



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

DIVISION OF
MARKET REGULATION

July 11, 2001

Act	Securities Exchange Act of 1934
Section	15
Rule	
Public	
Availability	10/11/2001

Brandon Becker, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Re: Acqua Wellington North American Equities Fund, Ltd.

Dear Mr. Becker:

In your letter dated July 11, 2001, you requested assurance that the staff will not recommend enforcement action to the Securities and Exchange Commission ("Commission") if Acqua Wellington North American Equities Fund, Ltd. ("Acqua Wellington") invests in equity lines of credit, as described in your letter, without registering with the Commission as a broker-dealer under Section 15 of the Securities Exchange Act of 1934 ("Exchange Act").¹

Based on the facts and representations set forth in your letter, and without necessarily agreeing with your analysis and conclusions, the staff will not recommend enforcement action to the Commission if Acqua Wellington, complying with the conditions in your letter, invests in equity lines of credit without registering with the Commission as a broker-dealer under Section 15 of the Exchange Act. This position is based solely upon the representations you have made and is limited strictly to the facts and compliance with the conditions described in your letter.

Your request for confidential treatment under 17 C.F.R. § 200.81 is granted until the earlier of 90 days from the date of this letter or the effective date of the first registration statement after the date of this letter in which Acqua Wellington is named as an underwriter for a new equity line of credit.

Sincerely,

Catherine McGuire
Chief Counsel

¹ 15 U.S.C. 78o.

Public Reference Copy

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363
HTTP://WWW.WILMER.COM

100 LIGHT STREET
BALTIMORE, MD 21202
TELEPHONE (410) 986-2900
FACSIMILE (410) 986-2928

520 MADISON AVENUE
NEW YORK, NY 10022
TELEPHONE (212) 230-8800
FACSIMILE (212) 230-8988

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 44 201 7872-1000
FACSIMILE 011 44 201 7839-3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 3221 285-4900
FACSIMILE 011 3221 285-4949

FRIEDRICHSTRASSE 95
D-10117 BERLIN
TELEPHONE 011 49301 2022-6400
FACSIMILE 011 49301 2022-6500

BRANDON BECKER
DIRECT LINE (202) 663-6979
INTERNET BBECKER@WILMER.COM

July 11, 2001

Securities Exchange Act of 1934
Section 15

Confidential Treatment Requested
Pursuant to 17 C.F.R. § 200.81(b)

By Hand

Catherine McGuire, Esq.
Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
Mail Stop 10-1
450 Fifth St. NW
Washington D.C. 20549

Re: Acqua Wellington North American Equities Fund, Ltd.

Dear Ms. McGuire:

On behalf of our client, Acqua Wellington North American Equities Fund, Ltd. ("Acqua"), we request confirmation that the Division of Market Regulation (the "Division") will not recommend that the Securities and Exchange Commission (the "Commission") take enforcement action against Acqua for investing in equity lines of credit, as described in more detail below, without registering as a broker-dealer under Section 15 of the Securities Exchange Act of 1934 (the "Exchange Act").

Background

Acqua is an international business company incorporated and registered as an investment fund in the Bahamas.¹ Acqua is a direct investor in companies, with what have become known

¹ Fortis Fund Services (Bahamas) Limited, an international business company incorporated in the Bahamas, is the fund manager for Acqua. Acqua Wellington Asset Management Ltd., also an international business company incorporated in the Bahamas, is Acqua's adviser. Acqua Wellington Asset Management LLC, a Delaware limited liability company, acts as the adviser to Acqua Wellington Asset Management Ltd.

as equity lines of credit constituting one type of investment that Acqua makes in public companies.

An equity line of credit is an agreement with a public company under which an investor makes a commitment at signing to purchase a specified dollar amount of common stock on terms that enable the company to determine the timing and dollar amount of securities the investor will receive. Because the investor has committed to purchase stock upon signing, an equity line provides a company with more flexibility to sell stock when market conditions are most favorable than conducting a series of private placements. As the investor under an equity line, Acqua agrees to purchase a maximum dollar amount of the company's registered common stock over a specified period of time (in general, 12 to 24 months).²

Specifically, the company has the right, but not the obligation, to sell common stock to Acqua, up to a specified maximum dollar amount, in a series of draw-downs. During a draw-down, the company can sell an amount of common stock to Acqua up to a specified portion of the maximum dollar amount. When the company gives Acqua notice that the company intends to make a draw-down under the equity line, Acqua is obligated to purchase the dollar amount of common stock from the company at a predetermined percentage discount from a price determined by a mathematical formula during the draw down period that is designed to approximate the current market price.³ The company has the sole ability to determine how much common stock to sell within specific minimum and maximum dollar amounts for each draw-down, subject to the aggregate maximum dollar amount for the entire equity line. The number of shares Acqua must purchase is determined by the dollar amount specified by the company in its draw-down notice.⁴

