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This expanded version of our Alert (available [here](#)) provides additional background to, and analysis of, the Information Update.

## SEC's Information Update for Advisers Relying on the Unibanco No-Action Letters

Recently, the SEC's Division of Investment Management published a four-page [Information Update for Advisers Relying on the Unibanco No-Action Letters](#) (the "Update"). The stated purpose of the Update is to inform multi-national financial firms that rely on the longstanding Unibanco letters (as defined below) about what information, if any, should be submitted to the SEC to address certain representations and undertakings recited in those letters concerning unregistered non-U.S. affiliates that participate in providing advisory services, through their affiliated registered investment advisers, to U.S. clients.

**Background.** Generally, an investment adviser, once it exceeds certain thresholds of U.S.-related assets under management, must be registered with the SEC to provide advice to U.S. clients, regardless of whether that adviser is located within the U.S. or abroad.

In 1992, the SEC Division of Investment Management published its *Protecting Investors* study that, among other things, recommended a "conducts and effect" approach to determine whether the Advisers Act applied to persons and their advisory activities outside of the U.S.<sup>1</sup> Months after the study's publication, the staff relied on *Protecting Investors* in a no-action letter, *Uniao de Bancos de Brasileiros S.A.* ("*Unibanco*"),<sup>2</sup> to provide assurance with respect to a registered adviser's non-U.S. affiliate (a "participating affiliate") sharing personnel with the registered adviser, and providing investment advice to U.S. clients through the registered adviser, without the participating affiliate registering under the Advisers Act.<sup>3</sup>

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<sup>1</sup> See SEC Division of Investment Management, *Protecting Investors: A Half Century of Investment Company Regulation* 228-229 (May 1992).

<sup>2</sup> SEC no-action letter (pub. avail. July 28, 1992). In addition, *Unibanco* liberalized the test for integration among advisory affiliates for purposes of Advisers Act registration in cases in which one of the affiliates is a non-U.S. entity.

<sup>3</sup> Prior to *Unibanco*, a foreign adviser would have had to form a separate and independent U.S. subsidiary to provide investment advice to U.S. clients or to provide that advice through a registered entity that was also registered in its home jurisdiction. This led to the question of what was required of the U.S. subsidiary to be considered separate and independent from its non-U.S. unregistered parent so the parent would avoid having to register under the Advisers Act by reason of the applicability of Section 208(d) (which makes it unlawful for a person to do anything indirectly through another person that it would be unlawful for such person to do directly). The SEC staff addressed this question in a no-action letter, *Richard Ellis* (pub. avail. Sept. 17, 1981) ("*Richard Ellis*"), in which the staff created the so-called "Richard Ellis conditions." Specifically, in *Richard Ellis*, the staff stated that a subsidiary "may be regarded as having a separate, independent existence and to be functioning independently of its parent if it (1) is adequately capitalized, (2) has a buffer, such as a board of directors a majority of whose members are independent of the parent, between the subsidiary's personnel and the parent, (3) has employees, officers, and directors, who if engaged in providing advice in the day-to-day business of the subsidiary entity, are not otherwise engaged in an investment advisory business of the parent, (4) itself makes the decisions as to what investment advice is to be communicated to, or is to be used on behalf of, its clients and has and uses sources of investment information not limited to its parent, and (5) keeps its investment advice confidential until communicated to its clients."

The Unibanco letters, which consist of *Unibanco* and subsequent no-action letters,<sup>4</sup> describe multiple conditions required for a registered adviser and its participating affiliate to rely on the Unibanco letters. Since *Royal Bank Canada (1998)*, there has been limited further detail from the SEC staff on how advisers can rely on an arrangement with a participating affiliate, despite the increasing globalization of the investment management industry and significant technological developments that facilitate the integration of investment and trading functions across borders and time zones.<sup>5</sup>

**The Update.** The Update, which is an Information Update and not a *Guidance* Update,<sup>6</sup> briefly summarizes most of the general conditions that a registered adviser and its participating affiliate must satisfy to rely on the Unibanco letters.

The substantive portion of the Update focuses exclusively on documentation affecting “the staff’s ability to monitor the conduct of participating affiliates.” According to the Update, over the years, the SEC has received a variety of documents from advisers seeking to rely on the Unibanco letters. Based upon a review of these documents, the Update lists certain items – documentation of a participating affiliate’s consent to U.S. and SEC jurisdiction and evidence that the participating affiliate has appointed a U.S. agent for service of process – as “address[ing] most clearly” the staff’s monitoring of participating affiliates. The list is reproduced in the attachment to this Alert (the “Jurisdictional Documents”).

The Update also provides an SEC email address to which Jurisdictional Documents, including any amendments to previously submitted documents, can be sent (submission by email is permissive rather than required).

**Discussion.** The Update does not state that submission of the Jurisdictional Documents to the SEC is required before a registered adviser and a participating affiliate may rely on the Unibanco letters. One possible reason for this silence is that the Unibanco letters differ on this point. *Unibanco* itself did not include a requirement that a participating affiliate’s Jurisdictional Documents must be submitted to the SEC. Each of four subsequent Unibanco letters – *Mercury 1993*, *Kleinwort Benson 1993*, *Murray Johnstone 1994* and *Royal Bank Canada 1998* – was based on an incoming letter that contained a form that was substantially the same as the Jurisdictional Documents, and that represented that the participating affiliate(s) would not provide investment advice to U.S. clients until after the completed form had been submitted to the SEC. However, the incoming letter underlying *ABN AMRO 1997* did not contain any form, and merely represented that the participating affiliates would submit to U.S. and SEC jurisdiction, and would not provide advice to be used for U.S. clients until documents effecting the appointment a U.S. agent had been submitted to the SEC. Thus, *ABN AMRO 1997* lacked a representation from the participating affiliates about

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<sup>4</sup> Mercury Asset Management plc (pub. avail. Apr. 16, 1993) (“*Mercury 1993*”); Kleinwort Benson Investment Management Limited (pub. avail. Dec. 15, 1993) (“*Kleinwort Benson 1993*”); Murray Johnstone Holdings Limited (pub. avail. Oct. 7, 1994) (“*Murray Johnstone 1994*”); ABN AMRO Bank, N.V. (pub. avail. Jul. 7, 1997) (“*ABN AMRO 1997*”); Royal Bank of Canada (pub. avail. June 3, 1998) (“*Royal Bank Canada 1998*”).

