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RULE 15a-6 AND BEYOND: ARE U.S. RULES FOR NON-U.S. BROKER-DEALERS WORKABLE IN TODAY'S GLOBAL MARKETPLACE?

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I. INTRODUCTION

Effective August 15, 1989, the Securities and Exchange Commission (the "Commission") adopted Rule 15a-6. This rule provides for conditional exemptions from broker-dealer registration under the Securities Exchange Act of 1934 for foreign entities engaged in certain limited securities activities in the United States. In the 1988 proposing release, the Commission recognized that the "world's securities markets rapidly [were] becoming international in scope." Examples included the relatively common occurrence of multinational offerings, and the increased trend toward foreign and domestic broker-dealers establishing international offices, and the development of linkages between trading markets. The Commission cited this internationalization of the securities industry as the basis for adopting Rule 15a-6.

However, more than a decade later, with the advent of the Euro, the introduction of Electronic Communications Networks...
("ECNs"), the impact of technology and the Internet, the recent trends in financial reform, and a continuing shift towards industry consolidation through international mergers and acquisitions, the securities industry must reevaluate Rule 15a-6. This Article examines whether Rule 15a-6 has outlived its usefulness in light of the objectives of U.S. securities laws and regulations - to establish and promote markets that are fair and efficient (and are perceived as such by participants) and the fact that in a post-Cold War world, national boundaries have seemingly become secondary to market imperatives. To that end, Part II reviews the historical background leading to the adoption of Rule 15a-6. Part III discusses the adopting release for the Rule. Part IV evaluates the exemptions from registration for the foreign broker. Finally, Part V presents and analyzes comments received by the Commission.

II. HISTORICAL BACKGROUND LEADING TO ADOPTION OF RULE 15a-6

The internationalization of financial markets has been an area of considerable debate, review and revision during the past few decades. The Commission has often been prompted to revisit and expand its position on foreign broker-dealer activity by a U.S. securities industry anxious to compete on a global scale.

In 1964, the Presidential Task Force on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad ("Task Force") urged the Commission to clarify its position on foreign affairs. In June of 1988, the Task Force recommended that the Commission publish a release setting forth its position on the registration, under the Securities Act of 1933, of offerings made by U.S. issuers outside the United States. In ad-

7. See Report on Internationalization, supra note 3, at II-88 to II-90.
8. See infra notes 12-53 and accompanying text.
9. See infra notes 54-80 and accompanying text.
10. See infra notes 81-122 and accompanying text.
11. See infra notes 123-92 and accompanying text.
16. See Registration Requirements for Foreign Broker-Dealers, Exchange Act Re-

Further, the Commission published Securities Act Release No. 4708 ("Release 4708"), which identified the conditions under which a foreign underwriter of a U.S. issuer's foreign offering of securities would not be required to register as a broker-dealer under Section 15(a) of the Exchange Act. The Commission indicated that registration was not required if a foreign broker-dealer limited its participation in a foreign offering of U.S. securities or the foreign part of a multinational offering of such securities to: (1) selling securities outside the United States to non-U.S. persons; and (2) participating in an underwriting syndicate in which all U.S. activities, such as sales to selling group members, stabilization, overallotment, and group sales, were carried out for the syndicate exclusively by a managing underwriter or underwriters registered with the Commission. Nevertheless, registration would be required where a foreign broker-dealer sold securities in the United States or purchased securities in the United States for sale to U.S. investors abroad.

Until Rule 15a-6, however, the Commission had traditionally insisted upon broker-dealer registration of foreign firms dealing with U.S. investors. In 1967, the Commission indicated that:

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17. See supra note 2.
19. See id.
21. See id.
22. See id.
23. See id.
24. See id.
While we sometimes raise no objection if a broker-dealer, without registration, buys securities in the United States and sells them outside the jurisdiction of the United States to persons other than United States nationals[,]\(^{25}\) we would not be willing to take such a no-action position as to broker-dealer registration if a broker-dealer sells any securities, even foreign securities, to United States nationals.\(^{26}\)

However, even prior to the Rule 15a-6 proposing release, the Commission began to relax its position by granting a number of "no-action requests to foreign broker-dealers" that wished to create contacts with U.S. institutions, through the registered broker-dealer affiliates.\(^{27}\) These no-action positions imposed the responsibility for many facets of U.S. persons' accounts upon the registered broker-dealer.\(^{28}\)

The Commission further indicated that U.S. institutional investors receiving research from a foreign broker-dealer affiliate of a U.S. bank holding company must be mediated by the U.S. investor.\(^{29}\) Furthermore, if a U.S. institutional investor that obtained such research contacts a foreign broker-dealer, a registered representative of the U.S. affiliate would be required to participate in all communications between the foreign broker-dealer and the U.S. inves-

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25. "The [Commission] also has taken no-action positions concerning the sale of U.S. securities by foreign broker-dealers to foreign investors outside the United States, where the securities were obtained in U.S. secondary markets through a registered broker-dealer." \textit{Id.} (citing letter from Francis R. Snodgrass, Associate Director, Division of Market Regulation, SEC, to M. David Hyman, Director of Legal & Compliance Department, Bear, Stearns & Co. (Jan. 7, 1976)).

26. \textit{Id.} (citing letter from Robert Block, Chief Counsel, Division of Trading and Markets, SEC, to Roberto Luna (Feb. 21, 1967)). Moreover, Section 30(b) of the Exchange Act limits the Commission's jurisdictional reach only "insofar as [a person] transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of [Title 15]." 15 U.S.C. § 78dd(b) (1994).


28. \textit{See} Exchange Act Release, \textit{supra} note 4. Other responsibilities include "taking orders directly from the U.S. persons, holding the accounts, confirming the trades, and maintaining all book and records on transactions for the U.S. persons." \textit{Id.}

Should orders result from these conversations, the U.S. broker-dealer would execute any orders and manage the accounts of the U.S. institutional investors. The Commission also adopted temporary no-action positions in which market maker quotations collected and published by a foreign exchange were distributed in the United States. Although foreign market makers who give quotes displayed in the United States could effect transactions in securities with regard to U.S. broker-dealer registration provisions, the Commission granted the request for a temporary no-action position. In doing so, the Commission sought to promote access to information on foreign market conditions. However, the Commission made clear that any actions by market makers leading to substantial U.S. contacts, other than the passive circulation of foreign market makers' quotes and consequential trades, were outside the realm of a no-action position.

