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RULE 15a-6 OF THE SECURITIES EXCHANGE ACT: A GUIDE FOR FOREIGN BROKER-DEALERS

SEC Rule 15a-6 allows non-U.S. broker-dealers to engage in certain activities, including soliciting U.S. institutional investors, without registering with the SEC as a broker- dealer. The rule provides exemptions from broker-dealer registration for activities such as providing research to U.S. investors and effecting transactions in the relevant securities, and soliciting and effecting transactions with U.S. institutional investors through a "chaperoning broker-dealer." The rule also permits a non-U.S. broker-dealer to effect unsolicited transactions, and solicit and effect transactions for banks acting as a broker-dealer, certain international organizations, foreign persons temporarily in the U.S., U.S. citizens resident abroad, and foreign branches and agencies of U.S. persons. Rule 15a-6 is intended to provide clear guidance to foreign broker-dealers seeking to comply with the U.S. broker-dealer registration requirement and balance access to non-U.S. capital markets by U.S. institutional investors through non-U.S. broker-dealers and the research they provide with investor protection and U.S. regulatory oversight.

By Guy P. Lander *

I. OVERVIEW

Under the Securities Exchange Act of 1934 (the "Exchange Act"), securities brokerage activities may only be conducted by a broker-dealer that is registered with the Securities and Exchange Commission (the "SEC" and "registered broker-dealer," respectively) and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"). Generally, it is impractical or too burdensome for a foreign financial entity to register as a broker-dealer in the United States because its entire operations would become subject to U.S. regulatory requirements. However, Rule 15a-6 of the Exchange Act permits a foreign financial entity to solicit U.S. persons and permits the foreign entity's personnel to have direct contact with some U.S. persons, subject to certain conditions, without subjecting the entire operations of the foreign financial entity to U.S. broker-dealer registration.

II. RULE 15a-6 UNDER THE EXCHANGE ACT

Section 15 of the Exchange Act makes it illegal for any broker or dealer to effect, induce, or attempt to induce securities transactions in the United States unless it is registered with the SEC.[1]

[1] A "broker" is "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A) (2024). A "dealer" is "any person engaged in the

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Generally, the Exchange Act does not apply to persons whose broker-dealer functions are conducted outside the United States. Broker-dealers located inside the United States and broker-dealers located outside the United States that solicit inside the United States or effect transactions with persons inside the United States, are required to register with the SEC as a broker-dealer. However, Rule 15a-6 provides an exemption that permits a foreign broker-dealer that is not registered with the SEC to engage in limited securities activities in the United States without requiring the foreign broker-dealer to register with the SEC as a broker-dealer.[2] Under Rule 15a-6, there are four exemptions for a foreign broker-dealer that is not located in the United States and is not an office or branch of an SEC-registered broker-dealer.[3] Notably, the third exemption requires the intermediation of an SEC-registered broker-dealer.[4]

A. Paragraph (a)(1) – Unsolicited Transactions

The first exemption of Rule 15a-6 provides an exemption for unsolicited transactions between foreign broker-dealers and U.S. persons, i.e., when U.S. investors seek out foreign broker-dealers outside the United States and initiate transactions in foreign securities in foreign securities markets.[5] Under this exemption, foreign broker-dealers are not required to register with the SEC merely because they have effected securities transactions for U.S. investors as long as they have not solicited those transactions.[6]

This exemption only covers unsolicited transactions for a U.S. customer. The SEC defines "solicitation" broadly as any affirmative effort by a broker-dealer to induce transactional business for itself or its affiliates. Once a relationship has been established, all subsequent transactions must also still be initiated by the U.S. customer. This means that any contacts with an unsolicited U.S. customer cannot be initiated by the foreign broker-dealer under this exemption. However, the SEC 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

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business of buying and selling securities for its own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A) (2024). However, persons not engaged in the business of dealing securities, i.e., a person who buys or sells securities individually or in a fiduciary capacity but not as a part of regular business, is exempt and not considered a "dealer." 15 U.S.C. § 78c(a)(5)(B) (2024).

[2] A "foreign broker or dealer" is any non-U.S. resident person (including any U.S. person engaged in business as a broker-dealer outside the U.S.) that is not an office or branch of, or a natural person associated with, a registered broker-dealer. 17 C.F.R. § 240.15a-6(b)(3) (1989).

[3] 17 C.F.R. § 240.15a-6(a) (1989).

[4] *Id*.

[5] 17 C.F.R. § 240.15a-6(a)(1) (1989).

