UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

January 30, 1996

Giovanni P. Prezioso, Esq.
Cleary, Gottlieb, Steen & Hamilton
1752 N Street, N.W.
Washington, D.C. 20036-2806



Re: Transactions in Foreign Securities by Foreign Brokers or Dealers with Accounts of Certain Foreign Persons Managed or Advised by U.S. Resident Fiduciaries

Dear Mr. Prezioso:

In your letter of November 13, 1995 on behalf of seven registered broker-dealers (the "Firms")1/, as supplemented by conversations with the staff, you request assurances that the staff will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act"), if any of the Firms or a foreign broker or dealer affiliated with any of the Firms ("U.S. Affiliated Foreign Broker-Dealer") engages in the activities described below without the U.S. Affiliated Foreign Broker-Dealer registering as a broker-dealer in accordance with the provisions of Section 15(b) of the Exchange Act. This staff position supersedes and replaces our letter to you dated November 22, 1995.

We understand the facts to be as follows:

When a foreign broker-dealer engages in securities transactions with a U.S. person, the foreign broker-dealer generally must register with the Commission as a broker-dealer pursuant to Section 15 of the Exchange Act, unless an exemption applies. Rule 15a-6 under the Exchange Act provides a number of exemptions to this general rule for foreign broker-dealers engaged in certain activities involving U.S. institutional investors.2/ For example, Rule 15a-6(a)(3) exempts transactions arranged by a foreign broker-dealer with a U.S. institutional investor or a major U.S. institutional investor, as those terms are defined in the

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1/ The Firms include Bear Stearns & Co., Inc.; CS First Boston Corporation; CSFP Capital, Inc.; Goldman, Sachs & Co.; Lehman Brothers, Inc.; Morgan Stanley & Co., Incorporated; and Salomon Brothers Inc.

2/ See generally Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013.

rule, as long as the U.S.-registered broker-dealer "handle[s] all aspects of these transactions except negotiation of their terms."3/

For purposes of both the broker-dealer registration provisions of the Exchange Act and Rule 15a-6, persons resident in the United States are among the persons deemed to be U.S. persons. A U.S. resident fiduciary, therefore, is considered to be a U.S. person for these purposes, regardless of the residence of the owners of the underlying accounts. Thus, when a foreign broker-dealer -- such as a U.S. Affiliated Foreign Broker-Dealer -- solicits discretionary or similar accounts of non-U.S. persons held by a U.S. resident fiduciary (including a U.S. registered investment adviser), it must either register with the Commission, or effect such transactions in accordance with Rule 15a-6(a)(3).4/ In other words, a U.S. Affiliated Foreign Broker-Dealer generally may effect transactions in Foreign Securities (as defined below) for a non-U.S. client without becoming subject to the broker-dealer registration provisions of the federal securities laws. This is not the case, however, when the non-U.S. client is represented by a U.S. resident fiduciary.

In your view, the beneficial owners of these accounts would not reasonably expect the U.S. broker-dealer regulatory requirements to apply to their transactions in Foreign Securities with the U.S. Affiliated Foreign Broker-Dealers merely because their accounts are managed by U.S. resident fiduciaries. While, currently, the U.S. Affiliated Foreign Broker-Dealers effect such transactions in compliance with the requirements of Rule 15a-6(a)(3), you believe that such compliance is burdensome and unnecessary in this narrow context. Moreover, you state that the application of the U.S. broker-dealer regulatory scheme to such transactions places the U.S. Affiliated Foreign Broker-Dealers at a competitive disadvantage with other foreign broker-dealers.

You, therefore, have requested assurances from the staff that it would not recommend enforcement action to the Commission if the U.S. Affiliated Foreign Broker-Dealers effect transactions in "Foreign Securities" for "Offshore Clients" using "U.S. Resident Fiduciaries," as these terms are defined below. As described in your letter, a U.S. Resident Fiduciary is not a registered broker-dealer or a bank acting in a broker-dealer capacity within the meaning of Exchange Act Rule 15a-6(a)(4)(i). A U.S. Resident Fiduciary may or may not be affiliated with U.S. or foreign broker-dealers, and may or may not be registered under the Investment Advisers Act of 1940.

In addition, you define an Offshore Client as: (1) any entity not organized or incorporated under the laws of the United States and not engaged in a trade or business in the United States for U.S. federal income tax purposes; (2) any natural person who is not a

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3. Id., 54 FR at 30029.