The Commission opined that "[s]olicitation includes efforts to induce a single transaction or to develop an ongoing securities business relationship." Solicitation may be any affirmative effort by a broker or a dealer intended to induce transactional business for the

30. See id.
31. See id.
33. See id. (citing letter from Robert L.D. Colby, Deputy Chief Counsel, Division of Market Regulation, SEC, to Richard B. Smith, Esq., Davis, Polk & Wardwell dated July 3, 1986).
36. See id.
37. Id. at 23,650.
broker-dealer or its affiliates. 38 Section 15(a) of the Exchange Act
refers to both inducing or attempting to induce the purchase or
sale of securities. 39 The activities generally viewed as involving solici-
tation included: telephone calls from a broker-dealer to a customer
encouraging use of the broker-dealer to effect transactions; running
investment seminars for U.S. investors regardless of whether the
seminars are hosted by a registered U.S. broker-dealer; advertising
the activities of foreign broker-dealers and their willingness to trade
foreign securities in U.S. newspapers or periodicals of general circu-
lation in United States or on any radio or television station whose
broadcasting is directed into the United States; 40 publishing quotes
in the United States; 41 and "providing advice about foreign securi-
ties (particularly where the advice is provided in return for broker-
age commissions on transactions placed with the foreign broker-
dealer)." 42

In 1986, the Commission exempted a number of foreign bro-
deralers from broker-dealer registration requirements, even
though they acted as dealers in the United States. 43 Citicorp, a U.S.
bank holding company, owned the foreign broker-dealers, and sought to purchase a U.S. affiliate of the foreign broker-dealers through its U.S. bank subsidiary, Citibank. In addition, the U.S. affiliate was an active market maker in NASDAQ and a registered U.S. broker-dealer. Due to laws precluding Citibank from owning a market maker, the U.S. affiliate's activities were restricted to executing those orders received from U.S. customers against those standing orders provided by the foreign broker-dealers.

Subject to four conditions, the Commission permitted foreign broker-dealers to purchase and sell shares at the same time through the U.S. affiliate without registering as domestic broker-dealers. First, the Commission limited the price and size of the foreign broker-dealers' outstanding orders. Consequently, the U.S. affiliate was able to exercise some discretion in its trading activities. Second, as a safeguard against possible failure of the foreign-broker dealers, the U.S. affiliate agreed to increase its net capital requirements to ensure its settlement obligations. Third, Citicorp agreed to cooperate with Commission investigations by disclosing information to the Commission regarding the trading activities of the foreign broker-dealers. Lastly, Citicorp agreed to serve as "the foreign broker-dealers' agent for service of process in any actions involving the foreign broker-dealers."

45. See id.
46. See id. ("Because the Glass-Steagall Act prevented Citibank from owning a market maker, the foreign broker-dealers entered into a contractual agreement with the U.S. affiliate that called for the foreign broker-dealers to provide standing orders to buy and sell the securities in which the U.S. affiliate had previously acted as a market maker.").
47. See id. at 23,648. "This arrangement was approved by the Comptroller of the Currency." Id. at n.23 (citing letter from Judith A. Walter, Senior Deputy Comptroller, to Ellis E. Bradford, Vice President, Citibank, N.A. dated Jun. 13, 1986).
48. See id. at 23,648.
49. See id.
50. See id.
51. See id.
52. See id. "Citicorp represented that information regarding the trading activities of the foreign broker-dealers would be made available to the Commission in connection with any investigation, and that it would attempt to obtain customer consent to release of information concerning their trading, if requested." Id.
53. Id.
III. THE ADOPTING RELEASE FOR RULE 15a-6

In 1989, the Commission adopted Rule 15a-6 under section 15(a)(2) of the Exchange Act. Rule 15a-6 provides for conditional exemptions from broker-dealer registration for foreign entities engaged in certain activities involving U.S. investors and securities markets. Unless otherwise exempted, section 15(a) of the Exchange Act requires any broker-dealer that uses any means or instrumentality of interstate commerce to effect transactions or to induce the purchase or sale of any security, to register as a broker-dealer. Sections 3(a)(4) and 3(a)(5) of the Exchange Act define the terms “broker” and “dealer” to apply to “any person” without a limiting requirement of U.S. citizenship. Accordingly, section 15(a) “literally applies to foreign broker-dealers who use the mails or instrumentalities of interstate commerce to offer or sell securities.”

The reasons underlying the Commission’s adoption of Rule 15a-6 were two-fold. First, the rule was intended “to facilitate access to foreign markets by U.S. institutional investors through foreign broker-dealers and the research that they provide, consistent with maintaining the safeguards afforded by broker-dealer registration.” Second, the rule was intended “to provide clear guidance to foreign broker-dealers seeking to operate in compliance with U.S. broker-dealer registration requirements.”

By the time Rule 15a-6 was adopted, all broker-dealers effecting, inducing or attempting to induce any securities transactions in the United States were required to register as broker-dealers with the Commission. However, domestic entities were not subject to the same requirements if they conducted their activities entirely

55. See id.
56. See 17 C.F.R. § 240.15a-6 (1999).
58. 6 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3012 (3d ed. 1990); see id. at n.117 (“Section 3(a)(17) defines ‘interstate commerce’ to mean ‘trade, transportation, or commerce . . . between any foreign country and any state . . . ’”).
60. Id.
61. See 6 LOSS & SELIGMAN, supra note 58, at 3017-18. This Commission requirement has been called the “territorial” approach, and applied equally to activities directed to foreign investors outside the United States. See id. at 3018.
outside the United States.\textsuperscript{62}

In addition, the Commission applied the registration requirements and regulatory system governing domestic brokers to those foreign broker-dealer entities operating a branch in the United States.\textsuperscript{63} However, if the foreign broker-dealer established an affiliate in the United States, only that affiliate was required to register as a broker-dealer.\textsuperscript{64} As such, absent certain exemptions, only the registered U.S. affiliate would be permitted to trade with U.S. investors or perform securities functions on behalf of those customers.\textsuperscript{65} Such functions include effecting trades, extending credit, maintaining records and issuing confirmations, and receiving, delivering, and safeguarding funds and securities.\textsuperscript{66} The Commission, however, expressly stated that if an introducing-clearing relationship existed, where the foreign broker-dealer held U.S. customers' funds and securities, registration of the foreign broker-dealer would be required.\textsuperscript{67}

The territorial approach employed by the Commission generally required registration by foreign broker-dealers that, from outside the United States, induced or attempted to induce trades by persons in the United States.\textsuperscript{68} The Commission indicated, however, that it would not require foreign broker-dealers to register when dealing from abroad with foreign persons domiciled abroad but temporarily present in the United States.\textsuperscript{69} Furthermore, the Commission did not require registration when a foreign broker-dealer effectuated trades outside the United States for U.S. citizens residing abroad, so long as the foreign broker-dealer had not other contacts within the jurisdiction of the United States.\textsuperscript{70}

\textsuperscript{62} See id.

\textsuperscript{63} See id. This Commission requirement has been called the "entity" approach. See id.; see also 17 C.F.R. § 240.15a-6(b)(3) (1999).


\textsuperscript{66} See id.


\textsuperscript{68} See id. at 30,017.

\textsuperscript{69} See id.

\textsuperscript{70} See id. "The Commission historically has taken the view, however, that foreign broker-dealers specifically targeting identifiable groups of U.S. persons residing abroad, e.g., U.S. military and embassy personnel, could be subject to U.S.
The requirements of section 15(a) do not distinguish between solicited and unsolicited transactions. Nevertheless, the Commission indicated, that as a matter of policy, U.S. registration would not be necessary if a domestic investor, on its own initiative, sought out a foreign broker-dealer outside the United States and initiated transactions in foreign securities markets. The Commission reasoned that U.S. investors initiating trades outside the United States would not expect the foreign broker-dealer to be subject to U.S. broker-dealer regulations. The Commission also noted that foreign broker-dealers would very likely refuse to deal with U.S. persons under any circumstances if required to comply with U.S. registration requirements as a result of these unsolicited trades.