[6] Although assessed on a case-by-case basis, the SEC views frequent or significant transactions with U.S. investors, including activities such as telephone calls to effect trades, directed U.S. advertising, or recommending specific securities, as indicative of solicitation. U.S. Sec. & Exch. Comm'n, Div. of Trading & Mkts., *Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers* (Mar. 21, 2013) (updated Apr. 14, 2014), https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/divisionsmarketregfaq-2; *see also* Greene, Edward F., et al., U.S. Regulation of the International Securities and Derivatives Markets § 14.03, 14-24 to 14-25 (11th & 12th eds. 2014–2017) (citing Richard R. Lindsey, Director, Division of Market Regulation, U.S. Sec. & Exch. Comm'n, *Letter re: Securities Activities of U.S.-Affiliated Foreign Dealers to* Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton (Apr. 9, 1997); Catherine McGuire, Chief Counsel, Division of Market Regulation, U.S. Sec. & Exch. Comm'n, *Letter re: Securities Activities of U.S.-Affiliated Foreign Dealers to* Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton (Apr. 28, 1997) (hereinafter collectively, the "1997 Cleary Letter") (clarifying that Rule 15a-6 permits foreign broker-dealers to effect "unsolicited" transactions with U.S. investors but does not define "solicitation" because its meaning is determined by the SEC on a case-by-case basis according to the Rule 15a-6 Adopting Release), https://www.clearygottlieb.com/-/media/files/isdm-12th-edition/18-chapter-14-pdf.pdf.

securities business relationship."[7] Additionally, the SEC has taken the position that a securities transaction resulting from a U.S. customer who viewed a foreign broker-dealer's website is a "solicited" transaction.[8]

B. Paragraph (a)(2) – Research Reports

1. Major U.S. Institutional Investors and $100 Million Entities

The SEC believes that providing research to investors may constitute solicitation. The second exemption of Rule 15a-6 provides an exemption for foreign broker-dealers that provide research reports to major U.S. institutional investors and effect any securities transactions resulting from those research reports.[9] A "major U.S. institutional investor" is a U.S. institutional investor that has, or has under management, total assets in excess of $100 million, or an SEC-registered investment advisor with total assets under management in excess of $100 million, or an entity all of whose equity owners are major U.S. institutional investors.[10] The SEC expanded the applicability of Rule 15a-6 to allow foreign broker-dealers to provide research reports to and enter into transactions with institutional entities (including corporations and partnerships) that own or control, or investment advisors, whether registered or unregistered, that have under management, in excess of $100 million in aggregate financial assets ("$100 Million Entities").The SEC's expanded view of major U.S. institutional investors applies to all provisions under Rule 15-a-6 in which the term is used.[11]

This exemption is narrow because a foreign broker-dealer relying upon it must comply with the following conditions:

a. The research reports may not recommend the foreign broker-dealer to effect trades in any security;

b. The foreign broker-dealer may not initiate contact with the recipients of the research reports to follow up on the research reports and may not otherwise induce or attempt to induce the purchase or sale of any security by the recipients;

c. The foreign broker-dealer may not provide research as part of any express or implied understanding that any U.S. recipients will direct commission income to the foreign broker-dealer (i.e., no "soft dollar" arrangement between the U.S. investor and the foreign broker-dealer);

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[7] Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at Question 9; Rule 15a-6 Proposing Release, 53 Fed. Reg. 23,645, 23,650 (June 23, 1988). The SEC has stated that the exception in Rule 15a-6(a)(1) for unsolicited trades was designed to reflect the view that "U.S. persons seeking out unregistered foreign broker-dealers outside the U.S. cannot expect the protection of U.S. broker-dealer standards." Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27,017, 54 Fed. Reg. 30,013, 30,031 (July 18, 1989). In this regard, SEC staff believes that if a foreign broker-dealer regularly effects transactions directly with or for a U.S. investor, the investor might reasonably expect to be protected by U.S. laws, regulations, and supervisory structures applicable to registered broker-dealers. Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at n.21.

[8] *See also* U.S. Sec. & Exch. Comm'n, *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore* (Mar. 27, 1998) (63 Fed. Reg. 14806), https://www.sec.gov/rules-regulations/1998/03/statement-commission-regarding-use-internet-web-sites-offer-securities-solicit-securities.

[9] U.S. Sec. & Exch. Comm'n, *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore* (Mar. 27, 1998) (63 Fed. Reg. 14806), https://www.sec.gov/rules-regulations/1998/ 03/statement-commission-regarding-use-internet-web-sites-offer-securities-solicit-securities.

[10] 17 C.F.R. § 240.15a-6(b)(4) (1989). Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at

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Question 18. The definition of a "U.S. institutional investor" broadly encompasses sophisticated entities with significant assets or management, including SEC-registered investment companies, banks, insurance companies, large employee benefit plans (over $10 million in assets), broker-dealers, and other financial institutions. 17 C.F.R. § 240.15a-6(b)(7) (1989).

[11] 1997 Cleary Letter. The SEC no-action relief granted in the 1997 Cleary Letter expanded the definition of major U.S. institutional investor to any entity. This eliminated the Rule 15a-6 limitation on corporations and partnerships generally not qualifying as major U.S. institutional investors despite owning or managing $100 million in assets. The SEC's expanded view of major U.S. institutional investors applies to all provisions under Rule 15a-6 in which the term is used. *See* Greene et al., *supra*, at 14-31 to 14-32 (explaining the SEC's distinction between U.S. institutional investors, major U.S. institutional investors, and $100 Million Entities).

d. If the above conditions are met, the foreign broker-dealer may effect trades in securities discussed in the research or other securities at the request of the major institutional investor receiving the report; and

e. But, if the foreign broker dealer has a "chaperoning" arrangement with an SEC-registered broker dealer that satisfies the third exemption (as described below), all resulting trades by the recipient of the research report must be "effected" through the SEC-registered broker-dealer.[12]

