Rule 15a-6: Safe Harbor for Non-U.S. Broker-Dealers

Under the Securities Exchange Act of 1934 (the "Exchange Act"), "any person engaged in the business of effecting transactions in securities for the account of others" is defined as a "broker,"[1] and required to register as such with the United States Securities and Exchange Commission ("SEC").[2] In particular, Section 15 of the Exchange Act requires registration of any broker that uses the "means … of interstate commerce" to conduct its securities business. "Interstate commerce" includes any communication from outside the United States into the United States,[3] so a broker that effects a securities transaction with any person physically present in the United States uses the means of interstate commerce, and is subject to registration.

SEC Rule 15a-6 (a copy of which is attached as Exhibit A) provides a limited set of exemptions from registration for foreign entities performing certain securities activities within the United States.[4] The Rule is intended to (i) facilitate access to non-U.S. markets by U.S. institutional investors through non-U.S. firms while maintaining the safeguards afforded by broker-dealer registration; and (ii) provide clear guidance to non-U.S. firms seeking to operate in compliance with U.S. registration requirements.[5] As supplemented by SEC no-action letters, Rule 15a-6 allows foreign firms to engage in various activities, including the following:

A. Unsolicited Transactions.

Under Rule 15a-6(a)(1),[6] a non-U.S. broker may effect transactions "with or for persons that have not been solicited" by the foreign broker. However, the SEC interprets this exception narrowly. When it adopted the Rule, the SEC explained that "solicitation" would include any activity intended to induce securities transactions, including telephoning U.S. customers or potential customers, transmitting quotes to U.S. persons, making a broker's business known in the U.S. through meetings or advertisements, conducting seminars for U.S. investors, or recommending securities transactions.[7] In fact, the SEC has stated that "a securities firm's Web

[1] Exchange Act §3(a)(4); 15 U.S.C. 78c(4).

[2] Exchange Act §15(a); 15 U.S.C. 78o(a).

[3] Exchange Act §3(a)(17); 15 U.S.C. 78c(17).

[4] 17 CFR 240.15a-6.

[5] *Registration Requirements for Foreign Broker-Dealers,* Rel. No. 34-27017, 1989 SEC Lexis 1308 (Jul. 11, 1989).

[6] 17 CFR 240.15a-6(a)(1).

[7] *Registration Requirements for Foreign Broker-Dealers,* Rel. No. 34-27017, 1989 SEC Lexis 1308 (Jul. 11, 1989) (at text accompanying nn. 53-56).

site itself typically is a solicitation," and that foreign firms relying on this exemption should "obtain … affirmative representations from potential U.S. customers … that those customers have not previously accessed their Web sites."[8]

B. Solicited Transactions with Certain Counterparties.

Under Rule 15a-6(a)(4), a non-U.S. broker may effect solicited transactions with or for certain specific types of counterparties without further conditions. Such counterparties include:

- U.S. broker-dealers, whether acting for their own account or as agent for the accounts of others;
- banks acting pursuant to exceptions or exemptions from the definition of "broker" or "dealer" under the Exchange Act, such as where a bank is acting as a trustee or custodian;
- foreign persons temporarily present in the U.S. with whom the foreign firm had a bona fide, pre-existing relationship before the foreign person entered the U.S.;
- certain transnational financial institutions and non-governmental organizations such as the Inter-American Development Bank, the IMF, etc.

In addition, pursuant to an SEC no-action letter,[9] with respect to transactions in "Foreign Securities,"[10] non-U.S. brokers may treat U.S. resident fiduciaries with discretionary authority for "Offshore Clients"[11] as non-U.S. clients, even if those fiduciaries are solicited in the United States.

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[8] *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore,* Rel. No. 33-7516, 1998 SEC Lexis 488 (Mar. 23, 1998) (at n. 56 and accompanying text).

[9] *Cleary, Gottlieb, Steen & Hamilton*, 1996 SEC No-Act Lexis (Jan. 30, 1996).