Numerous commentators argued for narrowing the definition of "solicitation." However, the Commission favors a broad construction of "solicitation," as the express language of section 15(a)(1) refers to both inducing or attempting to induce the purchase or sale of securities.

The Commission, however, has permitted certain activities perceived to be "solicitation" without the requirement of registration. For example, the Commission continues to allow U.S. distribution of foreign broker-dealers' quotations by third party systems without requiring registration. In addition, the Commission has indicated that foreign broker-dealers would not have to register if the scope of their U.S. activities were limited to contacts with registered broker-dealers and banks acting as broker-dealers.

71. See id.
72. See id.
73. See id.
74. See id.
75. See id. at 30,018. Commentators such as Fidelity Investments, Madrid Stock Exchange, and Dechert, Price & Rhoads argued for the more narrow definition. See id. at n.57.
76. See id. at 30,018.
77. See id.
Rule 15a-6 codified and broadened these exemptions. Under section 15(a)(2) of the Rule, the Commission established four exemptions that permit foreign broker-dealers to engage in certain activities without U.S. registration. Under the Rule, a foreign broker-dealer may rely on different exemptions for different transactions.

IV. EXEMPTIONS FOR REGISTRATION UNDER RULE 15a-6

Rule 15a-6, in effect, establishes exemptions for various broker-dealer/investor contacts and broker-dealer/investor research provisions.

A. Unsolicited or Nondirect Contacts

Under Rule 15a-6(a)(1), a foreign broker-dealer is not required to register to the extent that it "effects transactions in securities with or for persons that have not been solicited by the foreign broker or dealer." Therefore, a foreign broker-dealer could effect unsolicited trades for U.S. investors without the use of a U.S. registered broker-dealer intermediary. Although the Rule itself does not specifically define "solicitation," the Commission indicated that the term would be best addressed on a case-by-case basis consistent with Rule 15a-6 proposing and adopting releases.

B. Providing Research to Major U.S. Institutional Investors

In general, the Commission considers any deliberate transmission of information, opinions, or recommendations to U.S. investors as a solicitation, whether directed at individuals or groups. However, Rule 15a-6(a)(2) provides a conditional exemption from registration for foreign brokers or dealers that furnish research reports to un-

79. See discussion, infra Part IV.
80. 6 LOSS & SELIGMAN, supra note 58, at 3021.
81. 17 C.F.R. § 240.15a (1999). These exemptions include: "(1) unsolicited or nondirect contacts between an unregistered foreign broker-dealer and United States investors; (2) the provision of research by an unregistered foreign broker-dealer to major United States institutional investors; (3) direct contacts between an unregistered foreign broker-dealer and United States investors if the resulting transactions are effected through a registered broker-dealer; and (4) direct contacts between an unregistered foreign broker-dealer and five categories of persons with no condition that a registered broker-dealer act as an intermediary." Id.
82. 17 C.F.R. § 240.15a-6(a)(1) (1999).
83. See id.
84. Paragraph (a)(2) of the Rule does not distinguish between research reports provided in written or electronic form. See 17 C.F.R. § 240.15a-6(a)(2) (1999).
vestors in the United States, and effect transactions with those investors in the securities discussed in the research reports. This exemption is available to foreign broker-dealers, provided that they:

[Furnished] research reports are provided only to major U.S. institutional investors [only]; the research reports do not recommend the use of the foreign broker or dealer to effect trades in any security; 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; if the foreign broker or dealer has a relationship with a registered broker or dealer that satisfies the requirements of Rule 15(a)(3), 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); and the foreign broker or dealer does not provide research reports to U.S. 

85. See id.

86. A "major U.S. institutional investor" is a "U.S. institutional investor" or registered investment adviser that has total assets or assets under management of more than $100 million dollars. The term "U.S. institutional investor" is defined in Rule 15a-6(b)(7) to mean: "(1) an investment company registered with the Commission under section 8 of the Investment Company Act of 1940 [i.e. mutual funds]; or (2) a bank, savings and loan association, insurance company, business development company, small business investment company, or employee benefit plan defined in Rule 501 of Regulation D under the Securities Act of 1933; a private business development company defined in Rule 501(a)(2); an organization described in section 501(c)(3) of the Internal Revenue Code, as defined in Rule 501(a)(3); or a trust defined in Rule 501(a)(7)." 17 C.F.R. § 240.15a-6(b)(7) (citations omitted). In 1997, the Commission confirmed its no action advice regarding the expansion of the definition of "major U.S. institutional investor." The Commission defined "major U.S. institutional investor" to include, under all applicable provisions of Rule 15a-6 and interpretations thereunder, any entity, including any investment adviser (whether or not registered under the Investment Advisers Act of 1940), that owns or controls (or, in the case of an investment adviser, has under management) in excess of $100 million in aggregate financial assets. 17 C.F.R. § 240.15a-6(b)(4).

As to the registered investment adviser definition, to determine the total assets of an investment company under the Rule, a registered investment company may include the assets of any family of investment companies of which it is a part, and the term "family of investment companies" is defined in paragraph (b)(1) of the Rule. See Exchange Act Release, supra note 44, at 30,026.
persons pursuant to an express or implied understanding that those U.S. persons will direct commission income to the foreign broker or dealer.\textsuperscript{87}

This exemption is based upon the Commission's recognition that broker-dealers often provide securities research to investors without charging a fee, with the expectation that the investor will trade through the broker-dealer. Although such practices could be deemed solicitation, the Rule provides for the limited exceptions outlined above. So long as the foreign broker-dealer does not recommend itself for use in effecting trades in any security, and if the foreign broker-dealer does not initiate follow-up contact with the major U.S. institutional investors receiving the research, or otherwise does not induce or attempt to induce the purchase or sale of any security, the foreign broker-dealer's activities would fall within the scope of 15a-6(a) (2) and thus be permissible.\textsuperscript{88} The Commission has indicated that "direct distribution would be consistent with the free flow of information across national boundaries without raising substantial investor protection concerns."\textsuperscript{89}

The Commission emphasized, however, that 15a-6(a)(2) is not available for "soft dollar" arrangements between foreign broker-dealers and U.S. persons.\textsuperscript{90} The exemption for research in paragraph (a)(2) would be inapplicable because if a foreign broker-dealer provided research to U.S. investors pursuant to an understanding that the foreign broker-dealer would receive a commission, they would be considered to have induced purchases.\textsuperscript{91}