4. See Letter re: Regulation S Transactions during Distributions of Foreign Securities to Qualified Institutional Buyers (February 22, 1994). This position does not apply to a U.S. registered broker or dealer or a bank acting in a broker or dealer capacity as permitted by U.S. law. See Rule 15a-6(a)(4).

U.S. resident;5/ or (3) any entity not organized or incorporated under the laws of the United States substantially all of the outstanding voting securities of which are beneficially owned by the persons described in (1) and (2), above.

Finally, you define a "Foreign Security" as: (1) a security issued by an issuer not organized or incorporated under the laws of the United States when the transaction in such security is not effected on a U.S. exchange or through Nasdaq system;6/ or (2) a debt security (including a convertible debt security) issued by an issuer organized or incorporated in the United States in connection with a distribution conducted outside the United States.7/ For purposes of this definition, the status of over-the-counter ("OTC") derivative instruments would be determined by reference to the underlying instrument.8/

Response:

While not necessarily agreeing with the reasoning contained in your letter, based on the facts presented and the representations you have made, and particularly on the representations that (1) the U.S. Affiliated Foreign Broker-Dealer will obtain written assurance from the U.S. Resident Fiduciary that the account is managed for an Offshore

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5/ For purposes of this letter, a U.S. citizen residing in a foreign country would continue to be viewed as a resident of the United States unless the citizen (1) has $500,000 or more under the management of the U.S. Resident Fiduciary with whom a U.S. Affiliated Foreign Broker-Dealer transacts business, or (2) has, together with his or her spouse, a net worth in excess of $1,000,000.

6/ For purposes of this definition, a depository receipt issued by a U.S. bank would not be considered a Foreign Security unless it is initially offered and sold outside the United States in accordance with Regulation S under the Securities Act of 1933 ("Securities Act"). None of the definitions used for purposes of this letter should be construed as affecting the interpretation of terms used in Regulation S.

7/ For purposes of this definition, securities issued in a distribution outside the United States include securities offered and sold in accordance with Regulation S under the Securities Act. Debt securities of an issuer organized or incorporated under the laws of the United States would not be considered Foreign Securities if they were offered and sold as part of a "global offering" involving both a distribution of the securities in the United States under a Securities Act registration statement and a contemporaneous distribution outside the United States. Securities that are offered and sold outside the United States in accordance with Regulation S, however, would not lose their status as Foreign Securities as a result of offers and sales of securities of that issue to investors in the United States by means of either private placements pursuant to Section 4(2) of the Securities Act, or transactions effected pursuant to Securities Act Rule 144A or other resale transactions exempt from Securities Act registration.

8/ For example, an OTC derivative on a Foreign Security would be a Foreign Security, even if the writer of the instrument was a U.S. person. Similarly, an OTC derivative on a security other than a Foreign Security would not be a Foreign Security.

Client, (2) transactions with U.S. Resident Fiduciaries for Offshore Clients, other than transactions in Foreign Securities, will be effected in compliance with the requirements of either Section 15(a) of the Exchange Act or Rule 15a-6 thereunder, and (3) transactions effected with U.S. Resident Fiduciaries, other than transactions for Offshore Clients, will be effected in compliance with the requirements of either Section 15(a) of the Exchange Act or Rule 15a-6 thereunder, the staff would not recommend enforcement action to the Commission if U.S. Affiliated Foreign Broker-Dealers effect transactions in Foreign Securities with U.S. Resident Fiduciaries for Offshore Clients without the U.S. Affiliated Foreign Broker-Dealers either registering as broker-dealers or effecting the transactions in accordance with Rule 15a-6 under the Exchange Act.

This position concerns enforcement action only and does not represent a legal conclusion regarding the applicability of statutory or regulatory provisions of the federal securities laws. Moreover, this position is based on strict adherence by the U.S. Affiliated Foreign Broker-Dealers to the representations in this letter, and any different facts or conditions might require a different response.