The SEC-registered broker-dealer distributing research to major U.S. institutional investors is not required to take responsibility for the content of the report for which it acts as an indirect distributor.[13]

2. Other U.S. Persons – Persons Other Than Major U.S. Institutional Investors and $100 Million Entities

The Rule 15a-6 Adopting Release specifies conditions by which foreign broker-dealers may distribute research to any U.S. investor.[14] These conditions are: (i) an SEC-registered broker-dealer must distribute the research to U.S. persons; (ii) the research report must prominently state that the SEC-registered broker-dealer accepts responsibility for the content of the report; (iii) the research report must prominently state that any U.S. recipient that wishes to effect transactions in the securities discussed in the report must do so through an SEC-registered broker-dealer (as opposed to a foreign broker-dealer); (iv) all resulting transactions are in fact effected through an SEC-registered broker-dealer; and (v) there are no soft-dollar arrangements between the foreign broker-dealer and the U.S. recipient receiving the report.[15]

Essentially, this "exemption" is really a statement that an SEC-registered broker-dealer may distribute research prepared by a third party, such as a foreign broker-dealer. When distributing this third-party research, the SEC-registered broker-dealer is subject to most of the same responsibilities that it has for research prepared in-house, albeit some U.S. broker-dealers have qualified overseas research analysts who are able to review and approve research distributed into the United States.

3. FINRA Rules

Research reports distributed by a FINRA member, SEC-registered broker-dealer to either major U.S. institutional investors or other investors must comply with FINRA Rules 2241 and 2242 review and disclosure requirements.

C. Paragraph (a)(3) – Conditional Exemptions That Require Chaperoning by an SEC-Registered Broker-Dealer

The third exemption of Rule 15a-6 permits unregistered foreign broker-dealers outside the United States to solicit securities transactions from U.S. institutional investors and major U.S. institutional investors so long as the foreign broker-dealer has entered into a chaperone arrangement with an SEC-registered broker-dealer.[16] However, this exemption requires numerous conditions to be satisfied by the foreign broker-dealer, the foreign associated person of the foreign broker-dealer, and the SEC-registered broker-dealer.[17]

[12] Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at Question 5.

[13] Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at Question 5.

[14] Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27,017, 54 Fed. Reg. 30,013 (July 17, 1989).

[15] *Id*.

[16] 17 C.F.R. § 240.15a-6(a)(3) (1989); *see also* Thomas P. Lemke & Gerald T. Lins, *Broker-Dealer Regulation* § 1:48 (Thomson Reuters, current through 2024) (explaining that the foreign broker-dealer may have chaperone arrangements with multiple SEC-registered broker-dealers, and any such SEC-registered broker-dealer is permitted to be an affiliate of the foreign broker-dealer and does not need to be physically located within the U.S.). A "U.S. institutional investor" is a person that is (i) an SEC-registered investment company; (ii) a bank, savings and loan association, insurance company, business development company, small business investment company; or (iii) employee benefit plan, private business development company, organization described in § 501(c) of the Internal Revenue Code, or trust as defined in 17 C.F.R. § 230.501(a)(1)-(3), (7) (1982, as amended 1990 & 2020). 17 C.F.R. § 240.15a-6(b)(7) (1989).

[17] A "foreign associated person" is any natural person outside the U.S. who is an associated person of the foreign broker-dealer and who participates in the solicitation of a U.S. institutional investor or major U.S. institutional investor. 17 C.F.R. § 240.15a-6(b)(2) (1989).

Generally, this exemption requires compliance with the following conditions (as further discussed below):

1. The foreign broker-dealer must enter into a Rule 15a-6(a)(3) arrangement with an SEC-registered broker-dealer;

2. All resulting securities transactions with or for U.S. institutional investors, major U.S. institutional investors, and $100 Million Entities must be effected through the SEC-registered broker-dealer under the Rule 15a-6 chaperone arrangement;

3. Foreign associated persons must conduct all securities activities from outside of the United States, except oral communications and in-person visits with U.S. investors are permitted if the SEC-registered broker-dealer has accepted responsibility for the communications and: (i) an associated person of the SEC-registered broker-dealer participates in all oral communications between the foreign associated persons of the foreign broker-dealer from outside the United States and U.S. institutional investors (but not for major U.S. institutional investors or $100 Million Entities) and (ii) an associated person of the SEC-registered broker-dealer accompanies the foreign associated person on the in-person visits (but not for major U.S. institutional investors or $100 Million Entities for 30 or fewer days);

4. The foreign broker-dealer and any foreign associated persons must consent to service of process in the United States and comply with additional conditions.

a. Additional Conditions – Foreign Broker-Dealers and Foreign Associated Persons

The foreign broker-dealer is permitted to induce or attempt to induce the purchase or sale of a security from U.S. institutional investors, major U.S. institutional investors and $100 Million Entities, and foreign associated persons of the foreign broker-dealer to effect such securities transactions with these U.S. customers, subject to all of the following:

- Permitted Customers. The foreign broker-dealer's contacts with U.S. customers must be limited to U.S. institutional investors and major U.S. institutional investors, including $100 Million Entities.[18]

- Rule 15a-6(a)(3) Arrangement. The foreign broker-dealer must enter into an arrangement with an SEC-registered broker-dealer, which provides that any securities transactions with or for U.S. institutional investors or major U.S. institutional investors resulting from contacts between the foreign broker-dealer and the U.S. investors will be effected through the SEC-registered broker dealer and made in reliance on this third exemption.