Although this exemption is limited to major U.S. institutional investors, the Rule's research exemption is broader than either the proposed interpretive statement or the expanded rule, in that a reg-

\begin{itemize}
  \item \textsuperscript{87} 17 C.F.R. § 240.15a-6(a)(2); 6 Loss & Seligman, \textit{supra} note 58, at 3016; \textit{see also} Exchange Act Release, \textit{supra} note 44, at 30,021.
  \item \textsuperscript{88} \textit{See supra} notes 59-74 and accompanying text.
  \item \textsuperscript{89} Exchange Act Release, \textit{supra} note 44, at 30,022.
  \item \textsuperscript{91} \textit{See Exchange Act Release, \textit{supra} note 44, at 30,023.} "If a foreign broker-dealer provided research to a U.S. investor pursuant to an express or implied understanding that the investor would direct a given amount of commission income to the foreign broker-dealer, the Commission would consider the foreign broker-dealer to have induced purchases and sales of securities, irrespective of whether the trades received from the investor related to the particular research that had been provided." \textit{Id.}
\end{itemize}
istered broker-dealer would not be required to take responsibility for the content of the report received by the foreign broker-dealer. If, however, a foreign broker-dealer, for its own reasons, chose to distribute its research in the United States through a registered broker-dealer, affiliated or not, NASD Conduct Rule 2210 would require certain disclosures as a component of the research reports. NASD Conduct Rule 2210 requires that all "[a]dvertisements and sales literature shall contain the name of the [NASD] member, . . . [and of] the person or firm preparing the material, if other than the member . . . ." Furthermore, "[s]tatistical tables, charts, graphs or other illustrations used by members . . . should disclose the source of the information if not prepared by the member." By its terms, Rule 15a-6(a)(2) is only available when research is provided to major U.S. institutional investors and the foreign broker-dealer does not engage in any follow-up or solicitation of such investors. The Commission, therefore, adopted the interpretative position outside Rule 15a-6. Under this position, it would not require a foreign broker-dealer to register when its research reports were distributed to U.S. persons, other than major U.S. institutional investors, by a registered broker-dealer. However, the research report at issue stated that the foreign broker-dealer bore responsibility for its contents and that U.S. persons who wished to engage in

92. See id.
94. Id. at Rule 2210(d)(2)(K). Under Rule 2210(a)(2), “sales literature” specifically includes “research reports, market letters, performance reports or summaries . . . .” Id. at Rule 2210(a)(2). NASD Conduct Rule 2210 establishes the standards applicable to all communications made by a member firm to the public through advertisements and sales literature. Sub-paragraph (d)(1) sets forth the general standards of disclosure for advertising and sales literature. Under the Rule, a member firm’s advertising and sales literature must be approved by a registered principal of the member prior to release or filing with the NASD. See id. at Rule 2210(b)(1). It is the responsibility of the registered principal to ensure that the advertising or sales piece complies with the standards set forth in the Rule. See id. Under sub-paragraph (c), a member firm is required to file certain types of advertising and sales literature with the NASD within 10 days of first use or publication by the member firm. See id. at 2210(c)(1). The member firm must provide the actual or anticipated date of first use with the filing. See id. The filing requirements, however, are applicable only to advertisements and sales literature concerning registered investment companies. See id. Advertisements and sales literature used to market foreign equities would not require filing with the NASD. Such advertisements and sales literature, however, must still comply with the general and specific standards set forth in the Rule. See id.
transactions of securities mentioned in the report could only do so with the registered broker-dealer.95

C. Solicited Sales in the United States

Subject to certain conditions, Rule 15a-6(a)(3) permits foreign brokers or dealers, without registering, to induce or attempt to induce the purchase or sale of any security by "U.S. institutional investors"96 or "major U.S. institutional investors,"97 provided the resulting securities transactions are effected through an intermediary registered broker-dealer.98 Compliance with paragraph (a)(3) is predicated on the condition that solicitations are to be directed only to a U.S. institutional investor or to a major U.S. institutional investor.99 The Commission reasoned that:

[M]any foreign broker-dealers have established registered broker-dealer affiliates in the United States that are fully

95. Exchange Act Release, supra note 44, at 30,023. The registered:

[B]roker-dealer prominently stated on the research report that it had accepted responsibility for its content if the research report prominently stated that any United States persons receiving the research and wishing to effect any transactions in any security discussed in the report should do so with the registered broker-dealer, not the foreign broker-dealer and if the transactions with United States recipients of the report . . . were effected only with or through the registered broker-dealer and not the foreign broker-dealer.

[The Commission [indicated that it] would not require registration by a foreign broker-dealer whose research reports were included in a broadly-distributed electronic database to which U.S. persons who were not major U.S. institutional investors had access, provided that (i) a registered broker-dealer accepted responsibility for the research and for its inclusion in the database, (ii) the registered broker-dealer prominently stated on the research report, as displayed in the database, that it had accepted responsibility for its content, and (iii) the research report prominently indicated that any U.S. persons accessing the report and wishing to effect any transaction in the securities discussed in the report should do so with the registered broker-dealer, not the foreign broker-dealer. This position does not limit the research exemption in paragraph (a)(2) for research distributed directly to major U.S. institutional investors, whether in written or electronic form.

97. Id.
98. See id. § 240.15a-6(a)(3)(i)(A).
99. See 17 C.F.R. § 240.15a-6(a)(3).
qualified to deal with U.S. investors and trade in U.S. securities. Nonetheless, these foreign broker-dealers may prefer to deal with institutional investors in the United States from their overseas trading desks, where their dealer operations are based. In addition, because overseas trading desks often are principal sources of current information on foreign market conditions and foreign securities, many U.S. institutions want direct contact with overseas traders. Foreign broker-dealers themselves often are not willing to register as broker-dealers directly with the Commission, however, because registration would require the entire firm to comply with U.S. broker-dealer requirements.\(^\text{100}\)

A predicate to compliance with paragraph (a)(3) is that solicitations may be directed only to "a U.S. institutional investor or a major U.S. institutional investor."\(^\text{101}\) A foreign broker-dealer may solicit investors so long as the resulting transactions are effected through the registered broker-dealer in accordance with paragraph (a)(3)(iii).\(^\text{102}\) In addition, the foreign broker-dealer must generally submit to information requests by the Commission.\(^\text{103}\) The foreign broker's representative must not be subject to the "bad boy" provisions of sections 3(a)(39)\(^\text{104}\) and 15(b)(4),\(^\text{105}\) and must conduct all securities activities from outside the United States, with an important exception: foreign representatives may visit U.S. institutional investors and major U.S. institutional investors if the foreign representative is accompanied by a representative of the registered broker-dealer.\(^\text{106}\) In addition to chaperoning the foreign broker, the registered broker must take responsibility for the foreign broker's U.S.

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100. Exchange Act Release, supra note 44, at 30,024. The no-action request granted to Chase Capital Markets US allowed foreign trading operations to receive calls from U.S. institutional investors without the foreign broker-dealers registering with the Commission. Under the terms of that letter, foreign broker-dealers could be put in touch with U.S. institutional investors by a registered broker-dealer affiliate, with a U.S.-qualified representative participating in telephone conversations, effecting any resulting transactions, and taking full responsibility for the trades. Id. (citing letter from Amy Natterson Kroll, Attorney, Office of Chief Counsel, Division of Market Regulation, SEC, to Frank C. Puleo, Esq., Milbank, Tweed, Hadley & McCloy (dated July 28, 1987)).