<sup>5</sup> See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, Rel. No. IA-3222 (June 22, 2011) (“Nothing in the rules we are today adopting in this Release is intended to withdraw any prior statement of the Commission or the views of the staff as expressed in the *Unibanco* letters. We expect that the staff will provide guidance, as appropriate, based on facts that may be presented to the staff regarding the application of the *Unibanco* letters in the context of the new foreign private adviser exemption and the private fund adviser exemption.”); ABA Subcommittee on Private Investment Entities SEC No-Action Letter (pub. avail. Dec. 8, 2005) (hedge fund advisers could rely on the Unibanco letters, hedge fund adviser registration rule subsequently vacated).

<sup>6</sup> The Guidance Updates state that they “are recurring publications that summarize the staff’s views regarding various requirements of the federal securities laws. The Division generally issues *IM Guidance Updates* as a result of emerging asset management industry trends, discussions with industry participants, reviews of registrant disclosures, and no-action and interpretive requests.” There is no analogous description within the Information Updates, although they appear to be limited to procedural and administrative instructions.

submitting to the SEC documentation evidencing the participating affiliates' submission to U.S. and SEC jurisdiction.

In light of these discrepancies among the Unibanco letters, it is not surprising that, as the Update notes, “[o]ver the years, the staff has received a wide variety of documents from advisers seeking to rely on the Unibanco letters.” Nor is it surprising that the Update does not mandate submission of Jurisdictional Documents. Nevertheless, prospectively, new participating affiliates may want to avail themselves of the suggested email submission procedure because the Update clearly expresses the preference of the Division of Investment Management.

On its face, the Update does not require anything new of firms with existing participating affiliate arrangements. While there are certainly arguments that such a submission is not required by the Unibanco letters (or even the Update), the SEC exam staff may examine whether such a submission has been made and include the absence of a submission in a deficiency letter. As a result, it may take less time and involve less expense simply to document and submit the Jurisdictional Documents for each participating affiliate.<sup>7</sup>

If you would like to learn more about the issues in this expanded Alert or our related [Alert](#), please contact your usual Ropes & Gray attorney.

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<sup>7</sup> Submitting all relevant statements for affiliated entities in a single submission via email would have the benefit of aligning the internal records of an adviser with the materials that the SEC staff has readily accessible. This would seem a helpful approach for all involved.

## Items Listed in Update Regarding Documentation of Certain Representations and Undertakings by Participating Affiliate(s)

- A. The name of the participating affiliate and registered adviser, and a representation that the participating affiliate is an associated person of the registered adviser within the meaning of Section 202(a)(17) of the Advisers Act.
- B. Documentation of the appointment of an agent for service of process by a participating affiliate, including the name and contact information of such agent.
- C. A representation that the participating affiliate is under the jurisdiction of U.S. courts for actions arising, directly or indirectly, under U.S. securities laws or the securities laws of any state in connection with any of the following for U.S. clients: (1) investment advisory activities; (2) related securities activities arising out of or relating to any investment advisory services provided by the participating affiliate through its registered adviser; and (3) any related transactions. In addition, a representation that the participating affiliate has designated and appointed, without power of revocation, [insert agent] upon whom may be served all process, pleadings, or other papers in
- a. any investigation or administrative proceeding conducted by the Commission; and
  - b. any civil suit or action brought against the registered adviser or the participating affiliate or in which the participating affiliate has been joined as defendant or respondent,
- in any appropriate court in any place subject to the jurisdiction of any state or of the U.S. or any of its territories or possessions or the District of Columbia in connection with the activities and transactions enumerated in this paragraph.
- D. A representation that any such civil suit or action or administrative proceeding may be commenced by the service of process upon, and service of an administrative subpoena shall be effective service upon, [insert agent], and such service shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service has been made.
- E. A representation that the participating affiliate will appoint a successor agent if the participating affiliate or any person discharges the [insert agent] or the [insert agent] is unwilling or unable to accept service on behalf of the participating affiliate at any time until six years have elapsed from the date of the last investment advisory activity. Additionally, the participating affiliate undertakes to advise the Commission promptly of any change to [insert agent]'s name or address during the applicable period.
- F. A representation that the participating affiliate will promptly, upon receipt of an administrative subpoena, demand, or request for voluntary cooperation made during a routine or special inspection or otherwise, provide to the Commission or the Commission's staff any and all of the books and records required to be maintained in accordance with staff guidance, and make available for testimony before, or other questioning by, the Commission or the Commission's staff the employees of the participating affiliate (other than clerical or ministerial personnel) involved in the investment advisory activities or related securities transactions, at such place as the Commission may designate in the U.S. or, at the Commission's option, in the country where the records are kept or such personnel reside.
- G. A representation that the participating affiliate will produce, pursuant to an administrative subpoena or a request for voluntary cooperation, any documents in accordance with staff guidance.