[10] The term "Foreign Security" means (i) a security issued by an issuer not organized or incorporated under the laws of the United States when the transaction in such security is not effected on a U.S. exchange, including an American Depository Receipt issued by a U.S. bank that is initially offered and sold outside the U.S. in accordance with Regulation S under the Securities Act of 1933; or (ii) a debt security (including a convertible debt security) of an issuer organized or incorporated in the United States in connection with a distribution conducted outside the U.S. Foreign Securities do not include those inter-listed in the U.S. when the transaction is executed on a U.S. exchange.

[11] An "Offshore Client" is defined as (i) any entity not organized or incorporated under the laws of the United States and not engaged in a trade or business in the U.S. for U.S. federal income tax purposes; (ii) any natural person who is not a U.S. resident, or who is a U.S. citizen residing in a foreign country who (a) has U.S. $500,000 or more under the management of said fiduciary or (b) has, together with their spouse, a net worth above U.S. $1,000,000; or (iii) any entity nor organized or incorporated under the laws of the U.S. substantially all (i.e., at least 85%) of the outstanding voting securities of which are beneficially owned by persons described in (i) and (ii) above.

C. Solicited Transactions with "U.S. Institutional Investors" and "Major U.S. Institutional Investors."

Under Rule 15a-6(a)(3), effecting solicited securities transactions with or for U.S. Institutional Investors[12] or Major U.S. Institutional Investors[13] is permissible if certain conditions are met. In brief, the exemption requires that:

- the non-U.S. firm and personnel who contact U.S. persons must consent to service of process for proceedings brought by or before the SEC or a self-regulatory organization;
- the non-U.S. firm must provide the SEC, on request, with information, documents, testimony of personnel, and assistance in taking evidence of other persons as to transactions effected under the exemption (unless prohibited by non-U.S. law), and
- an SEC-registered broker-dealer (which may be affiliated with the non-U.S. firm) must agree to perform certain "chaperoning" functions, including among other things:
  - screening personnel of the non-U.S. firm to ensure they meet certain minimum qualifications;
  - attending the non-U.S. firm's meetings with investors, and listening in on telephone calls with institutional investors that are not "major" institutional investors;
  - maintaining books and records relating to the transactions (though they may be generated outside the U.S.);
  - reviewing trades for violations of U.S. securities laws or customer abuse;
  - issuing confirmations and periodic statements (though they may be printed and sent by the non-U.S. firm as agent for the chaperoning broker);

[12] The term "U.S. Institutional Investors" is defined in Rule 15a-6(b)(7) in material part as (i) registered investment companies, (ii) banks, (iii) savings and loan associations, (iv) insurance companies, (v) pension plans directed by defined fiduciaries, (vi) tax-exempt entities, and (vii) trusts with sophisticated fiduciaries with total assets in excess of U.S. $5 million.

[13] A "major U.S. institutional investor" is defined as a: (1) U.S. institutional investor that has, or has under management, total assets in excess of U.S. $100 million; provided, however, that for purposes of determining the total assets of an investment company, the investment company may include the assets of any family of investment companies of which it is a part; or (2) an SEC-registered investment adviser that has total assets under management in excess of U.S. $100 million.

This term was expanded in an SEC no-action letter to cover any entity, including any investment adviser (whether or not registered with the SEC), that owns or controls (or, in the case of an investment adviser, has under management) in excess of U.S. $100 million in aggregate financial assets (i.e., cash, money-market instruments, securities of unaffiliated issuers, futures and options on futures and other derivative instruments). *See*, Cleary, Gottlieb, Steen & Hamilton SEC No-Action Letter (April 9, 1997).

- as between the non-US and the registered broker-dealer, extending or arranging for the extension of credit to the U.S. investor, and
- receiving, delivering and safeguarding funds and securities.