102. See id. § 240.15a-6(a)(3)(i)(A).
103. See id. § 240.15a-6(a)(3)(i)(B).
communications, and must effect transactions in any securities discussed during the chaperoned visits.\textsuperscript{107} Section (a)(3)(iii) sets forth the responsibilities of the registered broker-dealer in connection with the activities covered by Rule 15a-6.\textsuperscript{108}

In a fine example of circular regulation, section (a)(3)(i)(A) requires that the foreign broker must effect transactions through the registered broker "in the manner described by paragraph (a)(3)(iii)."\textsuperscript{109} Section (a)(3)(iii)(A)(1) accomplishes this by simply repeating that the registered entity is only responsible for effecting transactions, rather than negotiating the terms.\textsuperscript{110} The concept that transactions are "effected through" the registered broker is clearly important; but ascertaining what is meant by that phrase is elusive. The requirement that transactions be "effected through" registered entities has not been elaborated upon in the proposing or adopting releases. NASD Regulation Inc. addressed the issue in a 1998 Notice to Members.\textsuperscript{111} In addition, the Commission has also issued several no-action positions.\textsuperscript{112}

In the absence of anything more definitive, it seems plausible that "effecting through" is simply intended to encompass the responsibilities covered in paragraphs (a)(3)(iii)(A)(2)-(6). Among those responsibilities are: issuing confirmations and statements; arranging the extension of credit on margin transactions; maintaining books and records as required under Exchange Act Rules 17a-3 and 17a-4; complying with Rule 15c3-1 net capital requirements; and complying with 15c3-3 rules as to physical possession and control, and required reserve accounts.\textsuperscript{113}

Paragraphs (a)(3)(iii)(B) through (E) cover miscellaneous issues such as the need for the registered broker to obtain consent to service of process and Form U-4 type information from the foreign representatives,\textsuperscript{114} as well as a parallel to the paragraph (a)(3)(ii)

\textsuperscript{107} See 17 C.F.R. § 240.15a-6(a)(3)(ii)(A) (1999). These sections specifically provide an exception to the general rule that people associated with foreign brokers must conduct all securities activities outside of the United States. See id. An individual associated with a foreign broker is allowed to conduct visits to U.S. institutional investors if this individual is accompanied by a person associated with a registered broker. See id. § 240.15a-6(a)(3)(ii)(A)(1).

\textsuperscript{108} See id. § 240.15a-6(a)(3)(ii)(A)(1)-(6).

\textsuperscript{109} Id. § 240.15a-6.

\textsuperscript{110} See id. § 240.15a-6(a)(3)(iii)(A)(1).

\textsuperscript{111} See infra notes 130-36 and accompanying text.

\textsuperscript{112} See infra notes 137-54 and accompanying text.

\textsuperscript{113} See 17 C.F.R. § 240.15a-6(a)(3)(iii)(A) (1999).

\textsuperscript{114} See id. § 240.15a-6(a)(3)(iii)(B)-(E).
chaperoning requirement.

D. Transactions with U.S. Brokers and Others

Paragraph (a)(4) of Rule 15a-6 provides an exemption from registration to foreign broker-dealers that solicit or transact business only with, among others, registered broker dealers or banks.\textsuperscript{115} However, the exclusion for transactions with banks may no longer be valid after the effectiveness, in May 2001, of the "push-out" provisions of the Gramm-Leach-Bliley Act of 1999.\textsuperscript{116} The purpose of the Act is to "enhance competition in the financial services industry."\textsuperscript{117} It also provides a "framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers."\textsuperscript{118}

Under Rule 15a-6, a foreign broker-dealer may transact business with certain other persons or entities.\textsuperscript{119} This list of other persons or entities includes certain international agencies,\textsuperscript{120} foreign persons temporarily in the United States with whom the foreign broker had an existing relationship,\textsuperscript{121} and U.S. persons either permanently located or resident outside the United States, so long as the foreign broker does not target identifiable groups of U.S. citizens who are resident abroad.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{115} See id. § 240.15a-6(a)(4)(i).
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. Among other things, the Gramm-Leach-Bliley Act eliminates the historic exclusion of banks from the definitions of "broker" and "dealer" in sections 3(a)(4) and 3(a)(5) of the Exchange Act. See id. § 201.20. Other than certain limited exceptions for traditional banking activities, a bank engaging in brokerage activities must register as a broker-dealer. See generally § 201.20: Therefore, the Rule 15a-6(a)(4) exclusion for transactions with banks may be a dead letter.
\item \textsuperscript{119} See 17 C.F.R. § 240.15a-6(a)(4) (1999).
\item \textsuperscript{120} See id. § 240.15a-6(a)(4)(ii). Examples include the United Nations and the International Monetary Fund. See id.
\item \textsuperscript{121} See id. § 240.15a-6(a)(4).
\item \textsuperscript{122} See id.
\end{itemize}
V. COMMENTS RECEIVED BY THE COMMISSION

A. Intermediation Maintained

Despite twenty-four comments to the contrary, the Commission decided to continue requiring the intermediation of a registered broker-dealer to address concerns regarding financial responsibility and the effective enforcement of U.S. securities laws. The registered broker-dealer, however, is not required to implement procedures to obtain positive assurance that the foreign broker-dealer was operating in accordance with U.S. requirements. Moreover, the intermediary does not need to be affiliated with a foreign broker-dealer through ownership or control. Since a nonresident registered broker-dealer was eligible to serve as intermediary under the Rule, the Commission reasoned that costs incurred by a foreign broker-dealer in complying with the Rule 15a-6(a)(3) direct contact exemption could be reduced.

The Commission indicated, however, that the registered broker-dealer, in effecting trades arranged by the foreign broker-dealer, has a responsibility to review these trades for indications of possible violations of the federal securities laws. The registered broker-dealer's intermediation in these trades is intended to help protect U.S. investors and securities markets. The Commission concluded that a registered broker-dealer would have an obligation, as it has for all customer accounts, to review any Rule 15a-6 account for indications of potential problems.

In addition to the above responsibility, the Commission stated:

[If the registered broker-dealer ignores indications of irregularity that should alert the registered broker-dealer to the likelihood that the foreign broker-dealer is taking advantage of U.S. customers or otherwise violating U.S. securities laws, and the registered broker-dealer nevertheless continues to effect questionable transactions on behalf of the foreign broker-dealer or its customers, the registered bro-

124. See id. at 30,025.
125. See id.
126. See id. An unregistered U.S. bank is not eligible to serve the intermediary function, since a bank "would not be subject to the Commission's extensive statutory authority to regulate, examine, and discipline registered broker-dealers." Id. at 30,026.
127. See id. at 30,025.
128. See id.
ker-dealer's role in the trades may give rise to possible violations of the federal securities laws.\textsuperscript{129}

This discussion of the registered broker's responsibilities vis-à-vis the foreign broker and its representatives begs the question of what actions must occur for a transaction to be "effected through" the registered broker.