Sincerely,

Catherine McGuire
Chief Counsel

CM:PJ:cn

CLEARY, GOTTLIEB, STEEN & HAMILTON

1752 N STREET, N.W. WASHINGTON, D.C. 20036-2806

(202) 728-2700

FACSIMILE
(202) 728-0846

ONE LIBERTY PLAZA
NEW YORK, NY 10006

41, AVENUE DE FRIEDLAND
75008 PARIS

RUE DE LA LOI 23
1040 BRUSSELS

CITY PLACE HOUSE
55 BASINGHALL STREET
LONDON EC2V 5EH

ROBERT C. BARNARD
FRED D. TURNAGE
COUNSEL

ULMENSTRASSE 37-39
60325 FRANKFURT AM MAIN

30TH FLOOR, BANK OF CHINA TOWER
ONE GARDEN ROAD
HONG KONG

SHIN KASUMIGASEKI BUILDING
3-3 KASUMIGASEKI 3-CHOME
CHIYODA-KU, TOKYO 100

J. EUGENE MARANS
DOUGLAS E. KLIEVER
DANIEL B. SILVER
KENNETH L. WACHTMAN, JR.
CHARLES F. LETTOW
RICHARD DEC. HINDS
BARA D. SCHOTLAND
MARK LEDDY
JOHN C. MURPHY, JR.
HENRY J. FLOOD, JR.
DANA L. TRIER
EUGENE M. GOOTT
JANET L. WELLER
MITCHELL B. DUPLER
LINDA J. BOLDO
GIOVANNI P. PREZIOSO
JOHN T. GYAM
JOHN PALENBERG
STEVEN N. ROBINSON
MICHAEL R. LAZERWITZ

RESIDENT PARTNERS

W. RICHARD BIDSTRUP
SCOTT N. BENEDICT
LINDA S. MATLACK

SPECIAL COUNSEL

RICARDO A. ANZALDUA
ROBIN M. BERGEN*
BARBARA W. BERNSTEIN
MATTHEW P. BLISCHAK
FRANK R. BORCHERT III
ELIZABETH M. BUNKE
MICHAEL J. BYRNES
ROBERT W. COOK
GEORGE R. A. DOUMAR
THOMAS M. DOYLE
MICHAEL O. ECKE
DAVID I. GELFAND
BRANDT J. GOLDSTEIN*
SCOTT R. GOODWIN
KEVIN A. GRIFFIN
MITCHELL E. HERR
JEAN E. KALICKI
KAREN A. KERR
CONSTANCE B. KIGGINS
JOHN M. KINCAID
DANIEL C. KOLB
JENNIFER M. LESTER
PETER S. LEVITT
KRISTIN D. MACKEY
JUDITH R. MARGOLIN

MICHAEL A. MATTUCHI
JOYCE E. MCCARTY
DAVID H. MCCLAIN*
JULIE BLOCH MENDELSOHN
MARK W. NELSON
JON S. NICHOLAS
MICHAEL F. O'CONNOR*
RUTH E. OLSON
MITCHELL L. RADINOWITZ
SCOTT E. SCHANZ*
MICHAEL P. SHEA*
STEVEN R. SHEVICK*
ANDRA J. SHUSTER
MARK A. SINGLEY
CHRISTOPHER D. SMITH
MICHAEL D. STEELE*
KRISTEN A. STILT*
MICHAEL J. SUSSMAN
SANDRA E. TRINDLE
PIRK VAN DRUNT
JAMES D. VOTAW
JULIE A. WADDELL
MICHAEL W. WALDRON*
AMY DEEN WESTBROOK
CARLA L. WHEELER

*NOT ADMITTED IN THE DISTRICT OF COLUMBIA

Securities Exchange Act of 1934
Section 15(a); Rule 15a-6

November 13, 1995

Ms. Catherine McGuire
Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Transactions in Foreign Securities by Foreign Brokers or Dealers with Accounts of Foreign Persons Managed or Advised by U.S. Resident Fiduciaries

Dear Ms. McGuire:

We are writing on behalf of our clients, listed in note 1 hereof,[1/] to request your advice that the staff would not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action against any of the Firms or any foreign broker or dealer affiliated with any of the Firms (a "U.S.-Affiliated Foreign Dealer") in the event that the U.S.-Affiliated Foreign Dealer does not register as a "broker" or "dealer" under Section 15 of the Securities Exchange Act of 1934,

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1/ Bear, Stearns & Co. Inc.; CS First Boston Corporation; CSFP Capital, Inc.; Goldman, Sachs & Co.; Lehman Brothers Inc.; Morgan Stanley & Co. Incorporated; and Salomon Brothers Inc (hereinafter referred to as the "Firms").

as amended (the "Exchange Act"), by virtue of its entering into purchases and sales of, and borrowing and lending and other transactions in, foreign securities ("foreign securities transactions") with or for a discretionary or similar account of an Offshore Client (as defined below) managed by a U.S. resident professional fiduciary ("U.S. resident fiduciary") without the involvement of a U.S. registered broker-dealer pursuant to Rule 15a-6 under the Exchange Act.