² The company must have an effective shelf registration statement prior to entering into the equity line agreement with Acqua. After executing the agreement, a post effective amendment to the registration statement is filed with the Commission. The Staff of the Division of Corporation Finance has taken the position that this type of equity line of credit constitutes an "at the market equity offering" within the meaning of Rule 415(a)(4) under the Securities Act of 1933 (the "Securities Act"). Given this position, the company must meet the requirements of Rule 415(a)(4), one of which is to name the underwriter or underwriters in the prospectus which is part of the registration statement under Rule 415(a)(4)(iv). To comply with this requirement, Acqua and the unaffiliated broker-dealers that effect sales into the trading market would be named as statutory underwriters in the prospectus. In addition to equity lines of credit that constitute at the market equity offerings under Rule 415(a)(4), there is an equity line of credit structure pursuant to which the investor purchases in a private placement from a company prior to the filing of the registration statement with the Commission. Under this type of equity line of credit, the company files a resale shelf registration statement for the dollar amount of common stock which the investor has committed to purchase prior to filing. While Acqua has not been an investor in this second type of equity line of credit, it may do so in the future.

³ For example, the formula could be based on the volume weighted average price of the company's common stock over a period of trading days.

⁴ In addition to draw-downs, an equity line agreement can provide that, in the company's discretion, it may grant Acqua the right to exercise one or more call options to purchase additional shares of the company's common stock during each draw down pricing period for the dollar amount specified by the company.

Once a draw-down occurs in accordance with the terms of the equity line agreement, Acqua is required to purchase the stock at that time.⁵ Acqua does not know if or when the company will choose to sell its stock to Acqua. While the equity line agreement requires the company to be publicly traded, the agreement does not link the company's draw-down rights to a specified trading volume in the stock during the draw-down period or otherwise link the draw-down amount to Acqua's ability to sell the shares, and does not require Acqua to sell at a set price per share. Acqua therefore takes the risk of ownership from the time of signing the equity line agreement, which risk results from the fact that there may be no ready market for sale of the securities it purchases pursuant to the equity line of credit.

Analysis

Section 15(a) of the Exchange Act generally prohibits any "broker" or "dealer" from effecting transactions in securities unless it is registered with the Commission.⁶ Section 3(a)(5) of the Exchange Act defines a "dealer" generally as "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise." The term "dealer" expressly excludes "a person that buys or sells securities for such person's own account, . . . but not as part of a regular business." The Staff has emphasized that the purpose of the phrase "engaged in the business" in Section 3(a)(5) of the Exchange Act is to distinguish a dealer from a trader or other investor. The Staff has stated that "a person who buys and sells securities for his own account in the capacity of a 'trader' . . . generally [is] not considered to be 'engaged in the business' of buying and selling securities and, consequently, would not be deemed a 'dealer' under the [Exchange] Act . . ."⁷ In our opinion, Acqua is an investor or trader in an equity line of credit and therefore should not be required to register with the Commission under Section 15(a) of the Exchange Act.

In various contexts, the Commission and its Staff have articulated a variety of factors that should be considered in distinguishing a person acting as an investor or a trader from a dealer.⁸

Upon Acqua's exercise of a call option, the company will issue the shares to Acqua at a discount generally based on the same discount used for draw-downs. The total dollar amount of securities that the company may issue to Acqua pursuant to all draw-downs and call options is limited to the amount specified in the equity line agreement. The equity line agreement provides that certain terms, other than the maximum dollar amount Acqua is obligated to purchase, may be changed by mutual agreement between the company and Acqua.

⁵ A draw down consists of a notice from the company to the investor that it intends to sell a specified dollar amount of common stock to the investor, followed by a pricing period, and culminating in the settlement, at which the investor pays the dollar amount of securities purchased.

⁶ Section 3(a)(4) of the Exchange Act defines a "broker" to mean a person that effects securities transactions "for the accounts of others." Acqua is not a "broker" because it engages in securities transactions for its own account only, and does not effect securities transactions for the accounts of others.

⁷ Burton Securities, SEC No-Action Letter (December 5, 1977).