- Consent to Service of Process. The foreign broker-dealer must provide a written consent to service of process in the United States for any civil action brought by or before the SEC or a self-regulatory organization. The foreign broker-dealer's personnel (i.e., foreign associated persons) who contact U.S. persons must also provide written consent to service of process in the United States (the same as the written consent provided by the foreign broker-dealer itself), which must be approved by the SEC-registered broker-dealer under the Rule 15a-6(a)(3) arrangement.[19]

- Statutory Disqualifications. Foreign associated persons must be determined to not be subject to statutory disqualifications or any disqualifying acts or statements, including being convicted of any foreign offense, enjoined from or found to have committed any foreign act substantially equivalent to those listed in Sections 15(b)(4)(B), (C), (D) or (E) of the Exchange Act, or having made any false foreign statement or omission, substantially equivalent to those listed in Section

[18] A "U.S. institutional investor" is a person that is: (i) an SEC-registered investment company; (ii) a bank, savings and loan association, insurance company, business development company, small business investment company; or (iii) employee benefit plan, private business development company, organization described in § 501(c)(3) of the Internal Revenue Code, or trust as defined in 17 C.F.R. § 230.501(a)(7) (1982, as amended 1990 & 2020). 17 C.F.R. § 240.15a-6(b)(7) (1989).

[19] *See also* Lemke & Lins, *supra*, § 1:48.

3(a)(39) of the Exchange Act.[20] The SEC-registered broker-dealer must conduct a review of the foreign associated persons substantially similar to the review it would conduct for its own personnel to ensure that the foreign associated persons are not subject to certain statutory disqualifications and any similar foreign sanctions.

- Information Provided to the SEC. Upon request by the SEC or under any agreement between the foreign broker-dealer and any foreign government or foreign securities authority, the foreign broker-dealer must provide the SEC with any: (i) information or documents within the foreign broker-dealer's possession, custody, or control, (ii) testimony of foreign associated persons, and (iii) assistance in taking the evidence of other persons. However, clauses (i)-(iii) above are only required to be provided to the SEC if they relate to securities transactions effected by the foreign broker-dealer.

- Limiting Caveat. If the foreign broker-dealer exercised its best efforts to provide requested information to the SEC, including requesting the appropriate governmental body and, if legally necessary, its customers, but it is prohibited by foreign law or regulations from doing so, the SEC may withdraw an exemption granted to the foreign broker-dealer, under Rule 15a-6(a)(3)(c).[21]

- Permitted Activities from Outside of the United States – Telephone Calls. Foreign associated persons may engage in oral communications (e.g., telephone calls) from outside of the United States with U.S. institutional investors, major U.S. institutional investors and $100 Million Entities, provided that the SEC-registered broker-dealer accepts responsibility for these communications. And, an associated person of the SEC-registered broker-dealer must participate in all oral communications between the foreign broker-dealer's associated persons and U.S. institutional investors during regular NYSE trading hours.[22] Notably, this is not required for major U.S. institutional investors or $100 Million Entities. Additionally, this requirement does not apply to telephone calls made by foreign associated persons to U.S. investors that occur outside of regular NYSE trading hours, provided no orders to effect transactions are accepted other than for foreign securities.

- Permitted Activities from Outside of the United States – In-Person Visits. Foreign associated persons may visit U.S. institutional investors, major U.S. institutional investors, and $100 Million Entities in-person, provided an associated person of the SEC-registered broker-dealer accompanies any foreign associated persons on those in-person visits (i.e., "chaperoning") and the SEC-registered broker-dealer accepts responsibility for any communications.[23] However, this chaperone requirement does not apply for major U.S.

[20] Any foreign acts substantially equivalent to those listed in Sections 15(b)(4) (B), (C), (D), or (E) of the Exchange Act are disqualifying foreign acts. Any false foreign statements or omissions substantially equivalent to those listed in Section 3(a)(39)(E) of the Exchange Act are disqualifying statements or omissions. Examples of certain other disqualifying acts under Section 3(a)(39) include expulsion from membership in a self-regulatory organization, felony convictions (primarily related to finance or securities), and false or misleading statements in any application, report, or proceeding with regulators. 17 C.F.R. § 240.15a-6(a)(3)(ii)(B) (1989).

[21] By order after notice and opportunity for hearing, the SEC may withdraw the third exemption of Rule 15a-6 for subsequent activities of the foreign broker-dealer upon the SEC's finding that the foreign country's laws or regulations prohibit the foreign broker-dealer from providing information in response to a request from the SEC. 17 C.F.R. § 240.15a-6(c) (1989).

[22] The SEC-registered broker-dealer may be present physically or by phone for communications between the foreign associated person and U.S. customers, provided it can actively participate in the communications as they occur in real time. 17 C.F.R. § 240.15a-6(a)(3)(ii)(A)(1), (a)(3)(ii)(B) (1989); *see also* Registration Requirements for Foreign Broker-Dealers, 54 Fed. Reg. 30,013, 30,029 n.191 (July 18, 1989).