The term "Offshore Client" is used in this letter to refer to (i) any entity not organized or incorporated under the laws of the United States and not engaged in a trade or business in the United States for federal income tax purposes; (ii) any natural person not a U.S. resident;[2/] or (iii) any entity not organized or incorporated under the laws of the United States substantially all of whose outstanding voting securities (e.g., 85 percent or more) are beneficially owned by persons in categories (i) and (ii) above.[3/]

Except where otherwise indicated, the term "foreign security" is used in this letter to refer to:

(i) a security issued by an issuer not organized or incorporated under the laws of the United States, provided the transaction which involves such security is not effected on a U.S. exchange or Nasdaq;[4/] and

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2/ For these purposes, a U.S. citizen residing in a foreign country would continue to be viewed as a resident of the United States unless the citizen (i) has $500,000 or more under the management of the U.S. resident fiduciary with whom a U.S. Affiliated Foreign Broker-Dealer transacts business or (ii) has a net worth (together with the citizen's spouse) in excess of $1,000,000.

3/ Prior to entering into the initial transaction with the account of an Offshore Client managed by a U.S. resident fiduciary (other than in reliance on Rule 15a-6(a)(3) or other exemptive relief), a foreign broker-dealer would obtain a representation by the U.S. resident fiduciary that the account under its management is an Offshore Client as defined above.

4/ For purposes of this definition, a depositary receipt issued by a U.S. bank would not be viewed as a foreign security unless the depositary receipt is initially offered and sold

(continued...)

(ii) a debt security (including a convertible debt security) issued by an issuer organized or incorporated under the laws of the United States in connection with a distribution conducted outside the United States.[5/]

For purposes of this definition, the status of over-the-counter derivatives that are securities ("OTC derivatives") would be determined by reference to the underlying instrument. For example, an OTC derivative on a foreign security would be a foreign security even if the writer of the instrument were a U.S. person. Similarly, an OTC derivative on a security other than a foreign security would not be a foreign security.

The term "foreign broker or dealer" has the same meaning herein as in Rule 15a-6(b)(3) and is used interchangeably herein with the term "foreign broker-dealer" unless the context otherwise requires. For purposes of this no-action request, it is assumed that the U.S. resident fiduciary (i) is not a registered broker-dealer or a bank acting in a broker-dealer capacity within the meaning of Rule 15a-6(a)(4)(i) under the Exchange Act, (ii) may or may not be affiliated with U.S. or foreign broker-dealers and (iii) may or may not be registered

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[5/](...continued)
outside the United States in accordance with Regulation S under the Securities Act of 1933 (the "Securities Act").

[5/] For these purposes, we understand that securities issued in a distribution conducted outside the United States would include securities offered and sold in accordance with Securities Act Regulation S. Debt securities of an issuer organized or incorporated under the laws of the United States would not qualify as "foreign securities" if offered and sold as part of a "global offering" involving both a distribution of the securities in the United States under a Securities Act registration statement and a contemporaneous distribution outside the United States. We understand, however, that securities offered and sold outside the United States in accordance with Regulation S would not lose their status as "foreign securities" as a result of offers and sales of securities of that issue to investors in the United States in a private placement pursuant to Section 4(2) of the Securities Act or in transactions effected pursuant Securities Act Rule 144A or in other resale transactions exempt from Securities Act registration.

under the Investment Advisers Act of 1940, as amended (the "Advisers Act").[6/]

**Background**

A. Foreign Securities Transactions

Increasing amounts of investment capital are being placed in investment vehicles established as Offshore Clients. These Offshore Clients consist primarily of institutional investors, including foreign corporate investors, pension funds and investment funds and other foreign investment vehicles. Certain of the Offshore Clients may have U.S. persons among their investors. Offshore Clients have shown a growing desire to use U.S. resident fiduciaries to manage portions of their securities portfolios and to use foreign broker-dealer affiliates of U.S. registered broker-dealers for their foreign securities transactions, as long as the use of these services does not result in an unjustifiable U.S. regulatory burden.