B. "Effected Through" Requirement

The requirement that transactions must be "effected through" the U.S. intermediary broker-dealer is not elaborated upon in the proposing or adopting releases. Therefore, what actions are sufficient to constitute "effecting through" have been less than clear.

This issue was addressed in a 1998 Notice to Members ("NTM") from NASD Regulation Inc. ("NASDR").\textsuperscript{130} Rule 2860(6)(3) imposes a limit on the number of equity options contracts in a class of stock options on the same side of the market (long calls plus short puts, or long puts plus short calls)\textsuperscript{131} that can be written by a member or an associated person.\textsuperscript{132} NTM 98-92 asked whether the Rule 2860 (6)(3) limits apply to options transactions intermediated by U.S. broker-dealers pursuant to Rule 15a-6(a)(3).\textsuperscript{133}

NASDR indicated some members take the position that since options transactions are "intermediated" but are not carried on the U.S. member firm's books, for capital purposes, the transactions are not covered by Rule 2860(b)(3).\textsuperscript{134} NASDR disagreed. In finding that the Rule applied, NASDR stated that even though the option position was maintained by the foreign affiliate, the transaction was "effected" by the U.S. member within the meaning of Rule 15a-6(a)(3).\textsuperscript{135} In stating its rationale, NASDR argued that its position was consistent with the purpose of Rule 2860(b)(3), and noted that since the U.S. member must record the affiliate's transactions, "the

\begin{flushleft}
\textsuperscript{129} Id. at 30,026 (citing Merrill Lynch, Exchange Act Release No. 19,070, 26 SEC Docket 254 (dated Sept. 21, 1982)).


\textsuperscript{131} A "put" is an option to sell a specified amount of a commodity at a fixed price at or within a given time. A "call" is an option to buy a certain amount of a commodity at a fixed price at or within a given time. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 162, 195 (10th ed. 1995).

\textsuperscript{132} See NASD Conduct Rule 2860 (1999).

\textsuperscript{133} See NASD Conduct Rule 2210(d)(2)(A).

\textsuperscript{134} See id.

\textsuperscript{135} See id.
\end{flushleft}
member has the practical ability to enforce compliance."136

The position taken by the NASDR seems to imply that it has adopted an expansive view of what actions of the U.S. intermediary are sufficient for a transaction to be deemed to have been "effected through" that firm. This at least raises the question of whether the NASDR would be similarly expansive in a situation where it was not trying to reach a desired regulatory outcome.

However, further support for a liberal reading of the "effected through" requirement can be found in several no-action positions of the Commission. For example, a core element of "effecting through" is the maintenance by the U.S. intermediary broker-dealer of the books and records relating to the covered transactions. The Commission has gone so far as to determine that an arrangement would be permissible where the information for such books and records is generated by the foreign broker-dealer and then transmitted electronically to an automated matching system that is under the joint control of the foreign broker-dealer and the registered U.S. intermediary.137

In this letter, the staff indicated that no enforcement action would be taken where the foreign broker made all records of the clearing and settlement of transactions that resulted from buy/sell matches made by the automated system and were executed by the foreign broker.138 The records would be shared electronically with the U.S. intermediary broker, and the parties requesting the no-action position represented that the U.S. broker would remain responsible for the accuracy of the records published, as well as the prompt delivery of those records to the Commission or other examining authority.139

The basis for the staff's position in Investment Technology Group, Inc. appears to have been that the imposition of dual record keep-

136. Id.
137. See Investment Technology Group, Inc., SEC No-Action Letter, 1993 SEC No-Act. LEXIS 1011, *4 (Oct. 6, 1993). The Commission allowed an arrangement whereby Jefferies International Limited, an unregistered foreign broker-dealer, executed trades then transmitted the records to Global Portfolio System for Institutional Trading. See id. at *4-5. Global, an automated system that matches purchasers to sellers of non-U.S. securities, was operated by Investment Technology Group, a wholly owned subsidiary of Jefferies Group, Inc. that is a registered broker-dealer. See id. at *1-2. Both Investment Technology Group and Jefferies International Limited controlled Global's computer system. See id. at *4.
138. See id. at *4-5.
139. See id.
ing requirements – i.e., on both the domestic and the foreign brokerage entities – is not only inefficient, but also increases the risk of operational error.\textsuperscript{140} It is also implicit in the staff’s conclusion that advances in electronic communications make it irrelevant where certain functions, such as record keeping, take place, so long as the regulatory intent – availability of records – is served.\textsuperscript{141}

This reasoning would explain a similar position taken in 1996. In a letter to Morgan Stanley & Co., Inc., the staff reached a number of conclusions that are important to understanding the current state of Rule 15a-6.\textsuperscript{142} In its application, Morgan Stanley represented that as a U.S. broker-dealer, it is prohibited from holding funds and securities in India on behalf of U.S. customers.\textsuperscript{143} To address this restriction, Morgan Stanley proposed to have transactions in Indian securities for U.S. customers executed by Morgan Stanley's Indian affiliate, Morgan Stanley India ("MSI") and settled through the customer's custodian.\textsuperscript{144} Although trade orders were to be placed with Morgan Stanley representatives, the order would not be entered into or processed on Morgan Stanley's books and records. Trades would be entered only onto the MSI system, by MSI employees.\textsuperscript{145}

Morgan Stanley argued that dual trade entry and reconciliation of dual sets of books would entail substantial additional costs. The application acknowledges that the recordkeeping and retention requirements under Exchange Act Rules 17a-3 and 17a-4\textsuperscript{146} would not be met, and the trades executed through the foreign affiliate would not be taken into account for purposes of Morgan Stanley’s compliance with Exchange Act Rules 17a-5\textsuperscript{147} and 17a-13.\textsuperscript{148} Moreover, the

\textsuperscript{140} The efficiency and accuracy factors also contributed to the staff decision in \textit{International Operations Association Securities Industry Association}. See infra notes 162-69 and accompanying text.

\textsuperscript{141} See Investment Technology Group, Inc., \textit{supra} note 137.


\textsuperscript{143} See \textit{id.} at *2.

\textsuperscript{144} See \textit{id.}

\textsuperscript{145} See \textit{id.} at *3-4.

\textsuperscript{146} See 17 C.F.R. §§ 240.17a-3, -4 (1999) (requiring brokers registered pursuant to the Exchange Act to record all daily transactions and the individual accounts which may be effected, and further requires these records to be preserved for at least three years).

\textsuperscript{147} See \textit{id.} § 240.17a-5 (requiring brokers registered pursuant to the Exchange Act to periodically file customer account transactions with the Commission’s office).

\textsuperscript{148} See \textit{id.} § 240.17a-13 (requiring brokers registered pursuant to the Exchange
confirmation delivered to U.S. customers on each transaction would be "combined in whole or in part with the confirmation provided by MSISL, but [it] will describe as appropriate the role of [Morgan Stanley] as agent . . . ."  

Nonetheless, the staff concluded that it would not recommend enforcement action under the circumstances. A key to this decision was that through the linked computer systems of Morgan Stanley and MSI, "the trade records entered onto MSISL records will become available to [Morgan Stanley], as soon as they are entered, on the same basis as if the trades had been entered directly onto [Morgan Stanley's] records."  