D. Research Reports.

1. Research Provided to "Major U.S. Institutional Investors."

Rule 15a-6(a)(2) provides a limited exemption from registration for non-U.S. broker-dealers to the extent they furnish research reports directly or indirectly only to "major U.S. institutional investors" so long as the following conditions are met:

> (1) the research reports do not recommend the use of the non-U.S. broker to effect trades in any security;
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> (2) the non-U.S. broker does not initiate contact with the major U.S. institutional investors to follow up on the research reports, and does not otherwise induce or attempt to induce the purchase or sale of any security by those major U.S. institutional investors;
>
> (3) if the non-U.S. broker has a relationship with a U.S. registered broker-dealer that satisfies the chaperoning requirements of paragraph (a)(3) of Rule 15a-6, any transactions with the non-U.S. broker in securities discussed in the research reports are effected only through the U.S. registered broker-dealer; and
>
> (4) the non-U.S. broker does not provide research to U.S. persons pursuant to any express or implied understanding that those U.S. persons will direct commission income to the non-U.S. broker.

2. Research Provided to Other U.S. Institutional Investors.

Rule 15a-6(a)(3) can be used to distribute research to U.S. institutional investors *and* major U.S. institutional investors if the contacts are "chaperoned" by a U.S. registered broker-dealer (which can either be affiliated or unaffiliated). This exemption requires the chaperoning U.S. broker-dealer to be responsible for performing certain specific functions in connection with the broker-dealer activities of the foreign firm, including among other things, opening and monitoring accounts, issuing, or ensuring issuance of, required confirmations and account statements, maintaining required net capital related to the transactions, and receiving, delivering and safeguarding funds and securities. When relying on the 15a-6(a)(3) chaperoning exemption, firms frequently limit the availability of research to U.S. institutional investors that are only "major" U.S. institutional investors since state securities laws do not have a corresponding provision to Rule 15a-6.

3. Research Provided to Other Investors.

The SEC has also confirmed that it does not require the registration of a foreign broker-dealer that distributes research reports to *any* U.S. investor (whether or not institutional) through a registered broker-dealer, provided that certain other conditions are met. Specifically, (1) a U.S. firm must prominently state on the report that it accepts responsibility for the contents of the

report, (2) the report must prominently indicate that persons receiving the report should effect transactions in securities discussed in the report through the U.S. firm, and (3) transactions in such securities by recipients of the report are to be effected only through the U.S. firm in accordance with Rule 15a-6.[14]

In order to accept responsibility for research prepared by the foreign broker-dealer, the SEC explained that the registered broker-dealer must take

> reasonable steps to satisfy itself regarding the key statements in the research. In cases where there are no indications that the content of the research is suspect, this responsibility can be fulfilled by reviewing the research in question and comparing it with other public information readily available regarding the issuer, to make certain that neither the facts nor the analysis appear inconsistent with outstanding information regarding the issuer.[15]

The U.S.-registered broker-dealer must also be responsible for effecting any securities transactions. Thus, the U.S.-registered broker-dealer would have to open and maintain the customer account(s), issue confirmations, maintain required net capital, and receive, deliver and safeguard customer funds and securities. Finally, to rely on this interpretation, there can be no "soft-dollar" arrangements between the foreign broker-dealer and U.S. persons (*i.e.*, no arrangements where research is provided to customers with the express or implied understanding that the customers will pay for it by directing trades to the foreign broker-dealer that result in payment of commissions).

The SEC requires that when a U.S.-registered broker-dealer distributes a research report prepared by an affiliated non-U.S. broker-dealer pursuant to the above-described interpretation, it must also comply with Rule 501 of Regulation AC.[16] Here, "research report" means any written communication (including in electronic form) that includes an analysis of a security or issuer and that provides information reasonably sufficient upon which to base an investment decision.[17] Unlike FINRA rules, the definition applies to reports regarding all types of securities, and not just equity securities.[18]

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[14] *See* SEC Rel. No. 34-27017, *Registration Requirements for Foreign Broker-Dealers*, 1989 SEC Lexis 1308, *49, *42 (Jul. 11, 1989); SEC Rel. No. 34-25801, *Registration Requirements for Foreign Broker-Dealers*, 1988 SEC LEXIS 1215 (Jun. 14, 1988).