The efficient conduct of foreign securities transactions has been impaired, however, by concerns relating to whether an unregistered foreign broker-dealer may enter into foreign securities transactions with Offshore Clients using U.S. resident fiduciaries without the involvement of a U.S. registered broker-dealer in compliance with Rule 15a-6.

These concerns have generated a significant competitive disadvantage for U.S. registered broker-dealers, U.S.-Affiliated Foreign Dealers and U.S. resident fiduciaries. The competitive disadvantage is particularly acute with respect to foreign securities transactions where a U.S. broker-dealer cannot arrange credit extended by a U.S.-Affiliated Foreign Dealer on terms more favorable than the terms upon which the U.S. broker-dealer could extend the credit (i.e., in cases where no Regulation T arranging exception is available). Currently, the arranging exception provided by Section 220.13(d) of Regulation T permits a U.S. broker-dealer to arrange credit extended by a foreign person only to purchase a "foreign security," as that term is defined in Regulation T (i.e., "a security issued in a jurisdiction other than the United States"). Thus, the exception is not available

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6/ Many U.S. resident fiduciaries operate offices only in the United States, or carry out certain investment management activities only in U.S. offices, for various financial, operational and legal reasons. Some U.S. resident fiduciaries may maintain foreign offices.

with respect to securities borrowing and lending transactions and short sales of such securities. Moreover, the exception does not apply even to purchase transactions involving securities other than "foreign securities" as defined in the Regulation.

Furthermore, even if the arranging exemption provided by Section 220.13(d) of Regulation T is available, the involvement of Rule 15a-6 intermediation for foreign securities transactions results in the additional significant competitive disadvantage of precluding the consolidated reporting of all of an Offshore Client's foreign securities transactions and the provision of other global services in respect of such transactions at a U.S.-Affiliated Foreign Dealer.

The Firms believe that the granting of the no-action relief requested in this letter would help mitigate the current competitive disadvantage of U.S. registered broker-dealers, U.S.-Affiliated Foreign Dealers and U.S. resident fiduciaries, and would facilitate the ability of Offshore Clients to make use of various securities services including execution, custody, recordkeeping and financing ("global securities services") provided by U.S.-Affiliated Foreign Dealers.

In the absence of the no-action relief requested in this letter, or any other available relief under Rule 15a-6 or otherwise, an unregistered foreign broker-dealer wishing to rely on Rule 15a-6 in entering into foreign securities transactions with Offshore Clients using U.S. resident fiduciaries would be required, among other things, to enter into these transactions through a registered broker-dealer intermediary. The intermediation of the registered broker-dealer would impose upon the Offshore Client the requirement that the foreign securities transactions be effected in accordance with a number of U.S. securities laws and regulations applicable to the registered broker-dealer and the foreign securities transactions. These U.S. securities regulations are often inconsistent with and may be more restrictive than the various local securities laws and regulations applicable to these transactions, burdening these transactions with incremental economic and operational costs. As a consequence, the Firms have found that Offshore Clients wishing to effect foreign securities transactions tend to prefer doing business with a foreign broker-dealer that considers itself outside the ambit of the Rule 15a-6 conditions rather than with a foreign broker-dealer that believes it is subject to these conditions.

B. U.S.-Affiliated Foreign Dealers

In the Firms' experience, U.S.-Affiliated Foreign Dealers who enter into foreign securities transactions with U.S. resident fiduciaries for Offshore Clients pursuant to Rule 15a-6 (and thereby involve a U.S. broker in effecting such transactions) are at a competitive disadvantage to foreign dealers which do not have U.S. affiliates and which appear to be more willing to take a position that they need not comply with the intermediation procedures of Rule 15a-6 in order to carry out foreign securities transactions with Offshore Clients whether or not the Offshore Clients have U.S. resident fiduciaries. As noted above, foreign broker-dealers, especially U.S.-Affiliated Foreign Dealers, who comply with the Rule 15a-6 requirements for the execution of transactions through a registered broker-dealer intermediary will subject the transactions to certain U.S. regulatory and operational restraints that foreign broker-dealers do not face in executing transactions that are not so intermediated. Foreign broker-dealers, including U.S.-Affiliated Foreign Dealers, are registered in their local jurisdictions and are already subject to comprehensive local securities laws and regulations.