Certainly, there were other factors that the staff considered in arriving at its conclusion: (1) that the trades would be effected on a "delivery versus payment" basis; (2) that Morgan Stanley would take charges for failed trades in accordance with Rule 15c3-1; (3) that it would comply with reserve formula requirements, even though Morgan Stanley would not receive, deliver or hold the subject funds or securities; and (4) that it would reconcile trade tickets written by its representatives against trades entered on MSI's books. But the condition precedent for this arrangement, and seemingly the sine qua non for the staff's acceptance, was the existence of a network that permitted real time transmission and sharing of trade data across international boundaries and time zones.  

In sum, the "effected through" requirement has become less meaningful as electronic communications have improved. While the requirement itself may have some validity, the nominal indicia are in many respects outmoded. There should be flexibility in what actions will satisfy this requirement.

C. Rule 15c3-3 Custody and Reserve Requirements  

Among the requirements of paragraph (a)(3)(iii) of Rule 15a-6 is that the registered U.S. broker-dealer comply with Rule 15c3-3. Rule 15c3-3, under the Exchange Act, requires that a broker-dealer maintain physical possession or control of all fully-paid and excess

Act to file quarterly reports accounting for all securities transacted under their control.

149. Morgan Stanley, supra note 142, at *17.
150. See id. at *4.
151. Id. at *4 (emphasis added).
152. See id. at *3-6.
153. See id. at *3-8.
margin securities carried for the customer's account.\footnote{155} Rule 15c3-3 further requires the broker-dealer to make deposits to a reserve account based upon the amount of customer funds obtained by the firm, less the amount of funds extended to, or on behalf of, the customer.\footnote{156}

A no-action letter issued subsequent to the Rule 15a-6 Adopting Release demonstrates how technological advances have rendered moot certain assumptions made under the Rule, particularly with respect to the control and reserve requirements. In a letter issued to RMK International Securities, Inc., the staff reviewed an application by a U.S. broker to act as an agent for U.S. customers who wished to purchase or sell German securities.\footnote{157} RMK, the U.S. broker, represented that it would maintain a cash account and a securities account at ADCA Bank in Frankfurt.\footnote{158} When RMK received a purchase order, RMK would forward the order to a foreign broker for execution.\footnote{159} The foreign firm would purchase securities for its own account as principal, and sell through RMK as an agent for the U.S. customer.\footnote{160} The customer would pay for the securities by transferring deutsche marks to the ADCA Bank account, or by instructing its custodian to transfer funds to the account in exchange for delivery of the securities.\footnote{161} Upon receipt of the customer's funds and occurrence of the settlement date,\footnote{162} the acquired securities would be credited to the ADCA account, and transferred by means of the Kassenverein System, an automated book-entry clearing system, to the customer's custodian. For a sale, the U.S. customer's custodian would transfer German sec-

\footnote{155. See 17 C.F.R. \$ 240.15c3-3(b)(1), (b)(4)(i)(D)(1999).}
\footnote{156. See id. \$ 240.15c3-3(e).}
\footnote{158. See id.}
\footnote{159. See id.}
\footnote{160. See id.}
\footnote{161. See id.}
\footnote{162. The staff had previously examined the applicability of Rule 15c3-3 in light of diverse settlement periods and procedures in international securities markets. See International Operations Association Securities Industry Association, SEC No-Action Letter, 1990 SEC No-Act. LEXIS 1066, *3-9 (Sept. 4, 1990). The staff found, among other things, that broker-dealers could treat the settlement date of foreign issued and settled securities according to the customary settlement cycle in a particular country. See id. at *7. In addition, in certain countries with highly developed markets, failed trades could be determined and aged based upon the settlement date. See id. at *8.}
curities sold through the Kassenverein System to the ADCA account. Upon receipt of the securities by ADCA Bank, the sales proceeds would be credited to the ADCA account and the securities transferred to the purchaser.

In assessing whether to enforce Rule 15c3-3, the staff noted the applicant's representations that settlement of transactions in the ADCA account occurred simultaneously, so that customer funds or securities would not be held in the account. Other than transfers into the account immediately prior to settlement, customer funds or securities would be held in the account only because of an error, or due to a failure to settle. RMK represented that customer securities or funds held due to errors or failure to settle would be returned to the customer immediately.

The staff concluded that no enforcement action would be taken if no deposits to the 15c3-3 Special Reserve Account were made, and if physical possession or control were not obtained. The staff’s finding once again hinged on the existence of electronic communications that would allow for simultaneous settlement of transactions through the foreign bank account, and the ability of the U.S. broker to immediately return funds or securities held due to errors or fails, coupled with the U.S. broker's representation that it could not independently cause funds or securities to be moved out of its customers' custodial accounts.

While not a focus of the staff's response, certain of the incoming correspondence from RMK had noted that other clearing systems besides Kassenverein, namely Euroclear and CEDEL (via a "bridge" from Euroclear) might be used. Also, in what perhaps foreshadowed a later 15a-6 interpretation by the staff, the applicant affirmed that all of its U.S. clients would be Qualified Institutional Buyers ("QIBs") as defined in Rule 144A.

D. Expansion of Permissible Contacts

A no-action letter issued shortly after the Morgan Stanley India letter re-affirmed several of the positions taken in that letter, and

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163. See RMK International Securities, supra note 157, at *2.
164. See id. at *5.
165. See id.
166. See id.
167. See id.
168. See id. at *1.
169. See id.
170. See supra notes 142-53 and accompanying text.
also established some important new guidelines for compliance with Rule 15a-6 requirements. The letter was issued to the law firm of Cleary, Gottlieb, Steen & Hamilton (Cleary Gottlieb), which had applied on behalf of a number of financial center investment banks. The application sought to: (1) expand the range of U.S. investors that may enter into transactions with U.S.–affiliated foreign broker-dealers; (2) permit the direct transfer of funds and securities from U.S. investors to such foreign broker-dealers; (3) expand the permitted oral and in-person contacts by such foreign broker-dealers; and (4) clarify that providing quotation systems that supply price and trading information from foreign broker-dealers would not constitute an impermissible contact under the rule. In presenting its case, Cleary Gottlieb noted that institutional investors now consider a “global approach” to be essential, and that the force that both drives and facilitates this approach is the “widespread availability of computer-based and related communicated technologies.”