[23] *Id*. The chaperoning associated person must: (i) be familiar with any research reports discussed during the visits, (ii) pre-review all written materials, summaries, outlines, or presentations provided by the foreign associated person, and (iii) ensure that the foreign associated person's statements are consistent with the foreign broker-dealer's current recommendations. The chaperoning SEC-registered broker-dealer bears the same responsibilities as if acting on its own behalf.

institutional investors and $100 Million Entities if the visits by foreign associated persons occur fewer than 30 calendar days per year and the foreign associated persons do not accept orders to effect any transactions (including foreign securities) while in the United States. Moreover, in either case, any securities transactions discussed during these visits must be effected through the SEC-registered broker-dealer. Although not expressly stated in the relief, the SEC has said that the 30-day limit is per foreign associated person, not per firm.[24]

b. Effecting Transactions – SEC-Registered Broker-Dealer Intermediation

Under Rule 15a-6(a)(3), all securities transactions solicited by the foreign broker-dealer for U.S. institutional investors, major U.S. institutional investors, and $100 Million Entities must be effected through the SEC-registered broker-dealer (i.e., all securities transactions must be "booked" by the SEC-registered broker-dealer as its own). The SEC-registered broker-dealer is required to perform each of the following activities (as further discussed below):

- Effect the securities transactions (other than negotiating their terms);
- Clearing and settling the trades (arranging for payment and delivery);
- Issue confirmations and account statements to the U.S. investors;
- Extend, or arrange for the extension of credit, to U.S. investors for the transaction (i.e., as between the two, not the foreign broker-dealer);
- Maintain the books and records for the transactions, including those required under Rules 17a-3 and 17a-4;
- Comply with the net capital requirements under Rule 15c3-1 for the transactions;
- Receive, deliver, and safeguard funds and securities for transactions with U.S. investors pursuant to Rule 15c3-3 (the "Customer Protection Rule"); and
- Obtain written consents to service of process from the foreign broker-dealer and each foreign associated person for any civil action brought by or before the SEC or another self-regulatory organization, and such service of process may be served to the SEC-registered broker-dealer.
- Effecting the Transactions.

The SEC-registered broker-dealer may delegate to the foreign broker-dealer the functions of: (i) negotiating the terms of the securities trade and (ii) physically executing the securities trades for the foreign securities in foreign markets or on foreign exchanges.[25] The SEC-registered broker-dealer must clear and settle the trades (arrange for payment and delivery). However, if the foreign broker-dealer does not act as a custodian to the U.S. investor, the SEC permits the clearance and settlement of transactions involving foreign securities and U.S. government securities through direct transfers of funds and securities between the foreign broker-dealer (or its agent) and the U.S. investor (or its custodian). However, those direct transfers of funds or securities are permissible only where: (i) the foreign broker-dealer agrees to make available to the SEC-registered broker-dealer clearance and settlement information relating to those transfers and (ii) the broker-dealer is not in default

[24] 1997 Cleary Letter; Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at Question 17. However, the participation in unchaperoned meetings on a per foreign associated person basis should not be structured so that the foreign broker-dealer uses a rotating series of individuals to create a de facto "office" or presence in the U.S. (e.g., a presence that would constitute a "permanent establishment" of the foreign broker-dealer for U.S. tax purposes) or to offer a continuous U.S. presence to deal with a specific major U.S. institutional investor or group of major U.S. institutional investors. *Id.* at n.24.

[25] Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27,017, 54 Fed. Reg. 30,013, 30,025 & n.150 (July 18, 1989). "Foreign securities" means:(i) securities of a non-U.S. issuer (i.e., an issuer not organized or incorporated under the laws of the United States) that are when the transaction is not effected on a U.S. securities exchange or through NASDAQ and (ii) debt securities of a non-U.S. issuer, including convertible debt, issued in connection with a distribution outside the U.S. Whether a derivative instrument involves foreign securities depends on the nature of the underlying securities. *See* Lemke & Lins, *supra*, § 1:48.

to any counterparty in any material financial market transaction.[26]

c. Confirmations and Account Statements.

The SEC-registered broker-dealer may appoint the foreign broker-dealer as its agent to mechanically print, process, and mail trade confirmations and statements related to the transactions directly to U.S. investors, provided: (i) the records comply with applicable federal securities laws (e.g., SEC Rule 10b-10 for confirmations) and applicable self-regulatory organization rules, (ii) the SEC-registered broker-dealer accepts responsibility for the records, and (iii) the SEC-registered broker-dealer maintains the records or copies of the records.[27] In addition, any confirmation sent to a U.S. investor 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.[28] Although the foreign broker-dealer is permitted to issue confirmations, the SEC may require additional disclosure based upon foreign law where the securities transaction is executed.[29]

