WILMERHALE

SEC Staff Issues FAQs on Rule 15a-6 and Cross-Border Securities Activities by Foreign Broker-Dealers; FAQs Address a Wide Range of Areas, But No Surprises

2013-04-01

On March 21, 2013, the Staff of the SEC's Division of Trading and Markets issued a new set of frequently asked questions regarding Rule 15a-6 under the Securities Exchange Act of 1934.[1] The FAQs address a wide range of topics regarding the Rule 15a-6 "safe harbor" for foreign broker-dealers and its application to cross-border securities activities.

Since the adoption of Rule 15a-6 in 1989, the financial markets and nature of securities transactions have changed considerably and in ways that were not contemplated by those writing the rule. The FAQs represent a positive step in providing more updated guidance to the industry regarding permissible interactions between foreign broker-dealers and U.S. persons. However, this is an area that is in great need of updated guidance, and we hope that the Staff will continue its efforts to modernize cross-border regulation. Below is a summary of the most notable guidance provided in the FAQs:

- *Meaning of "Temporarily Present" in the United States*. Rule 15a-6(a)(4) provides a safe harbor for an unregistered foreign broker-dealer to transact with a foreign person who is "temporarily present in the United States," and with whom the foreign broker-dealer had a bona fide, preexisting relationship before the person entered the United States. The term "temporarily present" is not defined in Rule 15a-6(a), and many firms relying on this exemption have struggled to define this term, particularly where a foreign person resides in the United States for an extended period of time for employment, educational or other purposes. The Staff's FAQs provide a bright-line test in determining whether someone is "temporarily present," clarifying that a person will meet this standard if they are neither a U.S. citizen nor a lawful permanent resident (*i.e.*, a Green Card holder). (FAQ No. 1.)
- *Administration of a Foreign Issuer's Employee Benefits Plan*. In connection with the administration of a foreign issuer's employee benefits plan, a foreign broker-dealer may have limited contact with U.S. persons and effect securities transactions, provided that certain conditions are met. Specifically: (i) the foreign broker-dealer may deal only with management and employee benefit representatives from the issuer outside the United States in administering the plan; and (ii) the foreign broker-dealer must limit its activities

with respect to U.S. persons to the sale, transfer or disposal of the foreign issuer's securities in connection with plan administration, and the sending of account and other related documents in connection with such plan administration. The factual scenario in the Staff's FAQ also presumes that: (i) the employee benefit plan is established and administered in accordance with foreign law for a foreign issuer that is organized outside the United States and whose principal office and place of business are located outside of the United States; and (ii) the U.S. persons are employees of the foreign issuer or the foreign issuer's U.S. subsidiary. This interpretation would still apply if the U.S. persons received, held or transferred their shares in the foreign issuer's securities pursuant to a sponsored American Depositary Receipt (ADR) program. (FAQ No. 2.)

- *Unsolicited Transactions*. The FAQs reiterate the Staff's broad view of the term "solicitation," explaining that this includes any affirmative effort by a broker-dealer intended to induce transactional business for the broker-dealer or its affiliates, including inducing a single transaction or an ongoing securities business relationship. However, a foreign broker-dealer effecting an unsolicited transaction on behalf of a U.S. investor may still rely on the unsolicited exemption in Rule 15a-6(a)(1) if it sends related confirmations and account statements to the investor, provided it does not send advertisements or similar materials. (FAQ Nos. 3 and 9.)
- *Providing Research Directly to MUSIIs*. The FAQs reaffirm that a foreign broker-dealer may send research directly to MUSIIs without any intermediation by a chaperone, provided that the chaperone retains copies of the reports in accordance with Exchange Act Rules 17a-3 and 17a-4 (but only to the extent they receive those reports). (FAQ No. 5.)
- *Minimum Net Capital Required for Chaperoning Relationships*. The FAQs clarify that the minimum net capital to be a chaperoning broker under Rule 15a-6 is $250,000 and, thus, introducing brokers with lower net capital requirements cannot act as chaperoning brokers unless they involve a $250,000 minimum net capital clearing broker in the chaperoning arrangement. (FAQ Nos. 10-14.)
- *Net Capital Charges for Fails*. A registered broker-dealer chaperone must take a net capital charge for a failed transaction even if the foreign broker-dealer is required to take the charge under foreign law. However, if the chaperone has entered into a fully disclosed carrying agreement, then the carrying broker-dealer would take the charge, though the chaperone still must comply with applicable books and records requirements regarding open trades and fails. (FAQ No. 15.)
- *Books and Records*. The FAQs clarify that a chaperoning broker must comply with the SEC's books and records rules, Rules 17a-3 and 17a-4, in connection with chaperoning activity. (FAQ No. 16.)

---

[1] Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, SEC (Mar. 21, 2013), *available at* http://www.sec.gov/divisions/marketreg/faq-15a-6-foreign-bd.htm.

Authors

Yoon-Young Lee

SENIOR COUNSEL

yoon-young.lee@wilmerhale.com

+1 202 663 6720

Bruce H. Newman

PARTNER

bruce.newman@wilmerhale.com

+1 212 230 8835

Stephanie Nicolas

PARTNER

stephanie.nicolas@wilmerhale.com

+1 202 663 6825