Furthermore, as described in more detail below, some U.S.-Affiliated Foreign Dealers believe that they are at a disadvantage in competing with other foreign dealers for global securities services as a result of this U.S. regulatory uncertainty. The global securities services provided by U.S.-Affiliated Foreign Dealers help coordinate and consolidate an Offshore Client's foreign securities transactions just as domestic securities services provided by registered broker-dealers do for the Offshore Client's U.S. transactions.

C. U.S. Resident Fiduciaries

The Firms believe that U.S. resident fiduciaries are at a competitive disadvantage to non-U.S. resident fiduciaries because Offshore Clients are unwilling to subject their foreign securities transactions to U.S. broker-dealer regulation, in addition to applicable local securities regulation, solely by virtue of using a U.S. resident fiduciary. While an Offshore Client might reasonably expect the protection of the U.S. securities laws (e.g., the Advisers Act) to attach by virtue of its selection of a U.S. resident fiduciary, few Offshore Clients would reasonably expect that the broker-dealer regulatory scheme of the Exchange Act and related Securities Investor Protection Act insurance protection would also apply (and few would want application of this scheme if it burdened the Offshore Clients

with the incremental economic costs of compliance). U.S. resident fiduciaries, in order to remain competitive with foreign investment advisers, must be able to provide the capability to enter into foreign securities transactions for their Offshore Clients on terms and conditions that are comparable to what Offshore Clients may obtain from foreign investment advisers.

D. Global Securities Services

Offshore Clients now have considerable concern about their ability to use U.S.-Affiliated Foreign Dealers as providers of global securities services (e.g., prime brokerage services) to coordinate their foreign securities transactions. The advantages to Offshore Clients of having the option to select U.S.-Affiliated Foreign Dealers as their providers of global securities services include: (1) good global clearance, settlement and trade execution capabilities, including expertise in the emerging markets; (2) foreign securities borrowing and lending capabilities to support the trading, including short sales transactions, of these Offshore Clients; (3) financing capabilities, including margin financing; and (4) worldwide consolidated portfolio reporting.

As many Offshore Clients have satisfactory and successful domestic securities services relationships with U.S. broker-dealers, they very much would like to have the option to continue those relationships where U.S.-Affiliated Foreign Dealers could offer global securities services facilities with worldwide consolidated reporting. These Offshore Clients therefore would like the opportunity not only to have relationships with U.S.-Affiliated Foreign Dealers but also to maintain and expand their relationships with related U.S. broker-dealers.

At present, however, Offshore Clients find it less practical to use U.S.-Affiliated Foreign Dealers for any foreign securities transactions because of limitations on the ability of U.S. broker-dealers to arrange credit extended by U.S.-Affiliated Foreign Dealers. As indicated above, even though the Regulation T arranging exemption is available in some cases for an Offshore Client's purchase transactions, the need to involve a U.S. broker-dealer for intermediation of transactions under Rule 15a-6 now effectively precludes access by the Offshore Client to consolidated reporting and other global securities services at a U.S.-Affiliated Foreign Dealer in respect of all of its foreign securities transactions.

The Firms believe that the no-action relief requested in this letter would, therefore, doubly enhance competitive opportunities for U.S. registered broker-dealers, U.S.-Affiliated Foreign Dealers and U.S. resident fiduciaries in foreign transactions with Offshore Clients. First, the relief would permit U.S.-Affiliated Foreign Dealers to compete effectively for securities borrowing and lending and short sale transactions of Offshore Clients without the burden of Rule 15a-6 intermediation. Second, the relief would enable U.S.-Affiliated Foreign Dealers to provide, and enhance the ability of U.S. resident fiduciaries to utilize, global securities services for all of the Offshore Client's foreign securities transactions. The relief would recognize, in a practical way, the increasing desire of Offshore Clients to consolidate their foreign securities transactions activity and global securities services with broker-dealers outside the United States.

**Analysis**

A. Scope of Section 15(a)

Section 15(a) of the Exchange Act requires any "broker" or "dealer"[7/] using U.S. jurisdictional means to effect securities transactions to register as a broker or dealer with the Commission. While Section 30(b) of the Exchange Act provides that the Exchange Act shall not apply to persons "transact[ing] a business in securities without the jurisdiction of the United States," the Commission has expressed the view that this exemption is unavailable if transactions occur in U.S. securities markets.[8/]

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7/ The term "broker" is defined in Exchange Act Section 3(a)(4) as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." A "dealer" is defined in Exchange Act Section 3(a)(5) as "any person engaged in the business of buying or selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business."