With regard to the range of U.S. investors covered by the Rule, the applicant noted that the definitions of “U.S. institutional investor” and “major U.S. institutional investor” omitted some significant classes of investors, such as U.S. business corporations and partnerships. Also omitted were investment funds advised by investment managers that are exempt from registration under the Investment Advisers Act of 1940. The staff acceded to the applicant’s request that U.S. affiliated foreign broker dealers be permitted to engage in transactions with any entity, including an investment adviser whether or not he is registered, that owns, controls or (as to advisers) manages $100 million or more in financial assets. In a

172. See id. at *1. The firms represented were: Bear, Stearns & Co., Inc.; Credit Suisse First Boston Corporation; CSFP Capital, Inc.; Goldman Sachs & Co.; Lehman Brothers, Inc.; Merrill Lynch, Pierce, Fenner & Smith, Incorporated; Morgan Stanley & Co., Inc.; Salomon Brothers, Inc.; and Smith Barney, Inc. See id. at n.1.
173. See id. at *20-36.
174. Id. at *17.
176. See Cleary Gottlieb, supra note 171, at *3.
178. See Cleary Gottlieb, supra note 171, at *4, 14. In granting this relief, the staff closed, to a significant degree, the gap that had existed between the definitions of “major U.S. institutional investor” in Rule 15a-6 and “qualified institu-
follow-up letter, the staff clarified that this interpretation applied to the provisions of paragraph (a)(2) as well as paragraph (a)(3) and to all applicable provisions of Rule 15a-6 and interpretations thereunder. 179

While technology-driven operations of U.S. investors underpinned the need to expand the definition of "major U.S. institutional investors," the request for relief from the customer protection provisions, requiring possession and control by the registered broker-dealer, is a more direct outcome of technological advances. In its application, Cleary Gottlieb notes that many U.S. institutions engage foreign custodians to hold, receive and deliver their foreign securities and local currencies. 180 The settlement of a trade between a U.S. customer and its foreign counterpart is effected most efficiently when the foreign broker-dealer is the sole intermediary between the parties. As explained by Cleary Gottlieb, the interposition of a U.S. broker-dealer would serve not only to cause a duplication of custodial, accounting and other settlement functions, but also would increase the risk of operational errors and settlement failures. 181

The Commission accepted this reasoning, but subject to the conditions that the foreign broker-dealer must make clearance and settlement information available to the registered broker-dealer, that the foreign broker-dealer may not be in default on any material financial market transaction, and also that the U.S. intermediary broker-dealer must fulfill its other obligations under Rule 15a-6. 182

The next element of the application sought to broaden the foreign broker-dealer's ability to contact U.S. investors personally and through the provision of electronic data. Under Rule 15a-6, personal contacts by the foreign broker-dealer are subject to the so-

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180. See Cleary Gottlieb, supra note 171, at *25.
181. See id. at *24-25.
182. See id. at *14-15. Neither the Cleary Gottlieb application nor the staff's response focuses on the paragraph (a)(3) responsibility of the registered broker for delivery of confirmations and statements, as well as other books and records requirements.
called "chaperoning" requirements.\textsuperscript{183} These requirements include limitations on both phone contacts and in-person visits by the foreign broker-dealers, unless a representative of the registered broker-dealer is present.\textsuperscript{184}

In accepting the arguments set forth by Cleary Gottlieb, the staff agreed to loosen the strictures of Rule 15a-6 so that foreign representatives, without the intermediation of the U.S. broker-dealer, could: (1) engage in oral communications from abroad with U.S. institutional investors where communications take place outside the trading hours of the New York Stock Exchange,\textsuperscript{185} so long as the unregistered foreign broker-dealer accepts orders only for foreign securities; and (2) have in-person contacts in the United States with major U.S. institutional investors, so long as the number of days on which in-person contacts occur does not exceed 30 per year and the foreign representatives do not accept orders while in the United States.\textsuperscript{186}

The other relief relating to contacts with U.S. investors was the request to relax the Commission's stance on provision of quotation systems. In the Adopting Release, the Commission stated that it would permit the distribution of third party quotation systems to U.S. investors where the quotations transmitted over such systems were delivered "primarily in foreign countries."\textsuperscript{187} In addition, proprietary quotation systems — where the U.S. investors could place a trade through the foreign broker/market maker providing the quotations — were viewed by the Commission as an impermissible inducement to trade with that foreign broker-dealer.\textsuperscript{188}

The applicant noted that since quotation systems had become more global through a variety of technological improvements since adoption of Rule 15a-6, it was no longer practicable to distinguish a system by whether its quotation data was delivered "primarily in foreign countries."\textsuperscript{189} As to proprietary systems, while acknowledging

\textsuperscript{183} See 17 C.F.R. § 240.15a-6(a)(3)(iii) (1999); see also supra notes 106-08 and accompanying text.
\textsuperscript{185} See Cleary Gottlieb, supra note 171, at *9-10. Also, while the application deals with specifics of oral and in-person communications, it is unclear how e-mail would be treated. See id.
\textsuperscript{186} See id. at *9-10, 14.
\textsuperscript{188} See id. at 30,019.
\textsuperscript{189} Cleary Gottlieb, supra note 171, *32.
that trades placed by the U.S. investor might be viewed as solicited and therefore outside the Rule 15a-6(a)(1) exemption for unsolicited trades, the applicant observed that quotations were already permitted to be delivered orally. Cleary Gottlieb summed up its argument by stating that "the availability of improved technologies for providing investors with quotations should not be restricted merely because it is impossible to 'chaperone' a data transmission."

As with the other relief requested, the staff accepted these positions. Notably, the staff expressly made the no-action relief applicable not only to Cleary Gottlieb and its clients, but also to all similarly situated U.S. registered broker-dealers and foreign affiliate broker-dealers.

Taken in isolation, the Cleary Gottlieb letters might appear to be a watershed event in the interpretation of Rule 15a-6. However, the positions taken by the staff in those letters are consistent with earlier decisions. Subsequent decisions have continued to vitiate the restrictiveness of the Rule as improvements in communications technology link the world's financial markets ever more closely together.

VI. CONCLUSION

The globalization of the securities industry has continued to accelerate since the adoption of Rule 15a-6. Competition between U.S. firms and foreign securities firms has become intense as each seeks to become a one-stop provider of a comprehensive and cost-effective range of financial products and related services for their customers. These firms are anxious to engage in cross-border transactions in an effort to either maintain or create equal access to the marketplace. Institutional investors recognize that their investment strategies must reflect the significance of proper diversification and a global approach to investing. Even some retail investors have demonstrated considerable interest in purchasing foreign securities as they go public. They too recognize that companies around the globe are capable of impacting their domestic economy.

Much of the marketplace competition has been fueled by technological and communications advances, as well as industry deregulation. The Internet and ECNs are already bridging the gap between buyers and sellers of securities, effectively diminishing the need for an intermediary broker. For institutions, clearing systems,

190. See id. at *34.
191. Id.
192. See id. at *14.
such as DTC, Kassenverein, Crest and Euroclear (to name a few), make real-time global communication and transactions a reality.\textsuperscript{193} The advances have spurred market activity to reach all-time highs.

All of which brings us to our original question: if U.S. securities laws and regulations are designed to establish and promote markets that are fair and efficient, then—in a world where national boundaries have become secondary to market imperatives—has Rule 15a-6 outlived its usefulness? Arthur Levitt, former Chairman of the Securities and Exchange Commission, stated “if barriers to competition did not exist, then neither would the need, in many respects, for regulatory involvement.”\textsuperscript{194} This statement may be apropos of Rule 15a-6.

\textsuperscript{193} See supra notes 157-69 and accompanying text.

\textsuperscript{194} September 23, 1999 speech delivered at Columbia Law School as reported by the Wall Street Journal.