[15] 54 FR at 30023, n.116.

[16] SEC Responses to Frequently Asked Questions Concerning Regulation Analyst Certification, Question and Answer 23 (*available at* http://www.sec.gov/divisions/marketreg/mregacfaq0803.htm).

[17] 17 C.F.R. § 242.50. The SEC has stated that in general, a communication that is "prepared for" a group of fewer than fifteen person, would not be deemed a research report under Regulation AC. Note that this is slightly different from FINRA's rules, which exclude communications that are "distributed to" fewer than 15 persons from its definition of a research report. NASD Rule 2711(a)(9)(B)(i).

[18] *Compare* 17 C.F.R. § 242.50 *with* NASD Rule 2711(a)(9). FINRA has, however, issued a proposal to adopt rules applicable to debt research reports. FINRA NTM 11-11, FINRA Requests Comment on Concept Proposal to Identify and Manage Conflicts Involving the Preparation and Distribution of Debt Research Reports (Mar. 2011).

Rule 501 of Regulation AC requires broker-dealers and persons associated with brokers-dealers that publish, distribute, or circulate research reports to include in those reports a "clear and prominent certification" that:

> (1) the views expressed in the research report accurately reflect the analyst's personal views about any and all of the subject securities or issuers; and
>
> (2) no part of the analyst's compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the analyst in the report, or if their compensation is related to such recommendations or views, a description of the amount, purpose and source of such compensation and a statement that such compensation might influence their views.[19]

As a member of FINRA, the U.S. broker-dealer would also be subject to NASD Rule 2711.[20] Rule 2711 requires certain disclosures of U.S. registered broker-dealers that distribute foreign research reports to U.S. investors. The Rule is intended to increase research analysts' independence, manage conflicts of interest and promote disclosure of conflicts in research reports. Conflicts of interest typically arise when a research analyst or broker-dealer has an investment banking or other business relationship with an issuer of recommended securities, or when a research analyst or broker-dealer owns securities of the recommended issuer. While the rule is lengthy and detailed, it generally requires that when a FINRA member distributes a research report prepared by an affiliate,[21] it must accompany the research report with (or provide a web address that directs the recipient to), the following disclosures, as they pertain to the member:

1. Whether, as of the end of the month immediately preceding the date of publication of the research report (or the end of the second most recent month if the publication date is less than 10 calendar days after the end of the most recent month), the member or its affiliates beneficially own 1% or more of any class of common equity securities of the subject company;

2. Whether the member or an affiliate managed or co-managed a public offering of securities for the subject company in the past 12 months, received compensation for investment banking services from the subject company in the past 12 months;

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[19] 17 C.F.R. § 242.501. There is an exception from the certification requirement for foreign persons located outside the U.S. who are not associated with a U.S. registered broker-dealer. However, this exception applies only when research is provided to major U.S. institutional investors under Rule 15a-6(a)(2) (17 C.F.R. § 242.503). There is another exception from the certification requirement for broker-dealers that distribute research reports from third party analysts, but this is not available if the U.S. broker-dealer and foreign firm share officers. 17 C.F.R. § 242.501(b).

[20] FINRA recently changed its name from "National Association of Securities Dealers," and several of its rules currently remain designated as "NASD" rules.

[21] The disclosure requirements are less onerous when a FINRA member distributes "independent third-party research reports." However, an "independent third-party research report" is one prepared by a third-party that (i) has no affiliation or business or contractual relationship with the distributing member or that member's affiliates that is reasonably likely to inform the content of its research reports; and (ii) makes content determinations without any input from the distributing member or that member's affiliates. NASD Rule 2711(h)(13).

or expects to receive or intends to seek compensation for investment banking services from the subject company in the next 3 months;

3. Whether it was making a market in the subject company's securities at the time the research report was published; and

4. The existence of any other actual, material conflict of interest of the research analyst or member of which the research analyst knows or has reason to know at the time of publication of the research report.