⁸ See, e.g., Davenport Management, Inc., SEC No-Action Letter (April 13, 1993); C & W Portfolio Management, Inc., SEC No-Action Letter (July 20, 1989); Fairfield Trading Corporation, SEC No-Action

In general, when analyzing whether a person meets the definition of a dealer, the Staff will consider all the relevant facts and circumstances, including whether the person:

- (1) advertises or otherwise holds itself out as willing to buy or sell securities from its own account on a continuous basis;
- (2) purchases or sells securities as principal from or to customers;
- (3) carries a dealer inventory in securities;
- (4) quotes a market in securities;
- (5) provides investment advice;
- (6) extends or arranges for the extension of credit in connection with securities transactions;
- (7) runs a book of repurchase and reverse repurchase agreements;
- (8) uses an interdealer broker for securities transactions;
- (9) lends securities to customers;
- (10) issues or originates securities;
- (11) guarantees contract performance or indemnifies the parties for any loss or liability from the failure of the transaction to be successfully consummated; and
- (12) participates in a selling group or acts as an underwriter.

Other than being named an underwriter pursuant to Rule 415(a)(4) under the Securities Act or as an underwriter or a selling securityholder in a resale shelf offering, Acqua does not and will not engage in any of the factors listed above. With respect to the first factor, Acqua does not and will not hold itself out as a dealer in any fashion. Specifically, Acqua will not advertise, distribute promotional materials, hold conferences, or otherwise hold itself out as a dealer. Furthermore, Acqua will not directly solicit public companies to enter into equity lines of credit. If Acqua is contacted directly by a company, Acqua will ask the company to engage an unaffiliated broker-dealer. Thus, Acqua can receive inquiries regarding possible equity lines of credit from unaffiliated broker-dealers acting on behalf of companies. Acqua may also ask unaffiliated broker-dealers to solicit their company clients concerning equity lines of credit.

Letter (Jan. 10, 1988); Louis Dreyfus Corporation, SEC No-Action Letter (July 23, 1987); United Savings Association of Texas, SEC No-Action Letter (April 2, 1987); National Council of Savings Institutions, SEC No-Action Letter (July 27, 1986); Burton Securities, SEC No-Action Letter (December 5, 1977).

An unaffiliated broker-dealer will be the agent of the company and interface with Acqua with respect to all aspects of an equity line of credit. If negotiations regarding an equity line of credit develop after Acqua has been introduced to a company by an unaffiliated broker-dealer, Acqua may participate in negotiating the terms of the agreement. All of the negotiated terms will be reviewed by the unaffiliated broker-dealer. Acqua will perform its own due diligence regarding the company. By avoiding advertising activities and relying on an unaffiliated broker-dealer in all aspects of the equity lines of credit, Acqua will avoid holding itself out as a dealer in any fashion, thereby addressing any concern under factor 1 above.

Just as Acqua does not and will not hold itself out as a dealer, Acqua does not and will not engage in any of the activities listed in factors 2 - 11 above. Acqua will not purchase or sell securities as principal from or to customers; carry a dealer inventory in securities; quote a market in securities; provide investment advice; extend or arrange for the extension of credit in connection with securities transactions; run a book of repurchase and reverse repurchase agreements; use an interdealer broker for securities transactions; lend securities to customers; issue or originate securities; or guarantee or indemnify parties to a transaction, other than indemnifying the company for material misrepresentations or omissions in a prospectus or registration statement made in reliance on information provided by Acqua.

In light of the definition of underwriter under Section 2(a)(11) of the Securities Act, Acqua may be deemed to be an underwriter in equity lines of credit under Rule 415(a)(4). We do not believe, however, that Acqua's status as a statutory "underwriter" under the Securities Act, by itself, renders Acqua a statutory "dealer" under the Exchange Act.

Underwriter status is a functional determination which is made with respect to each particular offering.⁹ The term underwriter is not defined by the particular person's general business, but by the person's participation in a particular offering, *i.e.* a public offering. Any person who participates in a public offering is deemed to be a statutory underwriter within the meaning of Section 2(a)(11) of the Securities Act. Under the Securities Act, an underwriter may include both non-broker-dealers, such as individual investors and employees of issuers, as well as broker-dealers. In defining the term underwriter, the Securities Act makes no distinction between professional investment bankers and non-broker-dealer investors.¹⁰ Thus, a person's status as an underwriter, standing by itself, should not result in that person being deemed a dealer.¹¹

⁹ See Loss & Seligman, Securities Regulation 1138.45 (3rd Ed. 1999).

¹⁰ For example, other funds that frequently buy convertible debt securities are named as being or potentially being underwriters in registration statements without being broker-dealers.