- *Extending Credit*. The foreign broker-dealer may extend or issue credit to U.S. customers for the purchase of securities in compliance with Federal Reserve Board Regulation T margin requirements.[30]
- *Maintaining Books and Records*. The SEC-registered broker-dealer is responsible for maintaining a copy of all books and records in its U.S. offices for securities transactions to which it is an intermediary for foreign broker-dealers (including those under Rules 17a-3 (trading blotters and personal account ledgers) and 17a-4 (retention for various time periods)) and ensuring that these books and records comply with U.S. law. While the foreign broker-dealer or a clearing firm may be delegated the responsibility of maintaining transaction-based books and records, the SEC-registered broker-dealer nonetheless retains responsibility of reviewing all transaction records to confirm that the underlying securities transactions are correctly reported. Additionally, the SEC-registered broker-dealer is responsible for maintaining all non-transactional books and records, including written records of all foreign associated persons, written consents for service of process by foreign broker-dealers and foreign associated persons, and personnel records for its own associated persons. The SEC-registered broker-dealer must approve all personnel of the foreign broker-dealer and obtain records of each foreign associated person (as if the foreign associated person were to become an associated person of the SEC-registered broker-dealer) containing types of information required under Rule 17a-3(a)(12), including sanctions imposed by foreign securities authorities, exchanges, and associations.[31]
- *Net Capital Requirements*. If the parties to a securities transaction agree to an extended settlement, the SEC-registered broker-dealer may be required to comply with net capital requirements for broker-dealers under Rule 15c3-1 by accepting

[26] Greene et al., *supra*, at 14-41 (noting that the Customer Protection Rule provides for the use of designated foreign control locations so that foreign securities do not need to be kept physically in the United States).

[27] *Id*. The 1997 Cleary Letter; Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at Question 4.

[28] Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, *supra*, at Question 4.

[29] *Id*. For example, trade confirmations may be required to include disclosure that the foreign broker-dealer is not a member of the Securities Investor Protection Corporation ("SIPC"). Registration Requirements for Foreign Broker-Dealers, 53 Fed. Reg. 23,645, 23,655 (June 23, 1988) (explaining that the SEC-registered broker-dealer intermediary is responsible for required customer protections, including the proper handling of funds and securities under Rule 15c3-3, which underlies SIPC coverage requirements).

[30] However, the foreign broker-dealer may be prohibited from assuming physical custody of the securities used to collateralize the credit. Lemke & Lins, *supra*, § 1:48.

[31] Records must include (i) an employment application by each foreign associated person, approved in writing by the foreign broker-dealer, and containing specific personal information about the foreign associated person and (ii) a record listing every foreign associated person, where they regularly handle funds or securities or effect transactions, and every internal identification code assigned to them by the foreign broker-dealer, including any Central Registration Depository number. 17 C.F.R. § 240.17a-3(a)(12) ("Records to Be Made by Certain Exchange Members, Brokers and Dealers").

responsibility for continuing capital charges, including failures to deliver or receive in the arranged transaction.[32] These charges can be substantial for foreign securities that lack a ready market under the net capital rule. However, the foreign broker-dealer and the U.S. investor may agree that the SEC-registered broker-dealer will not guarantee settlement of the transactions.

- *Customer Protection Rule*. Because the SEC-registered broker-dealer must treat U.S. institutional investors, major U.S. institutional investors, and $100 Million Entities to which it is an intermediary for foreign broker-dealers as its own customers, it must undertake fiduciary responsibilities, including overseeing sales activities, determining transaction suitability, and reviewing trades for potential violations of securities laws by periodically examining accounts, transactions, related correspondence, and lending activities. As such, SEC-registered broker-dealers that receive, deliver, and safeguard funds and securities on behalf of U.S. customers in connection with intermediating securities transactions for foreign broker-dealers must comply with the Customer Protection Rule under Rule 15c3-3 regarding the reserves and custody of securities.[33]

d. U.S. Clearing Firms

Many of the functions for which the SEC-registered broker-dealer is responsible under the Rule 15a-6(a)(3) exemption are typically performed by the SEC-registered broker-dealer's clearing firm. Unless the SEC-registered broker-dealer self-clears, generally, SEC-registered broker-dealers enter into a clearing arrangement in which the clearing firm is responsible for: (i) settling trades; (ii) custody of funds and securities; (iii) net capital charges; (iv) execution of securities transactions; (v) sending confirmations and statements; and (vi) transaction-related recordkeeping. The SEC-registered broker-dealer must provide the clearing firm with daily reports of all securities transactions entered into by the SEC-registered broker-dealer and its U.S. customers, as well as daily reports of unsettled transactions, so that the clearing firm can monitor activity and properly account for capital charges. If the clearing arrangement assigns liability for unsettled trades to the SEC-registered broker-dealer, it must record the corresponding capital charges on its own books.[34]

e. SEC-Registered Broker-Dealer Remaining Functions

If an SEC-registered broker-dealer enters into a clearing agreement with a U.S. clearing firm that complies with all applicable SEC accommodations, then the SEC-registered broker-dealer remains responsible only for the following functions:

- Being present and participating in technically intermediate securities transactions;
- Opening customer accounts (i.e., having the account statements signed);

[32] 17 C.F.R. § 240.15c3-1 ("Net Capital Requirements for Brokers or Dealers").

[33] 17 C.F.R. § 240.15c3-3 ("Reserves and Custody of Securities"); *see also* Greene et al., *supra*, at 14-41 (noting that the Customer Protection Rule provides for the use of designated foreign control locations so that foreign securities do not need to be kept physically in the U.S.).