In addition, whenever a non-U.S. broker-dealer disseminates research through a U.S. broker-dealer, whether affiliated or unaffiliated, the research report should prominently state that the firm that prepared the report is not subject to U.S. rules with regard to the preparation of research reports and the independence of analysts.

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Unregistered foreign entities that do not fall within an exemption under Rule 15a-6 risk steep penalties in the event of an SEC enforcement action. Under Section 21B of the Exchange Act,[22] any person that has willfully violated the broker-dealer registration requirements may be subject to civil penalties of up to U.S. $5,000 for a natural person or U.S. $50,000 for any other person. Penalties may rise to as high as U.S. $100,000 for a natural person or U.S. $500,000 for any other person if the failure to register involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement, and the failure resulted in (or created a significant risk of) substantial losses to other persons or substantial pecuniary gain to the unregistered entity. Under Section 32 of the Exchange Act,[23] substantially higher criminal penalties are possible for egregious behavior. The SEC may also seek injunctive relief and disgorgement. Finally, contracts made in violation of the Exchange Act may be subject to rescission under Section 29(b) of the Exchange Act.[24]

II. State Registration Requirements.

Separate and apart from the federal requirements, all of the states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have their own securities laws (known as "Blue Sky Laws"). These generally require broker-dealers and their personnel that conduct business with customers in their jurisdictions to register with state or local authorities.

Many such Blue Sky Laws and accompanying regulations include exemptions for broker-dealers that do not have a place of business in a State and that only conduct business with specific types of institutions. Institutional exemptions are available in most states, but not all, and not all institutional exemptions are the same. In any event, contacts with individual investors by an unregistered broker-dealer would be forbidden.

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[22] 15 U.S.C. 78u-2.

[23] 15 U.S.C. 78ff.

[24] 15 U.S.C. 78cc.

SEC RULE 15A-6

(a) A foreign broker or dealer shall be exempt from the registration requirements of sections 15(a)(1) or 1513(a)(1) of the Act to the extent that the foreign broker or dealer:

(1) Effects transactions in securities with or for persons that have not been solicited by the foreign broker or dealer; or

(2) Furnishes research reports to major U.S. institutional investors, and effects transactions in the securities discussed in the research reports with or for those major U.S. institutional investors, provided that:

(i) The research reports do not recommend the use of the foreign broker or dealer to effect trades in any security;

(ii) The foreign broker or dealer does not initiate contact with those major U.S. institutional investors to follow up on the research reports, and does not otherwise induce or attempt to induce the purchase or sale of any security by those major U.S. institutional investors;

(iii) If the foreign broker or dealer has a relationship with a registered broker or dealer that satisfies the requirements of paragraph (a)(3) of this rule, any transactions with the foreign broker or dealer in securities discussed in the research reports are effected only through that registered broker or dealer, pursuant to the provisions of paragraph (a)(3) of this rule; and

(iv) The foreign broker or dealer does not 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; or

(3) Induces or attempts to induce the purchase or sale of any security by a U.S. institutional investor or a major U.S. institutional investor, provided that:

(i) The foreign broker or dealer:

(A) Effects any resulting transactions with or for the U.S. institutional investor or the major U.S. institutional investor through a registered broker or dealer in the manner described by paragraph (a)(3)(iii) of this rule; and

(B) Provides the Commission (upon request or pursuant to agreements reached between any foreign securities authority, including any foreign government, as specified in section 3(a)(50) of the Act, and the Commission or the U.S. Government) with any information or documents within the possession, custody, or control of the foreign broker or dealer, any testimony of foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the Commission requests and that relates to transactions under paragraph (a)(3) of this rule, except that if, after the foreign broker or dealer has exercised its best efforts to provide the information, documents, testimony, or assistance, including requesting the appropriate governmental body and, if legally necessary, its customers (with respect to customer information) to permit the foreign broker or dealer to provide the information, documents, testimony, or assistance to the Commission, the foreign broker or dealer is prohibited from providing this information, documents, testimony, or assistance by applicable foreign law or regulations, then this paragraph (a)(3)(i)(B) shall not apply and the foreign broker or dealer will be subject to paragraph (c) of this rule;