¹¹ See *Laser Arms Corp. Sec. Litig.*, 794 F. Supp. 475, 484 (S.D.N.Y. 1989); *Nelson v. Quimby Island Reclamation Dist. Facilities Corp.*, 491 F. Supp. 1364, 1371 (N.D. Cal. 1980). See also Loss & Seligman, Securities Regulation, 1138.45 (3rd Ed. 1999).

In addition, as a substantive matter, Acqua's status as underwriter in an equity line investment has more in common with an institutional or private investor purchasing stock in a private placement than with the types of underwriters that commonly are viewed as dealers. In particular, Acqua faces risk more akin to an investor than an underwriter that is also a dealer because Acqua does not control how much stock it will have to buy, it does not control when it will have to buy the stock and it receives no assurance that there will be an active trading market in the stock at the time Acqua purchases the stock or at the time Acqua determines to sell the stock. Acqua has authorized us to represent to the Staff that, while the company's securities must be publicly traded, Acqua will not make its obligation to purchase common stock in an equity line contingent upon any measure of market volume in the company's common stock.

We believe that Acqua is not a "dealer" under the Staff's test for dealer status, notwithstanding Acqua's status as an underwriter under the Securities Act with respect to equity lines of credit or other resale registration statements. In compiling the list of dealer characteristics set forth above, the Staff did not intend to create a rigid test in which the satisfaction of any single factor is determinative of dealer status. On the contrary, the Staff has emphasized that all facts and circumstances of any given situation must be considered in analyzing the dealer question. Specifically, the Staff has stated that "the practical distinction between a 'trader' and a 'dealer' is often difficult to make and depends substantially upon the facts of a given situation."¹² Although Acqua may be designated an underwriter, thus meeting one factor in the list of twelve, this factor must be considered in conjunction with the fact that no other factor applies to Acqua. Given that Acqua satisfies only one of the twelve factors and given that other non-dealers are regularly considered underwriters, we believe that Acqua's underwriter status, standing alone, does not create a sufficient basis to require Acqua to register as a dealer.

We also believe that policy considerations support the conclusion that Acqua should not be considered a dealer. In that regard, Acqua believes that any investor protection issues raised by equity lines are adequately addressed by Acqua's business practices and procedures, including the use of an unaffiliated broker-dealer, thereby obviating the need for the Commission to require Acqua's registration under the Exchange Act. Such protective procedures also include limiting Acqua's equity line investments to larger companies. Acqua will not enter into equity line agreements with companies that have less than \$100 million in total market capitalization at the time the agreement is signed. Acqua also agrees not to engage in short selling the company's stock during the term of the equity line agreement, except pursuant to a draw-down notice for which Acqua has yet to take possession of the shares. Acqua is entitled to treat the draw-down

¹² See National Counsel of Savings Institutions, SEC No-Action Letter (July 27, 1986) and Burton Securities, SEC No-Action Letter (December 5, 1977).

notice as the transfer of ownership of the common stock and, therefore, Acqua may dispose of the common stock at its discretion once the notice has been given.¹³

Acqua will limit its equity line activities in a number of ways that parallel the investor protection requirements imposed on broker-dealers under the Exchange Act and by the National Association of Securities Dealers (the "NASD"). In light of conversations with the Staff, Acqua agrees to limit the difference between Acqua's purchase price and the market price as determined by the formula in the equity line agreement to the amount the NASD currently interprets is the maximum compensation a broker-dealer may receive pursuant to NASD Rule 2710. When Acqua offers or sells securities purchased under an equity line, Acqua will effect such offers or sales through an unaffiliated broker-dealer which is not the broker-dealer that acted as placement agent for the issuer on the equity line. As between the issuer and Acqua, Acqua will be responsible for paying any commissions or markdowns to the selling broker-dealer, which we believe will not be considered underwriting compensation to the selling broker-dealer. While Acqua will notify the selling broker-dealer that the selling broker-dealer is participating in an equity line of credit and may have a filing obligation under NASD Rule 2710 at the time the issuer files a post-effective amendment to its registration statement with the Commission, Acqua has no responsibility for the compliance or non-compliance of the selling broker-dealer with that rule.