[34] *See generally* FINRA, Notice to Members 05-38, *NASD Reminds Broker-Dealers of Their Responsibilities Regarding Deficits in Introduced Accounts* (May 20, 2005), https://www.finra.org/rules-guidance/notices/05-38 (discussing clearing firms' responsibility to take charges to their net capital for certain debits, failures to notify of reported deficits, and bar on passing the deficit onto other firms); FINRA, Regulatory Notice 23-02, *FINRA Amends FINRA Rule 2231* (Jan. 18, 2023), https://www.finra.org/rules-guidance/notices/23-02 (explaining FINRA's updates to rules governing customer account statements including disclosing certain information on statements, sharing statements with third parties, specifying each party's responsibilities for preparing and transmitting statements, sending confirmations via electronic delivery methods, distinguishing assets that are carried on behalf of a customer from assets held externally and solely as a courtesy to the customer, and providing joint summary statements); FINRA, NASD Regulation Articulates Position On The Application Of NASD Rule 2680 To U.S. Broker/Dealers That Intermediate Transactions Pursuant To Exchange Act Rule 15a-6(a)(3) (Nov. 1, 1998), https://www.finra.org/rules-guidance/notices/98-92 (reminding U.S. broker-dealers of their Rule 15a-6(a)(3) requirements, including issuing confirmations and statements to investors, maintaining books and records related to the transaction, and recording each options transaction).

- Maintaining books and records for the securities transactions;
- Bearing any net capital charges for the securities transactions; and
- Accepting fiduciary responsibility for customer relationships.
- Although the rule does not require review of written (including electronic) correspondence between foreign-associated persons of a foreign broker-dealer and U.S. institutional or major institutional investors, it is advisable that the chaperoning SEC-registered broker-dealer include these reviews in its correspondence supervisory review policy.

D. Paragraph (a)(4) – Transactions with Certain Counterparties

The fourth exemption of Rule 15a-6 serves as a catch-all provision, permitting certain additional securities transactions by foreign broker-dealers when the conditions of one exemption is met.[35] Acting as principal or agent for an SEC-registered broker-dealer or a bank, the foreign broker-dealer may transact directly with these entities, which are presumed sufficiently sophisticated and capable of handling transactions with unregistered foreign broker-dealers.[36] However, the foreign broker-dealer is prohibited from contacting the SEC-registered broker-dealer's or bank's customers, handling customer funds or securities, and issuing confirmations. Unregistered foreign broker-dealers may effect transactions with or for, or induce the purchase or sale of any security by satisfying any of the following (as further discussed below):

1. By the SEC-registered broker-dealer acting either as principal for its own account or as agent for others;
2. With various supranational financial agencies in the United States;
3. For foreign persons temporarily present in the United States so long as they had an established relationship with the foreign broker-dealer before their entry into the United States; or
4. With any agency or branch of a U.S. person permanently located outside the United States, or for U.S. citizens residing abroad, provided the transactions occur outside the United States and the foreign broker-dealer does not target identifiable groups of U.S. citizens.

a. Supranational Organizations

Securities transactions between foreign broker-dealers and certain multilateral agencies (and their affiliates and pension funds) are exempt. Various international financial agencies permitted under this fourth exemption include 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.[37] Foreign broker-dealers may solicit these organizations and directly engage in securities transactions with them in the United States.

b. Foreign Persons Temporarily in the United States.

Securities transactions between foreign broker-dealers and foreign persons that are temporarily present within the United States are exempt if the foreign broker-dealer had a bona fide, pre-existing relationship with the foreign person before the foreign person entered the United States.[38]

c. U.S. Residents Abroad

Foreign broker-dealers may effect securities transactions for agencies and branches of U.S. persons that are permanently located outside of the United States, provided all securities transactions occur outside of the United States and that no special selling efforts are directed or targeted toward identifiable groups of U.S. citizens.[39]

d. U.S. Advisers Acting for Non-U.S. Persons

Foreign broker-dealers may directly contact and effect transactions in foreign securities traded in foreign markets with U.S. resident professional fiduciaries that act for "offshore clients."[40] To rely on this no-action

[35] 17 C.F.R. § 240.15a-6(a)(4) (1989).

[36] *See also* Lemke & Lins, *supra*, § 1:45.

[37] 17 C.F.R. § 240.15a-6(a)(4)(ii) (1989).

[38] Lemke & Lins, *supra*, § 1:49.

[39] *Id*.

[40] A U.S. resident fiduciary is a professional intermediary that is neither an SEC-registered broker-dealer nor a bank acting as a broker-dealer under Rule 15a-6(a)(4)(i) but may be affiliated with a U.S. or foreign broker-dealer or registered under the Investment Advisors Act of 1940. *See* Greene et al., *supra*, at 14-29 to 14-30.

letter, the foreign broker-dealer must: (i) obtain written assurance from the U.S. resident fiduciary[41] that the account is managed for an off-shore client, (ii) ensure that all transactions with U.S. fiduciaries, other than transaction in foreign securities, will be made in compliance with either Section 15(a) (by an SEC-registered broker-dealer) or Rule 15a-6, and (iii) transactions effected with U.S. resident fiduciaries, other than transactions for offshore clients, will be effected in compliance with the requirements of Section 15(a) or Rule 15a-6.[42]