8/ Release No. 34-27017, 54 Fed. Reg. at 30,016 n.41 (July 18, 1989).

In 1989, the Commission promulgated Rule 15a-6 to provide non-exclusive safe-harbor exemptions[9/] from the Section 15 registration requirement for foreign broker-dealers desiring to engage in certain securities activities with U.S. investors.[10/] Rule 15a-6 was adopted in recognition of the desire by investors located in the United States, especially institutional investors, to trade more actively in international financial markets.[11/]

Rule 15a-(6)(a)(3) provides that foreign broker-dealers seeking to engage in securities activities with U.S. institutional and major U.S. institutional investors[12/] are exempt from the registration requirements of Section 15 of the Exchange Act if they comply with various requirements including effecting the transactions through a registered broker-dealer.[13/]

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9/ The Commission stated expressly in the preamble to its adoption of Rule 15a-6 that prior no-action letters (and, implicitly, the interpretive principles contained therein) would remain generally in effect. Id. at 30,020.

10/ Id. at 30,013.

11/ Id. at 30,014.

12/ Investment advisers are not included in the definition of a U.S. institutional investor in Rule 15a-6. Under Rule 15a-6(b)(4)(ii), however, investment advisers registered under Section 203 of the Investment Advisers Act of 1940, with assets or assets under management in excess of $100 million, are included in the definition of major U.S. institutional investor for purposes of the Rule.

13/ Any transactions resulting from contacts between the foreign broker-dealer and the U.S. institutional and major U.S. institutional investors must be effected through the intermediary registered broker-dealer. Rule 15a-6(a)(3)(i)(A). Of considerable potential significance to many Offshore Clients, as indicated above, the intermediary registered broker-dealer (who is subject to U.S. margin regulation) has responsibility, as between it and the foreign broker-dealer, for extending or arranging any credit to the U.S. institutional or major U.S. institutional investor in connection with these transactions.

In adopting Rule 15a-6, the Commission noted that it now generally uses a territorial approach in applying broker-dealer registration requirements to the international operations of brokers and dealers.[14/] The Rule 15a-6 exemptions in part incorporate certain exceptions to the Commission's territorial approach to broker-dealer registration requirements for transactions with certain categories of non-U.S. persons present in the United States. These exceptions cover, among other persons, a foreign person temporarily present in the United States, with whom the foreign broker-dealer had a bona fide, pre-existing relationship before the foreign person entered the United States and do not require U.S. broker-dealer intermediation.[15/]

B. Application of Section 15(a) to Foreign Securities Transactions in Offshore Client Accounts with U.S. Resident Fiduciaries

From a Section 15(a) perspective, an Offshore Client whose account is managed by a U.S. resident fiduciary is in a position comparable to that of a foreign person temporarily present in the United States (with whom a foreign broker-dealer would be permitted to deal directly under Rule 15a-6(a)(4)(iii)). Offshore Clients who choose to have relationships with U.S. resident fiduciaries generally are active global traders and investors who have experience entering into foreign securities transactions around the world. This experience has led them to expect and understand that they must obey the laws and regulations of the jurisdictions where they trade or engage in securities transactions. These Offshore Clients have a clear comprehension of the existence of active local regulation that applies to their foreign securities transactions and to any foreign broker-dealers involved in such transactions, including U.S.-Affiliated Foreign Dealers. Consequently, Offshore Clients may expect Advisers Act regulation to govern any registered U.S. resident fiduciary that they have selected, but would not reasonably expect that the full range of U.S. laws and regulations governing broker-dealers should apply to their

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14/ Release No. 34-27017, 54 Fed. Reg. at 30,016 (July 18, 1989).

15/ See Rule 15a-6(a)(4)(iii). In providing this exception the Commission noted that "the primary responsibility for protecting foreign investors from wrongful conduct of foreign securities professionals properly lies with foreign securities regulators." Release No. 34-25801, 53 Fed. Reg. at 23,649 (June 23, 1988).

foreign securities transactions with foreign broker-dealers just because they have retained a U.S. investment adviser.