(ii) The foreign associated person of the foreign broker or dealer effecting transactions with the U.S. institutional investor or the major U.S. institutional investor:

(A) Conducts all securities activities from outside the United States, except that the foreign associated persons may conduct visits to U.S. institutional investors and major United States institutional investors within the United States, provided that:

(1) The foreign associated person is accompanied on these visits by an associated person of a registered broker or dealer that accepts responsibility for the foreign associated person's communications with the U.S. institutional investor or the major U.S. institutional investor; and

(2) Transactions in any securities discussed during the visit by the foreign associated person are effected only through the registered broker or dealer, pursuant to paragraph (a)(3) of this rule; and

(B) Is determined by the registered broker or dealer to:

(1) Not be subject to a statutory disqualification specified in section 3(a)(39) of the Act, or any substantially equivalent foreign:

(i) Expulsion or suspension from membership,

(ii) Bar or suspension from association,

(iii) Denial of trading privileges,

(iv) Order denying, suspending, or revoking registration or barring or suspending association, or

(v) Finding with respect to causing any such effective foreign suspension, expulsion, or order;

(2) Not to have been convicted of any foreign offense, enjoined from any foreign act, conduct, or practice, or found to have committed any foreign act substantially equivalent to any of those listed in sections 15(b)(4)(B), (C), (D), or (E) of the Act; and

(3) Not to have been found to have made or caused to be made any false foreign statement or omission substantially equivalent to any of those listed in section 3(a)(39)(E) of the Act; and

(iii) The registered broker or dealer through which the transaction with the U.S. institutional investor or the major U.S. investor is effected:

(A) Is responsible for:

(1) Effecting the transactions conducted under paragraph (a)(3) of this rule, other than negotiating their terms;

(2) Issuing all required confirmations and statements to the U.S. institutional investor or the major U.S. institutional investor;

(3) As between the foreign broker or dealer and the registered broker or dealer, extending or arranging for the extension of any credit to the U.S. institutional investor or the major U.S. institutional investor in connection with the transactions;

(4) Maintaining required books and records relating to the transactions, including those required by Rules 17a-3 and 17a-4 under the Act (17 CFR 240.17a-3 and 17a-4);

(S) Complying with Rule 15c3-1 under the Act (17 CFR 240.150-1) with respect to the transactions; and

(6) Receiving, delivering, and safeguarding funds and securities in connection with the transactions on behalf of the U.S. institutional investor or the major U.S. institutional investor in compliance with Rule 15c3-3 under the Act (17 CFR 240.15c3-3);

(B) Participates through an associated person in all oral communications between the foreign associated person and the U.S. institutional investor, other than a major U.S. institutional investor;

(C) Has obtained from the foreign broker or dealer, with respect to each foreign associated person, the types of information specified in Rule 17a-3(a)(12) under the Act (17 CFR 240.17a¬3(a)(12)), provided that the information required by paragraph (a)(1 2)(d) of that Rule shall include sanctions imposed by foreign securities authorities, exchanges, or associations, including without limitation those described in paragraph (a)(3)(ii)(B) of this rule;

(D) Has obtained from the foreign broker or dealer and each foreign associated person written consent to service of process for any civil action brought by or proceeding before the Commission or a self-regulatory organization (as defined in section 3(a)(26) of the Act), providing that process may be served on them by service on the registered broker or dealer in the manner set forth on the registered broker's or dealer's current Form BD; and

(E) Maintains a written record of the information and consents required by paragraphs (a)(3)(iii)(C) and (D) of this rule, and all records in connection with trading activities of the U.S. institutional investor or the major U.S. institutional investor involving the foreign broker or dealer conducted under paragraph (a)(3) of this rule, in an office of the registered broker or dealer located in the United States (with respect to nonresident registered brokers or dealers, pursuant to Rule 17a-7(a) under the Act (17 CFR 240.17a7(a))), and makes these records available to the Commission upon request; or