III. COURSE OF ACTION FOR MAXIMUM BUSINESS OPPORTUNITIES IN THE UNITED STATES

A. Entering into a Rule 15a-6 Arrangement

The third exemption of Rule 15a-6 is considered the broadest, providing two means for compliance: (1) the foreign broker-dealer may enter into a Rule 15a-6(a)(3) arrangement with an SEC-registered broker-dealer or (2) the foreign broker-dealer may establish its own SEC-registered broker-dealer ("Registered Affiliate") to act as a chaperone under Rule 15a-6(a)(3). If the foreign broker-dealer creates an SEC-registered broker-dealer to serve as its Registered Affiliate, then the foreign broker-dealer should establish the Registered Affiliate as a separate legal entity to avoid subjecting the foreign broker-dealer to U.S. federal securities laws.[43]

Once in place to intermediate Rule 15a-6 transactions, the Registered Affiliate or chaperoning broker-dealer would allow the foreign broker-dealer to fulfill the chaperoning requirement of paragraph (a)(3). By accepting responsibility for all communications between the foreign broker-dealer and U.S. customers, the foreign broker-dealer could then make telephone calls and conduct in-person visits to U.S. customers with the Registered Affiliate chaperoning the foreign broker-dealer's interactions by: (i) participating in all oral communications during NYSE trading hours with U.S. institutional investors (excluding major U.S. institutional investors and $100 Million Entities, and telephone calls outside NYSE trading hours for accepting orders and effecting transactions of foreign securities) and (ii) accompanying all in-person visits to U.S. customers (excluding visits to major U.S. institutional investors and $100 Million Entities occurring fewer than 30 days per year) and effecting all securities transactions discussed during these visits. Additionally, the Registered Affiliate's registered representatives could serve as "dual-hatted" employees.

B. Dual-Hatted Employees

Compliance with the chaperone requirement may result in the Registered Affiliate or the SEC-registered broker-dealer assuming responsibilities that typically fall on the foreign broker-dealer, which can cause associated persons to be considered "dual-hatted employees." Foreign broker-dealers are permitted to use persons who are employees of both the foreign broker-dealer and the Registered Affiliate to comply with U.S. federal securities laws. Dual-hatted employees that are associated persons of the Registered Affiliate may communicate directly with U.S. customers without reliance on any Rule 15a-6 exemptions. Moreover, dual-hatted employees can serve as chaperones for foreign broker-dealers by joining employees of the foreign broker-dealer (who are not registered representatives of the Registered Affiliate) on telephone calls and in-person visits to U.S. customers

However, having dual-hatted employees may entail some difficulties for foreign broker-dealers. Typically, the location where employees work is treated as a FINRA branch office, so the foreign office from which dual-hatted employees work under the authority of the Registered Affiliate will likely constitute a branch office, requiring registration with FINRA.[44] Registered foreign branch offices must comply with U.S. federal securities laws and FINRA regulations, including registration requirements, supervisory obligations, and inspections.

Registered foreign branch offices are subject to FINRA's oversight and periodic inspections for both

[41] Catherine McGuire, Chief Counsel, Division of Market Regulation, U.S. Sec. & Exch. Comm'n, *Letter re: Transactions in Foreign Securities by Foreign Brokers or Dealers with Accounts on Certain Foreign Persons Managed or Advised by U.S. Resident Fiduciaries to* Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton 1996 WL 38823, at *3 (Nov. 22, 1995, rev. Jan. 30, 1996).

[42] 15 U.S.C. § 78o(a) (2025); *see also* Greene et al., *supra*, at 14-29 to 14-30.

[43] 17 C.F.R. § 240.15a-6(a)(3) (1989).

[44] FINRA may consider the foreign office where dual-hatted employees conduct securities and business activities, such as engaging in solicitating transactions, to be a branch office regardless of its geographic location and not limited to locations in the U.S., and failure to comply will result in FINRA and SEC scrutiny and potential penalties. NASD Notice to Members 01-81 (Dec. 2001), https://www.finra.org/rules-guidance/notices/01-81.

cycle and cause.[45] The foreign branch office must be staffed with at least one appropriately registered principal who passed the relevant qualifying exam and is responsible for supervision.[46] To become a registered representative, an employee of the foreign branch office must be fully under the supervision of the Registered Affiliate.[47] ■

[45] Non-supervisory branch offices must be inspected at least every three years and supervisory branch offices, which supervise other offices, must be inspected at least annually. FINRA, *Proposed Rule Change to Amend FINRA Rule 3110* (Mar. 2023), https://www.finra.org/sites/default/files/2023-03/SR-FINRA-2023-006.pdf.

[46] While supervisory tasks may be delegated to multiple registered representatives, ultimate supervisory responsibility remains with a registered principal. Even in the case of dual-hatted employees, the foreign branch office must ensure that supervisory responsibility rests with an individual who is both qualified and registered in the applicable capacity and relevant principal category for the type of business conducted at that office. NASD Notice to Members 99-45, *Supervision and Supervisory Controls* (June 1999), https://www.finra.org/rules-guidance/notices/99-45.

[47] While supervisory tasks may be delegated to multiple registered representatives, ultimate supervisory responsibility remains with a registered principal. *Id*.