (A) the determination of whether a person would be considered "temporarily present in the United States" under Rule 15a-6(a)(4)(iii), (B) communications with and transactions for a U.S. employee by a foreign broker-dealer administering a global stock option plan for a foreign issuer under Rule 15a-6(a)(1), and (C) the minimum net capital requirement, net capital charges for failed transactions, and recordkeeping obligations applicable to chaperones under Rule 15a-6(a)(3). Certain of the FAQs also specifically refer to certain SEC no-action letters (referred to as the "Nine Firms Letter" and the "Seven Firms Letter") and the scope of certain positions taken in such no-action letters, such as the applicability of the Nine Firms Letter and the Seven Firms Letter to a foreign broker-dealer with a chaperoning arrangement with an unaffiliated registered broker-dealer (and not just an affiliated registered broker-dealer), and the applicability of the expanded definition of a "major institutional investor" set forth in the Nine Firms Letter to all provisions of Rule 15a-6, among others. In addition, certain of the FAQs also refer the Rule 15a-6 adopting release, *Registration Requirements for Foreign Broker-Dealers*, Exchange Act Release No. 27017 (July 11, 1989). Thus, we recommend reviewing the FAQs, applicable no-action letters and the adopting release in their entirety and contacting legal counsel before reaching any conclusions regarding how the FAQs might impact your particular circumstances.

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