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SEC Update

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

Overview

In March, the Securities and Exchange Commission's (SEC) Division of Investment Management published a four-page *Information Update for Advisers Relying on the Unibanco No-Action Letters* (the Information Update).¹ The stated purpose of the Information Update is to inform multinational 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-US affiliates that participate in providing advisory services, through their affiliated registered investment advisers, to US clients.

Although it was intended to clarify and simplify matters, the Information Update has led to some uncertainty on the part of SEC-registered investment advisers relying on the Unibanco letters. Specifically, certain advisers were concerned that the Information Update represented new positions on the part of the SEC Staff to the effect that (i) prospectively, participating affiliates would be required to submit the documents described in the Information Update to the SEC (the Jurisdictional

Documents) and (ii) existing participating affiliates were required to submit Jurisdictional Documents to the SEC with retroactive effect.

This article analyzes the Information Update in the context of the Unibanco letters and explains that the Information Update does not require a new or an existing participating affiliate to submit Jurisdictional Documents to the SEC. Nevertheless, there may be a number of practical reasons why firms might consider submitting Jurisdictional Documents for their participating affiliates, and this article discusses several variations on how to satisfy the jurisdiction-related conditions of the Unibanco letters.

The Regulatory Context

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

In 1992, the SEC Division of Investment Management published its *Protecting Investors* study that, among other things, recommended a "conducts and effects" approach to determine whether the Advisers Act applied to persons and their advisory activities outside of the US.² 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)*,³ to provide assurance with respect to a registered adviser's non-US affiliate (a participating affiliate) sharing personnel with the registered adviser, and providing investment advice to US clients through the registered adviser, without the participating affiliate registering under the Investment Advisers Act.⁴

The Unibanco letters, which consist of *Unibanco* and a series of subsequent no-action letters,⁵ 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.⁶

The Information Update

The Information Update, which is an information update and not a Guidance Update,⁷ 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 Information Update focuses exclusively on documentation affecting “the Staff’s ability to monitor the conduct of participating affiliates.” According to the Information 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 Information Update lists certain items—documentation of a participating affiliate’s consent to US and SEC jurisdiction and evidence that the participating affiliate has appointed a US agent for service of process—as “address[ing] most clearly” the Staff’s monitoring of participating affiliates. The list of items that constitute the Jurisdictional Documents is reproduced in the Appendix to this article.

The Information 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). The email address is a general address within the Division of Investment Management and submitting parties are instructed to include “Participating Affiliate” in the subject line of the email.

Implications

The Information 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 US 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 lacked a representation about *submitting* documentation to the SEC (evidencing that the participating affiliates were subject to US and SEC jurisdiction).

In light of these discrepancies among the Unibanco letters, it is not surprising that, as the Information 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 Information 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

Information Update clearly tracks an approach that would be acceptable to the Division of Investment Management.

Things to Consider

The Information Update focuses on the Jurisdictional Documents. However, the Unibanco letters contain a substantial number of requirements that are unrelated to jurisdictional issues. The Information Update is a useful reminder of these additional requirements and, consequently, an adviser may want to review existing arrangements and procedures to confirm that the adviser and its participating affiliates satisfy the numerous requirements of the Unibanco letters. The review may reveal gaps or items in need of updating, which may appear in intercompany agreements or memoranda of understanding, or require amending the adviser's Form ADV disclosure at the next convenient opportunity.

With respect to the Jurisdictional Documents, the Information Update does not require anything new of firms with existing participating affiliate arrangements. While submitting the Jurisdictional Documents is not required by the Unibanco letters (or even the Information Update), the SEC exam Staff may examine whether such a submission has been made and take into account any perceived deficiencies regarding compliance with the Unibanco letters' conditions when considering what to include 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. An adviser and its participating affiliates have several options.

If the substantial equivalent of the Jurisdictional Documents already has been submitted to the SEC, an adviser and its participating affiliate may choose:

1. To submit documentation by email to update the previously submitted documents in respect of any material information (for example, changes in a participating affiliate's legal name), or

2. To submit a full set of Jurisdictional Documents for each participating affiliate as specified in the Information Update in a single submission by email, even if some portion of the submission duplicates prior correspondence with the SEC Staff. This approach would have the benefit of aligning the internal records of an adviser with the materials that the SEC Staff has readily accessible.

If the substantial equivalent of the Jurisdictional Documents has *not* previously been submitted to the SEC, an adviser and its participating affiliates may choose:

3. To submit Jurisdictional Documents for each participating affiliate (as described in 2, above),
4. To submit an email that simply states that the adviser maintains information and undertakings that are substantially equivalent to the Jurisdictional Documents, and the information is available to the SEC Staff upon request, or
5. To submit nothing to the SEC.

Finally, regardless of which of these five approaches is selected by an adviser and its participating affiliates, the adviser should consider whether its Rule 206(4)-7 compliance policies and procedures reflect any monitoring and updating that is required so that the Jurisdictional Documents or their substantial equivalent, wherever submitted or maintained, remain in compliance with the Unibanco letters' requirements.

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NOTES

- 1 The Information Update is available on the Division of Investment Management's website.

² See SEC Division of Investment Management, “Protecting Investors: A Half Century of Investment Company Regulation” 228-229 (May 1992).

³ Uniao de Bancos de Brasileiros S.A. (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-US entity.

⁴ Prior to *Unibanco*, a foreign adviser would have had to form a separate and independent US subsidiary to provide investment advice to US 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 US subsidiary to be considered separate and independent from its non-US unregistered parent so the parent would avoid having to register under the Advisers Act by reason 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.”

⁵ Mercury Asset Management plc (pub. avail. Apr. 16, 1993) (*Mercury 1993*); Kleinwort Benson Investment Management Ltd. (pub. avail. Dec. 15, 1993) (*Kleinwort Benson 1993*); Murray Johnstone Holdings Ltd. (pub. avail. Oct. 7, 1994) (*Murray Johnstone 1994*); ABN AMRO Bank N.V. (pub. avail. Jul. 1, 1997) (*ABN AMRO 1997*); Royal Bank of Canada (pub. avail. Jun. 3, 1998) (*Royal Bank Canada 1998*).

⁶ 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 (Jun. 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.”); American Bar Association, Subcommittee on Private Investment Entities (pub. avail. Dec. 8, 2005) (hedge fund advisers could rely on the *Unibanco* letters, hedge fund adviser registration rule subsequently vacated).

⁷ 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.

APPENDIX

Items Listed in Information 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 US courts for actions arising, directly or indirectly, under US securities laws or the securities laws of any state in connection with any of the following for US 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 US 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 US 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.

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