The relief requested in this letter would be consistent with the exception for foreign persons temporarily present in the United States. As in the case of a foreign person temporarily present in the United States, an Offshore Client would not reasonably expect, as noted above, that U.S. broker-dealer regulatory requirements would apply to foreign securities transactions entered into for its account with a foreign broker-dealer. Moreover, an Offshore Client whose account is managed by a U.S. resident fiduciary -- and who may have no physical presence in the United States -- would appear to present an even better case for exception under the territorial principles of Rule 15a-6 than a foreign person covered under Rule 15a-6(a)(4)(iii).

C. Consistency with Other Commission Policies

We believe that the relief requested in this letter would also help achieve greater consistency between broker-dealer registration policy under the Exchange Act and other Commission policies, such as those reflected in Regulation S under the Securities Act, that operate to avoid disadvantaging U.S. resident fiduciaries acting on behalf of Offshore Clients.

Regulation S, like Rule 15a-6, is based upon a territorial approach to jurisdiction, extending registration protection only to U.S. capital markets in light of principles of comity and the "reasonable expectations of participants in the global markets."[16/] Generally, Regulation S exempts from registration securities sold in "offshore transactions," wherein an offer is not made to U.S. persons and the non-U.S. buyers of the security are located outside the United States.[17/]

Regulation S specifically excepts U.S. professional fiduciaries acting with discretion for the accounts of non-U.S. persons from the definition of "U.S. Person," and excepts transactions with such persons from the class of transactions located in the United States by classifying them as offshore transactions.[18/] The Commission adopted this exception explicitly "[i]n light of the serious competitive disadvantages

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16/ Release No. 33-6863, 55 Fed. Reg. at 18,308 (May 2, 1990).

17/ 17 C.F.R. § 230.902(i).

18/ 17 C.F.R. § 230.902(i)(3), (o)(2).

that might [otherwise] be faced by U.S. professional fiduciaries."[19] The Regulation S exemption for offers and sales to U.S. professional fiduciaries acting on behalf of foreign investors is a codification of the position taken by the Staff in the Baer Securities no-action letter.[20]

The exclusion of foreign broker-dealers engaging in foreign securities transactions with U.S. resident fiduciaries acting on behalf of Offshore Clients from broker-dealer registration requirements under the Exchange Act would serve the same competitive goals as does the exclusion from Securities Act registration requirements under Baer Securities and Regulation S. The treatment of U.S. advisers under Baer Securities and Regulation S allows them to compete more evenly with non-U.S. investment advisers, who are free to buy unregistered foreign securities on behalf of non-U.S. persons. Similarly, excluding foreign broker-dealers dealing with U.S. resident fiduciaries acting on behalf of Offshore Clients from the effects of U.S. margin, intermediation and other Rule 15a-6 requirements in foreign securities transactions will allow U.S. resident fiduciaries seeking to provide investment advisory services to Offshore Clients to compete more evenly with non-U.S. investment advisers, who do not subject foreign broker-dealers to U.S. regulation when dealing with them on behalf of their Offshore Clients.

Conclusion

For the foregoing reasons, we respectfully request that the staff take the position that it would not recommend that the Commission take any enforcement action against a Firm or a U.S.-Affiliated Foreign Dealer by virtue of its engaging in foreign securities transactions, in the circumstances described above, with or for the account of an Offshore Client acting through a U.S. resident fiduciary in the manner described without registering as a broker or dealer under Section 15 of the Exchange Act or complying with the various statutory and regulatory requirements imposed on a "broker" or "dealer" as defined in Sections 3(a)(4) and 3(a)(5) of the Exchange Act.

We would appreciate consideration of this matter as promptly as practicable. If for any reason the staff is not disposed to grant the requested no-action relief, we would also

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19/ Release No. 33-6863, 55 Fed. Reg. at 18,317 (May 2, 1990).

20/ Baer Securities Corporation (Oct. 12, 1979).

appreciate an opportunity to discuss the situation with the staff prior to the issuance of any formal letters. Questions regarding this no-action request should be directed to the undersigned (at 202-728-2758), J. Eugene Marans (at 202-728-2888) or Alan L. Beller (at 212-225-2450).

Very truly yours,

Giovanni P. Prezioso

cc: Mr. Robert L.D. Colby
Deputy Director
Division of Market Regulation

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