(4) Effects transactions in securities with or for, or induces or attempts to induce the purchase or sale of any security by:

(i) A U.S. registered broker-dealer, whether the registered broker-dealer is acting as principal for its own account or as agent for others, or a bank 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;

(ii) The African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations, and their agencies, affiliates, and pension funds;

(iii) A foreign person temporarily present in the United States, with whom the foreign broker or dealer had a bona fide, pre-existing relationship before the foreign person entered the United States;

(iv) Any agency or branch of a U.S. person permanently located outside the United States, provided that the transactions occur outside the United States; or

(v) U.S. citizens resident outside the United States, provided that the transactions occur outside the United States, and that the foreign broker or dealer does not direct its selling efforts toward identifiable groups of U.S. citizens resident abroad.

(b) When used in this rule,

(1) The term "family of investment companies" shall mean:

(i) Except for insurance company separate accounts, any two or more separately registered investment companies under the Investment Company Act of 1940 that share the same investment adviser or principal underwriter and hold themselves out to investors as related companies for purposes of investment and investor services; and

(ii) With respect to insurance company separate accounts, any two or more separately registered separate accounts under the Investment Company Act of 1940 that share the same investment adviser or principal underwriter and function under operational or accounting or control systems that are substantially similar.

(2) The term “foreign associated person” shall mean any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the Act, of the foreign broker or dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under paragraph (a)(3) of this rule.

(3) The term “foreign broker or dealer” shall mean any non-U.S. resident person (including any U.S. person engaged in business as a broker or dealer entirely outside the United States, except as otherwise permitted by this rule) that is not an office or branch of, or a natural person associated with, a registered broker or dealer, whose securities activities, if conducted in the United States, would be described by the definition of “broker” or “dealer” in sections 3(a)(4) or 3(a)(5) of the Act.

(4) The term “major U.S. institutional investor” shall mean a person that is:

(i) A U.S. institutional investor that has, or has under management, total assets in excess of $100 million; provided, however, that for purposes of determining the total assets of an investment company under this rule, the investment company may include the assets of any family of investment companies of which it is a part; or

(ii) An investment adviser registered with the Commission under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of $100 million.

(5) The term “registered broker or dealer” shall mean a person that is registered with the Commission under sections 15(b), 1513(a)(2), or 15C(a)(2) of the Act.

(6) The term “United States” shall mean the United States of America, including the States and any territories and other areas subject to its jurisdiction.

(7) The term “U.S. institutional investor” shall mean a person that is:

(i) An investment company registered with the Commission under section 8 of the Investment Company Act of 1940; or

(ii) A bank, savings and loan association, insurance company, business development company, small business investment company, or employee benefit plan defined in Rule 501(a)(1) of Regulation D under the Securities Act of 1933 (17 CFR 230.501(a)(1)); a private business development company defined in Rule 501(a)(2) (17 CFR 230.501(a)(2)); an organization described in section 501(c)(3) of the Internal Revenue Code, as defined in Rule 501(a)(3) (17 CFR 230.501(a)(3)); or a trust defined in Rule 501(a)(7) (17 CFR 230.501(a)(7)).

(c) The Commission, by order after notice and opportunity for hearing, may withdraw the exemption provided in paragraph (a)(3) of this rule with respect to the subsequent activities of a foreign broker or dealer or class of foreign brokers or dealers conducted from a foreign country, if the Commission finds that the laws or regulations of that foreign country have prohibited the foreign broker or dealer, or one of a class of foreign brokers or dealers, from providing, in response to a request from the Commission, information or documents within its possession, custody, or control, testimony of foreign associated persons, or assistance in taking the evidence of other persons, wherever located, related to activities exempted by paragraph (a)(3) of this rule.