SEC Proposes to Relax Foreign Broker-Dealer Rule

On June 27, 2008, the SEC proposed far-reaching changes to Rule 15a-6, which generally provides conditional exemptions from registration for foreign broker-dealers doing business with certain U.S. investors.

The principal proposed changes are the following:

- The U.S. investors which a foreign broker-dealer can solicit, and to which it can provide investment research, would be considerably expanded by replacing the categories of "major U.S. institutional investor" and "U.S. institutional investor" with the category of "qualified investor." Significantly, the category would include any corporation, company, partnership or natural person owning and investing on a discretionary basis not less than $25 million, and any government or government instrumentality owning and investing on a discretionary basis not less than $50 million. The current version of Rule 15a-6 generally defines a "major U.S. institutional investor" as a U.S. institutional investor or registered investment adviser that has, or has under management, total assets in excess of $100 million, and does not reference natural persons at all. A "qualified investor" would also include registered investment companies, those exempt from registration under Section 3(c)(7) of the Investment Company Act of 1940, and certain other institutional investors without regard to portfolio size.
- The involvement of U.S. registered broker-dealers in securities transactions solicited by foreign broker-dealers subject to specific foreign regulation would be significantly reduced. In particular, foreign broker-dealers conducting "foreign business" could in general solicit securities transactions with qualified investors with very little intermediation by a registered broker-dealer. The foreign broker-dealer could provide full service brokerage to qualified investors on this basis, including taking custody of funds and securities, as long as a U.S. registered broker-dealer maintained copies of books and records of the foreign broker-dealer relating to any resulting transactions. The records could be maintained with the foreign broker-dealer, if the registered broker-dealer determined that copies could be furnished promptly to the SEC. Foreign broker-dealers soliciting qualified investors would also be required to disclose that they are regulated by foreign securities authorities, and not by the SEC, and that U.S. custody and bankruptcy rules do not apply to funds or securities held by the foreign broker-dealer. For this purpose, conducting a "foreign business" means that at least 85% of the aggregate value of securities purchased or sold in solicited transactions for qualified investors and for U.S. persons acting in a fiduciary capacity for the account of foreign resident clients, calculated on a rolling two-year basis, is derived from transactions in foreign securities, as defined.
- Foreign broker-dealers not meeting the 85% threshold described above could also solicit transactions with qualified investors with limited intermediation by a registered broker-dealer. Under these circumstances, however, the registered broker-dealer must maintain books and records relating to the resulting transactions, have custody of funds and securities, and obtain consents to service of process and representations from the foreign broker-dealer that it is complying with other aspects of Rule 15a-6. The foreign broker-dealer would be required to disclose that it is not subject to U.S. regulation. Notably, the current requirement in Rule 15a-6, that oral and electronic communications and in-person contacts with U.S. investors be chaperoned by a registered broker-dealer, would

be deleted in its entirety. Associated persons of a foreign broker-dealer would be explicitly authorized to conduct visits to qualified investors in the U.S.

- The list of specific customers with which a foreign broker-dealer could solicit securities transactions without restriction would include any U.S. person (other than a registered broker-dealer or a bank exempt from broker-dealer registration, both of which are already on the list) that acts in a fiduciary capacity for the account of a foreign resident client, if the foreign broker-dealer conducts foreign business, as defined.
- Foreign broker-dealers could effect unsolicited transactions for qualified investors in options on foreign securities listed on a foreign options exchange of which the broker-dealer is a member. Communications by exchange representatives with qualified investors, through U.S. programs, seminars, and disclosure documents, as well as limited contacts by foreign broker-dealers, would not be considered solicitation for this purpose.

The SEC release proposing these and other changes is 120 pages long and covers related topics not discussed here. The SEC is soliciting comments on the proposed changes, as well as on many other aspects of the rule, including defined terms and the need for additional exemptions. Comments are due by September 8, 2008. We expect the proposal to generate many comments.

Contact Information

If you have any questions about the proposed amendments, please contact **Dwight W. Quayle**, **Richard D. Marshall**, or your regular Ropes & Gray attorney.

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