Acqua also will not hire any employees who are statutorily disqualified from employment with registered broker-dealers. Acqua will hire a compliance officer to monitor its compliance with the conditions and representations set forth in this letter. As a result of all of these protections, which are set forth more specifically below, requiring Acqua or its affiliates to register as a dealer under the Exchange Act is unnecessary to protect investors and "to insure the maintenance of fair, honest and liquid markets."¹⁴

Conclusion

Given the nature of Acqua's equity lines of credit and the implementation of the investor protection safeguards articulated in this letter, we are of the opinion that Acqua is not and should not be considered a dealer under the Exchange Act. Therefore, we respectfully request that the Division not recommend enforcement action to the Commission against Acqua if it does not register as a broker-dealer under Section 15 of the Exchange Act and it invests in equity lines of credit as described herein, subject to the following conditions:

(1) Acqua will not solicit companies to enter into equity lines of credit. An unaffiliated broker-dealer will serve as placement agent for the company in all equity lines of credit. While Acqua may be initially contacted by unaffiliated broker-dealers on behalf of

¹³ To the extent that such sales are considered to be "short sales" pursuant to Rule 3b-3 under the Exchange Act, they will be excepted from Regulation M pursuant to Rule 105(b) because they relate to offerings filed under Rule 415 under the Securities Act.

¹⁴ Section 2 of the Exchange Act.

companies, Acqua will be able to communicate directly with unaffiliated broker-dealers that are able to solicit their clients concerning equity lines of credit. If Acqua is contacted directly by a company, Acqua will ask the company to use an unaffiliated broker-dealer as its placement agent.

(2) Acqua will work through the placement agent in all aspects of equity lines of credit, other than due diligence and negotiation of the terms of the agreement, subject to the review of the unaffiliated broker-dealer placement agent.

(3) Acqua will effect all sales of securities purchased pursuant to an equity line through an unaffiliated broker-dealer that is different from the placement agent on the equity line.

(4) Acqua will not enter into any arrangement with an NASD member pursuant to which the member will offer or sell securities acquired by Acqua under an equity line of credit into the market, either as agent or principal, unless Acqua notifies the selling broker-dealer that the selling broker-dealer is participating in an equity line of credit and may have a filing obligation under NASD Rule 2710 at the time the issuer files a post-effective amendment to its registration statement with the Commission. If such a filing is required and if, in order for the member to comply with NASD Rule 2710(b)(6), the member requests that Acqua provide it with information regarding the association or affiliation of Acqua's officers, directors and security holders with any member, Acqua agrees to provide such information. However, Acqua has no responsibility for the compliance or non-compliance of the selling broker-dealer with NASD Rule 2710.

(5) Acqua will not advertise, distribute promotional materials, hold conferences, or otherwise hold itself out as a dealer.

(6) Acqua will not pay a finder's fee to any party.

(7) Acqua will not enter into equity line agreements with companies that have less than \$100 million in market value of shares outstanding at the time the agreement is signed.

(8) In any equity lines of credit subject to Rule 415(a)(4), the difference between Acqua's purchase price and the stated market price (as determined by an agreed-upon formula) will not exceed the amount of compensation a broker-dealer could receive as an underwriter of the transaction under NASD Rule 2710 as it is currently interpreted.

(9) Acqua will not engage in short selling the company's stock during the term of the equity line agreement except pursuant to a draw-down notice for which Acqua has not yet taken possession of the shares.

(10) Acqua will not indemnify the company other than for material misrepresentations or omissions in a prospectus or registration statement made in reliance on information provided by Acqua.

(11) Acqua will not hire any employees who are statutorily disqualified from employment with registered broker-dealers.

(12) Acqua will not carry a dealer inventory in securities.

(13) Acqua will not quote a market in securities.

(14) Acqua will not provide investment advice.

(15) Acqua will not extend credit to investors.

(16) Acqua will not lend securities.

(17) Acqua will not use an interdealer broker for securities transactions.

(18) Acqua will not engage in repurchase transactions.

(19) Acqua will not make its obligation to purchase common stock in an equity line of credit contingent upon any measure of market volume in the company's security.

(20) Acqua will hire a compliance officer to monitor its compliance with the above restriction.

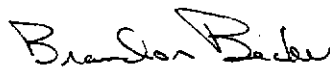
* * * * *

Catherine McGuire, Esq.
Securities and Exchange Commission
July 11, 2001
Page 10

Pursuant to 17 C.F.R. 200.81(b), Acqua requests confidential treatment of this letter and the Division's response until the earlier of 90 days after Acqua receives the Division's response or the effective date of the first registration statement after the date of this letter in which Aqua is named as an underwriter for a new equity line of credit.

John Huber of Latham & Watkins, our co-counsel in this matter, concurs in this request and in the opinions expressed in this letter. If you have questions or comments about this matter, please feel free to contact me at 202.663.6979 or Mr. Huber at 202.647.2242.

Sincerely,


(M.S.S.)

Brandon Becker

cc: John J. Huber, Esq.